

Formerly Employed Need Not Apply

An Analysis of the Ubiquity of Non-Compete Agreements, their Impacts on Workers, & Policy Solutions

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From Monopoly to Monopsony to Unfavorable Contract Terms

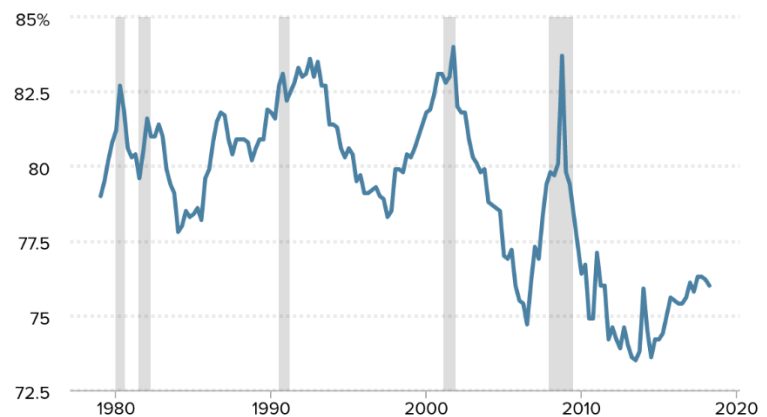
The 2020 presidential election is the second consecutive presidential campaign where discussions of extreme wealth and consolidated economic power are taking center stage. Multiple Democratic Presidential contenders pointed toward the largest firms in our economy as central players in income inequality, environmental degradation, and lower quality of life. National organizations such as *Brookings* and publications such as *The Economist* are keying in on “America’s monopoly moment.”¹ Monopoly has two disparate definitions depending on who is receiving the information being put forward. For economists, a monopoly is a market where a single entity is the sole supplier of a product or service. Simple enough. For advocates and those who experience the gears of the economy first-hand, monopoly is interchangeable with oligopoly: or a market controlled by just a few firms. This leaves participants in a market (and those dependent on a healthy market) with few options to communicate displeasure with labor practices and where few firms crush economic competition.²

While monopoly definitions describe the sellers of products, economic domination can also occur in the buyer’s market. In the labor market, this domination is called monopsony. In addition to the ways that monopolies increase inequality, a “reduction in competition among firms, [shifts] the balance of bargaining power towards employers.”³ Labor’s share of income is currently still

Figure 1

Labor’s share of income remains far from recovered

Share of corporate-sector income received by workers over recent business cycles, 1979–2018



Note: Shaded areas denote recessions. Federal Reserve banks’ corporate profits were netted out in the calculation of labor share.

Source: EPI analysis of Bureau of Economic Analysis *National Income and Product Accounts* (Tables

¹ Patrick Foulis, “Across the West powerful firms are becoming even more powerful,” *The Economist*, date published November 15, 2018, date accessed February 17, 2020, url: <https://econ.st/3d2JtW0>.

² *Open Markets Institute*, “Income Inequality & Monopoly,” date published November 2018, date accessed February 17, 2020, url: <https://bit.ly/2KNV5QB>.

³ Jason Furman and Peter Orszag, “A Firm-Level Perspective on the Role of Rents in the Rise in Inequality,” Presentation at *Columbia University’s “A Just Society” Centennial Event in Honor of Joseph Stiglitz*, date published October 16, 2015, date accessed February 17, 2020, url: <https://bit.ly/3f7yoEX>.

well below the year 2000 level (see Figure 1), and this disparity could be partially due to monopsonistic labor practices across various sectors of the economy.⁴ A 2016 publication from the White House’s Council of Economic Advisors (CEA) delivers a useful case where firm consolidation impacts workers: “a monopsonistic employer can pay a lower wage than would prevail in a competitive market without losing all its workers to competing employers. Like monopoly power, monopsony generally leads to economic inefficiency. And, in the labor market, it also leads to redistribution from workers to employer.”⁵

A common assessment measuring concentration in a market for employees is the Herfindahl-Hirschman Index (HHI), defined as the sum of squares of labor’s share for all firms in a certain industry. Benmelech, Bergman, and Kim find that, from 1977 to 2009, this industry-weighted index increased “from 0.698 to 0.756, an increase of 5.8 percent.”⁶ In fact, according to the authors, “a standard deviation increase in the HHI was associated with a wage reduction of between 1 and 2 percent.”⁷ High factory concentration was found to be ubiquitous across industries, however, “the only employees who did not experience wage stagnation [in highly concentrated industries] were those belonging to unions,” underscoring the assertion that unionization provided wage protections for workers.⁸ The Council of Economic Advisors’ brief echoed these wage impacts pointing to numerous practices that establish and reassert labor market monopsony. The Council cited market concentration, employer collusion, employer use of non-compete agreements, search costs and labor market frictions, “job lock”, employer-sponsored health insurance, and regulatory barriers to worker mobility.⁹

While all these elements deserve more scrutiny than they currently receive in economic analyses, advocacy circles, and main-stream media reportage, a particularly pernicious practice is the use

⁴ Josh Bivens, “The Fed shouldn’t give up on restoring labor’s share of income—and measure it correctly,” *Economic Policy Institute*, date published January 30, 2019, date accessed February 17, 2020, url: <https://bit.ly/3fhY026>.

⁵ *The White House Council of Economic Advisors*, “Labor Market Monopsony: Trends, Consequences, and Policy Responses,” date published October 2016, date accessed February 17, 2020, url: <https://bit.ly/2SrujSp>; pg. 2.

⁶ Efraim Benmelech, Nittai Bergman, and Hyunseob Kim, “String Employers and Weak Employees: How Does Employer Concentration Affect Wages? (NBER Working Paper No. 24307),” date published February 2018, date accessed February 19, 2020, url: <https://bit.ly/2S10dzO>; pg. 3.

⁷ *Ibid*; pg. 4.

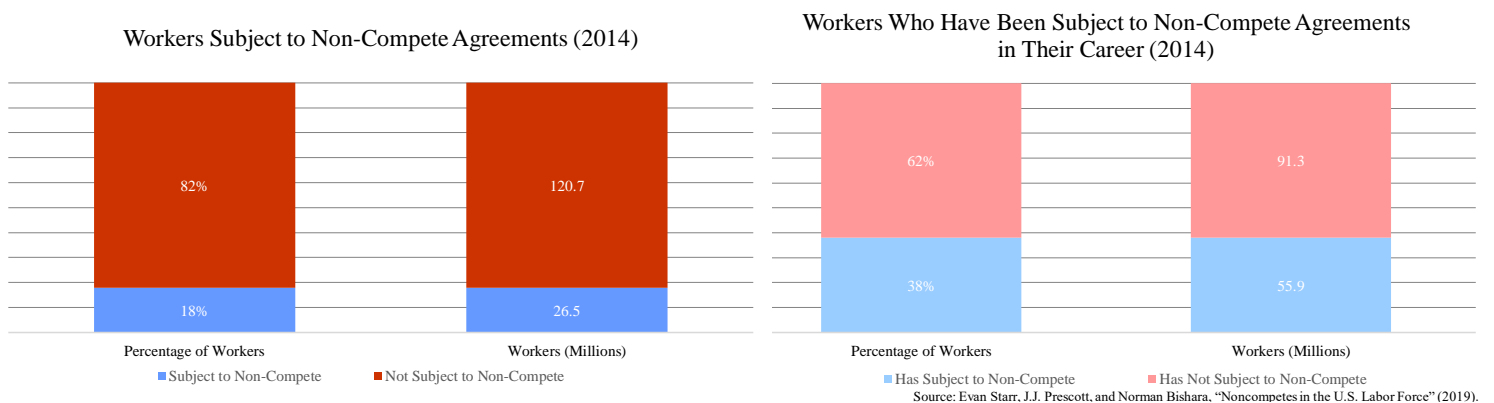
⁸ *Ibid*; pg. 4.

⁹ The White House Council of Economic Advisors; pg. 3-6.

of non-compete agreements (alternatively called covenants not to compete) across the labor market.

Non-compete agreements are an element of an employment contract signed by employees that limit the employee's capacity to work for a competitor. Non-competes typically restrict worker job tasks for a prescribed period of time in a prescribed geographic area after an employee leaves the original employer. Starr, Prescott, and Bishara estimate via a nationally representative survey of over 11,000 workers that “nearly one in five labor force participants were bound by non-competes in 2014, and nearly 40% had signed at least one non-compete in their [career].”¹⁰ This means that approximately 26.5 million Americans were subject to a non-compete agreement in 2014 and that 58.9 million were subject to one at some point in their career (detailed further by Figure 2).¹¹

Figure 2



The authors also conclude that, while popular conceptions of non-compete agreements’ center on impacts to high-wage, high-skill positions (such as management consultants or software engineer coders), “they are also common in low-skill, low-paying jobs” across states that both enforce and do not enforce the agreements.¹² Although a full discussion of the benefits and drawbacks to non-compete agreements will be discussed below, the authors of this study posit that these

¹⁰ Evan Starr, J.J. Prescott, and Norman Bishara, “Noncompetes in the U.S. Labor Force,” *U of Michigan Law & Economics Research Paper No. 18-013*, date published August 30, 2019, date accessed February 19, 2020, url: <http://dx.doi.org/10.2139/ssrn.2625714>; pg. 1.

¹¹ The Starr, Prescott, and Bishara study uses, “nationally representative data from over 11,500 labor force participants to characterize the broad use of noncompetes, describe key aspects of the signing process, and examine the relationship between noncompetes, wages, training, and job-satisfaction, with a focus on heterogenous effects related to notification timing (i.e., transparency);” pg. 2.

¹² *Ibid*; pg. 1.

agreements may translate short-term monopsonistic power elements (the salience of high job transfer costs to the worker) into a long-term monopsonistic power structure (the prevention of employees from considering switching to or starting competitor firms).¹³

The impacts of non-compete agreements vary along a variety of measures (such as state-level enforcement regimes, timing of non-compete signature, and worker power); however, what is consistent is a marked decrease in worker mobility and employee wages. Comprehensive information on non-compete agreements is challenging to understand due to the private nature of agreements and, if violations are litigated, the propensity for arbitration in these suits. Non-compete agreements exist alongside a variety of other practices, anti-unionization attitudes and employee no-poaching agreements among them, that create tangible harms for workers. Through this monopsony-centric lens, the agreements transform from a useful way to protect industry trade secrets to a worker-control device. Given the seeming increase in non-compete agreements since the beginning of the twenty-first-century, states have proposed and implemented many different policy options. These policies run the gamut between curtailing the terms of non-compete agreements to prohibiting them altogether.

This research explores the following categories of interventions in detail: prohibiting non-compete agreements, exemptions for certain classes of workers, limiting the terms and enforceability of the agreements, shifting from non-compete agreements to alternative contract arrangements (such as non-disclosure/confidentiality agreements, training repayment, and intellectual property protections), and collecting data to assess the impact of non-compete agreements.

This paper is a distillation of research, analysis, and commentary about non-compete agreements in employer-employee relationships. The next section will comprise a review of existing literature across the disciplines of economics, law, management, and media publications. The goal is to situate advocates and decision makers firmly into the history of non-compete agreements as an expression of consolidated market power. The section after that will deliver a Minnesota-specific context for the discussion. While the practice of having employees sign non-competes occurs across the United States (and indeed internationally), situating the discussion in

¹³ Ibid; pg. 2.

a state such as Minnesota will provide helpful context. Specifically, Minnesota is a useful proxy for the majority of U.S. states who have no non-compete agreement legislative regime. The section following Minnesota's context will be a policy menu of non-compete agreement legislative and legal remedies that currently exist across the 50 states. Cataloguing exceptions and statements on non-compete agreements will give the readers and decision-makers a sense of the scope of the policy solutions. The final section will include a set of policy recommendations for the state of Minnesota as it pertains to limiting the harm of non-compete agreements on workers.

Reviewing Research on Non-Competes

While there is a vast and varied history of non-compete agreements, it is useful to recognize the fact that firms have a legitimate economic incentive to utilize this contract structure. A non-compete agreement, at its heart, is a protection of the firm's investment in their labor. Firms cite non-compete agreements as vital for "preventing workers with 'trade secrets' from transferring technical and intellectual property of companies" to their rivals.¹⁴ In practice, the agreements can facilitate intra-firm innovation, research, and development by protecting trade secrets.¹⁵ Apart from trade secret protection, firms use non-compete agreements to protect their investment in specialized training. Traditional economic arguments regarding human capital assert that "firms will invest more in their workers if their non-competes are more likely to be enforced" because workers are less likely to take their skills to another firm.¹⁶ In fact, Starr finds that a one standard deviation increase in a state's enforcement level increases the average firm-sponsored training expenditure by 3 percent, lending credence to this argument.¹⁷ Increasing firm-specific human capital by investing in the workforce and then protecting that investment is a key element of non-compete agreement decision-making by firms.

Workers do have some incentives to sign these non-compete agreements if they assume that specialized training will result in higher wages or benefits for them. These incentives change,

¹⁴ *The White House Council of Economic Advisors*, "Labor Market Monopsony," pg. 5.

¹⁵ Office of Economic Policy, "Non-Compete Contracts: Economic Effects and Policy Implications," *U.S. Department of the Treasury*, date published March 2016, date accessed February 20, 2020, url: <https://bit.ly/3aXdKE1>; pg. 3.

¹⁶ Evan Starr, "Training the Enemy? Firm-Sponsored Training and the Enforcement of Covenants Not to Compete," *Three Essays on Covenants Not to Compete*, *University of Michigan*, date published 2014, date accessed February 19, 2020, url: <https://bit.ly/2W8o2fa>; pg. 1.

¹⁷ *Ibid*; pg. 2.

however, depending on an employee's position on the skill and income spectrum. A worker *may* be better off signing a non-compete agreement if they would receive a higher wage while working and need to sit out of the labor force after leaving. This situation assumes a high level of savings, and a relatively high degree of comfort with risk of non-earning. Many other workers would most definitely not be able to sit out of the labor force, which would lead them to not want to sign non-competes. Workers' decisions are rarely so cut and dry, however.

In a book for professionals on how to construct a non-compete agreement, the authors argue that “the driving force behind the evaluation of the reasonableness of the time, scope, and geography limitations in a non-compete will be the balancing exercise between the employer's degree of need for the restriction and the burden it places on the employee and the public.”¹⁸ But workers are often in a disadvantaged position. A national survey finds that 41% of workers think that non-compete agreements cannot be negotiated, and nearly one in four workers were unaware they were under the auspices of a non-compete agreement.¹⁹ In a perfectly competitive labor market training would be generally applicable and, therefore, firms would be able to hire workers on their demonstrated skill and workers would choose employers based on their competitive wages and benefits. We live, however, in a fallen, imperfect world. Protecting a firm's investment in their workers when those workers are costly to train and costly to lose makes economic sense under imperfect labor markets. This line of thinking is even more muddled because of the general unavailability of data regarding how much enforcement of non-compete agreements would cost workers. Most of litigation is dropped or arbitrated behind closed doors.

The arguments in favor of firms' use of non-compete agreements mainly concern high-skilled, high-wage work. Software developers or technical engineers, for instance, have highly specialized skills depending on where they work, and they are often in highly competitive markets for the firm's products or services. It is realistic to assume that worker's wages *could* increase due to their signing of non-compete agreements as they are a more robust investment by the firm. The productivity impacts in the case of high-wage workers are ambiguous and depend on the work involved. Many of these reasonable benefits for firms, however, do not hold up

¹⁸ M. Scott McDonald and Jacqueline C. Johnson, “The Traditional Noncompete Agreement,” *Unfair Competition and Intellectual Property Protection in Employment Law: Contract Solutions and Litigation Guide*, Bloomberg BNA (2014); pg. 257.

¹⁹ Starr, Prescott, and Bishara, “Noncompetes in the U.S. Labor Force;” pg. 22.

when applied to low-wage, low-skill workers. Low-income workers are much less likely to possess company trade secrets. Only 24% of all workers report that they possess trade secrets for their job, and one would expect this number to be even smaller amongst low-skilled workers.²⁰ The tricky aspect of this determination is the definition of trade secrets. As will be discussed later, the sandwich franchise Jimmy Johns sought to “protect their trade secrets” of sandwich making by restricting their employees from working for any sandwich shop-like enterprise. Low-skill workers, by definition, do not often receive highly technical training and investments in their human capital in most occupations and, therefore, the recouping of training dollars is less of a concern for them as well.²¹ Firms want low turnover for this section of the workforce in order to have a predictable labor supply when they are needed. Intra-firm innovation, the final justification for non-compete agreements from firms, falls apart upon inspecting the work done by low-skill, low-income workers. Distinguishing employee impacts by income class of workers will assist in understanding where reasonableness enters into non-compete agreement enforcement.

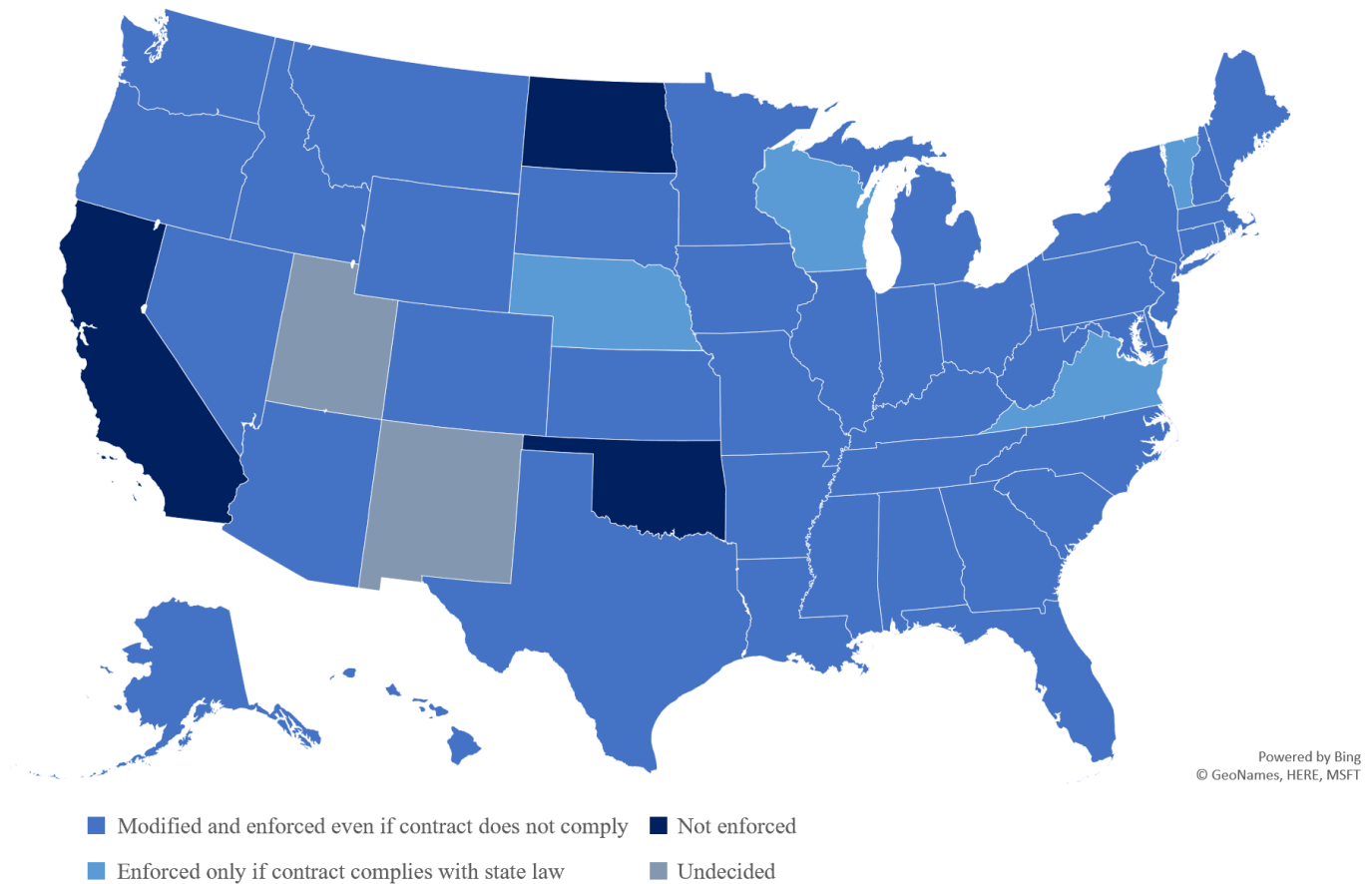
²⁰ Office of Economic Policy, “Non-Compete Contracts: Economic Effects and Policy Implications;” pg. 4.

²¹ Todd Gabe, Jaison R. Abel, & Richard Florida, “Can Low-Wage Workers Find Better Jobs?,” *Federal Reserve Bank of New York*, date published April 2018, date accessed April 13, 2020, url: <https://nyfed.org/3aNW4e1>; pg. 4.

Research on non-compete agreements spans decades and disciplines. While these agreements have existed for centuries, they are growing in ubiquity across industries and income levels. Until the late-2000s, most of the written content about non-compete agreements were part of law review articles, describing the disparity in enforcement regimes across states (see Figure 3). The central question of the legal articles focused on the reasonableness criteria (time of agreement, geographic spread, and limits to certain work activities) for courts that decide contract disputes. As labor markets consolidated, economic impact studies and management studies sought to evaluate the wage and job mobility impacts of non-compete agreements across a variety of criteria. In fact, a new line of inquiry is the impact that non-compete agreements have on low-wage workers. This is especially relevant as the prevalence of non-competes amongst workers making less than \$40,000 annually is approximately 12%, compared to around 20% for all

Figure 3

Non-Compete Enforcement by State



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Source: Matt Marx's, "Reforming Non-Competes to Support Workers," February 2018

income levels of workers.²² Finally, media stories create circumstances for policy changes and wider conversation on labor practices such as non-compete agreements.

Analysis of Non-Compete Jurisprudence Frames the Debate

The table-setting work in this discipline comes from Harlan Blake's 1960 Harvard Law Review article "Employee Agreements Not to Compete." In this article, Blake discusses a history of non-compete agreements (also referred to as "restrictions on trading labor") stemming from the English case *Mitchel v. Reynolds (1711)*.²³ The court in *Mitchel* instituted a "presumption of invalidity" for non-competes due to: (1) "the possible loss of the [worker's] means of earning a livelihood" and (2) "the loss to society of the services of a useful member."²⁴ The court made clear that employers must bear the burden of "showing a just reason" for the restrictive covenant.²⁵ Finally, the court also mentioned specifically the concerns for monopoly that such a contract practice may hold. In this discussion, while non-competes could exist, they must be balanced upon reasonable criteria for the workers they impact.

Blake then details case law after *Mitchel v. Reynolds* which, until the nineteenth century, relied upon the formative case. In 1853, an English royal court rejected the assertion that all restrictions are on their face invalid by switching the burden of proof to the employee.²⁶ In court proceedings, employers were not required to justify their use of non-compete agreements, their workers were expected to file lawsuits or challenge restrictive covenants instead. These shifts crossed the Atlantic during the Lochner Era of United States Supreme Court jurisprudence where business relationships and "freedom of contract" limited worker protections such as minimum wages, maximum hour requirements and others. By the end of the nineteenth century, both American and English courts had adopted the "reasonableness test" that courts would make clear in their jurisdiction.²⁷ In some areas, burden of proof lied with the firm, to justify why a restriction of worker mobility was reasonable. In others, burden of proof was with the employee

²² Michael Lipsitz and Evan Starr, "Low-Wage Workers and the Enforceability of Non-Compete Agreements," date published December 2019, date accessed February 19, 2020, url: <https://bit.ly/3aWHOLg>; pg. 2.

²³ Harlan Blake, "Employee Agreements Not to Compete," *Harvard Law Review* Volume 73(4), date published February 1960, date accessed February 19, 2020, url: <https://bit.ly/2WdOGmZ>; pg. 629.

²⁴ *Ibid*; pg. 629.

²⁵ *Ibid*; pg. 629.

²⁶ *Ibid*; pg. 640.

²⁷ *Ibid*; pg. 645-646.

to show what harm the firm had caused by restricting their freedom of contract.²⁸ Recall here our definition of non-compete agreements:

Non-compete agreements are an element of an employment contract signed by employees that limit the employee's capacity to work for a competitor for a proscribed period of time in a proscribed geographic area after leaving the original employer.

The reasonableness criteria enacted by jurists is based on the following criteria: (1) the non-compete agreement is “no greater than is required for the protection of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public.”²⁹ Common time restrictions are one to three years and while geographic restrictions vary by industry and market size, contracts may restrict an employee from finding work anywhere across the country.³⁰ State-level judges determine the reasonableness of these criteria, leading to disparities between states. Blake then details circumstances in which employers may enact a non-compete agreement including protecting customer relationships³¹ and confidential business information.³² He notes that firms must “demonstrate good faith”³³ if they are brought to court.³⁴

Sela Stroud’s “Non-Compete Agreements: Weighing the Interests of Profession and Firm” in the *Alabama Law Review* epitomizes much of the legal research in the intervening years. Stroud focuses on professional positions in “legal, physician, and accounting practices” in order to detail the restrictions and abilities of employers to institute a non-compete agreement.³⁵ Stroud finds that the “reasonable test” varies across the professions at the state-level. For instance, lawyers’ non-competes are presumed to be invalid due to their individual, client-based work while accountants’ agreements must be (1) “reasonable and necessary for the employer’s protection, (2) not be unreasonably restrictive to the employee, and (3) not be contrary to public policy.”³⁶ Physicians are assumed to take their patients with them across health system employment so

²⁸ Ibid.

²⁹ Ibid; pg. 648-649.

³⁰ Evan Starr, “Training the Enemy? Firm-Sponsored Training and the Enforcement of Covenants Not to Compete,” *Three Essays on Covenants Not to Compete*, University of Michigan, date published 2014, date accessed February 19, 2020, url: <https://bit.ly/2W8o2fa>; pg. 5-6.

³¹ Blake, “Employee Agreements Not to Compete;” pg. 653.

³² Ibid; pg. 667.

³³ Ibid; pg. 687.

³⁴ Ibid; pg. 691.

³⁵ Sela Stroud, “Non-Compete Agreements: Weighing the Interests of Profession and Firm,” *Alabama Law Review* Volume 53(3), date published 2013, date accessed February 20, 2020, url: <https://bit.ly/2y4ZH29>; pg. 1023.

³⁶ Ibid; pg. 1031.

non-compete agreements could be deemed reasonable. The author and the Alabama legislature proposes to flatten this disparity by enacting a full ban on non-compete agreements, given that the differences across occupations are attributed to lobbying power.³⁷ Stroud indicates that with this outright ban, “there is no need to analyze the interests of the parties involved.”³⁸ The author projects forward the issue that will occur with a company like Amazon (detailed below) by indicating: “there comes a point at which a firm has become so wide-reaching in its breadth of services that a withdrawing partner cannot engage in virtually any profession, let alone the one in which [they] have most experience.”³⁹

Nothing epitomizes the shift in thinking about non-compete agreements in legal circles more than the transition from Stroud to Viva Moffat’s “Making Non-Competes Unenforceable” in the *Arizona Law Review*. State-level change was the primary concern of Stroud’s piece, whereas this legal article asserts the difficulty of various legal regimes across states. Moffat proposes a federal “uniform rule of unenforceability [that] would do the most to reduce the disadvantages” to workers.⁴⁰ Essentially, the proposal is embodied not by stripping non-compete agreements from existence, but from the ability to have any power whatsoever. States exist on a spectrum of enforcement and restriction from full prohibition to rigorous scrutiny that “balance[es] the employer’s protectable interest” to an enforcement of all “reasonable non-compete agreements.”⁴¹ The author argues that, while federalism across many state legal regimes is a positive feature of the American system, it is not for non-compete agreements. For businesses with locations in multiple states, a legal patchwork is difficult to adhere to. Workers are often made to sign non-compete agreements that employers know cannot be enforced. This decision-making takes time and resources away from other activities by leading to a “race to the courthouse” by firms operating across state lines.⁴² Moffat argues that universal unenforceability of non-compete agreements “would facilitate the flow of commercial transactions” and is substantively “the preferable rule.”⁴³ While the author does not include relevant economic data,

³⁷ Ibid; pg. 1038.

³⁸ Ibid; pg. 1039.

³⁹ Ibid; pg. 1040.

⁴⁰ Viva R. Moffat, “Making Non-Competes Unenforceable,” *Arizona Law Review* Volume 54(4), date published 2013, date accessed February 20, 2020, url: <https://bit.ly/2WcXauQ>; pg. 939.

⁴¹ Ibid; pg. 941.

⁴² Ibid; pg. 953.

⁴³ Ibid; pg. 965.

their argument fits into a pattern of challenging the status quo on non-compete agreements on the terms of protecting the free flow of labor across the economy and across state lines.

The bulk of legal research and articles focus on high-wage, sophisticated jobs from the firm's perspective on how many clauses to restrict labor mobility can be included in employment contracts. While this line of inquiry is useful to chart the trajectory of non-compete agreement jurisprudence, there are multiple impacts of non-competes that have yet to be explored.

Economic and Business Analysis Chips Away at Crucial Questions

Moving from the legal implications of non-compete agreements to economic and policy analyses is useful for answering some of the following major questions about the practice. How many workers are subject to non-competes? In which industries are non-competes most frequently utilized? What are the impacts of these agreements on wages, job mobility, and innovation? Luckily, this area has been an active space for inquiry since the late 2000s.

Table 1. Occupation-Centric Articles on Non-Compete Agreement Ubiquity & Impact

<u>Article</u>	<u>Authors</u>	<u>Date</u>	<u>Empirical Methods</u>	<u>Primary Findings</u>
<i>Job-Hopping in Silicon Valley: Some Evidence Concerning the Micro-Foundations of a High Technology Cluster</i>	Bruce Fallick, Charles A. Fleischman, and James B. Rebitzer	2005	Current Population Survey data measuring employer-to-employer mobility in Silicon Valley and the Boston metro area.	Employees in the computer industry in Silicon Valley have higher rates of mobility than other metro areas, and mobility patterns for employees working in the industry do not hold for other industries in the same location.
<i>An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?</i>	Stewart J. Schwab & Randall S. Thomas	2006	Examined key legal characteristics of 375 employment contracts with some of the largest 1500 public corporations and their CEOs.	67% of CEOs have signed non-compete agreements.
<i>Non-Compete Agreements: The Real Cause of Separation Pay?</i>	Knut Heen	2008	Non-compete agreements and separation pay for 250 S&P 500 CEOs who left their firms.	50% of CEOs have signed non-compete agreements.
<i>Ties that Truly Bind: Non-competition Agreements, Executive Compensation and Firm Investment</i>	Mark J. Garmaise	2011	Use of the Execucomp database (five most highly paid executives for 2,610 large publicly traded firms) of executive job transfers, compensation, firm research and development spending, and firm capital investment.	70.2% of CEOs have signed non-compete agreements.
<i>The Firm Strikes Back: Non-compete Agreements and the Mobility of Technical Professionals</i>	Matt Marx	2011	In-depth interviews with 52 randomly sampled patent holders & a survey of 1,029 engineers across a variety of industries.	Ex-employees subject to a non-compete (43.3%) are much more likely to take a <i>career detour</i> (involuntarily leaving their technical field) to avoid a lawsuit.
<i>Buying Loyalty: Theory and Evidence from Physicians</i>	Kurt Lavetti, Carol Simon, and William D. White	2014	A representative sample of 1,967 primary care physicians across 5 states (California, Georgia, Illinois, Pennsylvania, and Texas).	Physicians with non-compete agreements (45%) that are over 40% more productive, earn 14% higher wages, and within-job earnings growth that is 21 percentage points higher.
<i>An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants</i>	Norman D. Bishara, Kenneth J. Martin, & Randall S. Thomas	2015	CEO employment contracts drawn from a large random sample of 500 S&P 1500 companies.	80% of CEOs have signed non-compete agreements with a broad geographic scope and lasting one to two years. Documenting that more covenants are appearing over time.

Most empirical economic analyses have focused on the impact of non-compete agreements on a single occupation, such as studies of technical workers,⁴⁴ corporate executives,⁴⁵ and physicians.⁴⁶ These occupations were the subject of long policy fights across states and their professions were carved out from non-compete enforcement.⁴⁷ These policy battles provide useful natural experiments to measure the impact of wage, mobility, and investment in training. As detailed in Table 1, Silicon Valley technology employees have higher rates of mobility than other tech-centric metro areas.⁴⁸ An interesting indication from the Fallick, Fleischman, and Rebitzer article is that, while non-competes in the studied period were primarily instituted in high-wage jobs, there was a “Silicon Valley effect on mobility” that ran through other industries.⁴⁹ The study analyzed *Current Population Survey* data on employer-to-employer mobility in Silicon Valley and other tech hubs. While the authors decline to conclude that mobility in high-skill technology sector jobs impacts mobility elsewhere it seems reasonable to operate off this assumption. Labor market mobility is never contained within jobs of the same sector as workers move across industries.

Marx’s article about technical workers, engineers, and non-compete agreements details what often happens to workers when they sign a non-compete agreement. The author finds these results via in-depth interviews with 52 randomly sampled patent holders in a single industry alongside a survey of over 1,000 engineers across a variety of industries.⁵⁰ Marx calls the result when a worker ends their employment a “career detour,” meaning that workers “involuntarily leave their technical field to avoid a potential lawsuit.”⁵¹ Almost half (43%) of employees

⁴⁴ Bruce Fallick, Charles A. Fleischman, and James B. Rebitzer, “Job-Hopping in Silicon Valley: Some Evidence Concerning the Micro-Foundations of a High Technology Cluster,” *Federal Reserve Board*, date published February 22, 2005, date accessed February 20, 2020, url: <https://bit.ly/2V57NEI>. &

Matt Marx, “The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals,” *American Sociological Review* Volume 76 (5), date published October 2011, date accessed February 20, 2020, url: <https://bit.ly/3f7Tnrm>.

⁴⁵ Randall S. Thomas, Norman Bishara, and Kenneth J. Martin, “An Empirical Analysis of Non-Competition Clauses and Other Restrictive Post-Employment Covenants,” *Vanderbilt Law Review* Volume 68(1), date published 2015, date accessed February 20, 2020, url: <https://bit.ly/2yfZcCm>.

⁴⁶ Kurt Lavetti, Carol Simon, and William D. White, “The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians,” *The Journal of Human Resources*, date published February 7, 2019, date accessed February 20, 2020, url: <https://bit.ly/2xlfRUu>.

⁴⁷ Lipsitz and Starr, “Low-Wage Workers and the Enforceability of Non-Compete Agreements;” pg. 2-3.

⁴⁸ Fallick, Fleischman, and Rebitzer, “Job-Hopping in Silicon Valley;” pg. 10.

⁴⁹ *Ibid*; 14.

⁵⁰ Marx, “The Firm Strikes Back;” pg. 695.

⁵¹ *Ibid*.

interviewed via their randomly selected sample of workers took this career detour, and Marx posits that this is because of their non-compete agreements. A survey of technical workers found that “nearly half... [across] several industries were subject to a non-compete.”⁵² This is significantly more than in the general population of workers. The author also finds through in-depth interviews that “firms strategically manage the process of obtaining compliance [with non-compete agreements by ensuring workers’] bargaining power is minimized (e.g., on an employee’s first day of work).”⁵³ Marx is quick to indicate that these results are not necessarily generalizable past highly skilled technical workers.

Corporate executives are another class of worker with relatively robust documentation of their non-compete agreements. According to Bishara, Martin, and Thomas’ paper, contract ubiquity for this population increased from 64.7% in 1993 to 78.8% in 2010.⁵⁴ Their data were drawn from a random sample of CEO employment contracts for leaders of S&P 1500 companies. Another study found that “even top executives were paid less in states with strict non-compete law;” a key finding under the economic necessity arguments for non-compete agreements.⁵⁵ Because many of these contracts are public and there are relatively few of them for top corporate executives, this population is a popular research topic. There are, however, reasons to caution conclusions drawn from these populations, namely that they are not representative of nearly any other class of workers.

A position more attainable in the U.S. labor system is that of a physician. Contrary to any of the other professions or classes of workers identified thus far, physicians are found to be better off than those who do not sign. From a representative sample of nearly 2,000 physicians across five states, Lavetti, Simon, and White find that “physicians earn 4% higher incomes, earn 27% more revenue per hour, see 12% more patients per week, and [crucially] have 29% longer tenures.”⁵⁶ The authors note that non-compete agreements come with a differently structured contract for

⁵² Ibid; pg. 696.

⁵³ Ibid.

⁵⁴ Thomas, Bishara, and Martin, “An Empirical Analysis of Non-Competition Clauses and Other Restrictive Post-Employment Covenants;” pg. 4.

⁵⁵ Karla Walter, “The Freedom to Leave,” *Center for American Progress*, date published January 9, 2019, date accessed February 20, 2020, url: <https://ampr.gs/2Ynaju>; pg. 6.

⁵⁶ Norman D. Bishara and Evan Starr, “The Incomplete Noncompete Picture,” *Lewis & Clark Law Review* Volume 20, date published August 11, 2016, date accessed February 20, 2020, url: <https://ssrn.com/abstract=2782137>; pg. 519.

these physicians: their share of total earnings comes more so from higher individual productivity.⁵⁷

Outside of these high-wage industries, economists have modeled general economic trends regarding non-compete agreements and attempted to answer questions on how they impact wages, mobility, and innovation. Starr's "Three Essays on Covenants Not to Compete," the first of which concerns how much non-compete agreements have an impact on firm-sponsored employee training, is one of the first studies to tackle these questions. The author finds that an increase of one standard deviation level of the state's enforcement level regarding non-compete agreement increases the amount spent on training by three percent.⁵⁸ Starr also brings forth an important concept, that employees who sign non-compete are subject to an *in terrorem effect*, "which refers to the idea that a worker who has signed a non-compete might obey it because [they] believe it to be enforceable, or because [they] feel ethically bound by it" regardless of whether their state will enforce it.⁵⁹ Starr's second essay features the question of new firm creation and non-compete agreements. He notes that, "an important avenue of new firm formation is through employees of an existing firm leaving their employment to establish a new firm" often called a spinout or a starburst.⁶⁰ Spinouts are a key economic activity that spurs innovation across the economy, examples include America Online spinning out from Time Warner, Expedia Group (the travel company) spinning out from Microsoft, and Intel (among many others) spinning out from Fairchild in the semiconductor industry. Starr finds that, using matched employer-employee data from several million new firms across 30 states, non-compete covenants reduces the initial size of new "spinout" firms, but seems to increase their growth between years five and seven.⁶¹ Again, while the generalizability of this question is suspect, understanding the overall impact non-competes have on a key economic action – opening a new business – is useful for understanding the impact of these contract elements across the economy.

⁵⁷ Ibid.

⁵⁸ Starr, "Training the Enemy?;" pg. 2-3.

⁵⁹ Ibid; pg. 13.

⁶⁰ Evan Starr, "Enforcing Covenants not to Compete: The Lifecycle Impact on New Firms," *Three Essays on Covenants Not to Compete*, University of Michigan, date published 2014, date accessed February 19, 2020, url: <https://bit.ly/2YIHQI0>; pg. 104.

⁶¹ Ibid; 115-116.

The significance of this question is broadly applicable across the corporate economy. In Orly Lobel's excellent *Talent Wants to Be Free*, the University of San Diego professor details a useful phenomenon for understanding the prevalence of non-compete agreements. She quotes a Boston attorney as saying that while "a few cases [of non-compete agreements] attract media attention... 'the bulk of it is under the water.'"⁶² In fact, the spinouts described above are prevented from development "with the counterproductive fear of employee who are willing to forgo job opportunities and interactions with potential clients to avoid even the appearance of impropriety."⁶³ This self-limitation (or Starr's *in terrorem effect*) inflicts harm both in the collective growth and innovation in the economy, and in the individual loss of "inventiveness [that is] harmful to careers."⁶⁴

Matt Marx and Lee Fleming detail the impacts that non-competes have on individual careers and the firm's ability to get labor. The authors astutely note that "non-competes essentially enable firms to set a monopoly price on the skills of ex-employees."⁶⁵ The authors also deliver a cogent argument of why non-disclosure agreements and non-compete agreements function so divergently. Non-disclosures assume that those subject to them are only barred from discussion of trade secrets and anything they learned during their employment. Employees are free to ensure that everything in their career prior to being subject to a non-disclosure agreement is not limited. Non-compete agreements, however, assume no time-related distinction, just a blanket ban. An interviewee cited sums up this issue's salience best: "I've been in the industry for 20 years. I have a PhD in the field. I walked in the door with an enormous amount of experience, and while I worked there for a year and a half they added maybe, what, 2% to that? And now they want to prevent me from working?"⁶⁶ In effect, only 2% of his knowledge is subject to an NDA, but 100% of it is subject to a non-compete agreement. The authors assume this operates as a chilling effect (a self-limitation due to fear of punishment) that could be powerful and pervasive amongst their interviewees and this adds a layer of complexity to the capture of firm data points on the

⁶² Orly Lobel, "Noncompete – Compete!," *Talent Wants to Be Free*, Yale University Press: New Haven, date published 2013; pg. 72.

⁶³ Ibid.

⁶⁴ Lobel, "Noncompete – Compete!;" pg. 47.

⁶⁵ Matt Marx and Lee Fleming, "Non-compete Agreements: Barriers to Entry... and Exit?," *National Bureau of Economic Research*, date published May 30, 2014, date accessed February 20, 2020, url: <https://bit.ly/3bUb7o0>; pg. 43.

⁶⁶ Marx and Fleming, "Non-compete Agreements: Barriers to Entry... and Exit?;" pg. 49.

issue.⁶⁷ On the firm side, the authors note that they found larger employers often used and benefited from non-compete agreements to a higher degree, which makes intuitive sense when considering the costs of labor for large, multi-faceted companies.⁶⁸ Again, this conjecture mainly stems from the fact that nearly all non-compete agreements are private contract understood to be litigated and enforced out of the public scope. This leads to a limited direct understanding of the costs and ubiquity of enforcement.

As discussion on these issues became more prominent, Bishara and Starr released a report surveying the academic literature on the topic, both poking holes in previous conclusions and advocating for further research. The empirical studies mentioned above on individual industries were indicated to “suffer from numerous shortcomings” given a lack of data and the trouble with comparing across high- and low-enforceability states.⁶⁹ Non-compete clauses themselves may preclude the power of these comparisons due to the chilling effect even in low enforceability states. The ubiquity of such enforcement is difficult to assess given the fact that these private contracts often are litigated in forced arbitration, thus limiting the power of empirical research in this area. Finally for Bishara and Starr, they detail that focus on non-compete agreements can also pressure legislators “into making hasty reforms” that risk the situation from being even worse.⁷⁰ This useful survey helps to set the stage for much of the non-compete agreement work to come after it.

The Treasury Department under Barack Obama published a brief detailing the labor market impacts that non-competes were having on workers in a comprehensive and engaging way. The brief pulls in facts from a broad range of areas, such as the fact that “only 24 percent of workers report that they possess trade secrets.”⁷¹ Treasury finds that stricter non-compete enforcement is associated with lower wage growth and lower initial wages (estimated via Starr at 4% lower aggregate for both), indicating what may really be at play in much of this conversation.⁷² Part of this can and should be attributed to worker misunderstanding. “Some workers may simply not

⁶⁷ Ibid.

⁶⁸ Ibid; pg. 53.

⁶⁹ Bishara and Starr, “The Incomplete Noncompete Picture;” pg. 501.

⁷⁰ Ibid; pg. 546.

⁷¹ Office of Economic Policy, “Non-Compete Contracts: Economic Effects and Policy Implications,” *U.S. Department of the Treasury*, date published March 2016, date accessed February 20, 2020, url: <https://bit.ly/2KOQVbd>; pg. 4.

⁷² Starr, “Are Noncompetes Holding Down Wages?”; pg. 19.

realize that they have signed a non-compete or fail to understand its ramifications” on their way of life.⁷³ Seeing the issue break through at the highest level of a presidential administration is a hopeful sign that the significance for non-compete agreement’s impact on workers is growing.

Survey data has become more powerful in response to these wide-ranging economic questions. Matt Marx delivers another piece of the puzzle in trying to determine who signs non-compete agreements. For instance, “younger workers are less than one-third as likely as their more-experienced counterparts to seek legal advice on their non-compete.”⁷⁴ For firms, these non-competes will “act as a brake on entrepreneurial activity by blocking the emergence of new companies and making it harder for them to grow.”⁷⁵

With the publication of a full survey detailing who is covered by non-compete agreements by Evan Starr, JJ Prescott, and Norman Bishara, several articles have been released testing wage, mobility, and training impacts across state enforceability regimes for all workers. In the initial publication, Starr, Prescott, and Bishara report nationally representative survey data from a sample of 11,505 labor force participants to understand “the use, implementation, and labor market outcomes associated with non-compete agreements.”⁷⁶ As detailed in Figure 2, they find that around 18% of workers were currently under the auspices of such an agreement while nearly 40% of workers had been subject to one throughout their career.⁷⁷ Starr finds, in a separate paper, that in non-compete agreement-bound workers, “the incidence of training is 14% higher and the wages are approximately 4% lower.”⁷⁸ Another statistic from a nationally representative survey is that 85% of workers report not having any kind of incentive or benefit for signing a non-compete agreement.⁷⁹ Recommendations for further research include the benefits of possible longitudinal data to determine how non-competes impact the full career of individuals as well as a way to firmly establish the role of non-compete agreements alongside other labor issues (non-

⁷³ Office of Economic Policy, “Non-Compete Contracts;” pg. 24.

⁷⁴ Matt Marx, “Reforming Non-Competes to Support Workers,” *The Hamilton Project*, date published February 27, 2018, date accessed February 20, 2020, url: <https://bit.ly/2yZ5S81>; pg. 8.

⁷⁵ *Ibid*; pg. 10.

⁷⁶ Starr, Prescott, and Bishara, “Noncompetes in the U.S. Labor Force;” pg. 1.

⁷⁷ *Ibid*.

⁷⁸ Evan Starr, “Are Noncompetes Holding Down Wages?, *National Bureau of Economic Research*, date published June 13, 2018, date accessed February 20, 2020, url: <https://bit.ly/35n77tS>; pg. 4.

⁷⁹ Evan Starr, “The Use, Abuse, and Enforceability of Non-Compete and No-Poach Agreements: A Brief Review of the Theory, Evidence, and Recent Form Efforts,” *Economic Innovation Group*, date published February 2019, date accessed February 20, 2020, url: <https://bit.ly/3aWHYXU>; pg. 3.

disclosure agreements, non-poaching agreements, and intellectual property), amongst many others.⁸⁰

Overall, the literature on non-compete agreements is rising; academic articles that discuss one of the many permutations of this issue, including job mobility or wages, are frequently being released. From its humble beginnings to a growing nationwide survey, this issue has boosted in prominence thanks in part to the process utilized by companies to restrict their workers. The overall impacts of non-compete agreements for workers point in a few different directions. Some studies indicate that workers subject to these agreements are 14% more like to receive training from the employers. When paired with a limitation on worker mobility the overall value of the training to workers. It is also unlikely that this increased training makes up for the lower wages received by workers which range from just over 2% to nearly 5% in the studies detailed above.

In fact, because these lower wages are paid out alongside more training, it is reasonable to assume the wage impacts are even higher because additional training should boost take-home wages due to higher sophistication. These impacts are shown in everything from technical workers to CEOs, stating that compensation reductions are not centered on one area of the labor market. There are also ambiguous effects regarding productivity. One could assume that lower wages and lower mobility would decrease productivity as a motivating force. Alternatively, job security and possibility for upward mobility could increase productivity. The prevalence of career detours by technical workers subject to non-compete agreements (nearly half) indicates that the harm for leaving a job where employees are bound by non-compete agreements to be quite large. In any case, the impacts on wages, job mobility, and employee training in aggregate indicate that non-compete agreements may not be a good deal for workers. While training seems to increase with workers subject to non-compete agreements, limiting their mobility and lowering their wages create compounding harms.

Evolution of Research on Non-Competes Moving to Assess the Impact on Low-Wage Workers

An exciting new line of inquiry as it relates to non-compete agreements is their disparate impact on low-wage workers. As mentioned above, popular conceptions of non-compete agreements lie with physicians, accountants, or lawyers. The reality, as shown by Starr, Prescott, and Bishara in

⁸⁰ Starr, "Are Noncompetes Holding Down Wages?;" pg. 8.

their survey, is that while approximately 18% of all workers are subject to non-competes, fully 12% of those with a bachelor's-level degree and earning less than \$40,000 a year signed non-competes.⁸¹ At 2014 national levels, this means that approximately 4.7 million households had workers subject to non-compete agreements and were in this lower income bracket. This is also not a theoretical exercise, scholars report “non-compete cases have been litigated against manicurists, carpet installers, liquor delivery men, bartenders, cosmetologists, pest exterminators, garbage collectors, janitors, night-watchmen, undertakers, and security guards.”⁸² Outside of California, Oklahoma, and North Dakota, where non-competes are banned entirely, a popular exemption from non-competes are low-wage workers. Illinois, Maine, Maryland, New

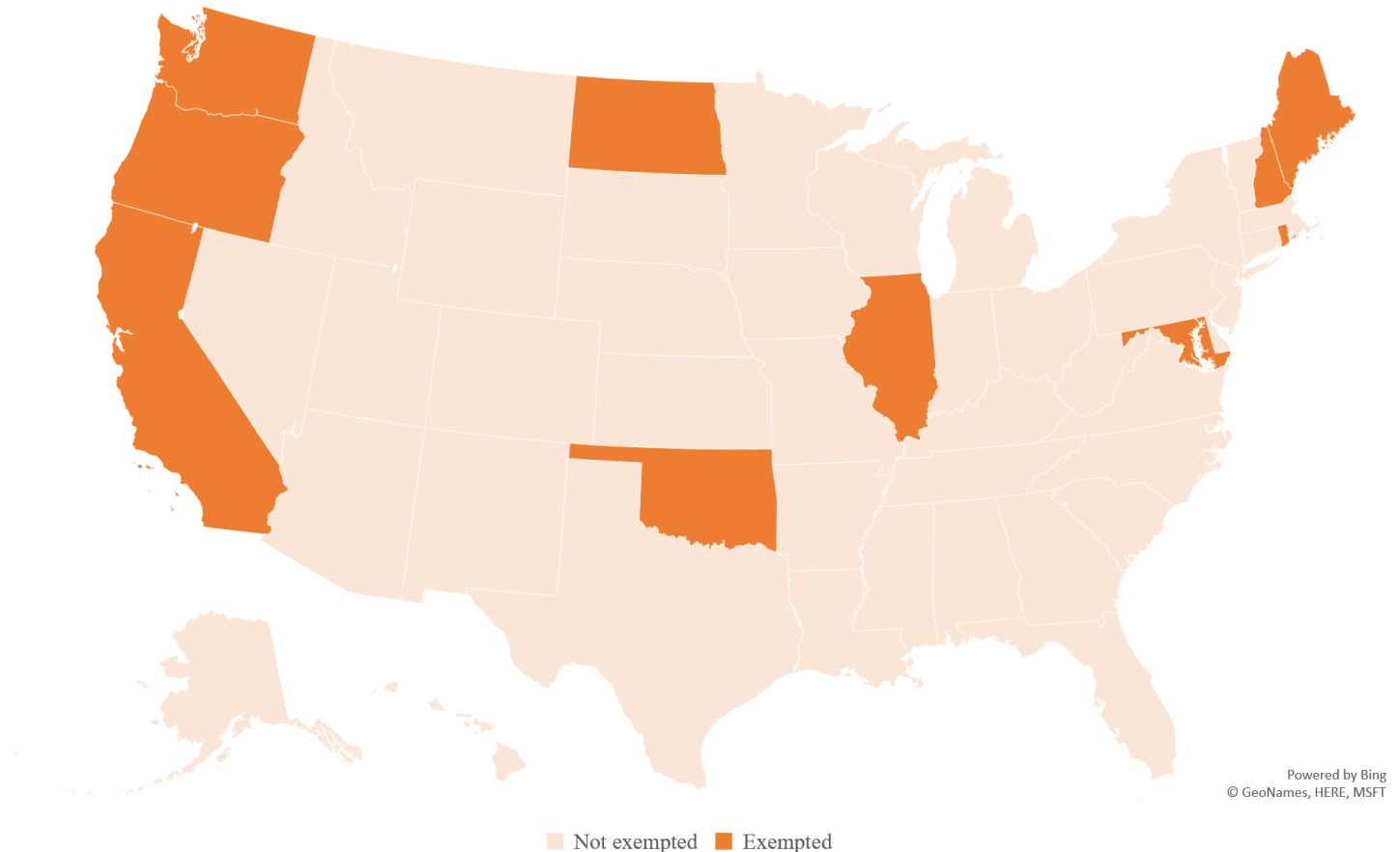
⁸¹ Starr, Prescott, and Bishara, “Noncompetes in the U.S. Labor Force;” pg. 3.

⁸² Starr, “Training the Enemy?;” pg. 5.

Hampshire, Oregon, Rhode Island, and Washington all currently have these exemptions on the books (see Figure 4).

Figure 4

Non-Compete Agreement Exemptions for Low-Wage Workers



Source: Beck Reed Riden LLP's "Employee Noncompetes: A State by State Survey," 2019

One possibility as to why the plight of low-wage workers is gaining more attention is the media scrutiny on actors such as the sandwich chain Jimmy Johns and Amazon (which will be discussed below). Starr and Lipsitz assert that given the six states already banning non-competes for low-wage workers, over a dozen additional legislatures have introduced proposals seeking to ban them.^{83, 84} The authors detail that omitting analysis of non-compete agreements' impact on low-wage workers is particularly egregious because "hourly-paid workers (who overwhelmingly

⁸³ Lipsitz and Starr, "Low-Wage Workers and the Enforceability of Non-Compete Agreements;" pg. 1.

⁸⁴ Russell Beck, "Employee Noncompetes: A State by State Survey," *Beck Reed Ride LLP*, date published October 19, 2019, date accessed February 20, 2020, url: <https://bit.ly/2SpvFgg>.

earn low wages) actually make up the majority of those bound by NCAs” due to the prevalence of low-wage workers in the economy.⁸⁵ In addition to their ubiquity, low-wage workers have fewer resources to fight these agreements in court, even in states where they are unenforceable, and little ability to negotiate their terms with their employer.⁸⁶

Non-compete agreements, when implemented seem to have a significant impact on wages for low-wage workers. The Starr and Lipsitz study focuses on a natural experiment in Oregon, where a 2007 law banned non-compete agreements for low-wage workers (those living under the median income for a family of four). What made this circumstance ripe for an experimental analysis was the way it came about. In the year the bill passed, only the final version included the conditions voiding non-compete agreements for low-wage workers, indicating “its adoption was somewhat exogenous or at least unexpected at the time.”⁸⁷ This is crucial so as not to impact the decision-making of firms in the state, which may have reduced non-compete terms if this had been a topic of conversation at the legislature across multiple years. What the authors find, using a difference-in-difference method with a synthetic control of nearby states with similar labor markets, is that wages for hourly workers increased by 2.2 to 3.1% in the six years following the implementation of the ban, even when controlling for demographic change alongside neighboring states.⁸⁸ They also find that the rise in hourly wages was delayed by several years as more low-wage workers entered into new contracts where non-compete agreements were banned.⁸⁹

Michigan, as opposed to Oregon inadvertently moved from a situation where non-compete agreements were not enforced to one in which they were allowed in 1985. Marx, Strumsky, and Fleming were interested in understanding this policy change’s effect on labor mobility. Their findings were stark. In 1985, Michigan repealed a section of anti-trust law that included a blanket ban on non-compete agreements. The particularly interesting fact about this law, however, was that it appears that legislators did this without knowledge of its impact. In over 20 pages of

⁸⁵ Lipsitz and Starr, “Low-Wage Workers and the Enforceability of Non-Compete Agreements;” pg. 1.

⁸⁶ Alan B. Kruger and Eric A. Posner, “A Proposal for Protecting Low-Income Workers from Monopsony and Collusion,” *The Hamilton Project*, date published February 2018, date accessed February 20, 2020, url: <https://bit.ly/2yVnIsq>; pg. 10.

⁸⁷ Lipsitz and Starr, “Low-Wage Workers and the Enforceability of Non-Compete Agreements;” pg. 9.

⁸⁸ *Ibid*; pg. 13.

⁸⁹ *Ibid*; pg. 15.

legislative analysis examined by the authors, neither the state House nor Senate “subcommittees mention non-competes as a motivation for the bill.”⁹⁰ This reality offers a near-perfect natural experiment to analyze the impacts of non-compete agreements on job mobility. With little attention paid to the legal change, firms and workers could make their employment agreements absent any external influences. Using a difference-in-difference statistical model and controlling for changes in the auto industry, the authors found “an 8.1% baseline drop in mobility for Michigan inventors that did not work for automobile firms.”⁹¹ These findings were found to be statistically and practically significant supporting their hypothesis that labor markets are severely impacted by the presence of non-compete agreements.

While the Michigan study focused mainly on high-skill workers, some of the most engaging results from the Oregon study are the impact that banning non-compete agreements have on job mobility. Job mobility and the movement of labor is, perhaps, one of the most important factors for low-wage workers. As noted in the paper, “mobility is an important outcome in its own right, as greater mobility may create better labor market matches, increase worker productivity,” and promote firm competition.⁹² Job mobility and wage effects noted in the article indicate that both results are not to some unobserved factor. Banning non-compete agreements improved job-to-job mobility by 12 to 18% and the authors found that “effects accrue across the age distribution, across multiple occupations and industries, and throughout the wage and education distributions.”⁹³

As attempting to understand the impact that non-compete agreements have on low-wage workers becomes more popular for academic analysis, there is a real benefit to integrating low-wage worker advocates and decision-makers who have implemented similar policies in the past. The most powerful aspects of non-compete agreements for employers are their ubiquity and their invisibility. Many low-wage workers do not know they are under the jurisdiction of such an agreement and if they do, the resources they must fight one deemed as “unfair” are extremely

⁹⁰ Matt Marx, Deborah Strumsky, and Lee Fleming, “Mobility, Skills, and the Michigan Non-Compete Experiment,” *Journal of Management Science* 55(6), date published June 2009, date accessed April 30, 2020, url: <https://bit.ly/3bTRgVL>; pg. 877.

⁹¹ Ibid; pg. 887.

⁹² Ibid; pg. 18.

⁹³ Ibid; pg. 26.

limited. What follows is an accounting of the media reports on non-compete agreements, many specifically in the field of low-wage workers.

Media Reports Builds Popular Capacity and Policy Momentum

Understanding the popular conceptions of non-compete agreements in media outlets is crucial for this policy area. This is because restrictive agreements, especially those on low-wage workers, can garner popular outrage through narrative media investigations. For this section, the media organizations of interest will be national, political publications such as the *New York Times*, the *Wall Street Journal*, *The Verge*, and *HuffPost*. Non-compete agreements are discussed in many financial and business publications; however, they have a limited reach and subsequent impact on public perception.

In 2014, the *New York Times* published an article surveying the landscape of non-compete agreements and their human impact. The authors attempt to capture the scope, writing: “from event planners to chefs to investment fund managers to yoga instructors, employees are increasingly required to sign agreements that prohibit them from working for a company’s rivals.”⁹⁴ The author presents both sides with equal deference to each side’s perspective. A proposed Massachusetts ban on non-competes was deemed as “[L]egislation in search of an issue” by the executive vice president of a Massachusetts trade group, and the issue was dismissed by a state senator as something that “should be up to the individual employer and the individual potential employee among themselves.”⁹⁵ Finally, the article quotes extensively from experts on non-compete agreements such as M.I.T.’s Matt Marx and University of San Diego School of Law’s Orly Lobel. This entry whets the appetite of readers who may be eager to learn more about this ubiquitous practice.

Later in 2014, a series of news articles told the story of restrictive non-compete agreements at the sandwich maker Jimmy John’s. *HuffPost*’s Dave Jamieson received an employment agreement from the company that locked the worker into not working for “one of the sandwich chain’s competitors for a period of two years” and that the definition of a competitor “encompasses any business that’s within three miles of a Jimmy John’s location and that derives at least 10 percent

⁹⁴ Steven Greenhouse, “Noncompete Clauses Increasingly Pop Up in Array of Jobs,” *New York Times*, date published June 8, 2014, date accessed February 20, 2020, url: <https://nyti.ms/3f4ckem>.

⁹⁵ *Ibid.*

of its revenue from... submarine, hero-type, deli-style, pita and/or wrapped or rolled sandwiches.”⁹⁶ By publicizing the terms of a non-compete agreement, Jamieson compellingly puts us into the shoes of a worker being asked to agree to these terms. It is an effective journalistic and advocacy-based writing technique. A lawyer for workers filing a class-action lawsuit states that the “blackout area would cover 6,000 square miles in 44 states and the District of Columbia,” a staggering limitation of low-wage worker’s job prospects.⁹⁷ Lest we think that this restriction is just on paper, the article notes that a Subway manager accused her employer of attempting to block them from a job at a different sandwich shop citing their non-compete agreement. A non-compete expert who asked not to be identified colorfully summed the situation up:

“A guy who’s putting a piece of roast beef between two pieces of rye bread – the challenge for the employer is to show what the hell this person knows that will hurt you. Without making a judgment about Jimmy John’s, I would say the lower you go down the food chain of employees, the question becomes a little more press: What is your legitimate business reason here?”⁹⁸

The sandwich franchise is not the only company employing low-wage workers to land in hot water on these issues, however. An employment contract for a seasonal worker at an Amazon warehouse was obtained by *The Verge*, and it showed a vast and restrictive non-compete agreement. Its egregiousness is worthy of quoting in full below, but one must note that Amazon seeks to be “the Everything Store” vastly expanding the restriction held within this agreement.⁹⁹

The terms read as follows:

“During employment and for 18 months after the Separation Date, Employee will not, directly or indirectly, whether on Employee’s own behalf or on behalf of any other entity (for example, as an employee, agent, partner, or consultant), engage in or support the development, manufacture, marketing, or sale of any product or service that competes or is intended to compete with any product or service sold, offered, or otherwise provided by Amazon (or intended to be sold, offered, or otherwise provided by Amazon in the future) that Employee worked on or supported, or about which Employee obtained or received Confidential Information.”¹⁰⁰

Particularly galling is the fact that this is given to *temporary* workers whose employment term with the company is limited. In fact, employees who were laid off “were asked to reaffirm the non-compete contract as a condition of receiving severance,” striking a blow to the claim that

⁹⁶ Dave Jamieson, “Jimmy John’s Makes Low-Wage Workers Sign ‘Oppressive’ Noncompete Agreements,” *HuffPost*, date published October 13, 2014, date accessed February 20, 2020, url: <https://bit.ly/2YII2Og>.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Spencer Woodman, “Exclusive: Amazon makes even temporary warehouse workers sign 18-month non-competes,” *The Verge*, date published March 26, 2015, date accessed February 20, 2020, url: <https://bit.ly/2SoS5hX>

¹⁰⁰ Ibid.

these agreements are inert and enhancing Starr’s assertion that the prevalence of non-competes are an expression and calcifying of monopsonistic power over labor markets.¹⁰¹ It’s true that the vast majority of non-competes will not be prosecuted, but these real-life examples exert a chilling effect over low-wage employees who cannot afford litigation costs. Woodman argues that “non-competes can exacerbate structural inequalities in the current job market, inequalities which themselves make non-competes easier for companies to demand.”¹⁰² The Amazon story also helps to clarify the relationship that non-compete agreements have with temporary work arrangements and forced arbitration clauses as ways to reduce worker power and enhance labor market control. As job tenure diminishes, especially for younger workers (2.8 years in a job for 25 to 34-year-old workers as compared to 10.1 years for workers 55-to-64-years-old), non-compete agreements will become even more burdensome across a variety of industries.^{103,104} Much of the public commentary has also been on the detrimental impact this has on businesses, including law professor Orly Lobel’s *New York Times* opinion piece arguing that businesses who “rely on non-competes rather than active recruitment and retention creates a market for lemons – a business will end up with employees who stay despite their unhappiness.”¹⁰⁵

Detailing the media stories that have broken through the noise to deliver a narrative on non-competes is useful for providing a template for public outrage and advocacy on changing these structures. Most workers and those who may disagree with these employment restrictions do not spend their time in academic research archives or legal minutiae – they respond to the stories of real people experiencing real hardship. An active discussion of one landscape in this environment, that of the state of Minnesota, will provide a useful case study for what can happen in adjusting these laws.

Minnesota Context for Non-Compete Agreements

While the theoretical discussion above is instructive for appreciating the current understanding of non-compete agreements, a contextual example will further underscore the decisions that states

¹⁰¹ Ibid.

¹⁰² Ibid.

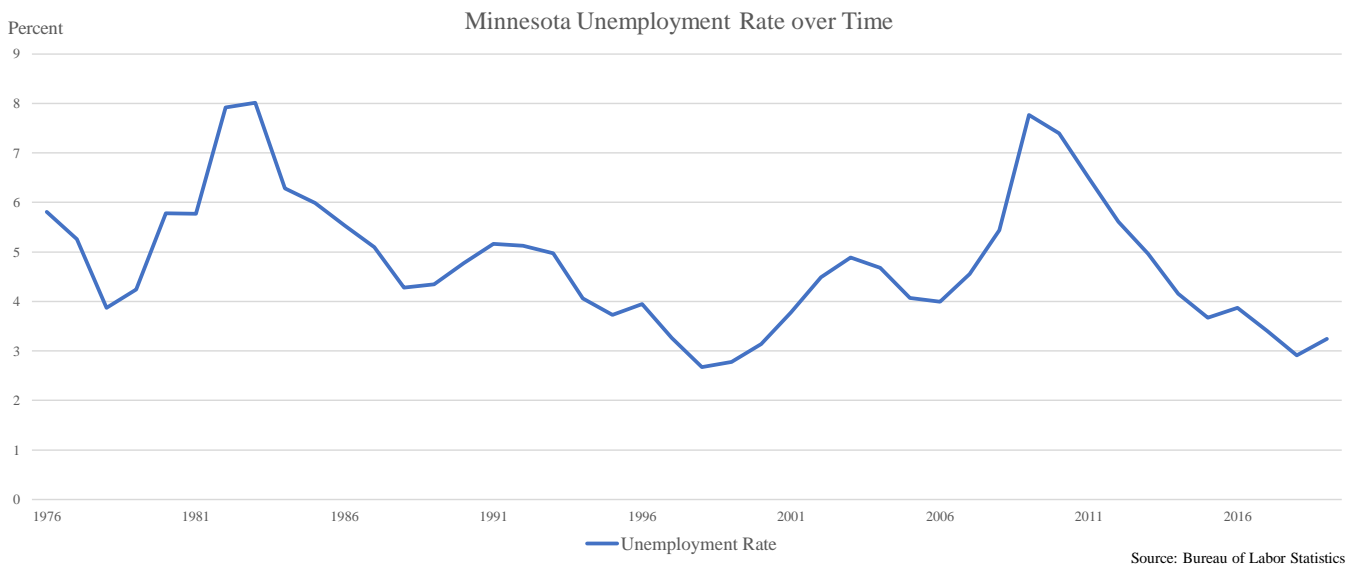
¹⁰³ Jess Scherman, “Employee Tenure Trends: Recent Retention, Millennials and More,” *Rasmussen College*, date published October 29, 2018, date accessed February 20, 2020, url: <https://bit.ly/2YmrK7H>.

¹⁰⁴ Aruna Viswanatha, “Noncompete Agreements Hobble Junior Employees,” *Wall Street Journal*, date published February 2, 2016, date accessed February 20, 2020, url: <https://bit.ly/2YonO6K>.

¹⁰⁵ Orly Lobel, “Companies Compete but Won’t Let Their Workers do the Same,” *New York Times*, date published May 4, 2017, date accessed February 20, 2020, url: <https://nyti.ms/35nz7ND>.

make regarding employee contracts. Minnesota is a good test case example of a state that enforces non-competes with no special exemptions for industries or classes of workers. This section will include labor market demographics in the state of Minnesota, including the prevalence of certain industries relative to the ubiquity of non-compete agreements. Then, the legal enforcement regime will be explained in order to show how much impact state courts have in determining outcomes for workers. Finally, Minnesota legislators continue to put forward various legislative proposals to impact the proclivity of firms to use non-competes. These will be evaluated and given legislative and political context in the state.

Figure 5



Minnesota, located in the upper Midwest with a population of 5.6 million, weathered the Great Recession and is now experiencing high economic outcomes on the measures of income, employment rate, and homeownership rates. While Table 2, below, summarizes relevant descriptive statistics, a few of the measures deserve explication. According to the Minnesota Department of Employment and Economic Development, the top industries in Minnesota are Trade, Transportation, and Utilities (18.59%); Education and Health Services (18.20%); and Health Care and Social Assistance (15.88%).¹⁰⁶ During the same period, December 2019, the state’s seasonally adjusted unemployment rate was 3.3% (see Figure 5), just under the national

¹⁰⁶ *Minnesota Department of Employment and Economic Development*, “Nonagricultural Wage & Salary Employment, Hours and Earnings,” date published December 2019, date accessed February 26, 2020, url: <https://apps.deed.state.mn.us/lmi/ces/Results.aspx>.

3.5% rate.¹⁰⁷ Demographically, however, the picture in Minnesota is not as rosy. In December 2019, black unemployment was 1.5 times as high as the full state rate at 5.5%.¹⁰⁸ These disparities track with vast income gaps across racial lines in Minnesota. The labor force participation rate, however, is highest amongst Hispanics (76.9%) followed by blacks (71.2%) and whites (70.2%).¹⁰⁹ The sixteen-county metro area of the Twin Cities (including some of western Wisconsin), with a population of approximately 3.6 million, is home to just over 2 million jobs, “ranking it 15th amongst largest United States metro” areas.¹¹⁰ The Twin Cities metro area has the sixth highest median household income rate at \$79,578.¹¹¹ Again, across racial lines there is a vast gulf in economic outcomes, specifically for black (\$36,849) and Native American (\$35,148) median household income.¹¹² This is the context that non-compete agreements slot themselves into in Minnesota. With a relatively strong labor market and a low unemployment rate we would expect wage growth and vast employer competition for workers. There are currently no exemptions to non-compete agreements in Minnesota. However, to be enforceable under Minnesota law, a non-compete agreement must serve a legitimate employer

interest. Minnesota courts have recognized three types of legitimate employer interests: (1) the protection of the employer's confidential information and/or trade secrets; (2) the protection of the employer's customer goodwill and relationships; and (3) specialized training.¹¹³ Given this information, one would assume that the environment for non-compete agreements in Minnesota would favor employers exclusively. This is, however, not the case.

Table 2. Minnesota Industry by Worker Percentage

Educational and Health Care Services	23.98%
Transportation, Warehousing, & Wholesale	18.64%
Professional, Scientific, Technical Services	13.36%
Manufacturing	11.24%
Hospitality, Food Services, & Retail Trade	10.47%
Financial and Insurance Services	6.38%
Construction	5.13%
Local, State, & Federal Government	4.85%
Other Services	3.18%
Information	1.75%
Natural Resources, Mining, and Utilities	1.02%
	100.00%

Source: Minnesota Department of Employment & Economic Development

¹⁰⁷ *Minnesota Department of Employment and Economic Development*, “State and National Employment and Unemployment,” date published December 2019, date accessed February 26, 2020, url: <https://bit.ly/2xmZNI9>.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Minnesota Compass*, “Overview,” date accessed February 26, 2020, url: <https://bit.ly/3aNPJiQ>.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Minnesotanoncompetelaw.com*, “Minnesota Non-Compete Frequently Asked Questions (FAQ’s),” date accessed March 3, 2020, url: <https://bit.ly/2YmrUMI>.

Law firms and employers assert that courts “disfavor” non-compete agreements and will strictly interpret the idea of “consideration” where they are concerned.¹¹⁴ Consideration is a legal concept adjudicated by courts that the “employee has received something valuable in exchange for signing the non-compete agreement” and that it was entered into after the employment relationship begins.¹¹⁵ Non-compete agreements can be exchanged for employment but not continued employment. Furthermore, if a non-compete agreement were entered into after employment contracts begins then Minnesota courts mandate a further economic incentive (such as a raise or increase in benefits).

A non-compete agreement is decided enforceable in Minnesota only if it adheres to “the reasonableness doctrine.” This doctrine is defined by the court’s ability to rewrite areas of the non-compete it does not deem reasonable.¹¹⁶ For example, if a company were to require that an employee cannot work in a proscribed industry for three years, a court can change the term to one year while also keeping the rest of the terms of the agreement in place. This is opposed to either blue pencil or red pencil doctrines (detailed by Figure 6). Blue pencil legal doctrine is a court decision to invalidate only the portions of the non-compete agreement that violate the court’s determination. Red pencil doctrine invalidates the entire agreement if any portion is deemed unreasonable via the court.

¹¹⁴ Jack Pierce, “Minnesota Courts Continue to Disfavor Non-Compete Agreements,” *Bernick Lifson, P.A.*, date published June 21, 2018, date accessed March 4, 2020, url: <https://bit.ly/3bWyyVG>.

¹¹⁵ *Minnesotanoncompetelaw.com*, “Minnesota Non-Compete Frequently Asked Questions (FAQ’s).”

¹¹⁶ *Ibid.*

Minnesota are impacted by these employment contract provisions and given that non-compete agreements are gaining in popularity across the occupations, the topic is active on the legislative and policy arena in the state.

Table 3. Non-Compete Agreements for Minnesota's Workers, Imputed by Industry

<i>Industry</i>	<i>Minn. Workers</i>	<i>Minn. Industry %</i>	<i>Incidence Estimate*</i>	<i>Imputed Non-Compete Incidence</i>		<i>Total</i>
				<i>Minn. Workers</i>	<i>Minn. Industry %</i>	
Hospitality, Food Services, & Retail Trade	305,231	10.47%	0.10	30,523.10	1.05%	
Construction	149,480	5.13%	0.11	16,442.80	0.56%	
Educational and Health Care Services	698,834	23.98%	0.22	153,743.48	5.28%	
Financial and Insurance Services	185,888	6.38%	0.25	46,472.00	1.59%	
Information	50,988	1.75%	0.32	16,316.16	0.56%	
Manufacturing	327,549	11.24%	0.23	75,336.27	2.58%	
Natural Resources, Mining, and Utilities	29,730	1.02%	0.31	9,216.30	0.32%	
Other Services	92,763	3.18%	0.16	14,842.08	0.51%	
Professional, Scientific, Technical Services	389,482	13.36%	0.31	120,739.42	4.14%	
Transportation, Warehousing, & Wholesale	543,205	18.64%	0.12	65,184.60	2.24%	
				548,816.21	18.83%	Total

Sources: *Noncompetes in the U.S. Labor Force* by Evan Starr, JJ Prescott, and Norman Bishara & Minnesota Department of Employment and Economic Development

* Incidence rates from Starr, Prescott, & Bishara for each industry.

Note: These numbers were created by imputing numbers from the above sources created by weighting the prevalence of non-compete agreements in various industries by these industries' weight in the Minnesota economy.

Since 2013, the Minnesota State Legislature has seen proposals seeking to limit the breadth of non-compete agreements in industries and certain classes of workers. Public attention was drawn to non-compete agreements in Minnesota as early as 2007. This is thanks to a dispute between the two major daily newspapers in the Twin Cities metro area, the St. Paul Pioneer Press and the Minneapolis Star Tribune.¹¹⁸ In the mid-2000s there were concerns about overly broad and specious terms in non-compete agreements between newspapers and their employees. In response to the story of a Pioneer Press editor leaving his position to become the publisher of the Star Tribune, an attorney who represents clients facing non-compete lawsuits stated that he has seen “instances where a company fires an employee and then tries to enforce a non-compete agreement. ‘The employer has decided they don’t want this person working for them anymore. But they don’t want them working for anybody else either.’”¹¹⁹ This points to a long-standing concern regarding non-competes in the Twin Cities.

Proposed legislative solutions to the issue of non-compete agreements in Minnesota have varied from protecting particular groups of workers to banning the enforcement of these agreements

¹¹⁸ Martin Moylan, “Growing number of employees subject to non-compete agreements,” *Minnesota Public Radio News*, date published May 2, 2007, date accessed March 4, 2020, url: <https://bit.ly/2VQENww>.

¹¹⁹ *Ibid.*

outright. In 2013, a simple bill that sought to void any “contract that prohibits a party to that contract from exercising a lawful profession, trade, or business” was introduced into the Minnesota House of Representatives.¹²⁰ The sweeping legislation included a few exceptions including the dissolution of a business partnership and the sale of a business. These exceptions are frequently included when discussions of banning non-competes arise due to the need to protect new business owners from competition with whomever they just purchased the business from. This bill did not gain traction in the legislature during the session despite a Democratic-Farmer-Labor (DFL), Democratic Party elsewhere, trifecta of the House-Senate-Governor.

Proposed 2015 legislation took a bit of a different approach. The same bill sponsors introduced pared down their legislation by asking for a report “regarding economic impact of certain non-compete agreements” that would seek to study “the impact of noncompete provisions in employment agreements on low-wage earning Minnesotans.”¹²¹ At this time, there was a split legislature with DFL-controlled Governor and House and Republican-controlled Senate. This bill also was introduced and referred to committee, where no further action was taken.

The 90th Legislature from 2017 to 2018 was especially active on non-compete agreements. In 2017, a member of Republican leadership in the House introduced a bill stating that the “right of physicians to practice medicine in a particular locale and for a definite period of time shall not be restrained by noncompete agreements.”¹²² It was introduced (and co-sponsored in the State Senate) and referred to committee, leaving the issue dormant. The next year, a member of the DFL leadership in the House introduced (paired with a Senate companion) a package of provisions regarding employment contracts. This bill banned non-compete agreements for any wage employee making “subaverage” wages, meaning a worker that makes less than the Minnesota average wage.¹²³ Interestingly enough, one of the co-sponsors in the House is now a Minnesota State Supreme Court Justice, lending a possibly kind ear if non-compete agreements

¹²⁰ Representative Joe Atkins and Alice Hausman, “HF 506 – 88th Legislature (2013-2014),” *Minnesota Office of the Revisor of Statutes*, date introduced February 11, 2013, date accessed March 4, 2020, url: <https://bit.ly/2W9T5Yc>.

¹²¹ Representative Joe Atkins and Alice Hausman, “HF 1532 – 89th Legislature (2015-2016),” *Minnesota Office of the Revisor of Statutes*, date introduced March 5, 2015, date accessed March 4, 2020, url: <https://bit.ly/2V5UgMI>.

¹²² Representative Jim Nash, “HF 1979 – 90th Legislature (2017-2018),” *Minnesota Office of the Revisor of Statutes*, date introduced March 2, 2017, date accessed March 4, 2020, url: <https://bit.ly/3aSOdvN>.

¹²³ Representatives Paul Thissen and David Bly, “HF 2914 – 90th Legislature (2017-2018),” date introduced February 20, 2018, date accessed March 4, 2020, url: <https://bit.ly/2KLNjXx>.

were to make it that high in the state. As seems to be the trend, this bill also was introduced, referred to committee, and the process ended there.

Strategically there are benefits and challenges to including non-compete agreement reformation as part of a larger package of labor provisions. Not doing this could have led to the failure of the aforementioned legislation. The state of Minnesota has had a strong labor presence since the state's founding, from unionizing tailors in the Twin Cities to strong presence of the Industrial Workers of the World on the northern Minnesota Iron Range.¹²⁴ The Democratic Party in the state merged with the Farmer-Labor Party in 1944 to incorporate these third-party ideals into the infrastructure of the party.¹²⁵ Furthermore, as opposed to other upper Midwest states such as Wisconsin, labor protections have been preserved. The flip side, however, is greater partisanship on labor issues. By aligning non-compete agreement legislation with issues such as minimum wage increases and forced arbitration reforms, policymakers may curtail the appeal of their proposals.

The current Legislature, which is made up of a DFL-majority House and democratic Governor and a Republican-majority Senate, has also seen non-compete agreements introduced. A House bill reintroduced in Spring of 2020 would ban physicians from being subject to non-compete agreements.¹²⁶ In 2019, the same bill passed through committees in the House but never came to a full vote.¹²⁷ The bill aims to “protect the physician-patient relationship and increase access to care.”¹²⁸ This occupation-based solution is a specific kind of argument centered on the kinds of tasks that workers execute, stating nothing about the wage position of the workers in question. This also opens up policy conversation to the specific employers to make opposing arguments specific to the occupation. For the physician non-compete proposal, health care companies argue that they need non-competes to “protect their investments in staff and equipment, ultimately saving everybody money on health care costs.”¹²⁹ Understanding Minnesota's specific economic

¹²⁴ Randy Croce, "Labor and Labor Organizing in Minnesota," *MNopedia - Minnesota Historical Society*, date accessed March 4, 2020, url: <https://bit.ly/2WgEbPL>.

¹²⁵ Ibid.

¹²⁶ Alisa Roth, “Psychiatrists push to end noncompete agreements in Minnesota,” *Minnesota Public Radio News*, date published February 12, 2020, date accessed March 4, 2020, url: <https://bit.ly/3f51VBz>.

¹²⁷ Ibid.

¹²⁸ Representatives Alice Mann, Steve Elkin, and Liz Olson, “HF 557 – 91st Legislature (2019-2020),” date introduced January 31, 2019, date accessed March 5, 2020, url: <https://bit.ly/2Soqxcd>.

¹²⁹ Roth, “Psychiatrists push to end noncompete agreements in Minnesota.”

and policy context helps to set the stage for the wealth of policy options a state can take to adjust how non-competes are enforced and written.

Policy Responses to Reform Non-Compete Agreements

Given the increase in non-compete agreements since the beginning of the twenty-first century, many different policy options have been proposed or implemented across the states. These policies run the gamut between curtailing the terms of non-compete agreements to prohibiting them altogether. The policies and categories detailed below are ones that have been passed by state legislatures and proposed by academic and policy researchers in their analysis of non-compete agreements. Each policy will be detailed and evaluated as best as is possible. It is instructive to note that many of these policies are mere proposals, where no legislature has implemented them.

Prohibition on Non-Compete Agreements

Currently, only three U.S. states prohibit the enforcement of non-compete agreements:

California, North Dakota, and Oklahoma. By far the earliest of these states to prohibit non-compete agreements is California whose Section 1660 of their Business and Professions Code was passed by their legislature in 1941. The code reads, in a section of business regulations dedicated to contracts that restrain trade, “every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.”¹³⁰ As applied and enforced by California courts, this section clearly means that an agreement that restricts the job movement of workers, even by employers not based in California is prohibited.¹³¹ In the case of non-competes in California, the burden of proof is on the employer to “legally prove that a former employee misused or abused confidential information in any way.”¹³² The California Supreme Court case *Edwards v. Arthur Anderson (2008)* was a seminal moment in the enforcement of non-compete agreements in the state. It was the first time enforced the ban under Section 1660 and decreed it as preventing non-compete agreements from being

¹³⁰ “Business and Professions Code - Section 1660,” *California Legislative Information*, date accessed March 12, 2020, url: <https://bit.ly/2YtKySu>.

¹³¹ *UpCounsel*, “Non-Compete California: Everything You Need to Know,” date accessed March 12, 2020, url: <https://bit.ly/2KQOLic>.

¹³² *Ibid.*

enforced. Furthermore, it established a precedent that when employers sue to enforce their non-compete agreements, they open themselves up to counter suits for unfair business practices.¹³³

The states of North Dakota and Oklahoma have seen more recent passage of non-compete agreement prohibitions. In 2001, the Oklahoma State Legislature passed a provision stating that any “person who makes an agreement with an employer, whether in writing or verbally, not to compete with the employer after the employment relationship has been terminated, shall be permitted to engage in the same business as that conducted by the former employer.”¹³⁴

Businesses challenged the provision in 2011 in a case that eventually reached the United States Supreme Court (SCOTUS). The case, *Howard v. Nitro-Life Technologies, LLC*, tested the ability of an employer to stop court review of overly broad non-compete agreements through forced arbitration clauses (contracts between employers and employees that means they cannot challenge employment issues in open court).¹³⁵ The agreement in question also included a non-solicitation of employees clause, limiting former workers’ ability to contact their former co-workers in addition to standard non-compete clauses. While the Oklahoma Supreme Court found that businesses could not get around the state provision using arbitration, the United States Supreme Court reversed that decision. In response to the SCOTUS decision in 2013, Oklahoma legislators passed a new law clarifying that the ban on non-compete agreements included a ban on non-solicitation agreements in order to protect “lawful profession[s], trade[s], and business[es] of any kind.”¹³⁶

North Dakota is the most recent state to adopt a prohibition on non-compete agreements. In 2006, North Dakota’s Legislature passed a law stating that, “a contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void,” with exceptions for business sellers and members dissolving a partnership.¹³⁷ While this has been on the books since the mid-2000s, it has only been applied to non-compete agreements

¹³³ Ibid.

¹³⁴ “Oklahoma Statutes – Title 15. Contracts, §15-219A. Noncompetition agreements,” *Justia*, date accessed March 17, 2020, url: <https://bit.ly/2y51nIZ>.

¹³⁵ Rebecca Woods, “Oklahoma Supreme Court Nixes Overly Broad Non-Compete Agreement,” *Trade Secrets Law Blog*, date published December 30, 2011, date accessed March 17, 2020, url: <https://bit.ly/2xnJzs2>.

¹³⁶ Daniel Joshua Salinas, “New Oklahoma Law Clarifies Enforceability of Non-Solicitation of Employee Covenants,” *Trade Secrets Law Blog*, date published May 30, 2013, date accessed March 17, 2020, url: <https://bit.ly/35jFbH4>.

¹³⁷ “N.D. Cent. Code § 9-08-06,” *CaseText*, date accessed March 13, 2020, url: <https://bit.ly/2Sor121>.

specifically since 2017, after the North Dakota Supreme Court’s decision in *Dawn Osborne v. Brown & Saenger, Inc.* In its decision, the court stated: “Simply put, one may not contract for application of another state’s law or forum if the natural result is to allow enforcement of a non-compete agreement in violation of North Dakota’s longstanding and strong public policy against non-compete agreements.”¹³⁸ An employee brought the case against their former employer, who is located in South Dakota, who sought to enforce a non-compete agreement to restrict the selling of office supplies within a 100-mile radius of Fargo for two years. The North Dakota Supreme Court in this case made explicit that the restriction on non-compete agreements applied to both workers for North Dakotan companies as well as companies located elsewhere. The case underlined what many legal advocates and individuals assumed in the state: “there is no surefire way to contract around the prohibition against non-[compete] agreements.”¹³⁹

These outright bans, as discussed above, are subject to litigation and frustration from businesses in the states in question. Utilizing an outright ban would no doubt lead to years of litigation across the following questions: 1) forced arbitration clauses which forgo court review of employment contracts, 2) application of a non-compete agreement prohibition on non-solicitation of former employees, and 3) the application of this prohibition on employers not located in the home state. While these fights help clarify statute, they may mitigate the certainty that an outright ban could entail for workers.

Exemptions for Certain Classes of Workers from Non-Compete Agreements

On the next ladder rung down from an outright prohibition of non-compete agreement enforcement is the ability of states to exempt certain classes of workers from these contractual agreements. This category of policy will be broken up into three different groups: classes of workers, industry-based groupings, and workers classified by a characteristic.

Breaking workers into different income groups or designations is a common type of legislation to make non-compete agreements unenforceable for certain workers. The states of Illinois, Maine, Maryland, New Hampshire, Oregon, Rhode Island, and Washington, for instance, render non-compete agreements for low-wage workers unenforceable (see Figure 4). Outside of states with

¹³⁸ Joel Fremstad, “North Dakota Supreme Court Rules in Favor of North Dakota Employees and North Dakota Employers,” *Fremstad Law*, date published December 7, 2017, date accessed March 16, 2020, url: <https://bit.ly/2z140LK>.

¹³⁹ *O’Keeffe Attorneys*, “North Dakota’s Prohibition on Non-Competition Agreements Prevails Over Choice of Law and Forum Selection Clauses,” date accessed March 16, 2020, url: <https://bit.ly/35iK8Qy>.

this type of policy, over a dozen proposals have sought to ban non-compete agreements for low-wage workers.¹⁴⁰ Inherently, low-wage worker exemptions make sense since low-wage workers have fewer resources with which to fight non-compete agreements and, when asked to sign them, have less power or contractual sophistication to negotiate their terms.¹⁴¹ In a study of Oregon's ban on non-compete agreements for low-wage workers (since rescinded), Starr and Lipsitz found that, relative to control states that saw no legislative change; unemployment fell, weekly earnings increased by 2.2 and 2.8 percent, and there was no reduction in hours worked per week.¹⁴² These findings indicate that, while non-compete agreements help to protect the investments of firms in worker training and their trade-secrets, for low-wage workers these concerns do not hold and simply reduce their job mobility and the ability to force firms to compete on wages and benefits. Starr and Lipsitz put it this way, "firms can generally implement low-wage non-compete agreements without compensating workers for giving up their right to compete, resulting in slower moving, lower earning workers."¹⁴³ With more states passing low-wage worker exemptions, more data will roll in for researchers to parse. Another worker classification that has been the subject of legislation is exempting "non-key employees" from non-compete agreements. This "key versus non-key" employee distinction is only in place in Idaho. A key employee is defined as "persons who have gained a high level of inside knowledge and influence with the company due to the employer's investment of time, money, trust, etc. in the employee. A person is presumed to be a key employee if they are among the highest paid five percent in the company."¹⁴⁴ Denoting this classification is an attempt by the state to balance the protection of valid employer interests and worker labor mobility.

¹⁴⁰ Lipsitz and Starr, "Low-Wage Workers and the Enforceability of Non-Compete Agreements;" pg. 1.

¹⁴¹ Kruger and Posner, "A Proposal for Protecting Low-Income Workers from Monopsony and Collusion;" pg. 10.

¹⁴² Lipsitz and Starr, "Low-Wage Workers and the Enforceability of Non-Compete Agreements;" pg. 26.

¹⁴³ Ibid.

¹⁴⁴ Joseph G. Ballstaedt, "Are Non-compete Agreements in Idaho Enforceable?," *Racine Olson*, date published January 25, 2017, date accessed March 17, 2020, url: <https://bit.ly/2WeYhtJ>.

Occupations play a large role in determining whether or not workers will be subject to non-compete agreements. Much more common among state legislative solutions to non-compete agreements are those that restrict them based on the occupation of the worker. The passage of these exemptions stem from both pressure by the worker groups representing certain occupations and a policy goal of freeing these workers from the bounds of a non-compete agreement. For instance, physicians are exempted in the largest number of states of any specific profession. This makes sense from the standpoint of a competitive healthcare marketplace that seeks to attract high-caliber physicians from one system to another. Furthermore, physicians, through the American Medical Association, find themselves with significant political power. Table 4 details which states exempt workers across 15 different occupations.

As the academic research detailed above, these exemptions have an impact on worker compensation. This impact, however, pales in comparison to the market considerations of individual professions. Local media stories detailed, for instance, the negative impact for psychologists subject to non-compete agreements in Minnesota. Having a rural provider of these services bound by the terms of a non-compete may leave this worker with nowhere to go to work in their chosen profession. State policymakers use these piecemeal exemptions, detailed in Table 4, to fulfill policy goals of preserving competition for employees in certain areas.

Table 4. State-Level Exemptions to Non-Compete Agreements

<i>Exemption</i>	<i>States Active*</i>
Accountants	Kansas
Automobile Salespeople	Louisiana
Broadcasters	Arizona, Connecticut, Illinois, Maine, Massachusetts, Utah, Washington
Clerks	Missouri
Cosmetologists	Vermont
Government Contractors	Illinois
Key Employees	Idaho
Low-Wage Employees	Illinois, Maine, Maryland, New Hampshire, Rhode Island, Washington
Mediators	Florida
Nurses	Massachusetts, New Mexico, Oregon
Physicians	Arizona, Colorado, Connecticut, Delaware, Florida, Illinois, Massachusetts, New Hampshire, New Mexico, North Carolina, Rhode Island, Tennessee, Texas
Professionals	Alabama, Arkansas
Psychologists	Massachusetts, New Jersey
Secretaries	Missouri
Security Guards	Connecticut
Social Workers	Massachusetts
Tech Workers	Hawaii

*California, Oklahoma, and North Dakota have made non-compete agreements unenforceable and apply to all categories in this list.

Source: Beck Reed Riden LLP's "Employee Noncompetes: A State by State Survey," 2019

The final potential area of exemptions is for workers that fulfill certain characteristics specifically workers that have been fired. Although no states have implemented this policy solution, it may make sense to release fired workers from these agreements in order to balance the buy-in employers have from restricting post-employment job mobility. If firing an employee voids their non-compete agreement, then employers will reconsider termination if this employee has information or clients that could allow them to start a competitor. This spin-off effect is contained if the employee leaves of their own accord, thus realigning incentives for employers concerned about this phenomenon.

The next group of policy interventions does not challenge the existence of non-compete agreements wholesale, but it seeks to control the terms and enforceability of these contracts.

Limiting the Terms and Enforceability of Non-Compete Agreements

Amending and limiting the terms of non-compete agreements is another avenue through which to enact policy changes. While this is currently executed by the courts in most states, legislative bodies can pass guidelines and limits as to which terms are reasonable. The policy options in this section revolve around proscribing the length, geographic area, and restricted activities of a non-compete agreement as well as mandating a red pencil enforcement regime.

The reality of a worker who signs a non-compete agreement is that there is no negotiation to be had on the terms of the agreement. In a survey of workers, the Starr, Prescott, and Bishara find that non-compete agreements are not changed because workers deem their terms reasonable (52%) or assumed that they could not be negotiated (41%).¹⁴⁵ This also comes on the heels of a finding that around 20% of the sample was “concerned that they would create tension with their employer or that they would be fired if they refused to sign.”¹⁴⁶ If, in fact, this finding holds for the entire population subject to these agreements, legislative solutions are necessary to protect workers’ position. While this survey data is helpful, it is useful to note that non-compete agreements are, by and large, private between employee and employer, therefore there are many aspects that are unknown. The ubiquity of how often an individual is sued for breach of the contract is just one example of what we do not know.

¹⁴⁵ Starr, Prescott, and Bishara, “Noncompetes in the U.S. Labor Force;” pg. 22.

¹⁴⁶ Ibid.

Workers' position could be improved by amending standard contract terms. As far as length is concerned, taking a leaf from the Minnesota state courts is instructive. Contract terms of one year were standard, anything beyond that becomes increasingly suspect in the eyes of Minnesota's judges. The reasonable contract terms could change depending on the occupation, however. When concerned with geographic area, the assumption is that a state's boundaries (or perhaps a metropolitan area that spans state lines) is the limit of an agreement's terms. This could be changed to a commonly understood commuting zone in order to both bring uniformity to the different geographic radiuses, but also to fully capture the employer interest of a local competitor that is utilizing secrets or training gained on the job. Commuting zones are used in demographic and economic analyses in order to determine market structures and population weights. Utilizing its specificity for this kind of labor market policy is a helpful alignment of goals. Finally, legislative bodies can proscribe limits on restricted activities for non-compete agreements. This could include language such as, "no non-compete agreement will be allowed to include overly broad, all-inclusive activities in its restricted activities section." The impetus for this policy could be Amazon's temporary worker non-compete that effectively banned former employees from working in any area where Amazon competed or would seek to compete. If you were a warehouse worker or logistics officer this means your job touches most everything that goes through Amazon's shipments, precluding you from work in everything from video games to dog food to cookware. All of these ideas currently guide state court determinations of "reasonableness" but should also be made explicit in legislation to even the scales for employees and ensure predictability in decisions.

Finally, passing policies that mandate a red pencil regime of enforceability would incentivize companies to narrowly tailor their non-compete agreements to abide by prevailing rules and regulations. A red pencil regime is one in which, if a state court determines an agreement does not meet their test for reasonableness, the entire agreement is null and void. Currently, most states abide by a blue pencil regime where courts can individually strike and amend provisions that are unreasonable but keep the agreement intact. The red pencil regime solution, alongside economic penalties for companies who write non-compete agreements that are found to be unreasonable, seek to improve worker's standing in these cases. A benefit of this policy is that it keeps the current "reasonableness" criteria for courts, but simply invalidates contracts that violate these standards rather than asking courts to amend them.

Currently, many workers do not know the laws in their state specifically and are subject to the *in terrorem effect* referring “to the idea that a worker who has signed a non-compete might obey it because he believes it to be enforceable, or because he feels ethically bound by it” regardless of its enforceability.¹⁴⁷ Making the maximum terms explicit in legislation and penalizing the employers who violate these terms is a way to inch this power dynamic in worker’s direction. Next is a proposed idea to shift away from non-compete agreements entirely into other well-established areas of contractual agreements between employees and employers.

Shifting from Non-Compete Agreements to Alternative Contract Arrangements that Better Fit Employer Goals Regarding Non-Compete Agreements

Across policy proposals from academics and researchers, a consistent theme is the prevalence of alternative employee contract agreements. These include non-disclosure/confidentiality agreements, intellectual property protections, and training repayment agreements. In many cases, non-compete agreements go hand in hand “with other restrictive covenants, such as nondisclosure and confidentiality agreements, non-solicitation-of-client clauses, and non-solicitations-of-former-fellow-employee provisions.”¹⁴⁸ This sharing of employee contract restrictions points to a contagion effect of labor market agreements for workers by employers. If, as is detailed above in the section on non-compete agreement terms, there is currently no penalty for an overly broad contracts, why wouldn’t an employer make the worker sign every possible restriction? These other contract provisions, however, have less of an impact on job mobility than strict non-compete agreements. They will be taken in turn.

Non-disclosure and confidentiality agreements are, perhaps, the best alternative to non-compete agreements that cover the widest swath of employer interests. While it is easier to prove a violation of a non-compete agreement (such as if the former employee is working for a rival firm) than it is to prove a violation of a non-disclosure agreement (did the former employee communicate trade secrets) an overall ban on employment for the worker is a “blunt instrument” to accomplish the same goal.¹⁴⁹ Furthermore, non-disclosure agreements only impose restrictions on those workers who would divulge trade secrets, not the entirety of a workforce. This approach is beneficial from both efficiency and equity standpoints. The policy proposal would be to

¹⁴⁷ Starr, “Training the Enemy?,” pg. 13.

¹⁴⁸ Bishara and Starr, “The Incomplete Noncompete Picture;” pg. 504.

¹⁴⁹ Marx, “Reforming Non-Competes Support Workers;” pg. 15.

specifically ease the ability of firms to enforce non-disclosure agreements on trade secret grounds to ensure a better substitute for non-compete agreements.¹⁵⁰

Specific clauses that can be included in these contracts make them a useful substitute for non-compete agreements. A confidentiality agreement could include clauses mandating that the former employee does not solicit their clients or their former coworkers when employed at their new business. These actions could help to mollify trade secrets concerns of employers and allow them to release workers from non-competes that could restrict their job mobility.

Instituting the use of non-disclosure agreements would help pare down the ubiquity of non-compete agreements for low-wage, lower skilled workers as well. Take a Jimmy Johns employee for instance. They are unlikely to have clients to solicit and it's unlikely that they will attempt to entice their co-workers from leaving their jobs to work for a competitor. This results in it being unlikely they will sign such an agreement. Paired with these clauses could be penalties for firms that require all staff to sign the agreements when it appears unnecessary.

The final two agreements that employers could have their workers sign are those agreeing to abide by intellectual property protections and a training repayment agreement. Intellectual property protections in the United States are quite strong; however, having employees acknowledge them when they become employed with certain firms may help to prevent the propagation of trade secrets. Training repayment agreements on the other hand help to mitigate the concern of employer investment in human capital only to see their investment leave. These agreements are signed at the beginning of employment requiring employees who leave within a certain timeframe to repay their employer for training costs. Court cases have been kind to employers in litigating these training repayment agreements; however, the legal fees may not adequately add up for many firms.¹⁵¹ For instance, for low-wage workers, training in the specificities of fast food, construction, or retail practice may not be an adequate investment to sue their employer. It is difficult to quantify the worker's training or the amount is relatively small compared to legal expenses. For higher-wage skilled tradespeople, however, these

¹⁵⁰ Ibid; pg. 5.

¹⁵¹ Riia O'Donnell, "When an employee leaves, can you recoup their training costs?," *HR Dive*, date published November 14, 2017, date accessed March 18, 2020, url: <https://bit.ly/3f9XHpO>.

trainings and certifications could be very expensive and worth the cost for employers to recoup their investment.

The final category of policy interventions could make it easier for researchers to collect data on state level impacts of non-compete agreements on wages, mobility, training, etc. Good data begets good policy, and currently we are lacking data on the impacts non-compete agreements have on workers.

Assisting Researchers in Assessing the Impact of Non-Compete Agreements

A fundamental reality of studying the impact that non-compete agreements have on workers is that, as of now, there is a limited amount of data available on who signs and what the terms are of these non-compete agreements. The typical time- and resource-intensive practice of recording length, geographic radius, and employment activity restrictions is based in researcher's ability to talk to individuals and record data directly from them. Bishara and Starr detail this predicament, arguing that:

“[T]he empirical studies of the impacts of noncompete enforceability, which make up the bulk of the literature, suffer from numerous shortcomings related to the lack of data on who signs non-competes. The most prominent of these is that comparisons across high- and low-enforceability states may mask significant effects of non-competes themselves. For example, if non-competes chill employee mobility even in low-enforceability states, then comparisons across high and low enforceability states will underestimate the impacts of non-competes themselves. A second important shortcoming is that most empirical studies consider one-dimensional measures of enforceability, which, in addition to being necessarily mismeasured without data on who signs non-competes, also provide little guidance to legislators about exactly how to increase or decrease enforceability to reach state policy goals.”¹⁵²

These shortcomings limit the decision-making ability that contributes to good policy design. States could legislate the reporting of non-compete agreement terms (such as length of time, geographic area, and restricted activities) or they could put money into collecting survey data. Furthermore, states could link this data with the occupation, employer, and income level of the worker. Finally, research could collect data that tracks the same set of workers across time in order to glean insight across a worker's career.¹⁵³ While the data contained in Starr, Prescott, and Bishara (2019) is useful due to its nationally representative sample of 11,500 labor force participants, more state-level and occupation-specific data is necessary to glean mobility and income effects of these non-compete agreements.¹⁵⁴ This is especially relevant in gaining a

¹⁵² Bishara and Starr, “The Incomplete Noncompete Picture;” pg. 501.

¹⁵³ Starr, “Are Noncompetes Holding Down Wages?;” pg. 8.

¹⁵⁴ Starr, Prescott, and Bishara, “Noncompetes in the U.S. Labor Force;” pg. 2.

picture of just how many workers are sued or enter into arbitration for a violation of their non-compete agreement.

Given the numerous policy options detailed throughout this section, it can be difficult to decide on the best course of action. The next section will deliver a policy recommendation for the state of Minnesota to take regarding non-compete agreements if it were interested in changing the paradigm for workers.

Policy Recommendations

Given the preceding section and the policy matrix one could be overwhelmed by the sheer number of possible solutions to change the ubiquity of non-compete agreements. Surely, each state will have a different political and policy environment within which to make change. The recommendations that are detailed below will be specifically for the state of Minnesota. However, they are broadly applicable to many states where few policies have been enacted. These recommendations are made given the information contained in the national survey as well as a synthesis of the numerous policy recommendations across academic and policy research projects. Furthermore, these recommendations are ordered in levels of preference from most desirable and ambitious to less desirable and more realistic.

Recommendation #1: Change the Paradigm – Assume Non-Compete Agreements Are Not Allowed & Carve Out Exemptions for Certain Occupations or Classes of Workers

This sweeping recommendation for the state of Minnesota is entirely shifting its regime of non-compete agreements from an assumption that they are allowed (while limiting the terms via jurisprudence cases) to an assumption that they are not allowed. This shift would include exceptions for occupations that are concerned with trade secrets protection and preservation of worker training investments. A legislative package detailing this shift would include recommendations that, where firms find the need to place restrictions on workers to protect their business, they investigate other contractual options including non-disclosure/confidentiality agreements, intellectual property protections, and training repayment agreements. Essentially, non-compete agreements are a last resort.

The current reality that all non-compete agreements are allowed in Minnesota and through most of the country has led to their ubiquity across occupations and income groups unwarranted for the protections they ensure. Multiple academic studies find that non-compete agreements led to a

wage decrease of between two and four percent for low-wage workers.¹⁵⁵ These wage reductions compound and lead to a weaker economic position for entire swaths of the economy.

Furthermore, banning non-compete was found to increase job mobility by between 12 and 18 percent.¹⁵⁶ These outcomes are especially egregious when paired with the reality that many of the trade secrets and training investment protections can be accomplished via alternative contract structures. Blanket non-compete agreements are an overly broad solution to a specific problem. It can be difficult to capture their full impact when an unknowable number of workers may be self-limiting from pursuing jobs in related fields even if it is unlikely their non-compete agreement will be enforced by a court.

One of the biggest benefits of this change would be how it shifts the burden of justification toward the firms in question. There are certainly legitimate reasons why a business would like to institute non-compete agreements on their workers; however, firms should make these reasons plain and appeal to their state legislative body. The regime in place now threatens workers generally, and low-wage workers specifically, because they cannot afford court and lawyer fees if their former employer attempts to enforce their non-compete agreement. The American economy, for the most part, is built on the free exchange of labor and non-compete agreements contradict this principle. Thus, states must take decisive action to rectify this inconsistency.

The political and policy reality of this proposal, however, means that it is unlikely to pass through a state legislature that has not shown an appetite to carve out exemptions for any occupations or classes of workers already. While the courts in the state of Minnesota have a worker-friendly attitude when it comes to the reasonableness of the contracts that they will enforce, the state legislature has seen the failure of numerous proposals for restricting or studying the impact non-compete agreements have on the state's labor force. Even though the likelihood of passing this sweeping legislation is low advocates should examine and promote this proposal for worker protections.

Recommendation #2: Banning Non-Compete Agreements for Workers Earning Less than 200 Percent of the Annual Median Income

If the above proposal is not viable the next best option is to ban non-compete agreements for low-wage workers. Across the academic and advocacy literature, the proposal of limiting who is

¹⁵⁵ Do non-compete hold down wages? & low wage noncompete impacts.

¹⁵⁶ Lipsitz and Starr, "Low-Wage Workers and the Enforceability of Non-Compete Agreements;" pg. 26.

under the purview of non-compete agreements is very common. As mentioned previously, low-wage workers feel the impact of non-compete agreements through wage reduction and mobility restrictions in an acute way.

The states of Illinois, Maine, Maryland, New Hampshire, Oregon, Rhode Island, and Washington already prevent non-compete agreements for low-wage workers. Outside of states where this is policy, over a dozen policy proposals sought to ban these agreements for low-wage workers.¹⁵⁷ Starr and Lipsitz find that, relative to their control states that saw no legislative change; unemployment fell, weekly earnings increased by 2.2 to 2.8 percent, and with no reduction in hours worked per week.¹⁵⁸ These findings indicate that, while non-compete agreements help to protect the investments of firms in worker training and their trade-secrets, for low-wage workers these concerns are less applicable and the real result is a reduction in job mobility and wage or benefit competition. Starr and Lipsitz put it this way, “firms can generally implement low-wage non-compete agreements without compensating workers for giving up their right to compete, resulting in slower moving, lower earning workers.”¹⁵⁹ There is also relatively wide recognition that low-wage workers should be exempted from non-compete agreements amongst academics and advocates.¹⁶⁰

The other element of banning non-compete agreements for low-wage workers is establishing a poverty threshold to determine qualification. The proposal in question qualifies workers earning less than the area median income (AMI) which allows for regional variation. This is a recognition that an annual median income looks much different for a worker living in Minneapolis than it does for someone in rural Greater Minnesota while still preserving the spirit of the law. The entirety of Minnesota’s AMI clocks in at \$68,388, whereas the Minneapolis-St. Paul metro area’s AMI is \$76,856 as of 2017.¹⁶¹ Other states have specified this low-wage

¹⁵⁷ Lipsitz and Starr, “Low-Wage Workers and the Enforceability of Non-Compete Agreements;” pg. 1.

¹⁵⁸ Lipsitz and Starr, “Low-Wage Workers and the Enforceability of Non-Compete Agreements;” pg. 26.

¹⁵⁹ *Ibid.*

¹⁶⁰ *The White House Council of Economic Advisors*, “Labor Market Monopsony, pg. 14;

Marx, “Reforming Non-Competes to Support Workers,” pg. 14;

Starr, “Are Noncompetes Holding Down Wages?,” pg. 7;

Walter, “The Freedom to Leave,” pg. 4;

Starr, “The Use, Abuse, and Enforceability of Non-Compete and No-Poach Agreements,” pg. 13;

Lipsitz and Starr, “Low-Wage Workers and the Enforceability of Non-Compete Agreements,” pg. 1.

¹⁶¹ *Department of Numbers*, “Minneapolis-St Paul-Bloomington Minnesota Household Income,” date accessed March 24, 2020, url: <https://bit.ly/2VTD1e0>.

designation differently. Illinois, for instance defines a low-wage employee as someone who makes the minimum wage or \$13 per hour, whichever is greater.¹⁶² Maryland pegged their restrictions on non-compete agreements to a \$15 an hour minimum wage, which equals around \$31,200 annually.¹⁶³ Maine on the other hand defines low-wage workers as those who make at or below 400% of the federal poverty level, as of 2019 that is \$51,040 annually.¹⁶⁴ Alternatively, Rhode Island defines them as workers making less than 250% of the federal poverty level, which equals \$31,900 annually.¹⁶⁵ The state of New Hampshire relies upon a definition of low-wage employees for those that make 200 percent of the federal minimum wage (which is those earning \$14.50 or less per hour or \$30,160 annually).¹⁶⁶ Finally, the states of Washington and Oregon are the most wide ranging in restricting the amounts of non-compete agreements. They ban them for any worker making less than \$100,000 a year.¹⁶⁷ AMI will standardize these metrics into something intelligible for Minnesota and other states who may adopt this policy.

Even if the eventual proposal were to just include state median income, noted above as \$68,388 as of 2017, this restriction would protect the least advantaged workers in the state. This legislative change would not be impossible to implement; however, given that no changes to non-compete agreements have passed the Minnesota Legislature this could be difficult. The greater narrative benefits this proposal holds is that it is protecting workers and codifying a practice that non-compete agreements are “unreasonable” for low-wage workers. Starr, Bishara, and Prescott estimate that about ~13% of low-wage workers are subject to non-compete agreements meaning that this policy could impact a significant number of people.

Recommendation #3: Instituting Red Pencil Enforcement Regime Which Nullifies Non-Compete Agreements if They Are Found to Be “Unreasonable”

¹⁶² *Illinois General Assembly*, “Employment: (820 ILCS 90/) Illinois Freedom to Work Act,” date accessed March 24, 2020, url: <https://bit.ly/2yfFHd5>.

¹⁶³ Lisa Burden, “Maryland Law Partially Banning Non-Compete Agreements Goes Into Effect Oct. 1,” *Zenefits*, date published October 1, 2019, date accessed March 24, 2020, url: <https://bit.ly/2yZ6WZz>.

¹⁶⁴ *Maine Legislature*, “§599-A. Noncompete agreements,” date accessed March 24, 2020, url: <https://bit.ly/3aUSI96>.

¹⁶⁵ Matthew H. Parker, “State of the law: noncompete agreements in Rhode Island,” *Whelan Corrente & Flanders LLP*, date published July 15, 2019, date accessed March 24, 2020, url: <https://bit.ly/2WcZ7ra>.

¹⁶⁶ David McGrath, “Assessing NH’s new noncompete law,” *New Hampshire Business Review*, date published August 29, 2019, date accessed March 24, 2020, url: <https://bit.ly/3c5sqmh>.

¹⁶⁷ *Immix Law*, “2019 WA H.B. 1450 – (Washington State) Non-competition Covenants,” date published May 8, 2019, date access March 24, 2020, url: <https://bit.ly/3cWvdy2>.

The final policy recommendation, when all else fails, is to institute an enforcement regime that nullifies those non-compete agreements found to have unreasonable terms. Passing policies that mandate a red pencil regime of enforceability would incentivize companies to narrowly tailor their non-compete agreements to abide by prevailing rules and regulations. A red pencil regime is one in which a state court determines an agreement to not meet their test for reasonableness and, therefore, the entire agreement is null and void. The benefit of this policy is that judicial decisions are already designed to evaluate “reasonableness” criteria, and the new policy just includes a greater penalty to its violation. Currently, most states abide by a blue pencil regime where courts can individually strike and amend provisions that are unreasonable but keep the agreement intact. State legislatures could codify the red pencil regime for the courts and institute a penalty for companies who violate it.

A change of this kind seems easy to make given the jurisprudence in Minnesota; however, the state has had legislative blockades regarding changes to non-compete agreement statutes. This option is least preferable because it largely leaves the current regime of ubiquitous non-compete agreements for all workers regardless of how applicable they are to a worker’s day-to-day.

Conclusion

Non-compete agreements are growing in their ubiquity across all occupations, income levels, and industries. Because of the privacy of private employer contracts, it is difficult to assess the terms and limitations of non-compete agreements for workers. But academics and researchers have still gleaned insight through national surveys. Employers have a vested interest in protecting their investments in workers and trade secrets; and therefore, use non-compete to make this legitimate goal a reality. Workers, likewise, could be incentivized to sign agreements because they assume they may gain higher amounts of training and a larger degree of job security. Nationwide surveys indicate, however, a large amount of these workers also are unaware that they are subject to these agreements or assume they cannot be negotiated. These surveys also return results indicating lower wages, higher incidence of employer training, and (unsurprisingly) lower job mobility associated with non-compete agreements. In aggregate these impacts come away as a neutral or negative for workers in mid- to high-wage jobs but are detrimental for those making low wages. Low wage workers are highly mobile and, to a greater degree, force their employers to compete

on wages. By taking away job mobility, employers of low-wage workers who employ non-compete agreements reduce wages and mobility from an already vulnerable group.

Many states enforce non-compete agreements using a court-enforced “reasonableness” standard and a practice of amending unreasonable portions of the contracts while leaving the agreements intact. Minnesota is one of these states and is, therefore, a useful test case for a set of policy recommendations. While possible policy responses vary from legislating limitations on the terms of the agreements to outright banning non-compete agreement enforcement completely, many states do not have any limitations on an employer’s ability to restrict former employees’ working. The recommendations detailed above help to shift the paradigm of what workers can expect if they must sign a non-compete agreement. Finally, the study of non-compete agreements is, by necessity, a difficult endeavor. Nearly all agreements are kept private, and the intangible impacts, such as curbing innovation, harming compounding wages, and chilling worker mobility, deliver real harm to workers across the labor market. The iceberg of non-compete agreements in the United States necessitates big ideas and significant intervention to protect workers.¹⁶⁸

¹⁶⁸ Lobel, “Noncompete – Compete!;” pg. 73.

Appendix 1. Non-Compete Agreements, State Interventions Policy Matrix

CATEGORY Where does this policy fit into?	POLICY What is the policy?	ACTIONS What actions/qualifications must be enacted to implement the policy?	RESPONSIBLE Who specifically must enact the policy?	ENFORCEMENT Who will be responsible for ensuring this policy is maintained?	STATE & STATUS Where is this policy in place currently?
Prohibition	Voiding all non-compete agreements within the bounds of a state	No special qualifications, all non-compete agreements are unenforceable.	State/Federal Legislature	Widely understood agreement unenforceability with fines for firms in violation of the policy.	California, North Dakota, Oklahoma
Prohibition	Voiding all new non-compete agreements within the bounds of a state	No special qualifications, all non-compete agreements are unenforceable after a certain date.	State/Federal Legislature	Widely understood agreement unenforceability with fines for firms in violation of the policy.	(Unclear)
Prohibition	Voiding all non-compete agreements if they were not signed prior to employment contracts	Jurisprudential decisions and body of law.	State Court Holdings	State courts will hold the responsibility to nullify improperly signed agreements	(Unclear)
		Statutory language clarifying the timing of signing the employment contract with the non-compete agreements.	State/Federal Legislature	Widely understood agreement unenforceability with fines for firms in violation of the policy.	(Unclear)

CATEGORY	POLICY	ACTIONS	RESPONSIBLE	ENFORCEMENT	STATE & STATUS
Where does this policy fit into?	What is the policy?	What actions/qualifications must be enacted to implement the policy?	Who specifically must enact the policy?	Who will be responsible for ensuring this policy is maintained?	Where is this policy in place currently?

Exemptions*	Prevent employers from placing low-wage workers under non-compete agreements	Statutory language defining what a low-wage worker is (recommended as under the area median income).	State/Federal Legislature	Widely understood agreement unenforceability with fines for firms in violation of the policy.	Illinois, Maine, Maryland, New Hampshire, Rhode Island, Washington
Exemptions*	Prevent employers from placing “non-key employees” under non-compete agreements	Statutory language defining what a non-key worker is (currently defined as someone who has not gained a high level of inside knowledge and influence in the company or is not one of the highest paid 5% in the company).	State/Federal Legislature	Widely understood agreement unenforceability with fines for firms in violation of the policy.	Idaho
Exemptions*	Prevent employers of certain occupations from placing workers under non-compete agreements	Physicians	State/Federal Legislature	Widely understood agreement unenforceability with fines for firms in violation of the policy.	Arizona, Colorado, Connecticut, Delaware, Florida, Illinois, Massachusetts, New Hampshire, New Mexico, North Carolina, Rhode Island, Tennessee, Texas
		Broadcasters		Widely understood agreement unenforceability with fines for firms in	Arizona, Connecticut, Illinois, Maine, Massachusetts, Utah, Washington

CATEGORY Where does this policy fit into?	POLICY What is the policy?	ACTIONS What actions/qualifications must be enacted to implement the policy?	RESPONSIBLE Who specifically must enact the policy?	ENFORCEMENT Who will be responsible for ensuring this policy is maintained?	STATE & STATUS Where is this policy in place currently?
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				violation of the policy.	
		Nurses		Widely understood agreement unenforceability with fines for firms in violation of the policy.	Massachusetts, New Mexico, Oregon
		Professionals		Widely understood agreement unenforceability with fines for firms in violation of the policy.	Alabama, Arkansas
		Psychologists		Widely understood agreement unenforceability with fines for firms in violation of the policy.	Massachusetts, New Jersey
		Security Guards		Widely understood agreement unenforceability with fines for firms in violation of the policy.	Connecticut

CATEGORY Where does this policy fit into?	POLICY What is the policy?	ACTIONS What actions/qualifications must be enacted to implement the policy?	RESPONSIBLE Who specifically must enact the policy?	ENFORCEMENT Who will be responsible for ensuring this policy is maintained?	STATE & STATUS Where is this policy in place currently?
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		Automobile Salespeople		Widely understood agreement unenforceability with fines for firms in violation of the policy.	Louisiana
		Mediators		Widely understood agreement unenforceability with fines for firms in violation of the policy.	Florida
		Social Workers		Widely understood agreement unenforceability with fines for firms in violation of the policy.	Massachusetts
		Tech Workers		Widely understood agreement unenforceability with fines for firms in violation of the policy.	Hawaii
		Secretaries		Widely understood agreement	Missouri

CATEGORY Where does this policy fit into?	POLICY What is the policy?	ACTIONS What actions/qualifications must be enacted to implement the policy?	RESPONSIBLE Who specifically must enact the policy?	ENFORCEMENT Who will be responsible for ensuring this policy is maintained?	STATE & STATUS Where is this policy in place currently?
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				unenforceability with fines for firms in violation of the policy.	
		Clerks		Widely understood agreement unenforceability with fines for firms in violation of the policy.	Missouri
		Government Contractors		Widely understood agreement unenforceability with fines for firms in violation of the policy.	Illinois
		Cosmetologists		Widely understood agreement unenforceability with fines for firms in violation of the policy.	Vermont
		Accountants		Widely understood agreement unenforceability with fines for firms in	Kansas

CATEGORY	POLICY	ACTIONS	RESPONSIBLE	ENFORCEMENT	STATE & STATUS
Where does this policy fit into?	What is the policy?	What actions/qualifications must be enacted to implement the policy?	Who specifically must enact the policy?	Who will be responsible for ensuring this policy is maintained?	Where is this policy in place currently?

				violation of the policy.	
Exemptions*	Prevent employers from keeping fired workers under non-compete agreements	Statutory language defining what a fired worker is.	State/Federal Legislature	Widely understood agreement unenforceability with fines for firms in violation of the policy.	(Unclear)
			State Court Holdings		

*Note: All these exemptions include the states of California, North Dakota, and Oklahoma because they prohibit non-compete agreements in every circumstance.

Terms	Proscribing length of non-compete enforcement	Jurisprudence on how long courts deem non-compete agreements “reasonable.”	State Court Holdings	State courts will invalidate violating agreements.	Every state that allows non-compete agreement enforcement has a version of this policy already.
		Statutory language placing temporal limits on when non-compete agreements can be enforced.	State/Federal Legislature	Appropriate agency will execute fines for violating firms.	N/A
Terms	Proscribing geographic area of non-compete enforcement	Jurisprudence on the geographic radius courts deem non-compete agreements “reasonable.”	State Court Holdings	State courts will invalidate violating agreements.	Every state that allows non-compete agreement enforcement has a version of this policy already.

CATEGORY	POLICY	ACTIONS	RESPONSIBLE	ENFORCEMENT	STATE & STATUS
Where does this policy fit into?	What is the policy?	What actions/qualifications must be enacted to implement the policy?	Who specifically must enact the policy?	Who will be responsible for ensuring this policy is maintained?	Where is this policy in place currently?

		Statutory language placing geographic limits on when non-compete agreements can be enforced.	State/Federal Legislature	Appropriate agency will execute fines for violating firms.	N/A
Terms	Proscribing restricted activities for non-compete enforcement	Jurisprudence on which activities can be restricted to deem non-compete agreements “reasonable.”	State Court Holdings	State courts will invalidate violating agreements.	Every state that allows non-compete agreement enforcement has a version of this policy already.
		Statutory language placing limits on how wide restricted activities can be for when non-compete agreements can be enforced.	State/Federal Legislature	Appropriate agency will execute fines for violating firms.	N/A
Enforceability	Mandating that non-compete agreements are void if any terms are deemed unreasonable	Statutory language deeming that any “unreasonable” elements of a non-compete agreement contract makes the entire agreement null and void.	State/Federal Legislature	Employers would bring suit, arguing that their terms are unreasonable, and courts would determine the case.	N/A

Data Collection	Mandate registration of all non-compete agreements and terms with central state office	Statutory language to study the impacts of non-compete agreements, and,	State/Federal Legislature	N/A	(Unclear)
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CATEGORY	POLICY	ACTIONS	RESPONSIBLE	ENFORCEMENT	STATE & STATUS
Where does this policy fit into?	What is the policy?	What actions/qualifications must be enacted to implement the policy?	Who specifically must enact the policy?	Who will be responsible for ensuring this policy is maintained?	Where is this policy in place currently?

		in order to do so, to collect data.			
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Alternative Contract Arrangements	Recommending the use of confidentiality/non-disclosure agreements in place of non-compete agreements	States encouraging/mandating the use of general Confidentiality/Non-Disclosure Agreements in place of non-compete agreements.	State Court Holdings	Court process of upholding confidentiality/non-disclosure agreements, more than likely through forced corporate arbitration.	N/A		
			State/Federal Legislature				
		States encouraging/mandating the use of Non-Solicitation of Client Clauses in place of non-compete agreements.	State Court Holdings	Court process of upholding confidentiality/non-disclosure agreements, more than likely through forced corporate arbitration.		N/A	
			State/Federal Legislature				
		States encouraging/mandating the use of Non-Solicitation of Former Employee Clauses in place of non-compete agreements.	State Court Holdings	Court process of upholding confidentiality/non-disclosure agreements, more than likely through forced corporate arbitration.			N/A
			State/Federal Legislature				

CATEGORY	POLICY	ACTIONS	RESPONSIBLE	ENFORCEMENT	STATE & STATUS
Where does this policy fit into?	What is the policy?	What actions/qualifications must be enacted to implement the policy?	Who specifically must enact the policy?	Who will be responsible for ensuring this policy is maintained?	Where is this policy in place currently?

Alternative Contract Arrangements	Recommending the use of intellectual property litigation in place of non-compete agreements	States encouraging/mandating the use of intellectual property protections in place of non-compete agreements.	State Court Holdings	Normal intellectual property proceedings via courts of various levels.	N/A
			State/Federal Legislature	Setting fines or penalties for violating individuals.	N/A
Alternative Contract Arrangements	Recommending the use of training repayment agreements in place of non-compete agreements	States encouraging/mandating the use of training repayment agreements in place of non-compete agreements.	State Court Holdings	Setting fines or penalties for violating individuals.	N/A