

**BEFORE THE
FEDERAL TRADE COMMISSION
Washington, D.C. 20580**

Re: Petition for Rulemaking to Prohibit Worker Non-Compete Clauses

PETITION FOR RULEMAKING

BY

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Petition for Rulemaking

The Open Markets Institute, 19 labor and public interest organizations, and 46 individual advocates and scholars submit this petition pursuant to the Administrative Procedure Act and the Federal Trade Commission Act, 15 U.S.C. § 45 to request the Federal Trade Commission (“FTC”) to initiate a rulemaking to prohibit employers from presenting a non-compete clause to a worker (regardless of whether the worker is classified as an “employee” or an “independent contractor”), conditioning employment or the purchase of a worker’s labor on the worker’s acceptance of a non-compete clause, or enforcing, or threatening to enforce, a non-compete clause against a worker. Under this rule, the FTC could bring enforcement actions against employers and purchasers of labor services (collectively hereafter “employers”) who engage in any of the described conduct.

Introduction

Employers have deprived tens of millions of workers of their freedom to leave their current job to accept employment with another firm or to pursue a business opportunity. They have done so through non-compete clauses (hereafter “non-compete clauses,” “non-competes,” “non-compete conditions,” “non-compete contracts,” and “non-compete requirements” will be used interchangeably). Non-competes require workers, *following separation* from their current employer, to refrain from accepting employment in a similar line of work or establishing a competing business for a specified period in a certain geographic area. For instance, a home health aide’s employer required him to sign a non-compete clause that prohibited him from working for another home health firm or starting his own firm in the county where he lives for

two years after he left his current employer.¹ Approximately 30 million workers,² across a wide range of fields and occupations including camp counselors, engineers, fast food workers, hair stylists, investment managers, and yoga instructors,³ are bound by non-compete clauses.

In labor markets, employers typically have the power to impose non-compete clauses on workers. Workers, who often depend on wages to subsist, are usually at a significant disadvantage in their relationship with employers. In any local or regional labor market in which large numbers of workers are unemployed or underemployed, individual workers are in an especially weak position to negotiate their terms of employment. Only a small fraction of private sector workers belong to a union and can assert collective voice. Compounding these disadvantages of workers, most local labor markets in the United States are highly concentrated on the employer side. As a result, many millions of workers see little or no competition for their services among employers.

Even when employers do compete for their services, workers are likely to focus on bargaining over wages and benefits, *not* contingent terms such as non-compete clauses. Employers generally present non-compete clauses to workers as standard form documents on a take-it-or-leave-it basis. When a worker does notice the clause, he or she may be loath to question or challenge a document that is presented on a take-it-or-leave-it basis, out of fear that the employer might rescind the job offer. Taken together, these factors indicate that non-compete clauses operate as contracts of adhesion.

¹ Sophie Quinton, *These Days, Even Janitors Are Being Required to Sign Non-Compete Clauses*, U.S.A. TODAY, May 27, 2017, <https://www.usatoday.com/story/money/2017/05/27/noncompete-clauses-jobs-workplace/348384001/>.

² U.S. DEP'T OF TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 6 (2016).

³ Rachel Abrams, *'No Poach' Deals for Fast-Food Workers Face Scrutiny by States*, N.Y. TIMES, July 9, 2018, <https://www.nytimes.com/2018/07/09/business/no-poach-fast-food-wages.html>; Steven Greenhouse, *Noncompete Clauses Increasingly Pop Up in Array of Jobs*, N.Y. TIMES, June 8, 2014, <https://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html>.

Non-compete clauses inflict significant harms on workers. Non-competes bind workers to their current employers and reduce their mobility. Even when employers do not or cannot enforce non-competes, workers subject to a non-compete clause may be deterred from leaving their current job. Because most private-sector workers do not belong to a labor union and lack effective voice on the job, the threat of leaving for another job is often the only source of leverage for many workers. By restricting exit, non-competes rob workers of this power. Research generally finds that non-compete clauses depress wages and wage growth and deter the formation of new firms. The adverse effects on workers extend beyond wages and firm creation rates. Workers subject to non-compete clauses may be compelled to remain in discriminatory, hostile, or unsafe work environments.

Non-competes can also impair product market competition. In a highly concentrated market, monopolists and other powerful firms can use non-compete clauses to deprive rivals of essential workers and thereby impede their ability to compete. Through this strategic use of non-competes, dominant firms can weaken and exclude rivals and maintain market power. Even in the absence of exclusionary intent, non-competes can favor incumbent large firms over small or new entrants. Relative to small firms, larger firms are more likely to be able and willing to take the legal risk of recruiting and hiring workers bound by non-competes.

While they inflict real harms on workers and society, non-competes do not have a credible justification. Employers and their representatives argue that non-competes allow employers to protect intangible investments, such as trade secrets and employee training, from “free riding” by rival firms. If employers are unable to protect against this type of free riding, they will underinvest in intangibles, according to this story. But this rationale does not stand up to scrutiny. First, it assumes that the broad dissemination of information and knowledge is

generally bad for society. Second, even if used to prevent workers from sharing information, non-compete clauses are a flawed method of defending against free riding. They are too broad because they deprive workers of the freedom to use their full experience, knowledge, and skills. At the same time, they are also too narrow because they provide only porous protection to intangibles. Third, employers, insofar as they need to protect their investment in intangibles, have several less restrictive alternatives, such as trade secret law, improved employee retention policies, and employment contracts.

The FTC should initiate a rulemaking to prohibit employers from presenting non-compete clauses as a condition of employment or other work agreement or enforcing or threatening to enforce a non-compete against workers. The FTC has expansive authority to interpret the FTC Act's prohibition on "unfair methods of competition"⁴ and has the power to write competition regulations under the Administrative Procedure Act.⁵ Given that non-compete clauses inflict real harms on workers and competition and offer no credible offsetting benefits to society, they arguably should be presumptively illegal under the Sherman Act.⁶ Using its broader legal authority under Section 5 of the FTC Act, the FTC should hold these clauses to be an unfair method of competition. Even if employers do not or cannot enforce non-competes, these clauses

⁴ 15 U.S.C. § 45. *See* *FTC v. Ind. Fed. of Dentists*, 476 U.S. 447, 454 (1986) (internal citations omitted) ("The standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons[.]; *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972) (emphasis added) ("[L]egislative and judicial authorities alike convince us that the Federal Trade Commission does *not* arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.").

⁵ The Magnuson-Moss Warranty Act imposes special procedures on FTC rules on unfair or deceptive acts and practices but it does not apply to rules on unfair methods of competition. 15 U.S.C. § 57a(a)(2). As a result, FTC rules on unfair methods of competition are governed by the Administrative Procedure Act's general notice-and-comment requirements for rulemakings. *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973).

⁶ *In re Polygram Holding, Inc.*, 136 FTC 310, 344 (2003), *pet'n denied Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005) ("A plaintiff may avoid full rule of reason analysis, including the pleading and proof of market power, if it demonstrates that the conduct at issue is inherently suspect owing to its likely tendency to suppress competition.").

still chill worker mobility and bind employees to their current employer. Accordingly, the FTC should write a rule holding that the use or enforcement of non-compete clauses is a per se violation of Section 5 of the FTC Act and that employers presenting, enforcing, or otherwise using non-competes with workers are subject to FTC enforcement action.

I. Overview of Non-Compete Clauses

Non-compete clauses restrict a worker from competing, or working for a firm competing, with his or her former employer for a specified time.⁷ In concrete terms, they restrict a worker from accepting employment or starting a business (1) in a line of work or industry, (2) in a geographic area, and (3) for a period of time following his or her departure or other separation from his or her current employer. Employers, in the first instance, draft the occupational (or industrial), geographic, and temporal scope of the non-compete contract. For example, an accountant bound by a non-compete may be prohibited from working as an accountant for another firm, starting her own accounting firm for a year following separation from her current firm, or even working in a *non-accounting* role at another accounting firm. When a worker leaves a current job in violation of a non-compete clause or expresses an interest in doing so, the employer can bring, or threaten to bring, legal action against the employee for breach of contract.

State law is the principal authority governing non-compete clauses today. States differ greatly in their treatment of non-competes. A few states, notably California, prohibit the enforcement of non-compete clauses against all workers. Other states bar the enforcement of non-compete clauses against certain classes of workers. Most states generally permit employers to enforce non-compete clauses against workers. In these states, courts apply a “reasonableness” test to decide the enforceability of non-competes.

⁷ Non-competes that are used as part of a sale or transfer of a business are distinguishable from worker non-competes and are not addressed in this petition.

A. *The Ubiquity of Non-Compete Clauses in Today's Labor Markets*

Millions of workers are subject to non-compete requirements. While traditionally associated with highly paid corporate executives, non-competes today are found across a wide range of fields and types of work. A recent study estimated that nearly 30 million American workers, or approximately one-in-every-five, are bound by non-competes with their present employers.⁸ Almost 60 million workers, or approximately two out of five, have been bound by a non-compete at *some* point in their careers.⁹ In general, workers with higher earnings and more education are more likely to be subject to a non-compete clause. Among architects and engineers in the manufacturing sector, approximately 50% of workers are bound by a non-compete.¹⁰ Another study found that 70% of the reviewed firms used non-compete contracts with their top executives.¹¹

But other workers are by no means exempt from non-competes. Among workers without a bachelor's degree and earning less than \$40,000 per year, approximately 12% are working under a non-compete clause.¹² To illustrate how ubiquitous non-compete clauses are today: they have been imposed on, among others, arborists, fast food workers, drilling rig operators, factory managers, journalists, and teachers.¹³ Firms have also imposed non-competes on independent contractors whose services they have retained.¹⁴

⁸ Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes in the U.S. Labor Force* 14 (2018).

⁹ *Id.*

¹⁰ *Id.* at 48.

¹¹ Mark J. Garmaise, *Ties That Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment*, 27 J. L. ECON. & ORG. 376, 396 (2011).

¹² Starr et al., *supra* note 8, at 2-3.

¹³ Abrams, *supra* note 3; Conor Dougherty, *How Noncompete Clauses Keep Workers Locked In*, N.Y. TIMES, May 13, 2017, <https://www.nytimes.com/2017/05/13/business/noncompete-clauses.html>; Aruna Viswanatha, *Noncompete Agreements Hobble Junior Employees*, WALL ST. J., Feb. 2, 2016, <https://www.wsj.com/articles/noncompete-agreements-hobble-junior-employees-1454441651>; Rachel Cohen, *Fining Teachers for Switching Schools*, AM. PROSPECT, Nov. 3, 2016, <http://prospect.org/article/fining-teachers-switching-schools>.

¹⁴ See, e.g., *Ag Spectrum Co. v. Elder*, 865 F.3d 1088, 1093 (8th Cir. 2017) (refusing to enforce an agricultural supply firm's non-compete against a salesperson classified as an independent contractor); John Howley, *Justice for Janitors: The Challenge of Organizing in Contract Services*, 15 LAB. RES. REV. 60, 71 (1990) (janitors classified as

A few examples illustrate the ubiquity of non-compete clauses and the expansive scope of non-competes. Until through at least March 2015,¹⁵ Amazon required temporary warehouse workers to assent to very broad non-compete clauses.¹⁶ After leaving Amazon, workers subject to this clause could not work for a period of 18 months for another company that “engage[s] in or support[s] the development, manufacture, marketing, or sale of any product or service that competes with any product or service sold, offered, or otherwise provided by Amazon, or intended to be sold, offered, or otherwise provided by Amazon in the future.”¹⁷ Since Amazon bills itself as “the everything store” and accordingly sells a wide variety of products, this non-compete appeared to prohibit workers from a very broad set of employment options across the United States (and potentially around the world as well). The company conditioned severance pay on an employee affirming his or her commitment to honoring the non-compete clause.¹⁸

The sandwich chain Jimmy John’s has included¹⁹ a broad non-compete clause in the hiring packet given to store employees.²⁰ Under these clauses, Jimmy John’s workers could not work for a competing restaurant, defined as “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

“independent contractors were made to non-competes). For a history of the legal development of the “independent contractor” worker identity, see Veena B. Dubal, *Wage Slave or Entrepreneur: Contesting the Dualism of Legal Worker Identities*, 105 CALIF. L. REV. 65 (2017).

¹⁵ Lauren C. Williams, *Amazon Gets Rid of Strict Non-Compete Clause for Contract and Temporary Employees*, THINKPROGRESS, Mar. 30, 2015, <https://thinkprogress.org/amazon-gets-rid-of-strict-non-compete-clause-for-contract-and-temporary-employees-f7b12b94cfa9/>.

¹⁶ Spencer Woodman, *Exclusive: Amazon Makes Even Temporary Warehouse Workers Sign 18-Month Non-Competes*, VERGE, Mar. 26, 2015, <https://www.theverge.com/2015/3/26/8280309/amazon-warehouse-jobs-exclusive-noncompete-contracts>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Jimmy John’s entered into settlements with the Illinois and New York attorneys general and committed to drop and not enforce non-competes against hourly employees in these states. It is unclear whether Jimmy John’s continues to use non-competes in other states. Samantha Bomkamp, *Jimmy John’s Agrees to Pay \$100,000 to Illinois AG Over Noncompete Contracts*, CHI. TRIB., Dec. 7, 2016, <http://www.chicagotribune.com/business/ct-jimmy-johns-settlement-1208-biz-20161207-story.html>.

²⁰ Aruna Viswanatha, *Sandwich Chain Jimmy John’s to Drop Noncompete Clauses from Hiring Packets*, WALL ST. J., June 21, 2016, <https://www.wsj.com/articles/sandwich-chain-jimmy-johns-to-drop-noncompete-clauses-from-hiring-packets-1466557202>.

sandwiches and which is located within three (3) miles of” *any* Jimmy John’s location.²¹ A lawsuit brought by the Illinois Attorney General against Jimmy John’s alleged that this restriction had a term for two years following an employee leaving Jimmy John’s.²² Because Jimmy John’s is a national chain with nearly 2,000 locations, the non-compete clauses potentially prohibited Jimmy John’s employees from working at a wide range of fast food restaurants across much of the United States.²³

The non-compete clause of payday lender Check Into Cash is another example of the expansive scope of non-competes. The Illinois Attorney General alleged that Check Into Cash required all storefront employees, including low-wage employees, to accept a non-compete clause that prohibited them from working for a wide range of “rivals” within 15 miles of any Check Into Cash location for one after leaving.²⁴ According to the Attorney General, Check Into Cash’s non-compete prohibited employment at not only payday lenders, title lenders, and pawn shops but possibly also “retail stores or auto dealerships that extend credit on an incidental basis or entities like Western Union or the U.S. postal service that transmit money.”²⁵

²¹ Dave Jamieson, *Jimmy John’s Makes Low-Wage Workers Sign ‘Oppressive’ Noncompete Agreements*, HUFFINGTON POST, Oct. 13, 2014, https://www.huffingtonpost.com/2014/10/13/jimmy-johns-non-compete_n_5978180.html.

²² Daniel Wiessner, *Jimmy John’s Settles Illinois Lawsuit Over Non-Compete Agreements*, REUTERS, Dec. 7, 2016, <https://www.reuters.com/article/us-jimmyjohns-settlement/jimmy-johns-settles-illinois-lawsuit-over-non-compete-agreements-idUSKBN13W2JA>.

²³ Viswanatha, *supra* note 20. For Jimmy John’s workers, non-compete contracts were not the only barrier to labor market mobility. Previously, franchisees, under their agreement with Jimmy John’s, were prohibited from hiring workers who worked for other Jimmy John’s franchisees. See Rachel Abrams, *7 Fast-Food Chains to End ‘No Poach’ Deals That Lock Down Low-Wage Workers*, N.Y. TIMES, July 12, 2018, <https://www.nytimes.com/2018/07/12/business/fast-food-wages-no-poach-deal.html>.

²⁴ Press Release, Ill. Att’y Gen., Attorney General Madigan Reaches Settlement with National Payday Lender for Imposing Unlawful Non-Compete Agreements (Jan. 7, 2019), http://illinoisattorneygeneral.gov/pressroom/2019_01/20190107b.html.

²⁵ *Id.*

B. Law Governing Non-Compete Clauses

Non-compete clauses are principally governed by state law today.²⁶ State law treatment of these clauses varies greatly and is complicated and muddled. An Ohio court described this patchwork of state law as “a sea – vast and vacillating, overlapping and bewildering. One can fish out of it any kind of strange support for anything, if he lives so long.”²⁷ Despite this welter of state law, states can be categorized as not enforcing non-competes for all workers, not enforcing non-competes for certain classes of workers, or permitting enforcement of non-compete clauses to varying degrees.²⁸ Only a few states categorically do *not* enforce non-compete clauses, while most states generally enforce them. Notwithstanding the law of the state where an employee resides, some employers have attempted to use “choice of law” provisions to import state law more favorable to the use and enforcement of non-compete contracts.²⁹

In California,³⁰ North Dakota,³¹ and Oklahoma,³² state law prohibits judicial enforcement of non-compete clauses. Employers in these states do not necessarily violate the law by conditioning employment on employee assenting to a non-compete clause. They, however, cannot enforce non-competes in court.³³ If an employee departs for another job or starts a

²⁶ The case law on non-competes dates back centuries and includes some of the earliest decisions on restraints of trade. *Mitchel v. Reynolds*, 24 Eng. Rep. 347 (Q.B. 1711). At the federal level, employees can challenge non-compete clauses as an unreasonable non-price vertical restraint under the Sherman Act. *E.g.*, *Butler v. Jimmy John’s Franchise, LLC*, 2018 WL 3631577 (S.D. Ill. 2018).

²⁷ *Arthur Murray Dance Studios of Cleveland v. Witter*, 105 N.E.2d 685, 687 (Ohio Ct. C.P. 1952).

²⁸ One business scholar has developed an index to capture how strongly or weakly a state enforces non-compete clauses. Norman D. Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants Not to Compete, Trends and Implications for Employee Mobility Policy*, 13 U. PA. J. BUS. L. 751 (2011).

²⁹ Viva R. Moffat, *Making Non-Competes Unenforceable*, 54 ARIZ. L. REV. 939, 952-53 (2012).

³⁰ Cal. Bus. & Prof. Code § 16600.

³¹ N.D. Cent. Code § 9-08-06.

³² OK Stat. § 15-219A. Oklahoma law prohibits the enforcement of non-compete clauses so long as employees do not poach customers from their former employer.

³³ For example, California law holds that “[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.” Cal. Bus. & Prof. Code § 16600.

business in violation of a non-compete clause, employers in these states generally cannot go to court and seek to enforce this contract and obtain remedies.³⁴

Other states bar enforcement of non-compete clauses for certain classes of workers. For example, Illinois law prohibits employers from requiring workers making less than \$13 per hour to assent to non-compete clauses.³⁵ In 2015, Hawaii enacted a law that restricts the enforcement of non-competes against information technology professionals.³⁶ Several states have barred the enforcement of non-compete clauses against physicians.³⁷

Most states, including states that have limited prohibitions or restrictions, allow the enforcement of non-compete clauses. Courts in these states determine the legality of non-compete clauses using a “reasonableness” framework. While the precise formulation of this reasonableness standard varies, many states have adopted the analytical test in the Restatement (Second) of Contracts.³⁸ Under the Restatement’s test, a non-compete clause ancillary to a valid agreement is “*unreasonably* in restraint of trade if (1) the restraint is greater than is needed to protect the business and goodwill of the employer; or (2) the promisee’s need is outweighed by the hardship to the promisor and the likely injury to the public.”³⁹

The test in the Second Restatement raises several legal issues for courts to decide.⁴⁰ First, courts decide whether a valid agreement, to which the non-compete clause is ancillary, exists. If

³⁴ See, e.g., *Edwards v. Arthur Andersen LLP*, 44 Cal.4th 937, 955 (2008) (“Noncompetition agreements are invalid under section 16600 in California, even if narrowly drawn, unless they fall within the applicable statutory exceptions of sections 16601, 16602, or 16602.5.”).

³⁵ 820 ILCS 90.

³⁶ Haw. Rev. Stat. § 480-4.

³⁷ E.g., RSA 239:31-a (New Hampshire); N.M.S.A. §§ 24-11-1-5; Tex. Bus. & Com. Code §§ 15.50-52.

³⁸ Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 677-678 (2008). E.g., *Summits 7, Inc. v. Kelly*, 178 Vt. 396, 399 (2005); *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 388-89 (1999).

³⁹ RESTATEMENT (SECOND) OF CONTRACTS § 188(1) (1981) (emphasis added).

⁴⁰ One court has stated that determining the enforceability of a non-compete clause requires answering 41 distinct questions. *Arthur Murray*, 105 N.E.2d at 695-99.

a non-compete clause is not ancillary to a valid agreement, it is per se illegal.⁴¹ Courts have taken two general approaches to what constitutes a “valid agreement” in the employment relationship.⁴² Some state courts hold that continued at-will employment is a valid agreement, to which a non-compete clause can be ancillary.⁴³ In an at-will employment arrangement, either the employer or the employee can end the relationship for practically any or no reason at all.⁴⁴ Courts in other states hold that the promise of continued at-will is not a valid agreement because the employer has not bound itself in any way and retains the option to terminate the employee immediately without cause.⁴⁵ In these states, an employer must bind itself in a tangible way in exchange for the employee assenting to a non-compete clause. Under this stricter approach, employers who agree to terminate workers only for “just cause” have likely created a valid agreement to which a non-compete clause can be ancillary.⁴⁶

Second, for non-compete clauses that are ancillary to a valid agreement, courts determine whether the scope of the non-compete is appropriately tailored to protect the employer’s legitimate interests. State law varies on what qualifies as a legitimate interest. A business’s legitimate interests can include customer relationships, trade secrets, and other intangibles.⁴⁷

⁴¹ *E.g.*, *Freiburger v. J-U-B Engineers, Inc.*, 141 Idaho 415, 419-20 (2005).

⁴² Tracy L. Staidl, *The Enforceability of Noncompetition Agreements When Employment Is At-Will: Reformulating the Analysis*, 2 EMPLOYEE RTS. & EMP. POL’Y J. 95, 104-05 (1998).

⁴³ *See, e.g.*, *Summits 7*, 178 Vt. at 404 (“A noncompetition agreement presented to an employee at any time during the employment relationship is ancillary to that relationship and thus requires no additional consideration other than continued employment.”).

⁴⁴ Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEG. HIST. 118 (1976).

⁴⁵ *E.g.*, *Rogers v. Runfola & Assoc., Inc.*, 565 N.E.2d 540, 542 (Ohio 1991).

⁴⁶ For instance, state law in Texas previously held that “[a]n ‘employment-at-will’ relationship is not binding upon either the employee or the employer. Either may terminate the relationship at any time. Thus, an employment-at-will relationship, although valid, is not an otherwise enforceable agreement.” *Travel Masters, Inc. v. Star Tours, Inc.*, 827 S.W.2d 830, 832-33 (Tex. 1991), superseded by statute as stated in *Alex Sheshunoff Mgmt Servs. L.P. v. Johnson*, 209 S.W.3d 644, 653 (Tex. 2006).

⁴⁷ Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 393 (2006). For an analysis of legitimate interests in the context of media employees, see Cathy Packer & Johanna Cleary, *Rediscovering the Public Interest: An Analysis of the Common Law Governing Post-Employment Non-Compete Contracts for Media Employees*, 24 CARDOZO ARTS & ENT. L.J. 1073, 1095-1105 (2006).

Notably, restraining competition is *not* a legitimate business interest.⁴⁸ When deciding whether a non-compete clause's scope is acceptable, courts analyze whether the covered activity, space, or time of the non-compete is overbroad and beyond what is necessary to protect the employer's legitimate interests.⁴⁹

Third, courts examine the offsetting harms to the bound employees and the public. They examine whether the employee has reasonable alternative employment options that are not proscribed by the non-compete clause. On occasion, courts have deemed jobs with significantly lower wages or located at a great distance from the employee's residence not to be reasonable alternatives.⁵⁰ Courts also sometimes examine the effect of enforcing the non-compete clause on broader market competition. Specifically, they consider whether enforcement of the non-compete would deprive rivals of skilled labor and impair their ability to compete.⁵¹

States that permit the enforcement of non-compete clauses take one of three approaches to non-competes that violate their reasonableness test.⁵² A few states follow the so-called "red pencil" doctrine. Under this doctrine, courts deem a noncompete clause with any overbroad provision to be unenforceable in its entirety.⁵³ Other states apply the "blue pencil" doctrine. In blue pencil states, courts strike any overbroad provisions and, if the remaining non-compete is

⁴⁸ See, e.g., *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 770 (Tex. 2011) (internal citations omitted) ("Where the object of both parties in making such a contract is merely to restrain competition, and enhance or maintain prices, there is no primary and lawful purpose of the relationship to justify or excuse the restraint.").

⁴⁹ E.g., *Golden Rd. Motor Inn Inc. v. Islam*, 376 P.3d 151, 155-56 (Nev. 2016). See also *Pivateau*, *supra* note 38, at 677-81.

⁵⁰ E.g., *Marinelli v. Medco Health Solutions, Inc.*, 951 F.Supp.2d 303, 320-21 (D. Conn. 2013); *Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 537 (1965).

⁵¹ E.g., *Weissman v. Transcon. Printing U.S.A., Inc.* 205 F.Supp.2d 415, 426-27 (E.D. Pa. 2002). Some courts have also stated that the public interest analysis includes determining whether enforcing the non-compete clause would compel the unemployed worker to seek public assistance. E.g., *Basicomputer Corp. v. Scott*, 791 F.Supp. 1280, 1291 (N.D. Ohio 1991).

⁵² WHITE HOUSE, NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGE, POTENTIAL ISSUES, AND STATE RESPONSES 11 (2016).

⁵³ E.g., *Star Direct, Inc. v. Dal Pra*, 319 Wis.2d 274, 313 (2009); *Ward v. Process Control Corp.*, 247 Ga. 583, 584 (1981).

still valid, enforce this revised version of the non-compete clause.⁵⁴ Finally, in another group of states (“reformation states”), courts rewrite overbroad non-compete clauses and enforce the “reformed” clause.⁵⁵ The red pencil doctrine promotes careful drafting by employers because overbroad non-competes will be held as categorically unenforceable. In contrast, the blue pencil doctrine and reformation permit, and even may encourage, employers to draft overbroad non-compete clauses.⁵⁶

II. Employers Can Generally Impose Non-Compete Clauses on Workers

Non-compete clauses function as contracts of adhesion instead of products of free bargaining between employees and employers. In general, the employee-employer relationship is defined by inequality. Tens of millions of Americans generally have nothing to sell but their labor and skills and so must work to subsist. Even in this nominally full employment economy, millions of Americans are unemployed or underemployed so competition among workers is intense in many labor markets. Since less than one-in-ten private sector workers belongs to a union, most workers have no means of asserting collective voice against their employer and must engage with their employer on an individual basis. To compound the weak position of workers, the employer side of most local labor markets is highly concentrated. This limits employment options for millions of workers and restricts their ability to bargain for better terms of employment.

Competition for workers, to the extent it exists, cannot be counted on to police the terms of employment. In situations in which employers do compete to hire employees, bargaining and

⁵⁴ *E.g.*, *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1286 (Ariz. 1999); *Reddy v. Cmty. Health Found. of Man*, 298 S.E.2d 906, 915 (W. Va. 1982).

⁵⁵ *E.g.*, *Hillard v. Medtronic. Inc.*, 910 F. Supp. 173, 177 (M.D. Pa. 1995).

⁵⁶ *Pivateau*, *supra* note 38, at 689-91. *See also* *White House*, *supra* note 52, at 11 (“[S]ome states [under the red pencil doctrine] provide disincentives for employers to write non-compete contracts that are unenforceable by refusing to enforce and making void a non-compete contract that contains any unenforceable provisions.”).

competition are likely to focus on salient features such as wages and benefits. In contrast, competition and bargaining are not likely to occur over terms contingent on future events such as non-compete clauses.

A. The Employee-Employer Relationship Is Defined Generally by Unequal Bargaining Power

Individual workers generally enter employment relationships in a highly unequal position relative to their employers. Most workers do not have significant sources of non-wage income and must work to meet their basic needs. Competition among workers is generally intense, with millions of workers on standby due to unemployment or underemployment. Other features of American labor markets strengthen employers and weaken workers. The default rule of at-will employment, low rates of unionization, and employer-side concentration in many local labor markets further disempower workers.

A large fraction of workers have only their labor to sell and have no other significant source of income.⁵⁷ According to a survey conducted by the Federal Reserve Board of Governors, only 19% of individuals between 30 and 39 and 26% of individuals between 40 and 49 receive *any* income from interest, dividends, or rental property.⁵⁸ Furthermore, many Americans do not have the savings to meet a modest emergency expense. In 2017, 41% of Americans stated that they couldn't afford a \$400 emergency expense without borrowing or selling assets (down from 50% in 2013).⁵⁹ A 2014 survey found that more than 60% of Americans did not have the savings to pay a \$1,000 emergency medical expense.⁶⁰ And even in

⁵⁷ See *Arthur Murray*, 105 N.E.2d at 704 (“The average, individual employee has little but his labor to sell or to use to make a living. He is often in urgent need of selling it and in no position to object to boiler plate restrictive covenants placed before him to sign. To him, the right to work and support his family is the most important right he possesses. His individual bargaining power is seldom equal to that of his employer.”).

⁵⁸ BD. OF GOV. OF THE FED. RES. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2017 12 (2018).

⁵⁹ *Id.* at 21.

⁶⁰ Neal Gabler, *The Secret Shame of Middle-Class Americans*, ATLANTIC (2016).

the absence of an emergency expense, more than 20% of Americans are unable to pay in full their monthly obligations on, among other items, housing, utilities, or credit cards.⁶¹

In the United States, the default of at-will employment further tilts the balance of power in favor of employers. Employers can dismiss workers for any reason, or no reason at all, under the prevailing at-will employment regime.⁶² Statutes such as the Civil Rights Act and National Labor Relations Act have qualified the rights of employers to terminate workers. For example, employers cannot dismiss workers based on race or gender or for labor organizing activities.⁶³ Nonetheless, under at-will employment, employers have broad discretion to dismiss workers or modify the terms of employment. Given the at-will employment rule, employers have the freedom to condition new or continued employment on the acceptance of their terms.⁶⁴

While the corollary to at-will *termination* for employers is at-will *resignation* for workers, this does not necessarily create functional equality between workers and employers. Except arguably for the very smallest firms, an individual worker is much more dependent on the employment relationship than the employer. The employer has other employees and can hire new employees or use other employees to make up for one worker's rejection of a job offer or resignation. Many workers, however, depend on one job for most, or all, of their income. In the words of Samuel Issacharoff, "the hiring stage is most like a first date between a polygamist [the employer] and a monogamist [the employee]."⁶⁵

The structure of labor markets weakens the position of workers and strengthens the position of employers. In most labor markets, workers compete aggressively against each other.

⁶¹ BD. OF GOVERNORS, *supra* note 58, at 22.

⁶² See generally Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65 (2000).

⁶³ 42 U.S.C.A. § 2000a; 29 U.S.C.A. § 158.

⁶⁴ Rachel Arnow-Richman, *Modifying At-Will Employment Contracts*, 57 B.C. L. REV. 427, 431 (2016).

⁶⁵ Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, 74 TEX. L. REV. 1783, 1795 (1996).

Even in an economy considered to be at full employment, millions of Americans are involuntarily unemployed or underemployed.⁶⁶ With the rise of gig platforms, some employers and other purchasers of labor participate in a global labor pool and can hire from anywhere in the world.⁶⁷ Geographic markets are, in effect, worldwide for *purchasers* of certain types of labor. This vigorous competition among workers can lead to an erosion in wages and labor market standards. While certain employers can hire from anywhere in the world, the labor market's geographic scope for workers is typically narrower, with workers generally looking for employment near their place of residence.⁶⁸

Low union density also limits the bargaining power of workers. Through unionization, workers band together and exercise collective power in negotiating with employers. Whereas an individual worker is typically dispensable and wields little power against an employer, a group of workers can exercise significant power, including by threatening to strike and disrupt the employer's business. Through unions, workers can obtain, for instance, higher wages⁶⁹ and greater job security.⁷⁰ While unions once represented nearly a third of American workers, only 10.5% of all workers belonged to a union in 2018.⁷¹ In the private sector, fewer than 7% of

⁶⁶ Broader unemployment measures and labor force participation rates indicate that the U.S. economy is still far from true full employment. See Bureau of Labor Stats., Table A-15. Alternative Measures of Labor Underutilization, <https://www.bls.gov/news.release/empsit.t15.htm>; Bureau of Labor Stats., Labor Force Statistics from the Current Population Survey, <https://data.bls.gov/timeseries/LNS12300000>.

⁶⁷ Alana Semuels, *The Online Gig Economy's 'Race to the Bottom'*, ATLANTIC, Aug. 31, 2018, <https://www.theatlantic.com/technology/archive/2018/08/fiverr-online-gig-economy/569083/>.

⁶⁸ See Ioana Marinescu & Roland Rathelot, *Mismatch Unemployment and the Geography of Job Search 2* (2014), <http://www.sole-jole.org/15260.pdf> ("Documenting the geography of job search, we find that job seekers are more likely to apply to jobs closer to home: for example, a job seeker is 50% as likely to apply to a vacancy that is 25 miles away relative to a vacancy that is in the job seekers' own zip code. Still, we find that 16% of applications are to out-of-state vacancies."). Notably, on online job platforms, workers display a great deal of inertia in switching between employers. See Arindrajit Dube et al., *Monopsony in Online Labor Markets* 14-15 (Nat'l Bureau of Econ. Res. Working Paper No. 24,416, Mar. 2018), <https://www.nber.org/papers/w24416> (finding low elasticity of labor supply among workers on Amazon's MTurk platform).

⁶⁹ E.g., Henry Farber et al., *Unions and Inequality Over the Twentieth Century: New Evidence from Survey Data* 43 (2018), http://tuvalu.santafe.edu/~snaidu/papers/union_sub3.pdf.

⁷⁰ Summers, *supra* note 62, at 77.

⁷¹ Bureau of Labor Stats., Union Members Summary, <https://www.bls.gov/news.release/union2.nr0.htm>.

workers are members of a union today.⁷² Furthermore, an important segment of the labor force— independent contractors⁷³—is not protected by federal labor law and may face antitrust investigations and lawsuits if they attempt to bargain collectively and engage in other concerted activity.⁷⁴ Because most workers are not represented by a union, they meet employers on an individual, not a collective, basis.

On the employer side, most local labor markets are highly concentrated, as defined by the Department of Justice and Federal Trade Commission’s Horizontal Merger Guidelines.⁷⁵ Labor markets in smaller cities and rural areas are most likely to be concentrated.⁷⁶ In a significant number of labor markets, workers have only one actual or prospective employer—a true monopoly.⁷⁷ Because of this concentration among employers, millions of American workers have only one or a few employment options.⁷⁸

Long-term and recent wage trends are consistent with the general powerlessness of American workers and the structural advantage enjoyed by employers. Median worker productivity has risen greatly since the late 1970s. During the same time, however, median wages have stagnated. Between 1973 and 2017, median worker productivity increased by 77.4%,

⁷² *Id.*

⁷³ Lauren Weber, *The Second-Class Office Workers*, WALL ST. J., Sep. 14, 2017, <https://www.wsj.com/articles/the-contractors-life-overlooked-ground-down-and-stuck-1505400087>.

⁷⁴ See, e.g., *FTC v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411, 436 (1990) (holding that lawyers’ boycott of Washington, D.C. public defender service is per se illegal). See generally Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969 (2016).

⁷⁵ José Azar, Ioana Marinescu, Marshall Steinbaum & Bledi Taska, *Concentration in U.S. Labor Markets: Evidence from Online Vacancy Data* 1 (2018), <https://www.econstor.eu/bitstream/10419/177183/1/dp11379.pdf>. Other research has found that employer-side concentration in local labor markets has increased since the 1970s. Efraim Benmelech, Nittai Bergman & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* 3 (2018), https://www.kellogg.northwestern.edu/faculty/benmelech/html/BenmelechPapers/BBK_2018_January_31.pdf.

⁷⁶ Azar et al, *supra* note 75, at 12.

⁷⁷ José Azar, Ioana E. Marinescu & Marshall Steinbaum, *Labor Market Concentration* A.2 (2017), <https://www.econstor.eu/bitstream/10419/177058/1/dp11254.pdf>. This employer-side concentration depresses wages. See *id.* at 2 (“Going from the 25th to the 75th level of concentration decreases posted wages by 17% in the baseline IV specification, and by 5% in the baseline OLS specifications.”).

⁷⁸ See Azar et al, *supra* note 75, at 2 (“When we weight markets by [Bureau of Labor Statistics’] total employment, we find that 17 percent of workers work in highly concentrated labor markets[.]”).

while hourly pay of the typical worker rose by 12.4%.⁷⁹ In other words, workers have received just a small share of the rewards from their increased productivity. Even in this current period of nominally full employment, median wages have only grown modestly.⁸⁰

Against this background of weak employees and strong employers, workers are unlikely to be able to avoid non-compete clauses. Due to their economic situation and the structure of labor markets in the United States, most workers have little leverage in the hiring context. Consequently, they typically must accept the terms of employment presented to them by employers. Indeed, workers' initial and continued employment generally are contingent on their acceptance of the employer's terms. Under these circumstances, most workers must acquiesce to an employer's insistence on a non-compete clause.

B. Workers Are Unlikely to Bargain Over Non-Compete Clauses

Even for individual workers who have some power, competition and bargaining are not likely to discipline employers' use of non-compete clauses. Insofar as workers can and do negotiate individually over terms, this bargaining is likely to center on the immediate terms of employment such as hours, wages, and benefits. In contrast, however, workers are much less likely to be aware, or take notice, of other employment terms, especially those contingent on a future event such as resignation or termination from a job. Given these biases, any competition among employers for workers likely focuses on the most salient dimensions of employment, such as wages and benefits, and not on less salient terms such as non-compete clauses.

Behavioral research has examined how individuals make decisions in general and in the face of uncertainty in particular. Whether as consumers or employees, individuals have limited

⁷⁹ Econ. Pol'y Inst., *The Productivity-Pay Gap* (2018), <https://www.epi.org/productivity-pay-gap/>.

⁸⁰ Ernie Tedeschi, *Unemployment Looks Like 2000 Again. But Wage Growth Doesn't.*, N.Y. TIMES UPSHOT, Oct. 22, 2018, <https://www.nytimes.com/2018/10/22/upshot/mystery-slow-wage-growth-economy.html>.

time and interest to evaluate all the terms in an economic relationship or transaction. Studies have found that individuals when shopping or bargaining for a product or service focus on certain terms and neglect other terms.⁸¹ Due to this “bounded rationality,” in which individuals do not consider the full universe of terms, bargaining and competition are likely to center on the salient terms and be weak or non-existent for the non-salient terms.⁸²

Empirical research has documented bounded rationality in several areas. In a modern economy, individuals engage in many economic transactions, each with its own set of price and non-price attributes. Given this informational overload, individuals are likely to simplify their decision-making by focusing on a few salient terms in each transaction. In the context of most consumer contracts:

[T]he close reading and comparison needed to make an intelligent choice among alternative forms seems grossly arduous. Moreover, many of the terms concern risks that in any individual transaction are unlikely to eventuate. It is notoriously difficult for most people, who lack legal advice and broad experience concerning the particular transaction type, to appraise these sorts of contingencies.⁸³

For example, a survey by the Consumer Financial Protection Bureau found that customers looking for a credit card showed most interest in a card’s fees, interest rate, and rewards and the reputation of the issuer.⁸⁴ In contrast, they were generally either uninterested in

⁸¹ Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429 (2002).

⁸² For example, considering just one common term, one study estimated that “reading privacy policies carries cost in time of approximately 201 hours a year, worth about \$3,534 annually per American Internet user.” Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 ISJLP 543, 565 (2008).

⁸³ Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1226 (1983).

⁸⁴ CONSUMER FIN. PROTECTION BUREAU, ARBITRATION STUDY § 3.4.1 (2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

or unaware of whether account-related disputes with the card issuer would be subject to mandatory arbitration.⁸⁵

The FTC has implicitly recognized the effects of bounded rationality in its consumer protection rulemaking. In the Credit Practices Rule, the FTC prohibited certain default remedies in credit contracts, including confessions of judgment and taking a security interest in a borrower's existing household goods, as an "unfair act or practice."⁸⁶ The FTC reasoned that competition cannot be expected to restrain creditors' use of these remedies and so consumers could not reasonably avoid these remedies. The FTC stated that "[b]ecause remedies are relevant only in the event of default, and default is relatively infrequent, consumers reasonably concentrate their search on such factors as interest rates and payment terms."⁸⁷ The FTC concluded that in the market for consumer credit competition disciplined lenders on certain loan terms, but not on others such as a creditor's remedies in the event of a borrower's delinquency or default.

Given the boundaries on human rationality, workers likely focus on immediate terms of employment and devote little, if any, attention to contingent terms. As Cynthia Estlund has written, "Arbitration and non-compete agreements constrain employees only in a fairly remote and uncertain future event; and we may expect employees to overdiscount the likelihood of these events or the importance of the rights at stake."⁸⁸

⁸⁵ *Id.* Research indicates that competition in the credit card market is heavily driven by behavioral biases. Despite a very large number of credit card issuers, interest rates on balances are "sticky" and insensitive to underlying changes in interest rates. The failure of competition to lower interest rates suggests that, when shopping for cards, "many consumers are insensitive to interest-rate differentials because they believe they will pay within the grace period (although they repeatedly fail to do so)." Lawrence M. Ausubel, *The Failure of Competition in the Credit Card Market*, 81 AM. ECON. REV. 50, 75-76 (1991).

⁸⁶ 16 C.F.R. § 444.2.

⁸⁷ Credit Practices, 49 FED. REG. 7740, 7744 (Mar. 1, 1984).

⁸⁸ Estlund, *supra* note 47, at 413.

Considering these behavioral limitations, bargaining and competition cannot be expected to discipline employers' use of non-compete clauses with their workers. In the context of non-competes, the Treasury Department described the potential effect of behavioral biases in a 2016 report:

[W]orkers do not pay attention to non-compete contracts and do not realize how much bargaining power and future employment flexibility they are foregoing. Only later, when workers consider exiting a firm, do they become aware of the existence and/or implications of the non-compete agreement.⁸⁹

To the degree workers can and do bargain with employers and “shop around” for the best job, they are unlikely to focus on the existence of a non-compete clause. Even when they have some power at the hiring stage, workers are still likely vulnerable to employers using non-compete clauses to restrain their future mobility in labor markets.

C. Given These Power and Behavioral Dynamics in Labor Markets, Non-Compete Clauses

Function as Contracts of Adhesion

Non-compete clauses function as contracts of adhesion. Todd Rakoff, in his seminal article on the topic, defined contracts of adhesion as documents that are drafted as standard forms by one party and presented to the other party on a take-it-or-leave-it basis.⁹⁰ Through contracts of

⁸⁹ U.S. DEP'T OF TREASURY, *supra* note 2, at 9.

⁹⁰ Rakoff, *supra* note 83, at 1177. He also provides a more precise seven-part definition. He defines a contract of adhesion as follows: “(1) The document whose legal validity is at issue is a printed form that contains many terms and clearly purports to be a contract. (2) The form has been drafted by, or on behalf of, one party to the transaction. (3) The drafting party participates in numerous transactions of the type represented by the form and enters into these transactions as a matter of routine. (4) The form is presented to the adhering party with the representation that, except perhaps for a few identified items (such as the price term), the drafting party will enter into the transaction only on the terms contained in the document. This representation may be explicit or may be implicit in the situation, but it is understood by the adherent. (5) After the parties have dickered over whatever terms are open to bargaining, the document is signed by the adherent. (6) The adhering party enters into few transactions of the type represented by the form - few, at least, in comparison with the drafting party. (7) The principal obligation of the adhering party in the transaction considered as a whole is the payment of money.” *Id.*

adhesion, corporations can reallocate legal rights and duties and structure legal environments to their own advantage. Due to power dynamics in labor markets and behavioral biases among workers, market competition is unlikely to discipline employers' use of non-compete requirements. Scholars studying non-compete clauses have written that "a reasonable interpretation of the data is that non-competes are typically a take-it-or-leave-it proposition."⁹¹ Non-competes can be included in an employment agreement or tucked inside an employee handbook (along with many other documents) whose unqualified acceptance is a condition of employment.⁹² In practice, non-compete clauses bear a close resemblance to mandatory arbitration clauses in that they deprive workers of future rights contingent on certain events. Instead of "memorializ[ing] a negotiated set of terms," employers use non-competes "to extract waivers of rights, thus realigning statutory and default rules to better reflect employers' interests."⁹³

Employees generally lack bargaining power and so they have little choice to accept terms of employment, such as non-compete clauses. Most workers are at a systematic power disadvantage relative to employers. First, they depend on labor income to subsist and often have limited resources. Second, most workers do not belong to a union and cannot exercise collective voice in negotiating with employers. Third, many workers today are in highly concentrated local labor markets and so have only a small set of potential employers.

Some employers further tilt the power imbalance in their favor by delaying presentation of the non-compete clause to workers. They withhold the non-compete until after a worker has

⁹¹ Starr et al., *supra* note 8, at 20.

⁹² Kenneth G. Dau-Schmidt & Timothy A. Haley, *Governance of the Workplace: The Contemporary Regime of Individual Contract*, 28 COMP. LAB. L. & POL'Y J. 313, 318, 345 (2007).

⁹³ Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 ARIZ. L. REV. 637, 639 (2007).

accepted an offer of employment or commenced employment. At this stage, workers have rejected potential alternative employment opportunities and their continued employment (in a world of at-will employment) is often contingent on their acceptance of the non-compete.⁹⁴ One survey found that 70% of respondents were “asked to sign the non-compete *after* accepting the offer.”⁹⁵ Like shrink wrap standard form contracts whose terms the consumer can only learn of after purchasing and opening a product, workers learn of these non-competes only after they have committed to a job, or even begun employment, with a company.⁹⁶

Market competition cannot be expected to discipline employers’ use of non-compete clauses. Behavioral biases ensure that competition among employers in recruiting workers, when and where it does exist, is not likely to constrain the use of non-compete clauses. To the extent workers face competition for their services and can negotiate terms of employment, their bargaining is likely to focus on wages, benefits, hours, and other non-contingent aspects of the employment relationship. In contrast, they are likely to discount or ignore contingent terms such as non-compete clauses that may affect them in the future. Due to these biases, competition among employers is likely to focus on wages and benefits and not on contingent terms such as non-compete clauses.

Because non-compete clauses function as contracts of adhesion in an environment characterized by power disparities and behavioral biases, employers have broad power to impose these restrictive agreements on workers. The conditions of contractual formation are very different from the textbook theory of contract in which bargaining and negotiation are

⁹⁴ Matt Marx & Lee Fleming, *Non-Compete Agreements: Barriers to Entry . . . and Exit?*, 12 INNOV. POL’Y & ECON. 39, 49 (2012).

⁹⁵ *Id.* (emphasis added).

⁹⁶ Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power Via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963, 977-80.

preconditions of reaching agreement.⁹⁷ Contracts of adhesion permit standardization and obviate the need for costly and time-consuming individual bargaining. They, however, create significant risks for consumers and workers. Under a legal system that generally enforces these terms, the drafting party has great power to reassign legal duties and rights in its own favor and against the receiving party.⁹⁸ Employers can use non-compete clauses to restrict the mobility of their workers, often without assuming any legal duty or responsibility in return.

Empirical research supports treating non-compete clauses as contracts of adhesion. Most workers read and sign the non-compete condition without attempting to bargain or negotiate. In a representative survey of workers, only approximately 10% of individuals presented with a non-compete sought to modify the terms of the non-compete or request benefits in exchange for signing it.⁹⁹ Fewer than one in five consulted a lawyer over the non-compete clause, and this consultation of a lawyer is strongly correlated with efforts to negotiate around the non-compete clause.¹⁰⁰ Most workers believed that their hiring was contingent on their signing the non-compete.¹⁰¹ Only 11% of workers thought they would still be hired if they refused to sign the non-compete clause.¹⁰²

Other evidence suggests that even highly educated, highly-paid workers do not bargain over, or attempt to resist, employers' non-compete clauses. A study of automated speech recognition experts found that, across age and tenure groups, at least 85% of study participants agreed to a non-compete clause, with the figure at or above 94% for the youngest and least

⁹⁷ MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 3-18 (2013).

⁹⁸ *Id.* at 33-34.

⁹⁹ Starr et al., *supra* note 8, at 18-19.

¹⁰⁰ *Id.* at 19.

¹⁰¹ *Id.*

¹⁰² *Id.*

experienced workers.¹⁰³ In other words, regardless of age or experience, most study participants accepted non-compete clauses. When presented with a non-compete clause before starting employment, fewer than one in six in the sample group asked a lawyer to review the non-compete.¹⁰⁴ This figure fell to fewer than one in twenty when employers presented the non-compete on the first day of work.¹⁰⁵ And not a single worker in the study group bargained over a non-compete.¹⁰⁶

Non-compete clauses are analogous to arbitration clauses in the employee-employer relationship. Like arbitration clauses, non-competes are contingent on the occurrence of a future event (resignation or termination in the case of non-competes and a legal dispute in the case of arbitration agreements). Employees are unlikely to be able to resist non-compete and arbitration clauses during the hiring process. And to the extent certain workers do have bargaining power and face competition for their services, bargaining and competition are likely to center on wages, benefits, and hours, as opposed to contingent terms such as non-compete and arbitration clauses.

III. Harms to Workers from Non-Compete Clauses

Non-compete clauses deprive workers of labor market mobility. Employers can file suit to enforce non-competes against workers who accept new employment and seek damages and injunctive relief. Most workers bound by a non-compete face three options: 1) stay with their current employer, 2) find employment in a line of work or a geographic area that is outside the scope of the non-compete, or 3) accept unemployment until the non-compete expires.¹⁰⁷ Workers subject to non-compete clauses may be forced to choose between potentially three unattractive

¹⁰³ Matt Marx, *The Firms Strikes Back: Non-compete Agreements and the Mobility of Technical Professionals*, 76 AM. SOC. REV. 695, 708 (2011).

¹⁰⁴ *Id.* at 706.

¹⁰⁵ *Id.*

¹⁰⁶ Marx & Fleming, *supra* note 94, at 51.

¹⁰⁷ *Id.* at 47-50.

alternatives. Even when employers do not, or cannot, enforce non-compete clauses, these restraints can discourage workers from seeking new employment and pursuing business opportunities. In practice, non-competes amount to workers “bartering away [their] personal freedom”¹⁰⁸ for present employment.

By restricting workers’ freedom to leave, non-compete clauses have material effects on the welfare of workers. Because they limit competition for workers among employers, non-competes have a negative effect on wages. Furthermore, they close off potential entrepreneurial opportunities and reduce new business creation. Importantly, the negative effects of non-competes extend beyond reduced wages and business formation. Non-competes can also compel workers to stay in a job where they are subject to gender or racial discrimination, sexual harassment, or other forms of mistreatment on the job or exposed to threats to their health and safety.

A. *Impaired Job Mobility*

Workers subject to a non-compete clause face substantially reduced labor market mobility. Under a non-compete clause, workers confront the choice of staying with their current employer, pursuing work outside the scope of the non-compete clause, or choosing unemployment. Workers who have independent sources of income (for example, an inheritance or sizable business investments) may be able to withstand a significant period of unemployment and “wait out” a non-compete clause.¹⁰⁹ Most workers, however, do not have significant non-wage sources of income.¹¹⁰ When bound by a non-compete clause, they typically have to stay

¹⁰⁸ Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 650 (1960).

¹⁰⁹ For example, apparently to comply with his non-compete agreement with Microsoft, tech executive Vic Gundotra took a year off before moving to Google. He used the sabbatical for “philanthropic pursuits.” Ben Romano, *Microsoft Loses Another to Google*, SEATTLE TIMES, June 29, 2006, https://blogs.seattletimes.com/microsoftpri0/2006/06/29/microsoft_loses_another_to_google/.

¹¹⁰ BD. OF GOVERNORS, *supra* note 58, at 12.

with their current employer or enter a new line of work or industry or move to a place outside the scope of the non-compete. Women may experience the restrictive effects of non-competes in an especially acute way because they often have less geographic and occupational flexibility than men.¹¹¹

A worker bound by a non-compete clause runs serious risks in pursuing an employment or entrepreneurial opportunity in violation of the non-compete. Her current employer may threaten to file suit to enforce the non-compete and seek damages for breach of contract and an injunction prohibiting the worker from pursuing employment or business in violation of the non-compete.¹¹² In some states, employers can enforce non-competes even against workers who have been terminated.¹¹³ In addition to suing the worker, her current employer may threaten her new employer for tortious interference of employment.¹¹⁴ When informed of the existence of a non-compete clause, a prospective employer may terminate the bound worker, or withdraw the offer of employment, to mitigate its own legal risk.¹¹⁵

Apart from being enforced in courts, the mere existence of a non-compete can deter workers from pursuing alternative opportunities. Employers appear to use non-competes to

¹¹¹ See Orly Lobel, Opinion, *Companies Compete but Won't Let Their Workers Do the Same*, N.Y. TIMES, May 4, 2017, <https://www.nytimes.com/2017/05/04/opinion/noncompete-agreements-workers.html> (“[W]hile noncompete restrictions impose hardships on every worker, for women these restrictions tend to be compounded with other mobility constraints, including the need to coordinate dual careers, family geographical ties and job market re-entry after family leave.”).

¹¹² See, e.g., *C&W Facility Servs., Inc. v. Mercado* 2018 WL 4854630, *4 (D. Mass. Oct. 5, 2018) (granting preliminary injunction to janitorial services company seeking to enforce non-compete contract against former employee).

¹¹³ Kenneth J. Vanko, “*You’re Fired! And Don’t Forget Your Non-Compete*”: *The Enforceability of Restrictive Covenants in Involuntary Discharge Cases*, 1 DEPAUL BUS. & COM. L.J. 1 (2002). Florida law takes a particularly absolutist approach to the enforcement of non-competes clauses against workers. See *Twenty Four Collection, Inc. v. Keller*, 389 So.2d 1062, 1063 (Fla Dist. Ct. App. 1980) (“[I]t is established law that a court is not empowered to refuse to give effect to such a contract on the basis of a finding, as was the case below, that enforcement of its terms would produce an ‘unjust result’ in the form of an overly burdensome effect upon the employee.”).

¹¹⁴ E.g., *Automated Concepts Inc. v. Weaver*, 2000 WL 1134541 at *5-7 (N.D. Ill. Aug. 9, 2000).

¹¹⁵ See, e.g., Viswanathan, *supra* note 13 (“Within weeks, . . . Thomson Reuters asked Ms. Russell-Kraft to leave. Her previous employer, Law360, also in New York, had sent a letter to the company citing a noncompete agreement she signed when she started at the newswire as a 25-year-old, her first full-time job in journalism.”).

discourage workers from departing in general and do not necessarily file suit to enforce the restriction against many (or in some cases *any*) employees. Harlan Blake wrote, “For every covenant that finds its way to court, there are thousands which exercise an *in terrorem* effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor, or who are anxious to maintain gentlemanly relations with their competitors.”¹¹⁶

Even in states where non-compete clauses are unenforceable, workers are subject to non-competes at roughly the same rate as workers in states where non-competes are enforceable. Although they cannot enforce non-competes in court in these states, many employers still condition employment on worker acceptance of non-compete clauses. Indeed, the relevant law appears to have minimal effects on employers’ use of non-compete restrictions. In California and North Dakota (two of the three states where non-competes are unenforceable), approximately 19% of workers are under a non-compete requirement—the same figure as for workers in states where non-competes are most likely to be enforced.¹¹⁷ When looking at only single-state firms, which are most likely to tailor their practices to conform to relevant state law, “the incidence of noncompetes in [California and North Dakota] is 14%, only slightly less than the 16.5% incidence level . . . in the highest enforcing states.”¹¹⁸

The chilling effect of non-competes on worker mobility appears to be very real. Interviews with automated speech recognition professionals found that these workers generally complied with non-competes even without actual litigation by their employer.¹¹⁹ Of the workers

¹¹⁶ Blake, *supra* note 108, at 682.

¹¹⁷ Starr et al., *supra* note 8, at 16.

¹¹⁸ *Id.*

¹¹⁹ See Marx, *supra* note 103, at 707 (“[F]irms strategically manage the process of obtaining signatures, waiting to present the non-compete until an employee’s bargaining power is minimized. Firms appear to accomplish these outcomes with minimal expenditure. Only one informant reported being formally sued and taken to court by an ex-employer; for the others, merely the threat of litigation sufficed to exert a chilling effect on their career plans.”).

who temporarily left their field of expertise due to a non-compete, *none* did so because they were sued by their employer.¹²⁰ They undertook this dramatic occupational change “on the expectation of what might happen if they refused to act in accordance with the employment agreement they had signed.”¹²¹

Some employers use non-compete contracts regardless of whether they can or will enforce them through legal action. For instance, although it insisted on a broad non-compete clause with storefront employees, Jimmy John’s asserted that it had *never* enforced a non-compete clause against an hourly worker.¹²² According to a legal services attorney who has represented workers bound by non-competes, “most workers obey initial threats [over non-competes] rather than going to court over them . . . [and] ‘there are people who have been affected by this, and it doesn’t even occur to them to get a lawyer.’”¹²³ Taken together, this evidence suggests that employers use non-compete clauses to discourage workers from seeking, or even exploring, alternative work and business opportunities. This chilling effect on worker mobility is not necessarily captured in litigation and may be the most significant consequence of non-compete clauses.¹²⁴

Empirical evidence shows that non-competes do reduce labor market mobility. The latest research finds that workers “bound by non-competes have . . . 11% longer [job] tenures.”¹²⁵ This

¹²⁰ Marx & Fleming, *supra* note 94, at 49.

¹²¹ *Id.*

¹²² Wiessner, *supra* note 22.

¹²³ Quinton, *supra* note 1.

¹²⁴ Arnow-Richman, *supra* note 96, at 981-82. One commentator has described “the pervasive use of noncompetes in Massachusetts is part of the dark matter of the legal landscape in the state. You know it’s there, exerting some gravitational force, but you can’t see it or measure it. You never really know how many employees didn’t move to another job, didn’t start their own companies, and didn’t take the risk of challenging their noncompete agreements in court.” Lee Gesmer, *Why Has Silicon Valley Outperform Boston/Route 128 as a High Tech Hub?*, MASS LAW BLOG, Dec. 6, 2007, <https://masslawblog.com/noncompete-agreements/why-has-silicon-valley-outperformed-boston-route-128-as-a-high-tech-hub/>.

¹²⁵ Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes and Employee Mobility* 3 (2019).

negative effect on job mobility is largely insensitive to the degree of non-compete enforceability in a state.¹²⁶ Notably, even workers not bound by non-competes appear to be adversely affected the existence of non-competes. Given the lack of transparency over who is bound by non-competes in a labor market, non-competes can increase employers' costs of recruiting and hiring and impede job market mobility for workers not subject to non-competes.¹²⁷ In labor markets with a higher incidence of non-competes and in states that favor enforcement of non-competes, *all* workers receive fewer job offers and have longer job tenures.¹²⁸

Other research finds that workers do stay with their current employer longer when they work in the shadow of a non-compete condition and that job tenure is longer in states where non-competes are more likely to be enforced. After Michigan rewrote its antitrust law and –made non-competes inadvertently easier to enforce in court – inventors (excluding inventors in the then-turbulent auto industry) experienced an 8.1% reduction in mobility relative to peers in other states,¹²⁹ while inventors with firm-specific knowledge and skills saw a 15.4% decline in mobility.¹³⁰ Another study found that workers in the computer industry in California, where non-competes are unenforceable, had greater job mobility than their peers in other states, where non-competes are (to varying degrees) enforceable.¹³¹ This finding was supported in another study on tech sector workers.¹³²

¹²⁶ *Id.*

¹²⁷ Evan Starr, Justin Frake & Rajshree Agarwal, *Mobility Constraint Externalities* 6-7 (2018).

¹²⁸ *Id.* at 26.

¹²⁹ Matt Marx, Deborah Strumsky & Lee Fleming, *Mobility, Skills, and the Michigan Non-Compete Experiment*, 55 *MGMT. SCI.* 875, 887 (2009).

¹³⁰ *Id.*

¹³¹ Bruce Fallick, Charles A. Fleischman & James B. Rebitzer, *Job-Hopping in Silicon Valley: Some Evidence Concerning the Microfoundations of a High-Technology Cluster*, 88 *REV. ECON. & STATS.* 472, 481 (2006).

¹³² See Natarajan Balasubramanian et al., *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers* 30 (Ross School of Business Working Paper No. 1339, Jan. 2017), (“We find that stricter [non-compete] enforceability is associated with longer job spells[.]”).

Impairment of job mobility extends to workers at the very top of the income distribution. Chief executive officers have longer tenures and are less likely to switch firms in states where non-compete clauses are more likely to be enforceable in court.¹³³

Alternatively, workers subject to non-compete clauses sometimes escape them through a temporary but costly “career detour”¹³⁴ or relocation. First, they can find a job in another line of work in which they cannot necessarily put their skills to full use. One study found that workers bound by non-competes reported more than a 50% higher probability of leaving for a firm in a different industry, relative to workers who were not subject to non-competes.¹³⁵ A survey of automated speech recognition professionals found that nearly one-third of workers subject to a non-compete left their field of expertise until their non-compete expired.¹³⁶ In one arguably extreme case, a survey respondent, despite having a PhD and 20 years of experience, accepted a data entry job to comply with the prohibitions in the non-compete clause.¹³⁷ This “detour” can be costly: workers who leave their field of specialization can experience “reduced compensation, atrophy of their skills, and estrangement from their professional networks.”¹³⁸

Second, some bound workers can relocate to another state or even country where they can work without fear of violating the non-compete clause. Due to the change in Michigan law under which non-competes became enforceable, the state saw an exodus of knowledge workers, an effect that was especially pronounced among those likely to engage in collaborative

¹³³ Mark J. Garmaise, *Ties That Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment*, 27 J. L. ECON. & ORG. 376, 400 (2011).

¹³⁴ Marx, *supra* note 103, at 696.

¹³⁵ Starr, Prescott & Bishara, *supra* note 125, at 3.

¹³⁶ Marx, *supra* note 103, at 705.

¹³⁷ Marx & Fleming, *supra* note 94, at 49.

¹³⁸ *Id.* at 48.

projects.¹³⁹ Relocation entails its own costs and challenges for workers, including uprooting one's family, severing existing familial and social ties, and starting afresh in a new place.

The loss of exit opportunities is particularly harmful in present-day labor markets. Due to workers' general lack of power in the workplace, their freedom to leave for another employer or pursue a business opportunity is critical today. Most workers are not members of a union. In the private sector, less than 7% of workers are represented by a union.¹⁴⁰ Furthermore, the Supreme Court has granted employers the right to use mandatory arbitration clauses to block employees' class action lawsuits alleging violation of employment, labor, and other laws governing the workplace.¹⁴¹ Because of the low rate of unionization in the private sector and the neutering of collective litigation methods, workers have little ability to act collectively to address shared grievances in the workplace. In general, they can only make claims as individual employees, which carries serious risk of retaliation and even termination. Exit provides a degree of leverage for otherwise disempowered workers, providing *some* freedom to leave unsatisfactory jobs and find better employment.¹⁴² Given the limited role of voice in the contemporary workplace, employer deprivation of workers' freedom to exit through non-compete clauses is especially harmful.

B. Effects of Reduced Job Mobility

By impairing labor market mobility and binding workers to their present employer, non-compete clauses inflict material harms on workers. Empirical studies have found that stronger enforcement of non-compete clauses is associated with lower wages and lower wage growth over

¹³⁹ Matt Marx, Jasjit Singh & Lee Fleming, *Regional Disadvantage? Employee Non-Compete Agreements and Brain Drain*, 44 RES. POL'Y 394, 403 (2015). See also Balasubramanian et al., *supra* note 132, at 30 (“We find that stricter [non-compete] enforceability is associated with . . . a greater likelihood of leaving the state[.]”).

¹⁴⁰ Bureau of Labor Stats., Union Members Summary, <https://www.bls.gov/news.release/union2.nr0.htm>.

¹⁴¹ Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

¹⁴² ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

time. Research has also found that stronger enforcement depresses the formation of new businesses. The adverse effects of non-competes likely extend beyond quantifiable measures such as wage levels, wage growth, and new firm creation. Given the ubiquity of harassment and discrimination at the workplace and unsafe job conditions, non-competes may also force workers to stay in hostile or dangerous work environments.

In a 2016 report, the Treasury Department concluded that increased enforcement of non-competes is associated with both lower wages and lower wage growth over time. By extrapolating from existing research on non-competes, it estimated that “maximal enforcement” states slow wage growth over time, especially older workers’ wage growth, relative to “minimal enforcement states.” The difference in wages between the two categories of states was “5 percent at age 25 and 10 percent at age 50.”¹⁴³

Another study found that “wages are 4% lower in an average enforcing state relative to a non-enforcing state.”¹⁴⁴ This wage depression was stronger among workers without a graduate-level degree and workers with long tenures at their present job.¹⁴⁵ Looking exclusively at tech workers: In states that are more likely to enforce non-compete clauses, initial wages and wage growth over time were found to be lower, relative to states that are less likely to enforce non-competes.¹⁴⁶ When widely used in a labor market, non-competes introduce costs and uncertainty into hiring and can depress job market mobility—and thereby wages—for all workers, not only those directly bound by them. Two factors—a higher incidence of non-competes and state law

¹⁴³ U.S. DEP’T OF TREASURY, *supra* note 2, at 20.

¹⁴⁴ Evan Starr, *Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete* 17 (2018).

¹⁴⁵ *Id.* at 27.

¹⁴⁶ Balasubramanian et al., *supra* note 132, at 30.

favoring the enforcement of non-competes—appear to depress wages for *all* workers, not only those bound by non-competes.¹⁴⁷

Even among elite workers who have power in the labor market and could reasonably bargain over terms of employment, non-compete contracts may depress incomes. An analysis that looked exclusively at the effects of non-competes on chief executive officers found that stronger state-level enforcement of non-competes reduces the growth rate of compensation by 8.2%.¹⁴⁸

While empirical studies generally find that non-competes depress wages, the research does not categorically find this relationship. Two studies have found evidence of a compensating wage premium for workers who accept non-compete clauses. In one study, physicians in group practices that used non-compete clauses had higher incomes and income growth over time than their peers in groups that did not use non-competes.¹⁴⁹ Looking at all workers, another analysis found a 10% wage premium for workers who receive a non-compete *before* they accept a job offer.¹⁵⁰

Non-compete clauses also appear to discourage workers from pursuing business opportunities and establishing new businesses. Workers subject to non-competes are often restricted from starting a business in competition with, or in the same line of business, as their current employer. One study of the biotechnology industry examined the rate of new firm creation after firms were acquired or made an initial public offering.¹⁵¹ (After either event, employees usually receive a significant amount of money that they can use to start their own

¹⁴⁷ Starr, Frake & Agarwal, *supra* note 128, at 26.

¹⁴⁸ Garmaise, *supra* note 11, at 402.

¹⁴⁹ Kurt Lavetti, Carol Simon & William D. White, *Buying Loyalty: Theory and Evidence from Physicians* 33-34 (2012).

¹⁵⁰ Starr et al., *supra* note 8, at 3.

¹⁵¹ Toby E. Stuart & Olav Sorenson, *Liquidity Events and the Geographic Distribution of Entrepreneurial Activity*, 48 ADMIN. SCI. Q. 175 (2003).

firm.) Examining startup activity after acquisitions or initial public offerings of biotechnology firms, the study found that the rate of new biotech startups is higher in states that do not enforce non-competes relative to states that do enforce non-compete contracts.¹⁵²

Strong enforcement of non-competes also frustrates the ability of venture capital to support startup businesses. An increase in the supply of venture capital funding increases the number of new firms most in states that are less likely to enforce, or do not enforce, non-compete clauses.¹⁵³

Non-compete clauses, by deterring and preventing workers from switching jobs, can bind workers to discriminatory and hostile work environments. Discrimination in the workplace is pervasive. Discrimination at work can include denials of promotions and raises, inferior assignments, and reduced visibility because of an individual's race or gender. For example, 57% of African Americans have reported being denied equal treatment on pay or promotions due to their race.¹⁵⁴ Studies have found a similar incidence of discrimination toward women in the workplace. Forty-two percent of women have reported being denied promotions, paid less for the same work that male coworkers perform, and given less rewarding assignments due to their gender.¹⁵⁵ Furthermore, hostile work environments are also common. For instance, 35% of

¹⁵² *Id.* at 197.

¹⁵³ Sampsa Samila & Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth* 57 MGMT. SCI. 425 (2011). Strong enforcement of non-compete clauses also can encourage prospective entrepreneurs to relocate to other states. As discussed earlier, in 1985, the Michigan legislature revised the state's antitrust law and unwittingly made non-compete clauses easier to enforce in court. Examining this legal change, a study found that the more employer-friendly approach to non-compete encouraged skilled technical workers, who may be especially capable of and interested in starting businesses, to leave the state. Marx, Singh & Fleming, *supra* note 139, at 403.

¹⁵⁴ NPR ET AL., DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF AFRICAN AMERICANS 6 (2017), <https://www.npr.org/assets/img/2017/10/23/discriminationpoll-african-americans.pdf>.

¹⁵⁵ Kim Parker & Cary Funk, *Gender Discrimination Comes in Many Forms for Today's Working Women*, PEW RESEARCH CTR., Dec. 14, 2017, <http://www.pewresearch.org/fact-tank/2017/12/14/gender-discrimination-comes-in-many-forms-for-todays-working-women/>.

women have experienced sexual harassment in the workplace.¹⁵⁶ By restricting job switching, non-compete clauses can lock workers into discriminatory or hostile work environments.

The freedom to leave is especially critical for victims of discrimination, harassment, and other mistreatment who are lower on the firm hierarchy. These workers generally have few legal protections on the job and no feasible path for seeking redress for the mistreatment they suffer.¹⁵⁷ For example, many women who are victims of sexual harassment may believe they have no option but to leave their current employer.¹⁵⁸ In one study, “[t]argets of sexual harassment were 6.5 times as likely as nontargets to change jobs” during the study period.¹⁵⁹

Non-competes can also force workers to remain at jobs with unsafe or dangerous working conditions. In 2017 in the United States, 5,147 workers died from traumatic injuries on the job, which means that fatal job injuries occurred at a rate of 3.5 per 100,000 workers.¹⁶⁰ In 2017, private sector employers reported 2.8 million cases of workplace injury or illness, or a rate 2.8 cases per 100 full-time workers.¹⁶¹ And unhealthy workplaces can inflict lasting harms on workers: exposure to toxins on the job is “responsible for more than 50,000 deaths and 190,000 illnesses each year, including cancers and other lung, kidney, skin, heart, stomach, brain, nerve

¹⁵⁶ 11/22: *More than One in Three Women Report Sexual Harassment in the Workplace*, MARIST POLL, Nov. 22, 2017, <http://maristpoll.marist.edu/1122-more-than-one-in-three-women-report-sexual-harassment-in-the-workplace/#sthash.5qBGru84.dpbs>.

¹⁵⁷ Rachel Arnow-Richman, *Of Power and Process: Handling Harassers in an At-Will World*, 128 YALE L.J. FORUM 85, 89-90 (2018).

¹⁵⁸ Heather McLaughlin, Christopher Uggen & Amy Blackstone, *The Cost of Sexual Harassment*, GENDER & SOC., June 7, 2017, <https://gendersociety.wordpress.com/2017/06/07/the-cost-of-sexual-harassment/>.

¹⁵⁹ Heather McLaughlin, Christopher Uggen & Amy Blackstone, *The Economic and Career Effects of Sexual Harassment on Working Women*, 31 GENDER & SOC. 333, 344 (2017).

¹⁶⁰ Press Release, Bur. Lab. Stats., Census of Fatal Occupational Injuries Summary (Dec. 18, 2018), <https://www.bls.gov/news.release/cfoi.nr0.htm>.

¹⁶¹ Press Release, Bur. Lab. Stats., Employer-Reported Workplace Injury and Illnesses, 2017 (Nov. 8, 2018), <https://www.bls.gov/news.release/osh.nr0.htm>.

and reproductive disease.”¹⁶² These figures likely undercount the incidence of death, injury, and illness on the job.¹⁶³ The threat of dangerous, unsafe, and unhealthy working conditions is real.¹⁶⁴ When workers want to leave for comparatively safer or healthier work environments, non-competes can bar them from finding jobs with employers that provide safer work environments.

IV. Monopolistic and Oligopolistic Businesses Can Use Non-Compete Clauses to Exclude or Limit Product Market Competition

On top of the direct harms to workers, non-compete clauses can protect dominant incumbents against competition in product and labor markets. Incumbents can use non-compete clauses to tie up scarce labor and thereby deprive current and would-be rivals of essential workers. Furthermore, non-competes can favor large incumbents over small rivals. Workers subject to non-competes may be more likely to move to large firms relative to small firms because larger firms are more able and willing to tolerate the risk of, and defend against, lawsuits. Conversely, workers restricted by non-competes may be *less* likely to move to small firms over bigger ones for the same reason. In short, non-competes can serve as an entry barrier, which helps maintain concentrated product and labor markets, and hinder the creation and growth of small businesses.

Dominant corporations can use non-compete clauses with workers to marginalize and exclude existing and potential rivals. In markets in which firms are dependent on highly specialized or otherwise scarce labor, a monopolist can deprive rivals of essential workers and hobble their ability to compete. For instance, a monopolistic hospital can use non-competes to

¹⁶² AFL-CIO, DEATH ON THE JOB: THE TOLL OF NEGLECT 40 (2018).

¹⁶³ *Id.* at 12-13.

¹⁶⁴ *Id.* at 8.

deprive a rival hospital of physicians.¹⁶⁵ Under these circumstances, the non-compete functions as a de facto exclusive dealing contract with physicians and starves rival hospitals of an essential “input” (physicians), which could violate the Sherman or Clayton Acts.¹⁶⁶ In a field such as medicine in which long-term relationships between providers and patients are important, the use of non-competes by powerful incumbents can be particularly damaging to rivals and patients.¹⁶⁷

Firms with market power can use also non-competes to block an important source of potential competition: their own employees. In many fields, employees have the skills and experience to start firms and compete with their current employers. For example, an entrepreneurial doctor may be well positioned to leave a hospital or group practice and establish her own independent practice.¹⁶⁸ Through non-compete clauses, incumbent firms can and do “frequently discourage” employees from breaking out and starting rival firms.¹⁶⁹

The use and enforcement of non-competes, in general, can favor larger incumbent firms over smaller, emerging firms. Workers bound by non-competes may believe large firms are a safer destination than smaller firms. Relative to small firms, larger firms may be better equipped to buy out non-compete clauses and defend themselves and the affected employees against

¹⁶⁵ See, e.g., *BRFHH Shreveport LLC v. Willis Knighton Med. Ctr.*, 176 F.Supp.3d 606, 625 (W.D. La. 2016) (“Vantage also asserts that its allegations of Willis-Knighton’s non-compete agreements with its physicians and its control of physician referrals are anticompetitive under section 2 of the Sherman Act.”). Warren Greenberg, *Marshfield Clinic, Physician Networks, and the Exercise of Monopoly Power*, 33 HSR: HEALTH SERVS. RES. 1461, 1470 (1998) (“The Marshfield Clinic also enforced a non-compete clause with physicians who were formerly employed by Marshfield. Such physicians could not practice within 30 miles of Marshfield for three years after termination from the Clinic, resulting in less competition to the Marshfield Clinic.”). See generally Steven C. Salop, *The Raising Rivals’ Cost Foreclosure Paradigm, Conditional Pricing Practices, and the Flawed Incremental Price-Cost Test*, 81 ANTITRUST L.J. 371 (2017); Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527 (2013).

¹⁶⁶ See, e.g., *McWane, Inc. v. FTC*, 783 F.3d 814, 842 (11th Cir. 2015) (affirming FTC’s decision that McWane engaged in illegal exclusive dealing). For antitrust framework on exclusive dealing arrangements, see *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961).

¹⁶⁷ Michelle Andrews, *Did Your Doctor Disappear Without a Word? A Noncompete Clause Could Be the Reason*, N.Y. TIMES, Mar. 15, 2019, <https://www.nytimes.com/2019/03/15/business/physician-non-compete-clause.html>.

¹⁶⁸ *Id.*

¹⁶⁹ Steven Klepper & Peter Thompson, *Disagreements and Intra-industry Spinoffs*, 28 INT’L J. INDUS. ORG. 526, 531 (2010).

lawsuits seeking to enforce non-competes.¹⁷⁰ In the course of her research on non-competes, Orly Lobel found that employees bound by non-competes often preferred to minimize the legal risks of departure “by going to an established competitor that has the resources to protect and indemnify them in the case of legal liability.”¹⁷¹ After Michigan permitted the enforcement of non-competes in the mid-1980s, inventors in that state who changed jobs “were considerably more likely to join larger firms.”¹⁷²

The combined effect of non-compete clauses can be to protect monopolistic and oligopolistic market structures. Dominant and near-dominant firms can employ non-competes as exclusive dealing clauses that deny key workers to actual and would-be rivals. Furthermore, the use of non-competes can favor large firms over small firms, who may be less able or willing to litigate potential lawsuits arising from these contractual restrictions.

V. The General Justification for Non-Compete Clauses Does Not Stand Up to Scrutiny

The general justification for non-compete clauses is unpersuasive on closer examination and should be treated with skepticism. The case for non-compete clauses presumes a need for employers to protect their investment in intangibles through a quasi-property right. These intangibles include trade secrets, customer lists, and employee training. In the absence of non-competes, proponents argue, the free movement of workers from one employer to another allows rival companies to “free ride” on the investment in intangibles made by the first employer.¹⁷³

¹⁷⁰ Marx, *supra* note 103, at 709. As an illustration of how the litigation process favors larger, established firms over new entrants and small firms, smaller biotechnology firms with higher relative costs of litigation appear less likely to patent a new invention in the same subclass as rivals. Josh Lerner, *Patenting in the Shadow of Competitors*, 38 J. L. & ECON. 463, 489-91 (1995). *See id.* at 472 (“In general, small firms believed that their patents were infringed more frequently, but were considerably less likely to litigate these infringements.”).

¹⁷¹ ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING 202 (2013).

¹⁷² Marx & Fleming, *supra* note 94, at 52.

¹⁷³ *See, e.g.*, Edmund W. Kitch, *The Law and Economics of Rights in Valuable Information*, 9 J. LEGAL STUD. 683, 691 (1980) (“It is often impossible to determine whether a former employee who has to work for a competitor has taken trade secret information, and whether he has disclosed that information to his new employer. The former

This justification mistakenly ignores how the dissemination and sharing of information can often benefit society. For example, copyright and patent law, while creating a property right over intangibles, recognize this logic and accordingly limit the scope of protection. Through non-competes, employers effectively expand intellectual property protection and disrupt the balance that Congress has attempted to strike.

Insofar as employers do need to protect their investment in intangibles, non-compete clauses are an overbroad and yet also ineffective tool. In the name of protecting an employer's discrete investment, non-compete clauses restrict an individual's job mobility and freedom to use his or her full experience, knowledge, and skills. Yet, non-competes do not protect the intangible itself and do not restrict employees from sharing it with rivals and other third parties. In lieu of non-compete contracts, employers have less restrictive methods of protecting their intangibles. These include trade secret law, improved employee retention policies, and employment contracts. Employers can use these legal tools to protect their intangibles against free riding without imposing a one-sided labor market restraint on workers.

A. The Justification for Non-Compete Clauses Rests on a Questionable Premise

While the justification for non-competes presumes that free riding is categorically bad, this story is, at best, incomplete and, at worst, specious. The sharing of information among individuals and firms is often desirable for society and should not be indiscriminately restricted through restraints such as non-competes. Moreover, the neoclassical economic theory that provides the justification for non-competes offers only qualified support for the use of non-competes.

employee may give the information to the new firm without disclosing its confidentiality and represent the information as his own to impress the new firm value. A restrictive covenant keeps the ex-employee away from the competitor.”).

Even accepting that firms principally use non-competes to protect their intangibles, information sharing is not a categorical “evil” that state action should police at any cost. What is disparaged as free riding often is the broad dissemination of knowledge that contributes to economic growth and innovation.¹⁷⁴ This sharing can contribute to the growth of new firms and new industries as workers are free to combine their knowledge with knowledge possessed by other workers and firms.¹⁷⁵ Excess protection for knowledge directly through intellectual property or indirectly through contractual restraints such as non-compete clauses can frustrate this iterative dynamic.¹⁷⁶

Non-competes appear to discourage the socially desirable dissemination and sharing of knowledge and other intangible assets. In a widely-cited article, Ronald Gilson, building on the work of urban planning scholar AnnaLee Saxenian,¹⁷⁷ examined the decline of the Route 128 corridor in Boston as a tech hub and the parallel rise of Silicon Valley in California.¹⁷⁸ He suggests that the differential treatment of non-compete clauses in the two states is a powerful explanatory factor. Until recently, Massachusetts law generally supported the enforcement of non-competes,¹⁷⁹ whereas California law has long held that non-competes are unenforceable in

¹⁷⁴ Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 100 COLUM. L. REV. 101, 111-14 (2006). For a summary of the economic and legal literature casting doubt on the free riding theory, see Alan Hyde, *Intellectual Property Justifications for Restricting Employee Mobility: A Critical Appraisal in Light of the Economic Evidence*, IN RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 357 (Cynthia L. Estlund & Michael L. Wachter eds., 2012).

¹⁷⁵ See generally LOBEL, *supra* note 171.

¹⁷⁶ *Id.* at 76-97. Intellectual property protections, such as copyrights and patents, are likely already overprotective. James Boyle has written that recent expansions of intellectual property protection have not had a sound empirical basis and described policymaking in this area as “an evidence-free zone.” JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 205-29 (2008).

¹⁷⁷ ANNALEE SAXENIAN, *REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128* (1996).

¹⁷⁸ 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).

¹⁷⁹ Mass. Gen. Laws. C. 149 § 186. Bob Salsberg, ‘Garden’ Clause in New Law Requires Pay During Noncompete, WBUR, Sep. 30, 2018, <http://www.wbur.org/news/2018/09/30/garden-clause-new-law-requires-pay-during-noncompete>.

court.¹⁸⁰ Gilson contends that California law’s hostility toward non-compete clauses promoted the sharing of information and knowledge and fostered the creation of new businesses.¹⁸¹ He argues that, in contrast, the relatively pro-enforcement orientation of Massachusetts law hindered the dissemination of knowledge and frustrated the creation of new firms in the technology sector.¹⁸²

Gilson’s theory is supported by other research. Relatively easy labor mobility across firms promotes innovation and invention.¹⁸³ Even for firms themselves, too little employee turnover can create an insular ethos resistant to new ideas and thereby become an impediment to innovative activity.¹⁸⁴

The neoclassical economic theory on which proponents of non-competes rely offers only qualified support for the free riding arguments. This theory holds that employers should be allowed to recover just enough on their investment to ensure that they invest in the future.¹⁸⁵ Permitting an employer to recover a *sufficient* amount is very different from allowing the employer to recover the *maximal* amount from their investment. If an employer can recoup its investment in job training within six months of a worker joining, society has no interest in ensuring that the worker stays with the employer indefinitely so that the employer can extract a maximal return on the training. Indeed, if the employer has recouped its investment in training or

¹⁸⁰ Cal. Bus. & Prof. Code § 16600.

¹⁸¹ See generally Gilson, *supra* note 178.

¹⁸² *Id.* at 602-13.

¹⁸³ See, e.g., LOBEL, *supra* note 175, at 40 (“[L]ocalities with dense connections between innovators, knowledge flows, and human capital enjoy dramatically more innovation than smaller, protective, and more isolated settings.”); Marx, Singh & Fleming, *supra* note 139, at 403 (finding that strong enforcement of non-competes encouraged out-migration of “workers who are more collaborative and whose work is more impactful, stripping enforcing states of some of their most valuable knowledge workers.”); Lee Fleming & Koen Frenken, *The Evolution of Inventor Networks in the Silicon Valley and Boston Regions*, 10 ADV. COMPLEX SYS. 53 (2007).

¹⁸⁴ See LOBEL, *supra* note 175, at 129 (“Pathologies of groupthink—whereby cohesive groups overlook important alternatives because of their desire for consensus and conformity—and [not invented here] mentalities are exaggerated when companies are overly stable.”).

¹⁸⁵ Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1046-50 (2005)

other intangible during the worker's tenure, it has no basis for restraining the worker for a single day *after* he or she leaves.

Importantly, non-competes can *discourage* certain forms of investment in intangibles. While non-competes can stimulate employer investment in the training of workers, these contracts can simultaneously discourage self-training by bound workers.¹⁸⁶ Deprived of the freedom to leave, these workers may be less likely to invest in training and other self-improvement because they have less power to obtain higher salaries and wages at their current firm or elsewhere.¹⁸⁷

The laws governing the protection of intangibles already reflect the risk of overprotection of intangibles. For instance, state law holds that non-competes with an unlimited duration are generally unenforceable.¹⁸⁸ Moreover, intellectual property law in the United States incorporates this consideration too. It aims to provide adequate incentive to creators and inventors, not maximal incentive. Accordingly, copyright and patent laws include a term limit on protection and include several important exceptions to the scope of protection. For instance, copyright protects the expression of an idea, but does not protect the idea itself.¹⁸⁹

Non-competes enable employers to circumvent the boundaries of intellectual property law. Copyright, patent, and trade secret law have important limitations on their respective scopes of protection. By imposing non-competes on workers, employers can do “an end run around

¹⁸⁶ LOBEL, *supra* note 175, at 178.

¹⁸⁷ *Id.*

¹⁸⁸ Piveteau, *supra* note 38, at 680. Harlan Blake wrote, “Every postemployment restraint, for whatever reason imposed, has inevitable effects which in some degree oppose commonly shared community values. In view of our feeling that a man should not be able to barter away his personal freedom, even this small degree of servitude is distasteful.” Blake, *supra* note 108, at 650. A non-compete in perpetuity could, in effect, compel the worker to remain with her present employer indefinitely and would raise serious 13th Amendment concerns. *See* U.S. Const. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

¹⁸⁹ Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 556 (1985).

these [intellectual property] regimes.”¹⁹⁰ Employers can overprotect intangible investments and upset the balance that the federal government and the states have tried to strike in copyright, patent, and trade secret laws. Through non-competes, employers can prevent what, from their perspective, is free riding detrimental to their profits, but, for the public, amounts to beneficial cooperation and sharing of information and knowledge.

B. Non-Competes Are a Flawed Means of Protecting Against Free Riding

Even for the purpose of preventing free riding, non-competes are an ineffective tool. They are overbroad means of protecting against improper appropriation. They are unlike copyright and patent, which protect a specific creative work, invention, or process. Non-competes do not directly control, or protect, intangible assets. Instead, non-competes restrict the possessor of the intangible—the worker. As one scholar of intellectual property has written, “noncompetes regulate the *inputs* to creation and invention, whereas IP rights regulate the inventive or creative *outputs*.”¹⁹¹ Non-competes restrain workers’ labor market freedom without providing effective protection to the intangible at issue. Accordingly, they are too broad and too narrow.¹⁹²

Although some employers may use non-competes to protect trade secrets or customer lists, a fundamental mismatch still exists between that justification and the operation of non-compete clauses. To protect, for example, a trade secret or customer list, employers restrain the labor market freedom of workers and their ability to earn a living. Non-competes prevent workers from using their *full* set of experience, knowledge, and skills at another employer in

¹⁹⁰ Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements*, 52 WM. & MARY L. REV. 873, 879 (2010).

¹⁹¹ *Id.* at 914 (emphasis in original).

¹⁹² *Id.*

order to protect an employer's *discrete* intangible.¹⁹³ To prevent a highly specific threat (rival free-riding on the employers' investment in an intangible), non-competes lock workers into their current job, inflicting harms on the bound workers themselves as well as broader society. While human beings cannot be separated from their experience, knowledge, and skills, non-competes strip workers of the freedom to *use* their talents, many of which they acquired or developed on their own and not from employers or any single employer. Through non-competes, employers "convert general training into firm-specific human capital by denying workers the opportunity to apply those skills outside the firm."¹⁹⁴

At the same time, non-compete clauses are not effective at protecting firms' investments in intangibles. Copyright and patent law operate against the entire world and grant the owner a cause of action against any and all parties who infringe their intellectual property. In contrast, non-compete clauses are a creation of contract and operate only against the bound employee, and potentially an employer who recruits this worker.¹⁹⁵ Accordingly, non-competes bind an employee who possess an intangible to his or her employer but do not protect the intangible itself. Even when bound by a non-compete clause, an employee can still covertly disclose a customer list or trade secret to a rival company or another third party. A non-compete clause does little or nothing to address this threat.

C. Employers Have Less Restrictive Alternatives to Protect Intangible Interests

¹⁹³ See LOBEL, *supra* note 175, at 37 ("At their most dangerous, human capital controls such as noncompete agreements temporarily prevent workers who have trained and labored in a specific field with a specific set of knowledge from using their expertise in pursuing their passions and perhaps also from earning a living."); Viva R. Moffat, *Human Capital as Intellectual Property? Non-Competes and the Limits of IP Protection*, 50 AKRON L. REV. 903, 928 (2016) ("By limiting the employment possibilities for employees, non-competes seek to control not only the output of human ingenuity and creativity, but also the source of it—the human capital itself.").

¹⁹⁴ Marx, *supra* note 103, at 698.

¹⁹⁵ See Viva R. Moffat, *Making Non-Competes Unenforceable*, 54 ARIZ. L. REV. 939, 980 (2012) ("[Non-competes] are too narrow because they operate only between an employer and an employee and thus do not protect the intellectual property against the world.").

To the extent they need to protect intangibles against socially harmful free riding, employers have a range of less restrictive means of achieving this objective. Indeed, employers have a vast array of tools in their legal arsenal through which to assert quasi-property rights over intangibles. Even apart from non-competes, Orly Lobel has argued that “human capital controls have wildly expanded and are widespread in almost every industry.”¹⁹⁶ Employers can protect their intangibles through trade secret law and non-disclosure agreements that prevent employees and former employees from sharing or publicizing protected information. In addition to these legal protections for intangibles, employers concerned about the loss of valuable intangibles due to employee departure can improve their retention policies or offer workers employment contracts. These methods allow employers to protect intangibles without imposing a broad one-sided restraint on workers’ mobility.

Trade secret law gives businesses the power to protect intangibles that may not be eligible for copyright or patent protection. Employers can use trade secret law to prohibit both current and former employees from divulging valuable information to competitors and the public. Trade secrets are defined as information that derives its value from being unknown or unascertainable to the public and that is subject to reasonable efforts to maintain its secrecy.¹⁹⁷ Misappropriation of trade secrets, whether through espionage or breach of a contractual or common law duty with an employer, is actionable.¹⁹⁸ The Economic Espionage Act (amended and strengthened several times in the past five years) makes misappropriation of trade secrets a federal crime.¹⁹⁹ In some states, courts can enjoin workers possessing trade secrets from working

¹⁹⁶ Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 TEX. L. REV. 789, 797 (2015).

¹⁹⁷ UNIF. TRADE SECRETS ACT § 1(4) (amended 1985). Nearly all states have adopted the Uniform Trade Secrets Act or some modification of it. H.R. REP. NO. 114-529, at 4 (2016).

¹⁹⁸ *Id.* at §§ 1(1) & (2).

¹⁹⁹ 18 U.S.C. § 1839.

for a rival or starting a competing business when they determine that the workers will inevitably disclose the trade secret.²⁰⁰ Under this “inevitable disclosure” doctrine, courts can impose an extraordinary “non-compete remedy” on a worker to protect his or her employer’s intangibles.²⁰¹ Trade secret law grants employers a potent tool with which to protect valuable intangibles.

Employers can also condition employment on employees’ signing non-disclosure agreements. Through a non-disclosure requirement, employers can convert statutory duties under state trade secret law into contractual duties. Employees bound by a non-disclosure condition are prohibited from divulging or publicizing information listed in the contract.²⁰² Today, non-disclosure clauses often prohibit the sharing of a long list of information including “any other information not generally known to the public which, if misused or disclosed, could reasonably be expected to adversely affect Company’s business.”²⁰³ Non-disclosure agreements do restrict employee’s freedom to communicate to new employers and colleagues but are less restrictive than non-competes.

For employers who find these legal tools are inadequate for protecting their intangible investments and believe preventing employee departure is still essential, they have multiple options that are superior to non-compete clauses. Employers can retain workers, and ensure their commitment and loyalty, through higher wages and salaries, more generous benefits, and fair treatment. This dynamic is an important pro-worker element of the more fluid employee-employer relationship in the United States today.²⁰⁴ Indeed, this threat of exit is an important

²⁰⁰ Eleanore R. Godfrey, *Inevitable Disclosure of Trade Secrets: Employee Mobility v. Employer’s Rights*, 3 J. HIGH TECH. L. 161 (2004).

²⁰¹ *E.g.*, *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1269 (7th Cir. 1995).

²⁰² Orly Lobel: *Enforceability TBD: From Status to Contract in Intellectual Property Law*, 96 B.U. L. REV. 869, 874 (2016).

²⁰³ *Id.* at 874-76.

²⁰⁴ Katherine V.W. Stone, *Knowledge at Work: Disputes Over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721, 733-37 (2002).

source of power for at least some workers in the contemporary workplace.²⁰⁵ Employers can retain workers, who may otherwise leave and accept employment with another company, through raises and promotions.

In lieu of non-compete clauses, employers can also offer employment contracts to workers entrusted with important information. Employment contracts depart from the default rule of at-will employment and offer guaranteed employment to workers for a term.²⁰⁶ They bind both the employer and the employee to commit to maintaining the relationship for a fixed period and limit the ability of both sides to end the contract before the completion of the term. And unlike non-compete clauses, employment contracts do not restrain a worker from finding employment *after* he or she has departed or otherwise left.

Employment contracts also serve an important channeling function. Because non-competes are often one-sided obligations, employers can use them as a matter of course without considering whether they are necessary to protect intangibles.²⁰⁷ In contrast to non-compete clauses often under which only the worker is bound, both the employer and the employee make a binding commitment in an employment contract. By retaining workers through term contracts, employers are required to deliberate on the importance of the intangibles involved. If employers seeking to protect intangibles cannot rely on non-competes and have to offer employment contracts and bind themselves, they are compelled to identify and evaluate the significance of the intangibles at stake and determine an employment term that is just long enough to recoup their investment in the intangibles.

²⁰⁵ Arnow-Richman, *supra* note 96, at 983-84.

²⁰⁶ *See, e.g.,* Luteran v. Loral Fairchild Corp., 455 Pa. Super. 364, 370, 688 A.2d 211 (1997). (“In order to rebut the presumption of at-will employment, a party must establish one of the following: (1) an agreement for a definite duration; (2) an agreement specifying that the employee will be discharged for just cause only; (3) sufficient additional consideration or (4) an applicable recognized public policy exception.”).

²⁰⁷ Staidl, *supra* note 42, at 119.

VI. The FTC Should Prohibit Non-Compete Clauses as an Unfair Method of Competition

Through a rulemaking, the FTC should declare worker non-compete clauses to be an unfair method of competition and classify them as per se illegal under the FTC Act. Non-competes, in general, function as contracts of adhesion that impair labor market mobility. Even if an employer does not intend to, or cannot enforce, them in state court, non-competes can deter workers from leaving a job and chill labor market mobility. By binding workers to their current employer, non-competes reduce wages, depress business formation, and lock workers into discriminatory, hostile, or unsafe workplaces. On top of these harms to workers, dominant firms and other powerful incumbents can also use non-competes to deprive rivals and new entrants of specialized workers and exclude these competitors from the market. In contrast to these real harms, the business justifications for non-compete clauses are fallacious. Businesses can protect their investment in intangibles in more effective ways that are also less restrictive for workers, including trade secret law, non-disclosure agreements, and employment contracts.

The FTC has broad authority to interpret “unfair methods of competition”²⁰⁸ and should use this authority to prohibit non-competes. To deter employers’ use of non-competes, the FTC should prohibit them as an unfair method of competition and not merely hold them to be unenforceable in court. Under the requested rule, an employer who presents, enforces, or otherwise uses worker non-competes would be liable under the FTC Act.

Tens of millions of workers are subject to non-compete clauses in the workplace today. Due to disparities in bargaining power and behavioral biases among workers, employers can generally condition employment on an employee’s acceptance of a non-compete clause. Non-

²⁰⁸ 15 U.S.C. § 45.

competes in the workplace function as contracts of adhesion. Even in states where they are unenforceable, non-competes clauses discourage worker mobility and lock workers into their current jobs. For workers, non-competes depress wages, frustrate their ability to start new businesses, and compel them to remain in discriminatory and hostile work environments. In addition to harming workers, firms with market power can use non-competes to exclude rivals. Through worker non-competes, incumbent firms can control the supply of labor and deprive rivals and new entrants of the workers that they need to grow and compete. Furthermore, non-competes can divert workers to larger firms and hinder the growth and entry of small and new firms.

The business justifications for employer use of non-compete clauses do not stand up to scrutiny. The underlying assumption is that employers need to guard their investment in intangibles (for example, customer lists, trade secrets, and training) against free riding by rivals and others. What is disparaged as free riding is often beneficial sharing of information and knowledge among workers and across firms. While firms have a motive to defend against perceived free riding by competitors, their private incentive to protect intangibles can conflict with the public interest in allowing the free dissemination and sharing of information and knowledge. Furthermore, non-competes are a flawed means of protecting against free riding. They are too broad and too narrow—binding a worker to his or her current employer and preventing full freedom to use his or her skills and yet failing to truly protect the relevant intangible. Employers have alternative and less restrictive methods of protecting their intangibles. They can use trade secret law and non-disclosure agreements to protect customer lists and trade secrets, and training, offering promotions, raises, and job contracts to retain employees.

The FTC has expansive authority to interpret the FTC Act’s prohibition on unfair methods of competition.²⁰⁹ Congress intended the FTC to be an expert policymaker on antitrust and delegated authority to the Commission to identify and restrict unfair methods of competition over time.²¹⁰ The Supreme Court has affirmed this congressional grant of policymaking power to the FTC, declaring the Commission, in defining “the congressionally-mandated standard of fairness,” can “like a court of equity, consider[] public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.”²¹¹ Furthermore, modern administrative law grants agencies, such as the FTC, the authority to interpret broad, open-ended statutes such as the FTC Act.²¹²

The FTC Act authorizes the FTC to outlaw practices beyond those that are reasonably certain to reduce competition or create a monopoly. Congress enacted the FTC Act and created the Commission to stop anticompetitive practices in their “incipiency.”²¹³ The Supreme Court has stated that “Congress enacted § 5 of the Federal Trade Commission Act to combat in their

²⁰⁹ See generally Sandeep Vaheesan, *Resurrecting “A Comprehensive Charter of Economic Liberty”: The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645 (2017).

²¹⁰ See Neil W. Averitt, *The Meaning of “Unfair Methods of Competition” in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 237 (1980) (“The judicial decisions which have reviewed [the FTC Act’s] legislative history confirm that the Commission has, as it must have, considerable flexibility in determining which particular acts or practices will constitute ‘unfair methods of competition.’”).

²¹¹ *Sperry & Hutchinson*, 405 U.S. at 244. See also *Ind. Fed. Of Dentists*, 476 U.S. at 454 (“The standard of ‘unfairness’ under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons[.]”).

²¹² *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). See Justin (Gus) Hurwitz, *Chevron and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209, 263-64 (2014) (“[F]irst, . . . the breadth of [Section 5] constructions likely to be considered permissible is very large; and second, . . . the proper forum in which to challenge such interpretations is not before the Article III courts. Given the breadth of the statute, once the matter has reached that point, there is great weight in favor of the FTC’s position receiving *Chevron* deference.”).

²¹³ See generally A. Everette MacIntyre & Joachim J. Volhard, *The Federal Trade Commission and Incipient Unfairness*, 41 GEO. WASH. L. REV. 407 (1973). See also Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 74 (2003) (“[The principal Congressional supporters] of the FTC Act wanted a new agency that would prosecute if the Department faltered, enforcing a flexible new standard that could reach where the Sherman Act might not.”).

incipiency trade practices that exhibit a strong potential for stifling competition.”²¹⁴ The principal Senate sponsor of the FTC Act wanted the FTC to become the “social machinery which will protect the individual from oppression and wrong.”²¹⁵ A Senate colleague echoed this statement, stating “no one here—I can speak with confidence for the entire Senate—would put one obstacle in the way of punishing dishonesty, of preventing oppression, of prohibiting exactions.”²¹⁶

Considering the documented harms and unconvincing business justifications for non-competes, the FTC should hold worker non-compete clauses to be an unfair method of competition and categorize them as per se illegal. For the reasons presented, non-competes are competitively suspect. Under existing Sherman Act precedent, non-competes arguably should trigger a strong presumption of illegality because they hurt competition for workers and can impair product market competition and rest on dubious justifications.²¹⁷ Section 5’s unfair methods of competition prong is expressly broader than the Sherman and Clayton Acts.²¹⁸ Accordingly, the FTC has the authority to go further and classify non-competes as per se illegal.

In exercising its Section 5 authority, the FTC’s competition rule should make the presentation or the enforcement of non-competes illegal. Prohibiting non-compete clauses, as

²¹⁴ *FTC v. Texaco Inc.*, 393 U.S. 223, 225 (1968).

²¹⁵ 51 CONG. REC. 11,109 (1914) (statement of Sen. Newlands).

²¹⁶ *Id.* at 14,782 (statement of Sen. Burton).

²¹⁷ *In re Polygram Holding, Inc.*, 136 FTC 310, 344 (2003), *pet’n denied Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005) (“A plaintiff may avoid full rule of reason analysis, including the pleading and proof of market power, if it demonstrates that the conduct at issue is inherently suspect owing to its likely tendency to suppress competition.”).

²¹⁸ *See Ind. Fed. of Dentists*, 476 U.S. at 454 (“The standard of ‘unfairness’ under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons[.]”). For example, the FTC has held that Section 5 reaches invitations to collude, which may fall outside the Sherman Act’s prohibition on “restraints of trade.” *See, e.g., In re Drug Testing Compliance Group, LLC*, 2015 WL 9254882, *8 (FTC 2015) (“Mr. Crossett’s communication to Competitor A is an attempt to arrange a customer allocation agreement between the two companies. The invitation, if accepted, would be a per se violation of the Sherman Act. The Commission has long held that invitations to collude violate Section 5 of the FTC Act[.]”).

opposed to making them only unenforceable in court, is essential. Regardless of whether they are enforceable in state court today, many employers condition employment on workers acquiescing to a non-compete provision. For instance, California law bars the enforcement of non-competes.²¹⁹ Nonetheless, nearly one-in-five workers in California is subject to a non-compete clause.²²⁰ The mere existence of non-compete contracts, even when legally not binding, still inflicts real harms on workers. Under the requested rule, employers who use non-competes would violate the FTC Act and be subject to FTC enforcement actions.

VII. Conclusion

Through non-compete clauses, employers have deprived tens of millions of workers of the freedom to leave their current job to accept a new job or start a business. Non-competes prohibit workers, following separation from an employer, from seeking employment in a similar line of work or industry or establishing a competing business for a specified period in a geographic area. Approximately 30 million workers, across a wide range of fields and occupations including accountants, engineers, and fast food workers, are bound by non-compete clauses.

In labor markets, employers generally have the power to impose non-compete clauses on workers to the detriment of workers. Due to workers' dependence on wages and lack of union representation and concentration among employers in local labor markets, the employee-employer relationship is defined by inequality. Even when they have employers competing for their services, workers are likely to bargain about wages and benefits, not contingent terms such as non-compete clauses. These factors taken together indicate that non-compete clauses function

²¹⁹ Cal. Bus. & Prof. Code § 16600.

²²⁰ Starr et al., *supra* note 8, at 16.

as contracts of adhesion. Employers present non-compete clauses to workers as a standard form contract on a take it-or-leave it basis.

By restricting labor market mobility, non-compete clauses inflict significant harms on workers and the broader public. Non-compete clauses bind workers to their current employers and thereby depress wages and wage growth and deter the formation of new firms. The effects extend beyond wages and firm creation rates. Due to non-competes, many workers may, in effect, be compelled to remain in discriminatory, hostile, or dangerous work environments.

Non-compete clauses also can impair product market competition and help protect monopolistic and oligopolistic market structures. In concentrated markets, dominant incumbent firms can use non-compete clauses as a way of depriving rivals and new entrants of essential workers and limit the growth of actual and would-be competitors. Even in the absence of any exclusionary intent, non-competes can direct workers toward larger existing firms and away from smaller firms and new entrants.

While the harms from non-compete clauses are real, their justifications are unpersuasive. Employers and their representatives justify worker non-compete clauses as a method of protecting their intangible investments, such as trade secrets and employee training, from free riding by rival firms. If they were unable to protect against this type of free riding, they would underinvest in intangibles, according to this theory. This rationale does not stand up to scrutiny and depends on a series of questionable, if not false assumptions. Insofar as employers should be permitted to protect intangibles, they have several less restrictive and more appropriately tailored alternatives to non-compete clauses.

The FTC should initiate a rulemaking to prohibit employers from presenting non-compete clauses as a condition of employment. The FTC has expansive authority to interpret the

FTC Act’s prohibition on “unfair methods of competition.” Given that non-compete clauses inflict real harms on workers and competition and rest on unpersuasive theoretical justifications, the FTC should hold these clauses to be an unfair method of competition. Accordingly, the FTC should hold these clauses to be a per se violation of Section 5 of the FTC Act. Under this rule, employers who use non-competes with their workers would violate federal law and face legal liability under the FTC Act.

Certification

The undersigned certifies, that, to the best knowledge and belief of the undersigned, this petition includes all information and views on which the petition relies, and that it includes representative data and information known to the petitioner, including information that is unfavorable to the petition.

Organizational Petitioners

The **Open Markets Institute (OMI)** is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine competition and threaten liberty, democracy, and prosperity. OMI regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public.

The **AFL-CIO** is a democratically governed federation of 55 unions representing 12.5 million working people.

The **Artist Rights Alliance (ARA)** is an artist-run non-profit advocacy group representing creators in the digital landscape. ARA's work is significant to anyone who creates and makes a living from their creations. ARA's objectives are two-fold: First, economic justice for musicians and music creators in the digital domain. Second, ensuring that the current and future generations of creators retain the rights needed to create and benefit from the use of their work and efforts. ARA has grown into a national organization based on representation, advocacy, and mobilization for sustainable careers in the digital age.

The **Center for Popular Democracy (CPD)** works to create equity, opportunity and a dynamic democracy in partnership with high-impact base-building organizations, organizing alliances, and progressive unions. CPD strengthens our collective capacity to envision and win an innovative pro-worker, pro-immigrant, racial and economic justice agenda.

coworker.org is a digital lab dedicated to supporting worker voice through our platform, trainings, and building networks of workers to improve their jobs.

The **Demand Progress Education Fund** educates its two million members and the general public about matters pertaining to the democratic nature of our nation's communications infrastructure and governance structures, and the impacts of corporate power over our economy and democracy.

The **Economic Policy Institute (EPI)** is a nonprofit, nonpartisan think tank created in 1986 to include the needs of low- and middle-income workers in economic policy discussions. EPI's mission is to inform and empower individuals to seek solutions that ensure broadly shared prosperity and opportunity. EPI believes every working person deserves a good job with fair pay, affordable health care, and retirement security. To achieve this goal, EPI conducts research and analysis on the economic status of working America. EPI proposes public policies that protect and improve the economic conditions of low- and middle-income workers and assesses policies with respect to how they affect those workers.

EIG is a bipartisan public policy organization, combining innovative research and data-driven advocacy to address America's most pressing economic challenges and advance solutions that empower entrepreneurs and investors to forge a more dynamic economy.

The **Institute for Local Self-Reliance (ILSR)** is a national research and advocacy organization that challenges concentrated economic and political power, and instead champions an approach in which ownership is broadly distributed, institutions are humanly scaled, and decision-making is accountable to communities.

Lake Research Partners is a national leader in public opinion research and strategy for Democratic and progressive candidates, causes, and campaigns.

Make the Road New York is a democratic, community-based membership organization representing more than 23,000 working class and immigrant families throughout New York City, Long Island, and Westchester, New York.

The **National Employment Law Project (NELP)** is a nonprofit organization with more than 45 years of experience advocating for the employment and labor rights of low wage and unemployed workers. NELP seeks to ensure that all employees receive the full protection of employment and labor laws, and that employers are not rewarded for skirting those basic rights. NELP promotes policies at the federal, state, and local level to protect workers' rights and has litigated and participated as amicus in numerous cases in the federal appellate courts and the U.S. Supreme Court.

Organization United for Respect (OUR) is a national organization working to reshape the economy so that all can live free, full lives with their families and loved ones.

Public Citizen was founded 46 years ago and serves as the people's voice in the nation's capital. It identifies excessive corporate power as the most serious threat to the values and policy objectives we most treasure: justice, health and safety, ecological sustainability, a functioning democracy, freedom, and equality. Public Citizen has delved into an array of areas, but its work on each issue shares an overarching goal: To ensure that all citizens are represented in the halls of power. Public Citizen carries out an advocacy agenda through divisions with specialized and extraordinary expertise. Its Health Research Group is recognized as the leading campaigner for pharmaceutical safety. Its Litigation Group operates the preeminent public interest Supreme Court practice. Its Global Trade Watch is recognized as a leading force for fair trade. Its Energy Project combines consumer and environmental advocacy for a sustainable future. Its Congress Watch project runs cutting-edge advocacy campaigns on a diverse array of issues, from worker safety to clean government. Moreover, Public Citizen's Austin office has helped turn Texas into a world-leading wind energy producer.

The **Revolving Door Project** is a nonpartisan effort to educate civil society in order to counteract the advantage that Wall Street and corporate America have in how the executive branch writes the rules of the economy. It does this by alerting and educating the media and activists when hard working people are being taken advantage of and by whom. If the executive branch is to write rules that structure the economy away from rent extraction and in the direction of greater economic equality, public-interest minded people must hold key executive branch positions.

The **Roosevelt Institute**, a New York-based think tank, promotes bold policy reforms that would redefine the American economy and democracy. With a focus on curbing corporate power and reclaiming public power, Roosevelt is helping people understand that the economy is shaped by choices—via institutions and the rules that structure markets—while also exploring the economics of race and gender and the changing 21st-century economy. Roosevelt is armed with a transformative vision for the future, working to move the country toward a new economic and political system: one built by many for the good of all.

Service Employees International Union (SEIU) unites 2 million diverse members in the United States, Canada, and Puerto Rico. SEIU members working in the healthcare industry, in the public sector, and in property services believe in the power of joining together on the job to win higher wages and benefits and to create better communities while fighting for a more just society and an economy that works for all, not just corporations and the wealthy.

Towards Justice is a Denver-based non-profit law firm that represents workers in attacking systemic abuses in the labor market through impact litigation, strategic policy advocacy, and capacity building. Towards Justice is particularly interested in attacking anti-competitive practices in the labor market that undermine worker power.

The **UFCW** is the largest private sector union in the United States, representing 1.3 million professionals and their families in grocery stores, meatpacking, food processing, retail shops and other industries. Its members help put food on our nation's tables and serve customers in all 50 states, Canada and Puerto Rico

UNITE HERE is a labor union that represents 270,000 working people across Canada and the United States. Its members work in the hotel, gaming, food service, manufacturing, textile, distribution, laundry, transportation, and airport industries. Its membership is diverse. Its members are predominantly women and people of color, and hail from all corners of the planet. Together, members are building a movement to enable people of all backgrounds to achieve greater equality and opportunity.

Individual Petitioners

Individual petitioners' institutional and other organizational affiliations are provided solely for identification purposes.

Alan Hyde is Distinguished Professor and Sidney Reitman Scholar at Rutgers Law School. He has been a visiting professor at Yale, Columbia, NYU, Toronto, Michigan, Cornell, Fordham, Cardozo, and Brooklyn law schools. He is the author of *Working in Silicon Valley: Economic and Legal Analysis of a High-Velocity Labor Market* (2003), an early analysis of the short job tenures typical of high technology in California and their benefit for startup firms, knowledge diffusion, and technical innovation. He lectures and publishes frequently on intellectual property issues in employment, in the US and around the world. He is a member of the American Law Institute and helped shape the chapter on non-competes in the new Restatement of Employment Law.

Amy Kastely is a senior professor of law at St. Mary's University Law School and a member of the bar in Texas and New Mexico. She is a nationally recognized authority on contract law, having co-authored a widely-known text entitled *Contracting Law*. She also has written numerous articles exploring how law is shaped by narratives of race, gender, class, and other systems of subordination. She served as lead counsel in *Esperanza et al. v. City of San Antonio*, the first case recognizing the importance of cultural rights in public arts funding. In addition, she has represented the Esperanza and numerous community coalitions in litigation and organizing projects involving a broad spectrum of important issues, including protection of the Edward's Aquifer; the right of communities to use public streets, sidewalks, and parks for cultural events and political expression; racial bias in San Antonio's historic preservation practices; and the public's right to witness government deliberations and to hold government officials accountable to democratic values.

Ann C. McGinley is William S. Boyd Professor of Law at the University of Nevada, Las Vegas, Boyd School of Law. The co-director of the Workplace Law Program, McGinley has published three books and more than sixty law review articles and book chapters. Her most recent book is *Masculinity at Work: Employment Discrimination Through a Different Lens* (NYU Press, 2016). McGinley has published articles about gender effects on lawyers' workplace conditions and continues to research this topic; she is the editor of the upcoming *Feminist Judgments: Rewritten Opinions in Employment Discrimination Law* (Cambridge University Press, forthcoming 2020). Professor McGinley has lectured at many universities in the United States and abroad and is a Visiting Foreign Professor at Universidad Adolfo Ibañez in Santiago, Chile where she lectures annually in Spanish about U.S. sexual harassment law. She currently serves on Nevada's Task Force on Sexual Harassment and Discrimination Law and Policy.

Ariana R. Levinson is a professor of law at the University of Louisville Brandeis School of Law who has taught employment law for the past ten years of her fourteen-year academic career. She has authored many law review articles, including some on the topic of technology and the

workplace. Before entering academia, she worked as an attorney representing working people, including spending a year as the fellow in the AFL-CIO Legal Department.

Barbara Bucholtz is professor of law at the University of Tulsa College of Law. She received her J.D. from Valparaiso University of Law and her LL.M. in environmental law from George Washington University (with highest honors). Prior to joining the Tulsa law faculty, she practiced corporate law, business litigation, class action litigation, and estate planning in the Chicago area and in Tulsa. She is a former law clerk for the Northern District of Oklahoma. She serves on the boards of several organizations in the business and the nonprofit sectors. Her teaching interests include contracts, sales, international private law, comparative corporate law, corporate law, securities law, international trade, American legal history and jurisprudence, the law of nonprofit organizations, and legal analysis and writing. She writes and speaks on topics that include international trade agreements, environmental law, and nonprofit associations.

Ben Templin is professor of law at the Thomas Jefferson School of Law. Prior to joining the faculty in 2003, he was a corporate attorney at Wilson Sonsini Goodrich & Rosati where his practice focused on general corporate law for early stage technology companies. Following graduation from the University of California, Boalt Hall School of Law, he taught legal methods to undergraduates at the University of California, Berkeley. His web site provides instruction in how to study and prepare for law school exams. Before going to law school, he was an editor in computer magazine publishing. He has published a series of law review articles on Social Security reform and government investment in private enterprise.

Carol Chomsky is professor of law and former Associate Dean for Academic Affairs at the University of Minnesota Law School, where she has been on the faculty since 1985. She teaches contracts, sales, and legislation and regulation, and she teaches and supervises field placements in the Judicial Externship class. She is co-author of *Contracts: A Contemporary Approach* (3d ed. 2018) and *Learning Sales Law* (2016), both published by West Academic. Her scholarship addresses topics in history, contracts law, and pedagogy. She was co-President of the Society of American Law Teachers in 2000-2002 and served as President of Minnesota Women Lawyers in 1993-1994. Before entering academia, she clerked for Judge Spottswood W. Robinson on the D.C. Circuit and practiced law in Washington, D.C.

Catherine Fisk is the Barbara Nachtrieb Armstrong Professor of Law at the University of California, Berkeley, where she teaches courses on employment and labor law, civil procedure, and the legal profession. She is the author of *Working Knowledge: Employee Innovation and the Rise of Corporate Intellectual Property*, a multiple prize-winning book examining the history of employer-employee disputes over workplace knowledge and intellectual property. She has written articles on the law of noncompetition agreements and trade secrets, as well as books and articles on numerous other topics related to the law of the workplace. Prior to joining the Berkeley Law School faculty, she held chaired professorships at Duke University and the University of California, Irvine. She is a graduate of Princeton University and Berkeley.

Charlotte Garden is an expert in labor & employment law. She is an associate professor (with tenure) at the Seattle University School of Law, where she teaches labor law, employment law,

constitutional law, appellate litigation, and legislation & regulation. Her scholarship focuses on the intersection of work/labor/technology and the constitution. Her articles have appeared in the *Emory Law Journal*, *Boston University Law Review*, *George Washington Law Review*, *Fordham Law Review*, *William & Mary Law Review*, the *University of Chicago Legal Forum*, and the *Harvard Civil Rights-Civil Liberties Law Review*. She is a co-author of two leading labor & employment law casebooks: *Modern Labor Law in the Private and Public Sectors*; and the forthcoming ninth edition of *Employment Law Cases and Materials*. In 2019, Cambridge University Press will publish her co-edited volume, *The Cambridge Handbook of U.S. Labor Law*.

Chris Odinet is an associate professor of law and affiliate associate professor in entrepreneurship at the University of Oklahoma. His primary teaching and research interests focus on the intersection of law, credit, consumer protection, and technology. He is also active in law reform efforts, serving on committees of the Uniform Law Commission, the European Law Institute, and the Association of American Law Schools. He is also the co-editor of the *Annual Survey of Consumer Finance Law*, which appears in the American Bar Association's *The Business Lawyer* publication.

Chrystin Ondersma is professor of law and Judge Morris Stern Scholar at the Rutgers Law School (Newark). She joined the faculty in Spring 2010. Her scholarship focuses on Bankruptcy and Commercial Law. She received her J.D. magna cum laude in 2007 from Harvard Law School where she was the recipient of a Goldsmith Academic Fellowship and an executive editor of the *Harvard Civil Rights-Civil Liberties Law Review*. From 2007 to 2008 she clerked for the Honorable Michael Daly Hawkins of the U.S. Court of Appeals for the Ninth Circuit. Prior to joining the Rutgers faculty, she was an associate in the Business Finance and Restructuring Department at Weil, Gotshal & Manges LLP in New York.

Colin P. Marks graduated magna cum laude from the University of Houston Law Center in 2001 where he served as an associate editor on the *Houston Law Review*. After law school, he clerked for the Honorable Harold R. DeMoss Jr. on the United States Fifth Court of Appeals for two years. In the fall of 2003, he joined the law firm of Baker Botts, L.L.P., in Houston, Texas where he was an associate in the trial department. At Baker Botts, his practice concentrated on commercial litigation, as well as some pro bono criminal work. He left Baker Botts in the summer of 2006 to join St. Mary's University School of Law. He is a member of the American Law Institute (ALI), Co-Chair of the ABA's UCC Annual Survey Subcommittee, and member of the executive committee for the AALS Sections on Agency, Partnerships, LLCs and Unincorporated Associations, and Section on Contracts. In 2018 he was elected President of the South Eastern Association of Law Schools and will begin his one year term in 2019.

Cynthia Ho is the Clifford E. Vickrey Research Professor at Loyola University of Chicago School of Law, where she is also the Director of the Intellectual Property Program. Prior to joining the faculty at Loyola, she litigated intellectual property cases and also was involved in evaluating IP assets and liabilities. She holds a B.A. from Boston University and a J.D. from Duke Law. She is a member of the New York Bar.

Dalié Jiménez is a professor of law at the University of California, Irvine School of Law. She teaches and writes in the areas of contract, bankruptcy, and consumer protection law.

Edward Janger is the David M. Barse Professor of Law, Associate Dean for Research and Scholarship, and Co-Director of the Brooklyn Law School Center for the Study of Business Law and Regulation. He teaches and writes in the areas of bankruptcy, secured credit and consumer finance.

Eileen Appelbaum is Co-Director of the Center for Economic and Policy Research, Washington, D.C., Fellow at Rutgers University Center for Women and Work, and Visiting Professor at the University of Leicester, UK. Prior to joining CEPR, she held positions as Distinguished Professor and Director of the Center for Women and Work at Rutgers University and as professor of economics at Temple University. She is past president of the Labor and Employment Relations Association. Her research focuses on organizational restructuring and outcomes for firms and workers; private equity and financialization; and work-family policies. *Private Equity at Work: When Wall Street Manages Main Street*, coauthored with Rosemary Batt, was selected by the Academy of Management as one of the four best books of 2014 and 2015, and was a finalist for the 2016 George R. Terry Award. *Unfinished Business*, coauthored with Ruth Milkman, examines the effects of paid family leave in California on employers and employees. It has been widely cited in discussions of national paid family and medical leave policy. Her current research examines the implications of consolidation of hospitals and decentralization of health services to outpatient care centers for employees in these two segments of the healthcare industry.

Frank Pasquale has researched and written extensively on law and political economy. He edited a special issue of *Critical Analysis of Law*, entitled *New Economic Analysis of Law*. He is the author of *The Black Box Society* (Harvard University Press, 2015), which develops a social theory of reputation, search, and finance, and has been translated into Chinese, Korean, French, and Serbian. The book offered critical legal commentary on algorithmic approaches to profiling, and recommended law & policy to improve the information economy. He has served on the NSF-sponsored Council on Big Data, Ethics, & Society, and has co-authored a casebook on administrative law and co-authored and authored over 50 scholarly articles.

Henry Drummonds is professor of law at Lewis and Clark Law School in Portland, Oregon.

Jane Flanagan is a Leadership in Government fellow with the Open Society Foundations and a Visiting Scholar at IIT Chicago-Kent School of Law. She is the former chief of the Workplace Rights Bureau within the Illinois Attorney General's Office, a bureau she founded and led from November 2015 through December 2018. Under her leadership, the bureau brought national attention to the increasing use of noncompete agreements for low-wage workers and negotiated settlements to release thousands of such workers nationwide from those agreements. Previously, she was an assistant attorney general in Maryland and counsel to Maryland's Division of Labor and Industry. She began her career in private practice litigating wage and hour collective action cases on behalf of employees.

Jeffrey W. Stempel is the Doris S. & Theodore B. Lee Professor of Law at the William S. Boyd School of Law, University of Nevada, Las Vegas where he teaches insurance law, civil procedure, contracts, professional responsibility, and evidence. Before joining the UNLV faculty in 1999, he was the Fonvielle & Hinkle Professor of Litigation at Florida State University College of Law and professor of law at Brooklyn Law School. Prior to becoming a law teacher, he was a civil litigator. He is a member of the American Law Institute, the European Law Institute, The Association of the Bar of the City of New York, the American Bar Association, the American Bar Foundation, the American Judicature Society, and the Law & Society Association. He received his B.A. degree from the University of Minnesota in 1977 and his J.D. degree from Yale Law School in 1981 and is admitted in Nevada and Minnesota.

Joan Vogel is professor of law at Vermont Law School. She specializes in employment law, anthropology of law, consumer law, medical malpractice, and tort reform. The courses she has taught at Vermont Law School include commercial law, employment discrimination law, employment law, law and anthropology, and torts. She received a BA degree from George Washington University in 1973. She earned an MA degree in anthropology in 1975 and a JD degree in 1981, both from the University of California at Los Angeles. She served as a teaching associate in UCLA's Anthropology Department from 1975 to 1976 and performed research in African law. In 1979 and 1980, she clerked with two Los Angeles law firms, Levy and Goldman, and Schwartz, Steinsapir, Dohrmann and Krepack. She was a law clerk for Judge Alfred T. Goodwin of the U.S. Court of Appeals, Ninth Circuit, in Oregon from 1981 to 1982. From 1982 to 1989, she served as assistant professor at the University of Pittsburgh School of Law, an associate visiting professor at Albany Law School, and an associate professor at Oklahoma City University Law School. She joined the faculty at VLS in 1989. She testified before the Vermont Senate Judiciary Committee on modification of the state's Human Rights Commission in 1995 and was a consultant for the drafting of Vermont's employment law bill in 1997. In 1998, she helped to write the tobacco reimbursement statute that passed the Vermont Legislature. She has presented widely on topics of legal pluralism, new teaching methods in labor law, tort reform, and on the "Lemon Laws." She has served as chair of the Law and Anthropology and the Labor and Employment Law sections of the Association of American Law Schools.

Karen Cross, as Associate Dean for Administration at John Marshall, develops law school policies and assists with the law school's pending acquisition by the University of Illinois at Chicago. She recently returned to the law school after taking leave to work in central administration on Northwestern University's Evanston campus. As a law student, Karen served as editor of the Harvard Civil Rights-Civil Liberties Law Review. After law school, she conducted research as a Fulbright scholar in former Yugoslavia and worked as an associate with Cleary, Gottlieb, Steen & Hamilton in New York. Since joining the John Marshall faculty, Professor Cross has taught at the Catholic University of Portugal in Lisbon, the University of San Diego's summer program in Moscow, the Central European University in Budapest, and the MBA program for Executives and International Managers at UIC. Her teaching and scholarship focuses on contract law, international economic law, arbitration, and higher education law and policy. She is a contributor to Kluwer Arbitration Blog and ASIL Insights, and her scholarship has appeared in the Journal of Collective Bargaining in the Academy (refereed), Journal of

International Economic Law (refereed), Ohio State Law Journal, and Michigan Journal of International Law, among other publications. She was awarded a Fulbright Distinguished Chair to Portugal in 2008 and has since served on many peer review committees for the Fulbright program. She teaches contracts, education law and policy, and arbitration-related courses. She received an M.S. in Higher Education Administration and Policy from Northwestern, a J.D., cum laude, from Harvard Law School, and a B.A., with distinction, from the University of Wisconsin-Madison.

Kathleen Engel is a research professor of Law at Suffolk University Law School. For several decades, she taught employment law, including the law of non-competes. Prior to her teaching career, she practiced employment law at Burnham, Hines and Dilday.

Lauren E. Willis is professor of law and William M. Rains Fellow at Loyola Law School, Los Angeles, teaches contracts and studies the effects of contractual fine print, among other topics.

Martha T. McCluskey is professor of law and William J. Magavern Scholar, State University of New York at Buffalo. Her scholarship focuses on economic policy and inequality. Her teaching and writing have included constitutional law, employment law, low-wage labor, gender equity and economic policy, and regulated industries. She is a member scholar of the Center for Progressive Reform, where she has worked on consumer and worker protection regulatory issues, and President of the Association for Promotion of Political Economy and the Law (APPEAL).

Meredith A. Munro is a partner at King & Greisen LLP, an all-women owned law firm specializing in employment law and civil rights. She has practiced law for over twenty-five years, in both private practice and the government. Her focus is on serving individuals, including employees and independent contractors, in ensuring that their federal and state law rights are protected. She most recently spoke on the topic of employee mobility and restrictive covenants before the Colorado Bar Association's Labor and Employment Section in January 2019 and is a member of the NELA and PELA, active advocates for legislation on behalf of workers.

Nancy Modesitt is a professor of law at the University of Baltimore School of Law. She teaches employment law, employment discrimination law, torts, and introduction to lawyering skills. She has written extensively on a variety of employment topics, including employment discrimination issues and whistleblowing claims. Before becoming a law professor, she was an attorney at the United States Department of Justice and in private practice at several large law firms. When she was in private practice, she negotiated and drafted noncompetition agreements on behalf of companies.

Nicolas Cornell is assistant professor of law at the University of Michigan Law School. He teaches and writes in the areas of contract law, moral philosophy, and private law theory. Prior to joining the faculty at Michigan, he was an assistant professor of Legal Studies and Business Ethics at the Wharton School, University of Pennsylvania. He holds a J.D. from Harvard Law School, a Ph.D. in philosophy from Harvard University. He clerked for the Vermont Supreme Court, and he is a member of the Pennsylvania Bar.

Orly Lobel is the Don Weckstein Professor of Law and founding member of the Center for Intellectual Property Law and Markets at the University of San Diego. A graduate of Harvard Law School and Tel-Aviv University, her interdisciplinary research is published widely in top journals in law, economics, and psychology and has recently been named among the most cited public law scholars in the nation. She has received numerous fellowships, grants and awards for her research and her books *You Don't Own Me: How Mattel v. MGA Entertainment Exposed Barbie's Dark Side* (Norton 2018) and *Talent Wants to Be Free: Why We Should Learn to Love Leaks, Raids and Free Riding* (Yale University Press 2013) are the winners of several prestigious awards.

Pamela Foohey is an associate professor at the Indiana University Maurer School of Law since 2014. Her research centers on bankruptcy, commercial law, and consumer law. Her work primarily involves empirical studies of bankruptcy and related parts of the legal system, combining quantitative and qualitative, interview-based research. Her work in business bankruptcy focuses on non-profit entities. She also is a co-investigator on the Consumer Bankruptcy Project, a long-term research project studying persons who file bankruptcy which has been the leading empirical study of consumer bankruptcy for the past 35 years. The results of her research have been featured in top media outlets, including *The New York Times*, NPR, Bloomberg, and the *Washington Post*.

Paul Secunda is professor of law at Marquette University Law School. He teaches employee benefits law, labor law, employment discrimination law, employment law, education law, civil procedure, and trusts and estates. He is also the founder and former faculty advisor of the *Marquette Benefits and Social Welfare Law Review*, which began publication in 2015. Professor Secunda is the faculty advisor for the student-run Marquette University Labor and Employment Law Society (LELS).

Rachel Arnow-Richman is the Chauncey Wilson Memorial Research Professor of Law at the University of Denver Sturm College of Law where she directs the Workplace Law Program. Prof. Arnow-Richman teaches and publishes in the areas of contracts, employment law and employment discrimination. She is co-author of two textbooks on Employment Law and has written numerous articles on topics including employment at will, covenants-not-to-compete, gender discrimination, and work family/conflict. She is a frequent media contributor on topics related to wrongful termination, employee competition, and equal employment opportunity, including sexual harassment. She currently serves on the Executive Committee of the American Association of Law Schools' Contracts & Commercial Law Section and is a past Chair of the Committee on Labor & Employment Law. Prior to joining the Denver Law School, Prof. Arnow-Richman was an Associate Professor at Texas A&M Law School, and she has held visiting appointments Colorado Law School, Fordham Law School, and Temple Law School. Prior to entering law teaching, she practiced employment law and commercial litigation at Drinker, Biddle & Reath in Philadelphia and clerked for the New Jersey Supreme Court.

Rick Bales is a faculty member at of Ohio Northern University Pettit College of Law (though he will be visiting at Akron 2018-19). He has published more than eighty scholarly articles and authored or co-authored five books on employment arbitration, alternative dispute resolution in

the workplace, employment law, labor law, and arbitration law. He has spoken widely on topics pertaining to innovative ways of teaching employment and labor law courses. Recent presentations have been in Berlin, Brisbane, Cartagena, Dhaka, Hanoi, Hong Kong, Manila, Milan, Moscow, Paris, Phnom Penh, Prato (Italy), Saigon, Siem Reap, and Yangon. He has twice been selected as a Fulbright Specialist, once each to Kuala Lumpur and Jakarta. He was Dean of ONU Law from 2013-16. Before coming to ONU, he was a faculty member at NKU Chase College of Law, where he was the Director of the Advocacy Center and he was Associate Dean of Faculty Development. Before that, he taught at the University of Montana Law School, Southern Methodist University Law School, and University of Houston Law School, and he litigated employment cases for Baker Botts and Baker Hostetler. He received his law degree from Cornell Law School and his B.A. from Trinity University.

Richard Carlson is a professor at South Texas College of Law-Houston and has taught employment law and other subjects since 1985. He earned his B.A. degree at Wake Forest University and his J.D. at the University of Georgia. He has written a number of articles on employment law and is co-author with Scott Moss of *Employment Law*, a casebook and text on employment law.

Robert H. Lande is the Venable Professor of Law at the University of Baltimore School of Law. Before this he worked at Jones Day and at the Federal Trade Commission. He has authored or co-authored more than 75 U.S. and 18 foreign legal publications. Eleven of his articles have been re-published in books or collections of articles. He has been quoted in the media hundreds of times about antitrust issues and has appeared on TV in the United States, France, the United Kingdom, and China. He has spoken at national events sponsored by many organizations, including the American Bar Association, Association of American Law Schools, National Association of Attorneys General, American Antitrust Institute, and the American Economic Association. He has testified before the US House of Representatives Judiciary Committee the US Senate Commerce Committee, the Antitrust Modernization Commission, and the federal antitrust enforcement agencies. He has given competition advice to enforcement officials from several foreign nations and has given legal talks in Italy, Spain, Japan, England, Belgium, Venezuela, and Peru. He is a past chair of the AALS Antitrust Section and has held many positions in the ABA Antitrust Section. He is an elected member of the American Law Institute and a member of the District of Columbia Bar. He received his JD and Masters in Public Policy from Harvard University and his BA from Northwestern University.

Ruben J. Garcia is Associate Dean for Faculty Development and Research, Co-Director of the UNLV Workplace Law Program, and professor of law at the University of Nevada, Las Vegas. He has held academic appointments at the University of California, Davis, California Western School of Law, the University of California San Diego, and the University of Wisconsin Law School, where he was a William H. Hastie Fellow. The courses that he teaches include constitutional law, employment law, labor law and professional responsibility.

Sanjukta Paul is assistant professor of law at Wayne State University. She is a graduate of Yale Law School and former judicial clerk for the U.S. Court of Appeals for the Ninth Circuit. Her current work involves the intersection of antitrust law and labor policy, and has appeared or is

forthcoming in the *UCLA Law Review*, the *Duke Journal of Law & Contemporary Problems*; the *Berkeley Journal of Employment & Labor Law*; and the *Cambridge Handbook of U.S. Labor Law*. Her forthcoming book *Solidarity in the Shadow of Antitrust: Labor & the Legal Idea of Competition* will be published by Cambridge University Press. Her paper *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action* was recognized with the Jerry S. Cohen Memorial Fund's award for the best antitrust scholarship of 2016 (category prize). She previously served as David J. Epstein Fellow in Public Interest Law & Policy at UCLA Law School and was a litigator representing workers and civil rights plaintiffs for several years.

Sara Sternberg Greene studies consumer law, bankruptcy, poverty law, access to justice and tax. Broadly concerned in her scholarship with the relationship between law and inequality, she has recently focused on the role of the law in perpetuating and exacerbating poverty and inequality. Her work has been published or is forthcoming in the *New York University Law Review*, the *Duke Law Journal*, the *Minnesota Law Review*, and the *American Bankruptcy Law Journal*, among others. She has presented her Access to Justice research at the Department of Justice to the White House Legal Aid Interagency Roundtable, and along with others, integrated her research on the Earned Income Tax Credit into a federal policy proposal, *The Rainy Day EITC: A Reform to Boost Financial Security by Helping Low Wage Workers Build Emergency Savings*. Senators Cory Booker (D-NJ) and Jerry Moran (R-KS) adopted the proposal and are co-sponsors of a bipartisan bill proposing the Refund to Rainy Day Savings Act. She received her BA in 2002 from Yale University (magna cum laude and with distinction). She received her JD in 2005 from Yale Law School, where she received the Stephen J. Massey Prize for excellence in advocacy and served as notes editor for the *Yale Law Journal* and articles editor for the *Yale Law and Policy Review*. After clerking for Judge Richard Cudahy on the United States Court of Appeals for the Seventh Circuit, she focused on housing law and tax credit matters at the law firm Klein Hornig in Boston before beginning a Ph.D. program. She received her Ph.D. in social policy and sociology from Harvard University in 2014.

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