THE EFFECT OF NON-COMPETE AGREEMENTS ON ENTREPRENEURSHIP: TIME TO RECONSIDER?

FLORENCE SHU-ACQUAYE*

INTRODUCTION

Covenants to not compete or non-compete agreements ("NCA") are formal contractual agreements between employers and employees relating to restrictions on employees' post-employment activities. Although there is limited empirical research on the use of non-competes,[1] said covenants are not a new phenomenon and they are increasingly used by employers to restrict an employee's ability to work for a competitor, start a competing business and, in some cases, to protect valuable information such as trade secrets. NCAs may also deal with restraining the employee from competing with the business after it is sold and/or from soliciting clients of the former employer.[2] These contractual terms, often signed as a condition of employment, could be embedded in the employment contract or written as a stand-alone agreement.[3]

---

* Professor of Law at the Shepard Broad College of Law of Nova Southeastern University, where she teaches the Business, International, Comparative and Commercial Courses. I would like to thank my research assistants, Ms. Paige Applebaum for editing the footnotes, Ms. Mariah Schiff for her research.

[1] Norman D. Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants Not to Compete, Trends, and Implications for Employee Mobility Policy*, 13 U. PA. J. BUS. L. 751, 783 (2011) (States that a statistical data on the actual number of non-competes in specific jurisdictions and industries are missing a piece of non-compete research, given this information is hard to obtain because these non-competes are generally not publicly reported or catalogued).

[2] Norman D. Bishara, *Covenants Not to Compete in a Knowledge Economy: Balancing Innovation from Employee Mobility Against Legal Protection for Human Capital Investment*, 27 BERKLEY J. EMP. & LAB. L. 287, 294 (2006).

[3] *Id.*

On the one hand, these non-compete agreements are beneficial to companies. They protect human capital, intellectual property, interfere relations and could increase productivity as companies would be more willing to invest in training workers and developing new products and processes, if confident of being able to reap the benefits of this investment.[4] Indeed, traditional economic theory finds post-employment restrictions are relevant and necessary in constricting the movement of human capital, as it assumes that, without such contractual restrictions, employers would "underinvest in research, development and employee training," as there is a higher risk that such employees would leave and use these acquired attributes as competitors.[5]

However, on the other hand, the enforcement of non-compete agreements may have negative effects, as it may hinder innovation, economic growth and entrepreneurships.[6] Kenneth Arrow argues that competition is what fuels innovation, and, with reference to human capital, "mobility of personnel among firms provides a way of spreading information."[7] He believes such information travels with workers between companies thereby resulting in even more knowledge and consequently strengthening competition.[8] Professor Hyde, a strong advocate for labor mobility, under a conducive legal structure that, among other things, disallows non-compete agreements, has argued in favor of the California approach, which essentially bans NCAs, as the state's laws have enabled a "high velocity" labor market where employees move quickly between jobs or simply remain independent contractors. "Thus, technical information and innovation are shared quickly, without restrictions and are "porous to outside influence." Hence the success of Silicon Valley.[9]

Although non-compete agreements were originally considered unenforceable because they were said to be in restraint of trade, a majority of states' policies allow some degree of enforcement. Virtually all state courts today employing one of three rules to determine enforceability: (1) the all or nothing approach; (2) the blue pencil approach, and; (3) the judicial modification standard approach, which could enforce, revise or strike out the non-compete agreement.[10] However, the states treat the enforcement of these covenants differently, thereby making it complex to even discern a standard form language in the different jurisdictions.[11] California statutes, for example, restrict courts to enforcing non-compete clauses in very limited circumstances, with the California Business &

---

[4] Sampsa Samila & Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth*, 57 Mgmt. Sci. 425, 425-26 (2011).

[5] On Armir & Orly Lobel, *Driving Performance: A Growth Theory of Noncompete Law*, 16 Stan. Tech. L. Rev. 833, 837 (2013).

[6] Samila & Sorenson, *supra* note 4, at 425-26.

[7] Armir & Lobel, s*upra* note 5, at 846.

[8] *Id.*, at 837.

[9] Bishara, *supra* note 2, at 308.

[10] *See* Clark's Sales & Serv., Inc. v. Smith, 4 N. E.3d 772, 783-87 (Ind Ct. App. 2014) (Where court struck down a provision in its entirety because it was patently unreasonable).

[11] Sye T. Hickey, *To Compete or Not to Compete: Is that the Question?*, 21 BUS. TORTS & UNFAIR COMPETITION 18, 22 (2014).

Professions Code stating that "every contract by which anyone is restrained from engaging in a lawful possession, trade, or business of any kind is to that extent void."[12] In Texas is liberal in its enforcement of non-compete clauses through the Texas Business & Commerce Code section 15.50 (a).[13] *Guy Carpenter & Co. v Provenzale*[14] provides that a covenant not to compete is enforceable if it is "ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable."[15] Some state courts take a "reformation" or "blue pencil" approach and will rewrite unreasonable or impermissible clauses.[16] Florida exemplifies such a case, as Fla. Stat. S 542. 335 (1) (c) provides that courts "modify the restraint and grant only the relief reasonably necessary to protect [legitimate] business interests."[17]

Regardless of which side of the debate one stands, a fundamental issue to handle is how the law of non-compete agreements should be dealt with in a changing landscape of the labor market. How should state policy makers construe these employment relationships in evaluating non-compete agreements in an evolving market? What are the public policy implications of allowing or restricting non-compete agreements? For example, with the explosion and evolution of technology come many complex issues relating to non-compete agreements. With some companies providing products or services exclusively on the internet or offering an online platform for their customer services, there are complex challenges in interpreting non-compete agreements based on physically measurable terms like duration and geographic scope and location.[18]

This article will thus evaluate non-compete covenants and their impact on businesses and entrepreneurship as a whole within the changing labor market and their influence in fostering or impeding growth of firms; it will examine the Law and Economic approach to non-compete covenants to identify what may be most efficient for the employer/employee in light of mobility, human capital, spillovers and other emerging factors in an increasingly technology focused world.

My analysis will be bolstered by two case studies: considering the undisputed economic success of Silicon Valley, I will examine the California model and approach to NCAs, with the goal of determining if it constitutes a policy approach that could be replicated in other states. If so, examine why this has not been widely done aside from an unsuccessful attempt in Massachusetts. I will also examine the case of Ohio, which applies a two-pronged test to determine whether NCAs are reasonable and perceived to be strictly against employees. The pertinent question for Ohio is the effect that evolving technology may have on determining

---

[12] CAL. BUS. & PROF CODE § 16601.
[13] TEX. BUS. & COM. § 15.50 (2001).
[14] Guy Carpenter & Co., Inc. v. Povenzale, 334 F. 3d 459, 464-65 (5th Cir. 2003).
[15] Hickey, *supra* note 11, at 19.
[16] *Id.*
[17] *Id.* at 19
[18] Adam V. Buente, *Enforceability of Noncompete Agreements in the Buckeye State: How and Why Ohio Courts Apply the Reasonableness Standard to Entrepreneurs*, 8 OHIO ST. ENTREPREN. BUS. L. J. 73, 93 (2013).

reasonableness, which is the focus of non-compete litigation, again, determine if it would be desirable to replicate or abandon this approach.

I. HISTORICAL BACKGROUND TO NCA AND THE POLICY IMPLICATIONS FOR ALLOWING OR RESTRICTING NON-COMPETE AGREEMENTS

The law of non-compete and restrictive covenant in the United Sates originated from the English common law, prevalent in England since the 17th century.[19] Historically, CNC in the employment context has been an issue of contention both under the English common law and as applied in the American law. These agreements were considered to be in restraint of trade and freedom of contracts and therefore void.[20] This hostility towards CNC is compounded by the fact that the CNC are contracts of adhesions, whereby the parties have unequal bargaining power as well as one party having no choice in its terms.[21] Although traditionally, courts frowned on agreements not to compete, with such agreements actually proscribed under the early common law, this rule has been watered down, as the courts believe that the NCA can be effective and yet serve other interests besides free trade.[22] Consequently, NCA subject to an employment contract are permissible based upon the agreement meeting the reasonableness test.[23] Under this common law test, the court tries to balance the conflicting interests of the employer, employee and the society. That is, the employer has an interest to protect the use of its business assets via misappropriation by a former employee, and in the same vein, an employee has a similar interest in ensuring its marketability and mobility.[24] The society on the other hand, has an interest in promoting a free and fair competition that invariably foster innovation and new endeavors in the market place.[25] Thus, in balancing these interests, the common law permits employee NCA agreements but simultaneously put limits on the restrictive covenants, in that way, ensures that it is not too arduous to the employee nor harmful to the market place.[26]

So if the employer demonstrates that a legitimate interest will be served by an agreement not to compete, the terms of the non-compete agreement will be scrutinized to make sure it is not burdensome or too extensive to serve that interest.[27] The factors the courts would consider in examining the NCA for reasonableness includes the time period restriction, the geographic scope, the breadth of the restriction post-employment and the effect of the restriction on the

---

[19] Benjamin I Fink, *Is strict Enforcement of Non-Competes Good Policy?*, https://www.bfvlaw.com/wp-content/uploads/2017/05/2017-TS-Summit-article-re_-non-compete-policy-00891624.pdf (last visited April 12, 2019).

[20] *Id.*

[21] *Id.*; *see also* Restatement (Second) of Contracts, § 188 (1981).

[22] Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L. J. 107, 114 (2008).

[23] *Id.*

[24] *Id.* at 115.

[25] *Id.* at 115. (The added public interest is also in discouraging employers from limiting the exploitation of the market by the use of their superior bargaining power).

[26] *Id.*

[27] *Id.* at 117.

employee, as well as the effect it may have on competition in the market.[28] For example, a court would be reluctant to honor a NCA that prevents the employee from working for a competitor or enters into a business that does not directly affect the business of the former employer. The case of *Kapinsky v. Ingrasci* exemplifies this principle. [29] In that case, the New York Court of Appeals readily recognized and upheld an NCA that would deny an oral surgeon from practicing oral surgery within a certain radius of New York. However, the court did not uphold the part of the NCA that denied the oral surgeon the ability to practice dentistry, as that practice was not in direct competition with the ex-employer's business.[30]

A. GENERAL CURRENT TREND OF NON-COMPETES IN THE UNITED STATES

Today, although these post-employment restraint agreements have been greatly debated and litigated by the legislature and courts, there is no consistent comprehensive uniform policy applicable across the states as to what factors would be sufficient to support the employer's claim. To the contrary, the enforcement of NCA is still evolving and unpredictable, just as with related broader issues in employment and contract law.[31] Although most states employ the reasonableness test in evaluating the enforceability of NCA as discussed above, the approach, tools and principles employed by the courts vary from court to court. This also would mean that what one court may consider a reasonable constraint on employee's activities might not necessarily be the same standard employed in another court or jurisdiction.[32] In the same vein, a courts determination as to whether to accept a non-compete by the court's use of contract modification or reformation or the grant of partial enforcement would also vary and as exercised by the court's discretions.[33] Consequently, gauging the strength of a non-compete legal enforcement is complex and challenging as understanding enforcement or enforceability should take into account state statutes and case law in the different jurisdictions.[34] In spite of these challenges, Bishara and Starr carried out a survey project in 2014. They noted the following on a spectrum of weak to strong enforcement of non-competes:[35] 96 % of states—49 states and the District of Columbia—permits some type of non-compete enforcement, with 12 states (20 %) strongly enforcing non-competes (such as Florida and New Mexico); 9 states 9 (18%) weakly enforce non-competes, such as Arkansas and Alaska, and 30 states (60%) moderately enforcing non-compete.[36] It is important to state that:

---

[28] Garrison & Wendt, *supra* note 22, at 123-24.
[29] Karpinski v. Ingrasci, 268 N.E. 2d 751, 754-55 (1971).
[30] Garrison &Wendt, *supra* note 22, at 118.
[31] Norman D. Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants not to Compete, Trends, and Implications for Employee Mobility Policy*, 13 U. PA. J. BUS. L. 751, 756 (2011).
[32] *Id.* at 773
[33] *Id.*
[34] *Id.*
[35] *See generally* J.J. Prescott, Norman D. Bishara, Evan Starr, *Understanding Noncompetition Agreements: The 2014 Non-Compete Survey Project*, 2016 MICH. ST. L. REV. 369, 457-62 (2016).
[36] *See* Fink, *supra* note 19, at 17.

> Non-compete agreements in the United States fall into two major basic trends with some nuances and subtleties in the different jurisdictions in between. First, those laws that find non-compete agreement invalid —like in California and North Dakota— which will not generally enforce a non-compete in the employment context. As such, these two states occupy one end of the spectrum. Second, those laws providing non-competes may be enforced if they pass the reasonableness standard test.[37]

Some states will not enforce non-competes except under limited circumstances. For example, Colorado is more permissive of non-competes for executives and management personnel.[38] Some states will only enforce non-compete against someone who has willingly quits he job.[39]

All states agree that there should be protection of a business interest, like trade secrets, confidential information, but the states are not in unison as to what those interests should be.[40] In Florida and in Kentucky, the protectable interests include general skill training.[41] Some states will rewrite unreasonably broad non-compete and yet, other states will simply refuse to enforce the agreement.[42] In Oregon, the procedure and consideration required for enforcement of the non-compete, includes a requirement that the company inform the employee of the non-compete at least two weeks before the employee begins work.[43] The employer's failure to do so will result in more consideration for the modification.[44]

B. THE POLICY OF THE FEDERAL GOVERNMENT ON NON-COMPETE AGREEMENTS

Although the non-compete issue is primarily a matter of state law, non-compete agreements caught the attention of the federal government as the interest to reform non-compete were brought to the forefront especially in light of oppressive non-competes for low wage employees.[45] This decision was made even more eminent by the released Report of the US Department of Treasury's Economic Policy titled *Non-compete Contracts: Economic Effects and Policy Implications*. It concluded that non-competes are harmful to the broader economy.[46]

---

[37] *Id.*
[38] Prescott, Bishara & Starr, *supra* note 34, at 391.
[39] *Id.* at 457.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 458.
[43] Prescott, Bishara & Starr, *supra* note 36, at 458.
[44] *Id.*
[45] *Id.* at 393.; *See also* Senator Chris Murphey Franklin's bill to ban non-compete agreements for low wage workers, *New Competition for Non-Compete Agreements*, FRANKLIN & PROKOPIC (June 3, 2015), https://www.fandpnet.com/new-competition-for-non-compete-agreements/.
[46] OFFICE OF ECONOMIC POLICY, U.S. DEPARTMENT OF THE TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS (The Treasury Department reported that although employers use these non-competes for their benefits, such as to protect trade secrets, limit employee turnover and more, but that these benefits also come at the expense of the workers and the economy as whole.

Consequently, then President Obama called upon Congress to act on the "unnecessary" non-compete agreement in order to set aside non-compete agreements for salary workers below a certain threshold, as well as implement best practices for states that enforce these non-compete agreements.[47] This congressional interest led to the Proposed Mobility and Opportunity for Vulnerable Employee Act of 2015 ("MOVE ACT"). The Act sought to ban covenants not to compete for workers making less than $15 an hour.[48] Advocates for the bill believed that the low wage employees are stuck at the same low level with no opportunity to rise to a higher job paying level because of these none competes that employers force them to sign[49]. In other words, because of these agreements, there is no incentive for these low wage earners to seek better and higher paying jobs and therefore they are wedded to these low paying jobs, holding them in this vicious cycle of poverty. Therefore, the advocates believe that banning the use of non-competes agreements, these workers may be encouraged to move into better jobs and therefore a better life for them and their families.

As issues arise as to whether there is a policy of nationalizing non-compete agreements, the fact remains that the "Call to Action" by the Treasury Department's white paper and the Obama administration merely sought to encourage state lawmakers to undertake non-compete regulation."[50] Because employers are expected to continue to focus on state-level regulation of non-compete provisions, to talk of a national regulation of non-competes may be far-fetched.[51] Currently, the Trump administration does not appear to depart from this general policy under the Obama administration.[52] How long this would be for, only time will tell.

The strict traditional approach to non-competes which was founded on being highly protective of employee's right to mobility and promoting society's

---

[47] *See* The White House Office of the Press Secretary, *FACT SHEET: The Obama Administration Announces New Steps to Spur Competition in the Labor Market and Accelerate Wage Growth*, OBAMA WHITE HOUSE ARCHIVES (Oct. 25, 2016), https://obamawhitehouse.archives.gov/thepress-office/2016/10/25/fact-sheet-obama-administration-announces-new-steps-spurcompetition.

[48] *Id.*; *See also* Mobility and Opportunity for Vulnerable Employees Act, S. 1504, 114h Cong. (2015).

[49] Prescott, Bishara & Starr *supra* note 34, at 393.; S*ee also* Senator Chris Murphey Franklin's bill to ban non-compete agreements for low wage workers, *New Competition for Non-Compete Agreements*, FRANKLIN & PROKOPIC (June 3, 2015), https://www.fandpnet.com/new-competition-for-non-compete-agreements/.

[50] *See* Cody Lonning & Douglas Mishkin, *Non-Competes Depart the Federal Scene in the New Administration*, TRADE SECRETS & TRANSITIONS (July 13, 2017), https://www.tradesecretsandtransitions.com/2017/07/non-competes-depart-the-federal-scene-in-the-new-administration/.

[51] This deference to states is exemplified by states laws like the Illinois Freedom to Work Act, outlawing non-competes for low-wage employees, and Utah's Post-Employment Restrictions Act, limiting non-competes to one year.

[52] Laura Dyrda, *Trump Administration Asks States to Scrutinize Non-Compete Clauses for Physicians*, (Dec. 07, 2018) https://www.beckersasc.com/asc-turnarounds-ideas-to-improve-performance/trump-administration-asks-states-to-scrutinize-non-compete-clauses-for-physicians.html BECKER'S ASC (last visited April 12, 2019). ("The recent Trump administration proposed recommendations and changes to the healthcare system includes non-compete clauses. The proposal recommends that states "scrutinize non-compete agreements and restrictive covenants to avoid unenforceable non-compete clauses and reduced competition.")

interest of free competition and open markets created a kind of suspicion and hostility towards non-compete agreements.[53] Thus, the courts reviewed these agreements under the auspices of the reasonableness test, judiciously making sure that the interest being protected under the covenant and its scope were paramount to protecting those interests.[54]A majority of states tend to enforce non-compete agreements with two extremes outliers.

II. THE PROS AND CONS OF NON-COMPETE AGREEMENTS

Examining and understanding the rational for the use of non-competes agreements from the Employer and Employees perspectives is quintessential in the policy rational behind regulations and court's decision. In the same vein, looking at the rational against the use and enforcement of these agreements, would give a fuller and better appreciation to both sides of the debate. The Pros and Cons for and against upholding Non-Compete Agreements include, as Buliga and Fitzgerald explain in their article:

> [b]y definition, non-compete agreements block the formation of new businesses that may compete with their employers. Companies that utilize non-compete agreements are looking to keep themselves on top by controlling potential entrepreneurs and squashing any innovation before it begins. Doing this perpetuates a marketplace bureaucracy that protects established, larger businesses and deters entrepreneurs from introducing and implementing revolutionary new ideas.[55]

On the other hand, competition is key to innovations, quality of products and new opportunities, and non-compete clauses tend to restrict mobility, and stops people from creating new businesses.[56] It is important that new firms enter the market to contribute to economic dynamism and speeds improvements in welfare.[57] Jackson and Weins also state "innovation is more likely to occur in a competitive market where opportunities and resources for developing new products are up for grabs."[58]

This leads us to the rise of litigation over non-compete clauses over the decades. Many employers may not realize the effect this has on entrepreneurship, including that non-compete agreements prevent innovation. Those non-compete agreements prevent people from leaving corporations and starting their own

---

[53] Garrison & Wendt, *supra* note 22, at 122.
[54] *Id.*
[55] Bianca Buliga & Jenna Fitzgerald, *Stepping Our Game Up: America's Path To Innovation*, SEED SPOT (July 28, 2016) https://seedspot.org/stepping-game-americas-path-innovation/.
[56] Chris Jackson & Jason Weins, *A Fair Fight and Competition Policy*, REAL CLEAR POLICY, https://www.realclearpolicy.com/public_affairs/2018/10/11/a_fair_fight_entrepreneurship_and_competition_policy_110844.html (last visited April 12, 2019).
[57] *Id.*
[58] *Id.*

businesses or even hire workers.[59] Simon and Angus used the example of a man named Rami Essaid who started a program that protects websites from attackers.[60] Soon after he started the company, his former employer sued him and he spent six months negotiating a settlement.[61] Rami commented that non-compete clauses limit your ability to grow and tap your own network.[62]

Another con lies in that non-compete clauses effect startup companies because it hinders these companies from hiring new prospective employees.[63] John Hirschtick, the founder of a startup technology business says that it is hard to hire new software engineers because non-compete clauses restrict them from working with competitors.[64] Professor Alan Hyde, a professor of Rutgers University School of law stated that non-compete clauses have little social or economic advantage, "You have slower growth, fewer startups, fewer patents and loss of brains to jurisdictions that don't enforce the agreement."[65] However, a recent study revealed that states that strictly enforce non-competes agreements have fewer employees leave their current jobs to start new businesses in the same field. The study also found that in these same states, businesses of poor quality are weeded out, and the spins outs that are founded are larger and better performing.[66]

Others argue that non-compete clauses help innovations and economic development to flourish as theses clauses protect entrepreneur's ideas, investments, good will, and other legitimate business interests.[67] This assertion is often buttressed by the use as an example to critics of non-compete clauses to show that where non-compete clauses are nonexistent, companies tend to thrive.[68] Hence, the argument goes that the reason Silicon Valley is so successful is that the companies there are hard to replicate.[69] Non-compete clauses do not make it impossible to find jobs per se, as in most states it can "only reasonably limit competition by narrowly tailoring duration, geography, and scope restriction, and it also must protect the legitimate business interest of the party seeking enforcement."[70]

---

[59] Ruth Simon & Angus Loten, *Litigation Over Noncompete Clauses is Rising*, WALL ST. J. (Aug, 15 2013, 8:06 PM), https://www.wsj.com/articles/litigation-over-noncompete-clauses-is-rising-does-entrepreneurship-suffer-1376520622.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 2.

[63] *Id.* at 3.

[64] *Id.*

[65] *Id.*

[66] Chad Brooks, *Are Non-Competes Bad for Entrepreneurship?*, BUSINESS NEWS DAILY (July 31 2016, 3:37 PM), https://www.businessnewsdaily.com/9285-non-compete-effect-entrepreneurship.html.

[67] Philip C. Korovesis, Bernard Fuhs & Marc Oswald, *Why Noncompete critics are Singing the Wrong Song*, BUTZEL LONG, 41 (Mar. 2012), https://www.butzel.com/media/publication/382_03.12.2012%20-%20Article_%20Noncompete.pdf.

[68] *Id.* at 42.

[69] *Id.*

[70] *Id.* at 43. Critics of non-compete in Massachusetts point to the case of Zona Corp. v. McKinnon, 2011 Mass. Super., 28 MASS. L. REP. 233 (2011); as the prime example of why those clauses should be banned.; *See also* Philip C. Korovesis, Bernard Fuhs & Marc Oswald, *Why Noncompete critics are Singing the Wrong Song*, BUTZEL LONG, 41 (Mar. 2012), https://www.butzel.com/media/publication/382_03.12.2012%20-

Another perspective that defends non-compete clauses lies in that, without them, entrepreneurs have no incentive to invest in an new idea and train employees, if those new employees are able to take what they have learned and move across the street and start competing with the company.[71] The argument goes that innovation and business developments take large amounts of time, money and trial and error, therefore without the adequate protection, other businesses who are not in the same financial position would be able to steal ideas.[72] Non-compete clauses create the incentive to innovate and protect entrepreneurs and their ideas, thus banning non-compete clauses would remove that incentive.[73]

Others who oppose employee restrictions using non-competes contend that these agreements tend to promote innovation and reinforce the economic growth, as firms would be likely to invest in research and design.[74] In addition, in so doing, the company is not really concerned that their potential competitors will "poach knowledgeable employees or that the employees would leave them to start their own directly competing business."[75] On the other hand, this very assertion is opposed by research that demonstrates that the enforcement of non-competes to the contrary, is attended by lessened expenditure on research and design.[76] In the same vein, other research also shows that upon signing a non-compete, an employee has no incentive to develop new ideas for a current employer as the employee is very aware that he will not make any gains from the new idea, or even when he starts a new business upon the new idea.[77]

Once again opposing non-compete agreements, some argue that spillover is important for competition and innovation and with the restrictions on mobility placed on employees with non-compete clauses, intel cannot be passed from one company to the next easily.[78] Entrepreneurs, who wish to have a startup firm, usually spin it off the previous work they were doing.[79] The owners of the startups face setbacks with not being able to get their companies off the ground because they are not able to hire the right employees for the jobs, who have been bounded

---

%20Article %20Noncompete.pdf. This case is a good example of how a reasonable tailored non-compete clause protects a legitimate business. *Id.* In this case Zona Corporation hired a recent graduate of cosmetology school and required that he sign a non-compete agreement. The clause prohibited Zora from competing against the seven-town area, for a period of one year after he stopped working that employer. *Id.* at 43. On the other hand, the employer argued that this non-compete did not restrict him from earning a livelihood as the employee would be able to work outside of the seven-town area. *Id.*

[71] Philip C. Korovesis, Bernard Fuhs & Marc Oswald, *Why Noncompete critics are Singing the Wrong Song*, BUTZEL LONG, 43 (Mar. 2012), https://www.butzel.com/media/publication/382_03.12.2012%20-%20Article %20Noncompete.pdf.

[72] *Id.*

[73] *Id.* at 44.

[74] Abigail S Nicandri, *The Growing Disfavor of Non-Compete Agreements in the New Economy and Alternative Approaches for Protecting Employer's Proprietary Information and trade Secrets*, 13 U. PA. J. BUS. L. 1003, (2011).

[75] *Id.* at 1013.

[76] *Id.*

[77] *Id.*; *See also* Mark A. Lemley & James H.A. Pooley, *California Restrictive Employment Covenants after Edwards*, 23 CAL. LAB. & EMP. L. REV. 1, (2013), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1295606*.

[78] Sampsa & Olave, *supra* note 4, at 428.

[79] *Id.*

from non competes from their previous employers.[80] Research shows that in areas that do not enforce non-competes clauses or rarely enforce them, there is a higher number of patents and entrepreneurship. The higher the level of entrepreneurship had a correlation with high levels of mobility.[81]

Regarding the contract itself, a fact that opposes non-compete agreements lies in that there is not much of any negotiations of these non-compete contracts, given that virtually anyone asked to sign does so.[82] One in 10 people request for a lawyer's review of the employment contract. Seventy percent of workers with none compete clauses were only asked to sign after they have received their job offers, and with forty percent, asked to sign after the first day of work.[83] Not unsurprisingly, where workers happen to have been given the non-compete agreement in advance of the job offer being accepted, they may not necessarily be conversant with the fact that there is a non-compete clause in the contract, and let alone its content.[84]

The argument also goes that non-competes could be advantageous to both the employer and the employee. That is, where the employee is prohibited from working for a competitor, it protects not only employer's trade secrets, but also could also be advantageous to the employee.[85] For example, in the area of sports, it is said that professional athletes would benefit from a "fixed term contract" instead of hoping from one team to another. This would result in a "lower worker turnover" which invariably may result in the employer's readiness to invest even more in the employees through training.[86]

The final point focuses on a jurisdictions' enforcement of the non-compete agreements. Mark Garmaise of the University of California, Los Angeles, found that the more stringently a state allows enforcement of non-compete agreements, the longer executives stay at the companies, the less they are paid, and the greater the use of salary compensation over alternatives such as stock options. This, due to the enforcement, may lead to a reduction of human capital self-investment by

---

[80] *Id.* at 428.

[81] *Id*. at 432.

[82] Matt Marx & Ryan Nunn, *The Chilling Effect of Non-Compete Agreements*, THE HAMILTON PROJECT BLOG (May 20, 2018), http://www.hamiltonproject.org/blog/the_chilling_effect_of_non_compete_agreements.

[83] *Id*.

[84] *Id.* at 3. Matthew Marx, a professor at the Sloan School of Management at M.I.T. found that employees are typically presented with non-compete clauses when their bargaining power is at its lowest, on the day they star working. The enforcement of non-compete agreements vary from state to state, and economists have been able to study what happens in States that strictly enforce non-compete agreements. They found the results are almost universally negative, "wages and entrepreneurship are all diminished when workers have little leverage to bargaining with their employer or leave a job for a better opportunity.". *See* Conor Doughty, *How Non-compete Clauses Keep Workers Locked In*, NEW YORK TIMES, (June 19, 2017), https://www.nytimes.com/2017/05/13/business/noncompete-clauses.html.

[85] Matt Marx & Ryan Nunn, *The Chilling Effect of Non-Compete Agreements*, THE HAMILTON PROJECT BLOG 1 (May 20, 2018), http://www.hamiltonproject.org/blog/the_chilling_effect_of_non_compete_agreements.

[86] *Id.*

high-ranking employees. According to Garmaise, this is because the executive's self-investments were more important than the companies' investments in them.[87]

III. SOME JURISDICTIONAL EXAMPLES OF HANDLING NON-COMPETE AGREEMENTS

A. THE OHIO MODEL AND APPROACH

Ohio's Supreme Court decides non-compete litigation on a case-by-case basis.[88] The Supreme Court used the blue pencil test prior to 1975.[89] Under this blue pencil test, it allows the court to remove certain parts of the non-compete clause, but did not allow the court to alter or modify the clause.[90] That is the blue pencil rule empowers the court to "sever portions of an overbroad non-compete agreement."[91] After 1975, the Ohio court began using the reasonableness standard test.[92] The reasonable standard test was adopted in the case of *Raimonde v. Van Vlerah*,[93] where the appellant and appellee were both veterinarians in a small town. Appellee was working for appellant and signed a covenant not to compete within 30 miles of appellant, and for a period of three years. Upon termination of his employment, appellee started his own practice less than 30 miles from appellants.[94] Appellant sued appellee based on the covenant, but the suit was dismissed because the covenant was in unreasonable restraint of trade. The court in so holding abandoned the "blue pencil" approach of striking out unreasonable provisions in favor of the reasonableness approach.[95] The court wanted a more consistent standard to apply to non-compete litigation.[96] In its opinion, the court laid out two tests to be employed in considering reasonableness of the non-compete.[97] The first was a three prong balancing test, while the second was reasonableness factors to be considered in light of the circumstances of the case.[98] The three prongs to be considered are:[99] (1) the covenant is no greater than is required for the protection of the employer; (2) does not impose undue hardship on the employee, and; (3) does not cause injury to the public.[100] The second other factors the court indicates should be considered in the balance in the Raimonde

---

[87] David Price, *Does Enforcement of Employee Noncompete Agreements Impede the development of Industry Cluster*? FEDERAL RESERVE BANK RICHMOND, 5 (Nov. 2014), https://www.richmondfed.org//media/richmondfedorg/publications/research/economic_brief/2014/pdf/eb_14-11.pdf.

[88] Buente, *supra* note 18, at 81.

[89] *Id.*

[90] *Id.*

[91] Garrison & Wendt, *supra* note 22, at 124.

[92] Buente, *supra* note 18, at 83.

[93] Raimonde v. Van Vlerah, 42 Ohio St. 2d 21, (1975).

[94] *Id.*

[95] Buente, *supra* note 18, at 83.

[96] *Id.* The court's ruling does not seem to leave any consistency among the trial courts.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] Buente, *supra* note 18, at 84.

case include: (1) whether the employee represents sole contact with clients; (2) is the employee in possession of with confidential information or trade secrets; (3) does the non-compete clause eliminate unfair competition, or ordinary competition; (4) does the non-compete clause impede skill and experience of the employer; (5) the benefit of the employer and the detriment to the employee; (6) does the non-compete clause impedes the employees ability to seek a livelihood; (7) if the talent the employer want to restrict was gained during employment, and; (8) if the forbidden employment is merely incidental to the main employment.[101]

Courts in Ohio are more likely to uphold non-compete clauses when the former employee is trying to start their own business, as seen in the case of *Copece Inc. v. Caley*.[102] In this case, where a former employee who had worked a copy business and left his employer to start his own copy business with a partner, the court reasoned that the non-compete clause was reasonable because the former employee gained knowledge and industry experience by his former employers. This is even more so given that the non-compete prohibited the former employee from started a similar business in a forty-five miles radius.[103]

The lower Courts in Ohio seem to be struggling with the application of the reasonable standard stipulated in *Raimonde*, and therefore no consistent application resulting to confusion among the lower courts.[104] Some Ohio courts only apply the reasonableness test under the three prong and proceed to use the said factors above as illustrative authority. On the other hand, other courts tend to give equal weight to both the three-prong test and the added factors.[105] Unfortunately, the Supreme Court has not actually clarified or given directions thereby only leaving the confusion entrenched for businesses and trial attorneys.[106]

The *Raimonde* court's decision and approach regarding post-employment restrictions was reaffirmed in *Rogers v. Runfola & Associates, Inc.*.[107] In this case, Rogers and a coworker worked with Runfola, a business company providing court reporting services, and signed a covenant not to compete with Runfola.[108] After working for the company for ten years, they each sent to employer a letter of resignation and proceeded to start their own reporting company.[109] However, they did so in contravention of the non-compete with Runfola prohibiting them from providing court-reporting services in Franklin County for two years.[110] The agreement also had anti solicitation and anti-piracy clauses but with no time limit. The Ohio Supreme Court held that the non-compete agreements were unreasonable and excessive, and went on to deal with the issue of "whether some restrictions prohibiting appellees from competing were necessary to protect

[101] Buente, *supra* note 18, at 84-85.
[102] Buente, *supra* note 18 at 89; Copeco, Inc. v. Caley, 632 N.E. 2d 1299 (Ohio CT App. 1992).
[103] *Id.*
[104] Buente, *supra* note 18 at 86.
[105] *Id.*
[106] *Id.*
[107] Rogers v. Runfola & Associates, Inc., 565 N. E. 2d. 540 (Ohio 1991).
[108] *Id.*
[109] *Id.* at 541.
[110] *Id.* at 541.

Runfola's business interests.[111] The court modified the scope of the covenant but safeguarded employer's business interests, taking into consideration its investment in human capital.[112] That is, the agreement was enforced for a period of one year, as well as also prohibit solicitation and competition of Runfola's customers within Columbus.[113] In so deciding, the Court found that the Runfola Company had a "legitimate business justification for the non-compete agreement in the general training it provided the court reporters."[114]

B. THE CALIFORNIA MODEL AND APPROACH

As stated in the introduction, California is a forefront state well known for outlawing non competes in employment contracts, as these clauses for the most part are generally considered void.[115] Under section 16600 of the Professional Business and Professions Code, with limited exceptions, "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."[116] California often said to be the most hostile state to non-competes.[117] However, where the non-compete is necessary to protect trade secrets for example, the non-compete may not be considered invalid. Based on court decisions, California law appears to allow for non-compete in very limited three circumstances, where those agreements are in connection with: (1) the sale of business; (2) dissolution of a partnership, and; (3) termination of a member's business interest in a limited liability company.[118] California court decisions buttress a legislative policy under Section 16600 in favor of completion and employee mobility.[119] In so doing, indicating the legislature espouses a predetermined outcome that the balancing of employer/employee interests in these non-competes clause will more or less tend to be in favor of the employee.[120] It has been stated that the California policy regarding non-compete statute is not rooted in the desire to encourage employee mobility as much as it is rooted in seeking employee autonomy.[121] The state's court repeat this same sentiment in the public policy of section 16600. It states that California has "a strong public policy against

---

[111] *Id*. at 544.; *See* also Buente, *supra* note 18, at 89-90.
[112] *Id*.
[113] *Id*.
[114] *Id*.; *See also* Garrison & Wendt, *supra* note 22 (stating that Runfola played a huge role in the employees' development as successful court reporters. Thus, these employees obtained valuable insights in the business, "much of the training and support undoubtedly inured to the benefit of the employees.").
[115] *See* D'Sa v. Playhut, Inc., 85 Cal. App. 4th 927, 933 (2005) (Stating that California automatically voids all blanket non-compete agreements).
[116] *Id*.
[117] Nicandri, *supra* note 73, at 1011.
[118] Nicandri, *supra* note 73, at 1008. Citing *Dowell v. Biosense Webster Inc*., 102 Cal. Rptr. 3d 1, 8 (Ct. App. 2009) (indicating the three exceptions to Section 16600).
[119] Nicandri, *supra* note 73, at 1009.
[120] *Id.* Showing from the case of *Diodes, Inc. v. Franzen*, 67 Cal. Rpter. 2d. 19, 26 (Ct. App. 1968) (that "the interests of the employee in his own mobility and betterment are deemed paramount to the competitive business interests of the employers, where neither the employee nor his new employer has committed any illegal act accompanying the employment change.").
[121] Bishara, *supra* note 1, at 312.

noncompetition agreements under section 16600" given that that policy "protects Californians, and ensures that "every citizen shall retain the right to pursue any lawful employment and enterprise of their choice," and also protects "the legal right of persons to engage in businesses and occupation of their choosing."[122]

Likewise in California, any employee use of a non-compete falling outside the three stated exceptions, (otherwise known as illegal non-competes), is said to be in violation of the state's completion laws.[123] An employer who is in violation does not only encounters the court's denial to enforce the agreement, but may also be subject to penalties for seeking to enforce a broad non-compete clause.[124] Consequently and as indicated in some recent cases, it is only fair to conclude that covenants not to compete in California are void as matter of law, unless they are covered under the statutory exceptions provided to section 16600.[125]

For example, in the 2008 case of *Edwards v. Arthur Andersen*,[126] where the employee plaintiff challenged the non-compete agreement he had signed with his employer at the time he was hired in 1997. In finding that the non-compete clause was unenforceable, the Supreme Court considered the "narrow restraint" exception, which some federal courts had embraced in their decisions.[127] These federal courts held that non-compete agreements, which lead to only a partial or narrow restraints on the employee's ability to work in his profession were reasonable and enforceable.[128]The Supreme Court rejected this section 16600 purported exception, stating that the public policy behind said section did not allow for such a restraint, regardless of limitation.[129] Therefore, this case makes clear as well as reaffirms the longstanding public policy behind section 16600 and unmistakably rejects non-compete clauses that are crafted in a way to conform to the narrow restraint exception.[130]

Likewise, section 16600 cannot be avoided by choice of law provision in the employment contract, for example, by claiming or select the law of another state to govern the agreement and so do away with the provisions of the California

---

[122] *Id.*

[123] Nicandri, *supra* note 75 at 1009.

[124] *Id.*

[125] *Id.*

[126] Edwards v. Arthur Andersen LLP, 189 P.3d 285, 291-92 (2008).

[127] *California Law on Restrictive Covenants and Trade Secrets*, ON LABOR, https://onlabor.org/wp-content/uploads/2016/05/4_orrick.authcheckdam.pdf (last visited April 12, 2019).

[128] *Id.*

[129] *California Law on Restrictive Covenants and Trade Secrets*, ON LABOR, https://onlabor.org/wp-content/uploads/2016/05/4_orrick.authcheckdam.pdf (last visited April 12, 2019).

[130] *Id.* The Edwards case did not however address the important issue of whether the limited exception extend to trade secrets, that is whether as a narrow exception, employers can use a covenant not to compete as an exception, if the goal is to protect trade secrets. *Id.* Although many courts have suggested the trade secret exception to 16600, the California Court of Appeals in Retirement Group v. Galante, 176, Cal. App. 4th 1226 (Ct. App. 2009) dealt with the issue and held that any such contractual provision is void. However, a limited trade secret exception relating to a former employer's customer list may be recognized. That is, under section 16600, an agreement preventing a former employee from making use of a former employee's customer list for purposes of soliciting business was recognized and enforced in Gordan V. Landou 321 F.2d 456 (9th Cir.1958). In spite of this, most agreements not to so compete is unenforceable. *See* Garrison & Wendt, *supra* note 22, at 121.

section.[131] The strict application against the choice of law provision to avoid the California rule even if inadvertently is demonstrated by the case of *Application Group Inc. v. Hunter Group Inc.*[132] The Court of Appeals in California refused to validate and enforce an out of state non-compete agreement signed by an employee who accepted a new job in California.[133] That is the court in California invalidated a non-compete agreement, which is otherwise valid in the state in which it is made, but the employee was to move to California to take up the new job. The issue was whether California law may be applied to determine the enforceability of a covenant not to compete in an employment contract between an employee who is not a resident of California and an employer whose business is based in the outskirts of California, when a California based employer seeks to hire the nonresident for employment in California. The court in reinforcing its public policy rationale of ensuring every citizen retain the right to pursue any lawful employment of their choice, stated that there is no evidence that Pike attempted to exploit Hunter's trade secrets or other protected information about its customers.[134]

In essence, California does not enforce choice of law provisions, in the case of non-compete clauses, meaning that as long as the employee is working in California, the non-compete clause will not be enforced.[135] Even companies that are based in California and hire workers outside of the state are not allowed non-compete clauses in their employee contracts.[136] Therefore, California helps trade and competition within its borders with not only a policy that values human capital and its mobility but also the readiness to provide a safe haven to employees who have signed non-compete elsewhere.[137]

C. MODERN APPROACHES TO ENFORCEMENT OF NON-COMPETES IN AN EVOLVING MARKET

Traditionally, non-compete agreements were quite protective of the employer by maintaining and protecting free competition and employee's mobility

---

[131] *Id*.

[132] *Application Group, Inc. v. Hunter Group, Inc*., 61 Cal. App. 4th 881 (Ct. App. 1998). Application Group Inc., (AGI), is a Maryland corporation that has computer consulting services for businesses that use human resource software. *supra* at 884 Hunter has a branch in San Francisco, California. AGI and other California based software companies are Hunter's immediate competitors. The Hunter employees that worked in California did not sign non-compete clauses, however all non-California employees did sign them. AGI, *supra* at 886. AGI is a California corporation that provides customers computer consultant. Pike was an employee of Hunter for 16 months. *supra* at 887. Pike never had any business contact in California but was sued when she resigned from Hunter to go work for AGI *Id.* Hunter's non-compete stated: "for a period of one year after the date of its termination. Pike agrees that she will not render, directly or indirectly, any services of an advisory or consulting nature, whether as an employee or otherwise, to any business which is a competitor of Hunter.

[133] *Id*.

[134] Application Group, Inc. v. Hunter Group, Inc., 61 Cal. App. 4th 881, 902 (Ct. App. 1998) (The California court also reasoned that California has a greater interest than Maryland in the application of its law and that interest would be more impaired if Maryland policy was enforced.).

[135] Enterprise Counsel Group, *The Legal California Non-Compete Agreement*, Sept. 30, 2016.

[136] *Id*.

[137] On Amir & Orly Lobel, 16 STANFORD, REV. 833 at 860 (2013).

for the interest of society.[138] Regardless of whether one is using the common law reasonableness standard or the restraint of trade statutes, employers were expected to meet the threshold standard that would defend the employee non-compete agreement.[139] Overtime, less demanding approaches to non-compete agreements has been employed with states adjusting to less stringent standards.[140] States have statutes that relaxed the old common law strict rules and accepting of non-compete agreements that would otherwise be unreasonable and unacceptable under the customary common law rules.[141] This approach often referred to as the modern approach, is more in favor to the interests of the worker and less in favor of the interests of the employer's interest, especially regarding mobility.[142] The courts have done so for example, by widening the permissible scope of employee non-compete agreements by relaxing the common law reasonable standard. Thus, it is not unusual to find some courts acceptable of restrictive covenants of up to five years.[143] In this new approach, courts have accepted non-competes covenants that goes beyond contacts with whom the employee may have had contacts with.[144] In this same vein, non-compete covenants that were seen as simply designed to prevent the employee from working even for a business not in competition with the previous employer are not enforceable.[145]

In the state of Ohio, the initial strict adherence to the common law reasonable standards have been relaxed as seen in the cases of *Raimonde v. Van Vlerah*, a case which started with a permissive method to worker's non-compete agreements, by departing from the blue pencil rule and embracing court modification of non competes, is itself a modern approach.[146] In the same vein, the outcome of the *Runfola* case discussed above, in that the court enforced the non-compete agreement for one year, while barring competition and solicitation. Therefore, in so doing, the court is saying that it finds "a legitimate business justification for the non-compete agreements in the general training provided for the court reporters." However, under the common law reasonable standard, this sort of generalized skill and training would not pass muster, as it would not have been considered enough to meet the after employment restraint.[147] Consequently, *Runfola* would appear to enlarge the business interests that employers can seek to protect under non-compete agreements.[148] The joint effect of these two cases are said to liberalize the law of non-compete in employment in Ohio[149] and, therefore, a modern trend.

---

[138]. Garrison & Wendt, *supra*, at 122.
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id. See* the case of Dobbins, DeGuise & Tucker v. Rutherford, 708 P. 2d. 577, 580 (Mont) 1985.
[144] *Id.*
[145] *Id.*
[146] Garrison & Wendt, The Evolving Law of Employee Noncompete Agreements, *supra* at 125
[147] Garrison & Wendt, The Evolving Law of Employee Noncompete Agreements, *supra* at 126.
[148] Garrison & Wendt, The Evolving Law of Employee Noncompete Agreements, *supra* at 127.
[149] *Id.*

In the field of employee education and training, courts tend to be protective of the employer who has spent time and money on employee education and training that are extraordinary or deals with specialized training thereby giving that employee enhanced and sophistication in his current skill. It therefore seems unfair for that employer to allow that employee to use those improved skills to benefit a competitor, more so after contracting not to do so.[150] The state of Colorado has dealt with the issue of employer's interest in employees training expenses statutorily. The law allows for the employer to recover expense of educating and training the employee who has worked for the employer for less than two years.[151]However, this law has not deterred some courts from employing an expansive employer interest by extending to generalized training as well as to employees who have not shown to specialize or acquire unique skills.[152] Consequently, it is a departure from the common law standard to recognize employer investment in a generalized employee training as legitimate interests.[153]

Another evolving trend already mentioned briefly above, is the movement by many states from the blue pencil doctrine to reformation, which simply means the court is empowered to change or modify over broad non-compete agreements in order to make them enforceable as reformed.[154] The reformation approach has been applauded by some scholars because it gives the courts the discretion to write the non-compete agreement in a reasonable manner reflective of the parties' general intent.[155] In following this approach, the courts are mindful of employer overreaching. Reformation where employers have intentionally drafted unreasonable or overbroad non-compete provisions with the expectation that the court would reform such a provision without any penalty against the employer is often met with the good faith requirement scrutiny before reformation and enforcement is upheld.[156] Consequently, if a court finds the employer acted in bad faith or deliberately drafted an overbroad non-compete, the court may refuse to reform and enforce the agreement.[157] A court may also refuse to reform the agreement if it finds the covenant "so lacking in essential terms which would protect the employee" such that the court is no longer modifying but rewriting the

---

[150] Garrison & Wendt, The Evolving Law of Employee Noncompete Agreements, *supra*, at 128, citing *Hapney v. Cent. Garage Inc.*, 579 SO. 2d. 127, 132 (Fla. App. 1991).

[151] Garrison & Wendt, The Evolving Law of Employee Noncompete Agreements, *supra*, at 129; *see also* Rev. Stat. Ann. S 8-2-113 (2) C (West 2003).

[152] *Id.*

[153] *Id.* The case of Borg-Warner Protective Services, Corp. v. Guardsmark, Inc., 946 F.Supp. 495 (E. D. Ky. 1996). Where the court enforced a non-compete agreement relating to security guards. Another rival company employed these security guards. The court in upholding the covenant stated that the former employer of the security guards had a legitimate interest in the two week, on the job training and education in the "culture of the client's firm and clients own security personnel." Id.

[154] Garrison & Wendt, The Evolving Law of Employee Noncompete Agreements, *supra*, at 130.

[155] *Id.*

[156] Michael Garrison & John Wendt, Employee Non-competes and Consideration: A Proposed Good Faith Standard for the "Afterthought" Agreement, 64 U. Kan. L. Rev. 409, 456 (2015).

[157] *Id.* this is consistent with the view of the Restatement First of contracts, §§ 513–15, Amer Law. Institute 1932.

covenant.[158] The good faith standard used in evaluating whether to reform an agreement is exemplified in the case of *Merrimack Valley Wood Products, Inc. v. Near*.[159] A former employee and sales person was constrained under his non-compete clause from selling to any client of his former employer for a period of one year of his employment termination. The employee was never informed that he would sign a non-compete agreement until six months into his employment when he was asked to sign it and told his continued employment was contingent upon him signing the agreement.[160] Also, the agreement was considered overbroad given that out of the employer's 1200 clients, the employee solicited only sixty of them.[161] The court refused the reformation of the covenant because the employer acted in bad faith when he rather coerced the employee into signing the overbroad non-compete after he was already working for him[162]. The court found bad faith in the manner in which the employer obtained the overbroad non-compete agreement.[163] That is, the employee really had no choice than to consent to signing the agreement at that time.

In looking at the shifting trend and policy to non-compete agreements today, one cannot undermine the changing employer/employment relationship especially in light of the information age and the economy.[164] As commented by scholars and management, this relationship has shifted from the old-style long-term employment relationship characterized in the industrial age. In that traditional long-term relationship, employee long-term commitment to the employer and concomitantly, employee growth and advancement and job stability somewhat of inherent in the relationship.[165] This was a business relationship that was sustainable as it not only promoted long term business planning but also businesses were encouraged to invest in their employees in training.[166] As such, there was inherent in this relationship an "implied quid pro quo, with employers guaranteeing employment and the potential for advancement within the firm in exchange for employee loyalty and commitment."[167] This established relationship referred to by Garrison and Wendt as a "psychological contract", which is mutually beneficial to both employee and employer.[168] The employer was going to be promoted and enjoy career growth, as employee is loyal to the employer. In the same vein, the employer reaps the fruits of employee labor through enhanced productivity, profits, and business growth.[169]

---

[158] Garrison & Wendt, Employee Non-competes and Consideration, *supra* note 155, at 458–59.

[159] *Merrimack Valley Wood Products, Inc. v. Near*, 876 A.2d 757 (2005). *See* also the case of *Freiburger v. J-U-B Engineers*, Inc. 111 P.3d 100 (Idaho 2005).

[160] Merrimack Valley Wood Products v. Near, 876 A.2d at 760.

[161] *Id.* at 763.

[162] *Id.* at 761.

[163] *Id.* at 765.

[164] Garrison & Wendt, *supra* note 20, at 164.

[165] Garrison & Wendt, *supra* note 20, at 165.

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] Authors statements.

On the other hand, in the contemporary employment relationship, external market forces are said to substitute the internal labor force of the industrial age as it is instead characterized by "employee mobility, lack of job security and limited loyalty by either employees or employers."[170] As a result, the employer in this environment would want to survive by being very competitive, and this competitiveness is sometimes not only in their local markets but also may be impacted by global trends.[171] Thus, such an employer would want to remain competitive by being astute and flexible in responding to rapid changes, strategies and plans. Thus, where profitability is less than optimal for example, the employer is invariable faced with cost cutting measures which may include layoffs resulting to employees' job insecurity as a trend.

This contemporary relationship is fraught with uncertainty and flexibility than was the case in the industrial tradition.[172] Under this relationship, the psychological contract demonstrates this new practicality of the work environment.[173] Therefore under this atmosphere, and the "new implicit quid pro quo, employers do not make a long term commitment and employment and job security in exchange for the loyalty of the employee."[174] The employer if at all makes any implied promise, it is that the employee would become more competitive in the market because of acquiring skills and experiences from being employed.[175] Thus "employability, not employment is what the employer implicitly offers in exchange for the employee's efforts and productivity."[176] Based on this new relationship, one could strongly argue in favor of the employee to have and be allowed "broad rights to acquire retain and deploy their human capital" per the new psychological contract, where employability and not employment is the offer by the employer.[177] The logical conclusion would therefore be that non-compete agreements would no longer be necessary under this new psychological contract.[178] That is, because of employee mobility in this new contractual relationship, non-compete agreements appear to be cumbersome, if employees are not allowed to take along to their new employers, the acquired skills.[179]

D. LAW AND ECONOMY APPROACH TO NON-COMPETE AGREEMENTS

From a macroeconomic perspective, post non-compete agreements were heralded as necessary and essential to protect the employer's investment in the

---

[170] Garrison & Wendt, *supra* note 22, at 166.
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] Garrison & Wendt, *supra* note 22, at 166.
[176] Garrison & Wendt, *supra* note 22, at 167.
[177] *Id.*
[178] However, as discussed under the pro and cons of non-compete above, it has been argued that employee non-compete agreements is relevant to protect employer's investment in employees. Other scholars have stated this differently by saying that theses restrictive covenants are scrutinized even more so as the U.S economy moves away from manufacturing to a knowledge-based market; See, J.J Prescott, Norman D. Bishara & Evan Scott, Understanding Non-Competition Agreements: The 2014 Non-Compete Project, 2016 MICH. ST. L. REV. 369 *(2016)* at 380.
[179] Nicandri, *supra*, note 75, at 1013.

employee as well as the company's knowledge or trade secrets.[180] That by guarding trade secrets through these agreements, research and development was encouraged and thus innovation.[181] And, since these agreements also invariably prevent unfair competition, they are important for the adequate running of an efficient market.[182] These assumptions have been questioned by scholars, many of whom believes that the employee needs more legal protections for its human capital than as it exists under the common law.[183]

Economists and scholars instead stipulated that innovation and entrepreneurial activities increase where there are laws in place restricting employee non-competes. In addition, the success of the IT companies in Silicon Valley, California is often tooted as an example and model to be followed. The success has been largely credited to the high employee mobility, which also results in information sharing, which in turn ushered in new capital ventures in the area.[184] Professor Ronald Gilson, a prominent scholar in this field stated in his article that: Silicon Valley's legal infrastructure, in the form of Business and Professional Code's 16600's prohibition of covenants not to compete, provided a pole around which Silicon's characteristics business culture and structure precipitated."[185]

Although non-competes have been challenged recently in a number of states, with some states actually introducing legislation to limit its applicability,[186] the policy debate in some states is still prevalent. Massachusetts for example, in emulating California IT sector, passed legislation that renders non-compete agreements void and unenforceable.[187] The question is: Why do we not hear of Massachusetts's prominence in the same way we hear of Silicon Valley's? Professor Ronald Gilson in comparing the two High tech economies of Massachusetts' Route 128 and Silicon Valley, posited that the difference in the enforcement of the non-compete agreements in the two regions accounts for the distinct elevation of Silicon Valley.[188] That is, Gilson posits, the animosity in the state towards non-competes agreements because of the culture of free mobility resulted in an entrenched economic growth[189]. Professor Gilson also claims that the states approach to enforcement may also be an attributable factor in the difference, as Massachusetts follows the common law reasonable standard approach, which allows for enforcement under certain situations, while California out rightly bans almost all non-competes agreements[190]. To the extent that this is indeed outcome determinative, then there is some supportable argument to be made that limiting

---

[180] Garrison & Wendt, *supra* note 22, at 418.
[181] *Id.*
[182] *Id.*
[183] *Id.* at 419.
[184] *Id.*
[185] *Id.*, citing Ronald Gilson, *The Legal Infrastructure of High Technology Industrial District: Silicon Valley, Route 128 and Covenant Not to Compete*, 74 N.Y.U. L. REV. 575, 578 (1999).
[186] In 2015, Hawaii passed a law eliminating non-competes for High Tech workers. *See* HB. 1090, 28th Leg. Reg. Sess. (Haw. 2015), https://legiscan.com/HI/bill/HB623/2015.
[187] Garrison & Wendt, *supra* note 22 at 420.
[188] Prescott, Bishara and Starr, *supra* note 36 at 381.
[189] Garrison & Wendt, *supra* note 22 at 171.
[190] *Id.*

these non-compete employment agreements may actually foster growth and technological innovations.[191] A 2004 empirical study in Silicon Valley and other places seems to confirm Gilson's conclusion, as the study revealed evidence that Silicon Valley employees in the information technology were shown to have higher rates of finding other jobs than those employees from other cities.[192] Scholars who criticized Professor Gilson included Prescott, Bishara, and Starr,[193] arguing that his explanation for the difference between the two states "relied on the perception that high tech workers in Silicon Valley were more mobile was theoretical but intuitively attractive."[194]

Another law and economic approach on analyzing non-competes clauses posits that non-competes enforcement results in wages staying down and executive stability.[195] Nevertheless, as much as human capital investment in managers is promoted in this atmosphere, the downside is that self-investment in human capital by the employee is undermined, especially given that employees are not going to invest in their own human capital because of the non-compete agreements.[196]

E. TRADE SECRETS AND NON-COMPETE AGREEMENTS

Although there is nothing improper per se with employers protecting business trade secrets by using employee covenant not to compete, courts tend to be hesitant to enforce the agreement, where the employee does not appear to have access to trade secrets or confidential information.[197] The reluctance of the court to do so is to avoid unlawful restraint of trade.[198] However, even where the employer has entered into a non-compete agreement to protect trade secrets or prevent the former employee from disclosure of such secrets and/ or limit the employee's desire to open a competing business or start one himself, this protection is only prophylactic at best.[199] This is so because this non-compete agreement is likely insufficient to protect the former employer, even where there is an added protection under state statutes and the Uniform Trade Secret Act ("UTSA"), which makes available injunctive relief for actual or threatened misappropriation of trade secrets.[200] That is, by the time the former employer invokes the tenets of the non-compete or get injunctive relief under state law or the UTSA as applicable, it may be too late, as the misappropriation of the

---

[191] *Id.*
[192] *Id.*
[193] *See* Prescott, Bishara and Starr, *supra* note 22 at 381.
[194] *Id.* (The authors discussed other empirical studies that have been done in the area of non-competes and the possible flaws as well as the survey they themselves carried out and were writing about in this current article. See generally the entire article.)
[195] Bishara, *supra* note 1, at 765, citing Mark J. Garmaise, *Ties that Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment*, 27 J.L. ECON. & ORG. 376 (2011).
[196] *Id.*
[197] Fink, *supra* note 19, at 9.
[198] *Id.*
[199] *Id.* at 9 – 10.
[200] *Id.* at 10.

information may have already taken place and possibly the ensuing damage.[201] Scholars have argued that the use of such non-compete agreements as a tool for the prevention and misappropriation of trade secrets is not effective.[202]

This employee misappropriation of trade secrets or confidential information by a former employee often referred to as the inevitable disclosure doctrine defined as the "legal theory that a key employee, once hired by a competitor, cannot avoid misappropriating the former employer's trade secrets."[203] Based on this doctrine, a court can prevent by injunction, "a former employee from working for a competitor of the employer to prevent an imminent threat of trade secret misappropriation."[204] Under this doctrine, there does not have to be an employee non-compete agreement, or an actual misappropriation of trade secret for the doctrine to kick in.[205] A court would usually invoke the doctrine where an employee is in possession of technical "specialized and highly valuable trade secrets" and the court want to stop a competitor from unlawfully securing that protected and valuable knowledge by hiring that employee.[206] Under the common law, the doctrine, which was in existence prior to the UTSA and was developed in a number of cases,[207] was more restrictive, and intended to simply prevent "imminent threat of a trade secret disclosure" which was disastrous for unfair competition.[208]

However, in the case of *PepsiCo*[209] the Seventh Circuit expanded the common law standard as it developed a new form of the inevitable disclosure doctrine under the UTSA.[210] In it, the court changes the focus and the elements of the doctrine in this case.[211] The case rises in the context of the soda wars of the

---

[201] *Id.* (The reason for stating that some employers use these non-competes as a prophylactic because the former employer is using it as an extra protection against the misappropriation of its business trade secrets in the first place and then having to respond to the harm caused thereafter.)
[202] *Id.* at 10 – 11 (stating that when used as a prophylactic tends to be generally overbroad and not measured to only the trade secret in disclosure in question; that such non-competes entails the risk of over deterrence; the non-compete could be overbroad with the employer anticipating a reformation or modification, which invariably means the non-compete will not be invalidated).
[203] Garrison & Wendt, *supra* note 22, at n. 233 at 149.
[204] *Id.* at 149.
[205] *Id.*
[206] *Id.*
[207] *See E.I. Dupont de Nemours & Co. v. American Potash & Chemical Corp.*, 200 A. 2d.428 (Del. CH. 1964).; *Allis- Charmers Manufacturing Company v. Continental Aviation and Engineering Corporation*, 255 F. Supp. 645 (E.D. Mich. 1966).
[208] Garrison & Wendt, *The Evolving Law of Employee Noncompete Agreements*, *supra* note 22, at 149.
[209] *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1270 – 71 (7th Cir. 1995).
[210] Garrison & Wendt, *supra* note 22, at 155. ("Under the common law the elements of the inevitable disclosure doctrines are;" 1) the existence of valuable, technical and specialized trade secrets that gives the former employer a strong position in the market, 2) the hiring away of employees with knowledge of those trade secrets in an attempt by a competitor to improperly secure that technology; and 3) employment of the former employee in a position where it would be impossible for the employee to perform without using the trade secret information.")
[211] *Id.* (The core Pepsi factors for using the doctrine was based on the following factors: 1) the degree of competition between the new and former employers, 2) the closeness between the employer's old and new employers, and 3) the extensiveness of the former employee's knowledge of technical or managerial trade secrets.)

nineties, which resulted in two forefront companies. Quaker Oats being popularly known for its Gatorade brand along with the Snapple fruit drink, while PepsiCo, a competitor and rival also joined the market with its all sports brand in 1994. [212] In order to increase its market share, PepsiCo went into a joint venture with Ocean Spray Cranberry and Thomas Lipton company in 1995. Mr. William Redmond who worked for PepsiCo as a high-level executive apparently accepted a similar position in Quaker Oats.[213] Because Redmond had taken part in planning and orchestrating PepsiCo's marketing and strategies for 1995, the likes of which involved "sensitive information on pricing and attack plans for specific markets," PepsiCo brought suit against Redmond and Quaker Oats. The law suit claimed an imminent threat of trade secret misappropriation.[214] The district court prohibited Redmond from taking up the position with Quaker Oats for six months, which was a noncompete period essential to protect PepsiCo's trade secret and strategic plan for 1995.[215] The court upon a review of the Illinois Trade Secret Act and case law stated that "a plaintiff may prove a claim of trade secret misappropriation by demonstrating that the defendant's new employment will inevitably lead him to rely on the plaintiff's trade secrets."[216] Although many courts have embraced the inevitable disclosure doctrine as in PepsiCo, they have done so in different ways, yet the doctrine remains the majority rule with courts using for the most part the rules of the inevitable disclosure doctrine and legal reasoning.[217]

CONCLUSION

This article has shown the complexities of the laws on non-compete agreements and how there is no one size fits all solution. The law varies from state to state, with only a handful of the states completely prohibiting non-compete agreements between the employer and employee, and with California being the most prominent of these few states.[218] However, all states agree that there should be protection of a business interest like trade secrets, confidential information but the states are not in unison as to what those interests should be.[219]

One of the main issues in these non-competes agreements revolves around the control of human capital. Human capital 'refers to the acquired skills, knowledge, and abilities of human beings.[220] "Underlying the concept is the notion that such skills and knowledge increase human productivity, and that they do so

---

[212] *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1264 (7th Cir. 1995).
[213] *Id.*
[214] *Id.*
[215] *Id.* at 1267.
[216] *Id.* at 1269.
[217] *Id.* at 152, 156.
[218] Other states include Oregon, Colorado, and North Dakota.
[219] Prescott, Bishara and Starr, *supra* note 36, at 457.
[220] Bishara, *Covenants Not to Compete in Knowledge Economy: Balancing Innovation from Employee Mobility against Legal Protection for Human Capital Investment*, *supra* at 300, Lester M. Salamon, *Why Human Capital? Why Now?* in *Human Capital and America's Future: An Economic Strategy for the '90's* 3 (David W. Hornbeck & Lester M. Salamon eds., 1991)..

enough to justify the costs incurred in acquiring them. It is in this sense that expenditures on improving human capabilities can be thought of as investment.'[221]

Thus, in legislating and enforcing these non-compete agreements, one must strike the right balance between promoting investment in human capital, research and development, and encouraging the productive use of the acquired investment.[222] The evolving contemporary employment relationship between the employer and employee demonstrates how states and policy makers should evaluate non-competes agreements and its effects; adapt to the changing landscape of the labor market today in light of employee mobility.[223] As stated previously,[224] "employability, not employment is what the employer implicitly offers in exchange for the employee's efforts and productivity."[225] That is, because of employee mobility in this new contractual relationship, non-compete agreements appear to be cumbersome, if employees are not allowed to take along to their new employers, the acquired skills.[226] This is even more precarious in an environment with constantly evolving technology. It may be more difficult to determine a company's geographic scope if for example, the business is one that operates and offer its services on the internet, which may span into markets beyond its local physical boundary. In the same vein, it could be difficult to access proper time limitation for the scope of the non-competing agreement, regardless of the test that may be employed.[227] New businesses and therefore entrepreneurship can mostly multiply and thrive if such challenges are thoughtfully addressed by the courts, states and policy makers.

However, "[o]ne thing is certain, that regardless on which side of the con or pro debate one is on regarding non-competes, 'every company benefits from being able to hire talented employees and enjoy other companies, knowledge spillovers, but at the same time every company also wants to prevent its own employees from leaving and taking their training and knowledge with them."[228]

---

[221] *Id.*
[222] Amir & Lobel, *supra* note 5, at 836.
[223] *Id.* at 864.
[224] *See* Section IV: Modern Approaches to Enforcement of Non-Competes in an Evolving Market.
[225] Garrison & Wendt, *supra* note 22, at 166 - 67.
[226] *Id.* at 168.
[227] Buente, *supra* note 18, at 93 - 4.
[228] *Id.*