The Evolution of Employee Restrictive Covenant Legislation

Norman D. Bishara*

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PAPER OUTLINE

INTRODUCTION

For some time business law and management scholars have observed changes to the nature of the traditional American employer-employee relationship.[1] This shift coincides with sometimes disruptive macroeconomic trends, including globalization, a move away from manufacturing-based to a service-based economy,[2] and the increased speed of technological innovations throughout the workplace.[3] The pressure that these trends place on the relationship between employers and employees in the United States manifests itself in a variety of ways, ranging from disputes over ownership of intellectual property, access to benefits and training, and a demise of the long-term employment relationship that has been exchanged for a series of shorter and flexible employment arrangements.

In the last decade or so, this changing relationship has been described in terms of a New Psychological Contract, under which many employees have been forced to trade job stability and reciprocal loyalty with their employer for more flexible arrangements.[4] This newly evolving reciprocal relationship, however, has not lived up to its potential in many cases as employers seek to maximize their power at the expense of various employee freedoms. The traditional employer-employee relationship is often strained at times when employers seek to restrict their employees from using information and knowledge *after* the employment relationship has ended.[5]

This paper focuses on public policy implications of the legal restrictions, particularly achieved by contract between the parties, which employers are increasingly imposing on employees and the growing body of legislation defining the boundaries of these restrictions. In most jurisdictions the state's common law governs the use and limits of these contracts, generally using a reasonableness-based balancing test.[6] This form of judicial regulation has been studied by legal researchers in the last ten years with a focus on covenants not to compete (also called non-competition agreements or, simply, noncompetes) and yielding an increased understanding of how these restrictive covenants are used in practice by employers.[7] There has also been harsh criticism of the public policy choice of allowing noncompetes or default protections for employers such as the doctrine of inevitable disclosure.[8] Nonetheless in recent years other research has concluded that there is a trend toward more noncompete enforcement by states, not less.

While business law researchers have actively analyzed noncompetes and other post-employment restrictions on competition, such as inevitable disclosure and, more recently, garden leave, there has been less focus on the public policy goals of states as articulated by policy makers. There have also been attempts by management scholars and economists to examine the effects of the presence of these sorts of competitive restrictions empirically.[9] Specifically, there has not been much attention paid to the way states through their elected policy makers are envisioning a cohesive post-employment restrictions policy. These policy goals can be reflected in the common law and filtered by the courts, however the states are increasingly resorting to legislation to bring greater consistency to interpreting restrictive covenants. Moreover, as this paper will discuss, there is not a unified approach to legislation regulating the use of restrictive employment covenants across the United States, thus suggesting an area of the law that is unsettled and possibly subject to opportunistic attempts from various sectors to influence knowledge management and public policy choices with implications for business advantage and employee freedom. The challenge for policy makers is to craft solutions that guard against both employer overreaching by

abusive contracting and employee or competitor usurpation of that same employer's knowledge assets or other legitimate interests.

This paper identifies, reviews, and analyzes the current legislative approaches to restrictive post-employment covenants, with a focus on the treatment of covenants not to compete, before providing normative recommendations aimed at synthesizing public policy goals related to employee protections and business realities across jurisdictions. Thus, the paper addresses a fundamental question about how states do – and should – approach issues of balancing employee freedom of choice and mobility against an employer's legitimate interests in protecting knowledge ownership. First, I discuss some of the policy concerns and business goals and how those aims may be in conflict when employee freedom and employer property assertions collide, particularly over knowledge ownership. Next, in Part II, I briefly review the legal rules related to post-employment restrictions on employee competition before examining the modern statutory approaches to restrictive covenants and emerging proposals for new forms of legislation. Part II concludes with a typology of the extant and proposed legislative approaches. Part III comprises a public policy analysis of the various approaches and presents suggestions for reform in light of a state's public policy goals as balanced against protecting employee freedom and addressing legitimate employer knowledge ownership concerns related to competitive advantage. A brief Conclusion follows.

I. POLICY CONCERNS AND BUSINESS GOALS OF POST-EMPLOYMENT MOBILITY RESTRICTIONS

As is often the case, public policy concerns over employee freedoms can be in conflict with practical business concerns, including the area of management theory known as competitive advantage. These tensions illustrate issues of the boundary of the firm and have implications for how employers should treat their employees in an ethical manner.[10] This Part first addresses the changes to the employer-employee relationship underway in the last few decades and discusses the public policy challenge of both protecting employee freedom of choice and employer property rights in the context an approach to allowing restrictive covenants.

A. THE EVOLVING NATURE OF THE EMPLOYER-EMPLOYEE RELATIONSHIP

In the last decade academics have pointed to changes in the relationship between employers and employees in the United States. In particular, the new relationship has been called a new psychological contract between these parties that is a departure from earlier social contracts marked by long-term employment and training in exchange for employee loyalty.[11] In this new era, the contract has changed in line with pressures for more employee mobility and, thus, shorter and more numerous employment relationships. As Professors Garrison and Wendt describe it:

> The new employment relationship is more uncertain and flexible than the industrial model. A new psychological contract is emerging that reflects the realities of the new workplace. Under the new implicit *quid pro quo*, employers do not make a long-term commitment of employment and job security in exchange for the loyalty of the employee. Rather, if the employer makes any implied commitment at all, it is that employment will provide employees with the skills and experiences necessary to make them competitive in the market. Employability, not employment, is what the employer implicitly offers in exchange for the employee's efforts and productivity.[12]

These changes to the so-called psychological contract between employers and workers have occurred within the context of a seemingly irreversible trend in the United States away from a manufacturing-based economy and toward a services-oriented one. This is also a departure from an older paradigm of long-term employment, and the mutual loyalty of the parties has been replaced by shorter term and more flexible legal arrangements and outsourcing, which often favor the employer.[13] In this new dynamic the formerly strong and predictable bonds of employer-employee loyalty are weakened and modern employees feel greater freedom to have increased job mobility, perhaps at the expense of the employer's competitive advantage rooted in employee knowledge and skills.[14]

The economy in which these newly evolving employer-employee relationships are maturing is also based on changes in technology and globalization.[15] Moreover, these trends force policy makers to confront the fallout from this new dynamic because the U.S. is in transition "from being a country that was dominated by internal labor markets with corporate administrative rules and expectations of long-term employment to one which is governed by an international spot market for labor raises a host of issues for our national labor policies and labor and employment law."[16] There are also examples of globalization's impact on the employment relationship and restrictive covenants now that workers are more easily moving around the globe for career opportunities at competing firms.[17]

The strategic desire of employers to restrict the post-employment mobility of their workers is also heightened in the knowledge economy where the intellectual assets of workers are a source of sustainable competitive advantage. Thus, these private constraints can have broader societal impacts such as access to unique professional services and innovation that are often ignored by commentators, the courts, and policy makers. The conflicting goals of allowing employee mobility while respecting employer investments in training and knowledge creation is discussed in the next section.

B. Conflicting Public Policy and Business Goals: Employee Rights v. Employer Knowledge Protection

Legal restrictions on post-employment competition of departing employees or the fact that they are controversial are not new. Rather, their legitimacy has been disputed for centuries.[18] However, in the last decade there has been a resurgence of interest in post-employment competitive restrictions from both academic researchers and policymakers. For researchers, the discussion has been framed by debates over the role, if any, of contractual restrictions such as covenants not to compete in influencing labor mobility and possible related spillovers.

In particular the resurgence in noncompetes can be attributed, at least in part, to a 1999 article by Professor Ronald Gilson that addresses the agglomeration economy of Silicon Valley and its legal infrastructure.[19] Therein Gilson argues that part of Silicon Valley's enviable high-tech economy is due to California's long-standing ban on employee noncompete agreements and the ease of mobility and knowledge transfer facilitated by the ban.[20]

This general thesis – that noncompetes restrict worker mobility and have other negative spillovers such as dampening innovation and other markers of economic growth – has been addressed by various economics and management studies, often concluding that the presence of noncompetes can influence such consequences.[21] These studies typically focus on a specific independent variable, such as innovation, patent generation, or new start-up creation in jurisdictions that do and do not allow noncompete enforcement. Generally the articles in this vein conclude that the presence of noncompete enforcement in a jurisdiction does negatively impact these variables and has led to reflexive conclusions that noncompetes should be banned.[22]

Another stream of research that is critical of restrictive covenants, again mostly focused on non-compete agreements, can be categorized as an employee rights approach. Professor Katherine Stone has pointed out that under the new psychological contract, employers still tend to overreach and not keep up their part of the bargain by using noncompete agreements.[23] Others have discussed how, particularly in a struggling national economy, noncompetes can be unfair to employees.[24]

Arguments that temper criticism of restrictive employee covenants come from several perspectives. Law and Economics researchers have evaluated noncompetes, for instance, and suggested that a model of costless renegotiation of a restrictive covenant will allow for the parties to reach optimal outcomes.[25] This works follows on arguments from Professors Peter Shedd and Paul Rubin that noncompetes can be useful tools for ensuring an employer's incentive to invest in employee human capital without the fear of immediate expropriation by the employee or a competitor.[26] As for noncompetes, employers use them for both property protection and business competitive advantage, as well as for strategic purposes.[27]

Some researchers have argued that restrictive covenant enforcement can be used optimally to foster human capital investments in certain types of workers[28] or that courts should consider the knowledge ownership rights of employers and employees within a resource-based view of the firm.[29] Professor Cynthia Estlund has also argued that non-compete covenants and arbitration agreements are legitimate examples of hybrid employment law by which some default employee protections and rights can be conditionally waived by contract.[30] Additionally, part of this argument is that employers also have business concerns that can supersede employee rights if those concerns actually legitimate interests properly bargained for under the law.[31]

II. The Law of Post-Employment Competition Restrictions by Contract

Despite much commentary and skepticism of restrictive covenants by academics and commentators, most states do allow some level of moderate enforcement of noncompete agreements.[32] These contracts have been traditionally viewed with great suspicion because they, on their face, restrict competition and can impinge employee freedom of occupational choice.[33] Yet, there remains much discrepancy across the United States on how to best interpret these agreements.[34] In this Part the various legal approaches to enforcing or limiting restrictive covenants is discussed.

A. The Traditional Common Law Approach and New Developments in Limiting Post-Employment Competition

There are several ways employers seek to restrict their former employees from competing against them after the employment relationship is terminated. The law related to an employers' protection of knowledge through limiting the theft of trade secrets is an important default option when trade secrets are at issue. While trade secret protections are often acknowledged in confidentiality agreements and non-compete agreements, they are regulated through a standalone area of law and, thus, will not be discussed at length in this paper. The three main mechanisms for limiting an employee's post-employment competitive activities that are discussed in this Part are the covenant not to compete, the doctrine of inevitable disclosure, and the relatively new contractual option called garden leave.

The majority of United States jurisdictions will enforce noncompetes to some extent, although two states, California and North Dakota, have what are considered near total bans on employee non-compete agreements.[35] Of the forty-nine of fifty-one U.S. jurisdictions that will enforce noncompetes, most states will use some version of a reasonableness test in their courts, although some jurisdictions have enacted legislation on the subject as well.[36] Those statutes are discussed in detail below, but at this point it will be useful to explain how the common law reasonable test functions. The generally-used reasonableness standard holds that a restraint will be upheld if it is simultaneously "(1) …no greater than is required for the

protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public."[37] Functionally, noncompete agreements limit the post-termination, often including a termination for any reason, actions of employees by restricting the departing employee from working for a competitor or starting a competing business within a certain geographic area or for a specified period of time. In addition, many noncompetes contain prohibitions on the former employee from soliciting his or her former coworkers to leave the employer or for the use of customer contacts.

A concept that has arisen in the common law in just a few states is the doctrine of inevitable disclosure.[38] The doctrine is essentially an argument from a former employer that, even in the absence of a noncompete agreement among the parties, a court should enjoin the departing employee from going to a competitor. The essence of the argument is that the mere confidential knowledge held in the mind of the employee will inevitably be used, even unintentionally, to compete against the former employer. When trade secrets are at stake, an injunction based on this doctrine could theoretically be in place indefinitely so long as there is a verifiable trade secret kept by the employer. The harshness and default nature of inevitable disclosure has led to it being criticized on both legal soundness[39] and ethical grounds.[40] While this is a rarely used and much critiqued doctrine, it is worth mentioning here since it has the same effect of limiting employee mobility and career choice as a noncompete and because it is an extension of trade secret protections.

Garden leave is a more recently emerging concept that, like a noncompete agreement, is contained in an explicit agreement between and employer and an employee.[41] The idea, first used in Britain as an alternative to a noncompete, essentially provides an extended termination notice period of usually three to twelve months during which a departing employee is paid all or a substantially part of their salary, although they do not continue to work for employer.[42] The employee is free to spend time in their proverbial English garden and not work for a competitor until the leave runs out. Functionally, the employee is still employed so they maintain a duty of loyalty and they are compensated for their furlough time, unlike a noncompete. This arrangement has been deemed an ethically-preferable alternative to noncompetes.[43] While there are only a handful of U.S. cases that specifically address garden leave, it seems to be acceptable from both a public policy and legal perspective and the lack of reported cases.

The next section examines how these concepts are present in existing state-level legislation in the U.S. Notably, the discussion focuses on noncompetes since inevitable disclosure is a common law concept that is not addressed by statute at this time and because garden leave has yet to fully take root in American jurisprudence.

B. MODERN STATUTORY APPROACHES

In this section I discuss the status quo of statutory approaches to the issue of employee restrictive covenants and then describe some emerging proposals being considered in various states. Based on this initial descriptive analysis I present a typology of the legislation in the United States related to post-employment restrictions on various types of employees.

1. EXISTING STATUTES GOVERNING POST-EMPLOYMENT MOBILITY

Approximately forty-two of the fifty-one jurisdictions (the states and the District of Columbia) have some legislation at least tangentially related to post-employment restrictions that impact competition or individual freedom.[44] The simplest way to begin with evaluating the existing forms of restrictive covenant legislation is to look at the restrictive end of the enforcement spectrum. There are only two states, as mentioned, with a virtual ban on employee noncompetes and other restrictions on employee mobility.[45] California is the most well-known state with an anti-noncompete policy and a strict, long-standing stance in favor of employee freedom that bans noncompetes.[46]

However, the majority of jurisdictions that do allow post-employment noncompete enforcement will apply some version of the reasonableness test coupled with an evaluation of the parties' interests,[47] and this approach is mirrored in many state statutes. For example, Wisconsin's restrictive covenant statute essentially repeats the common law reasonableness test approach to evaluating noncompetes.[48] Other states take the approach that initially sounds like a ban on all restraints against trade, including noncompetes, but then provide a list of exceptions that usually includes employee noncompetes and non-competition covenants related to the sale of the goodwill of a business. In Nevada, for instance, restraints on trade are illegal and create liability for fines and a misdemeanor charge, but then an extensive provision exempts non-competition agreements.[49]

Another trend in existing statutes – which seems to be expanding, based on the proposed legislation discussed in the next Part – is the practice of including specific carve outs for listed professions and listing exact parameters for what time and geographic scope is considered *per se* reasonable by the state. Oregon's relatively recent revisions include carve out provisions that set specific rules for post-employment competitive restrictions related to broadcasters.[50] Some states also specifically provide (or disallow) the so-called "blue pencil" doctrine that allows a reviewing court to modify the terms of a restrictive covenant to make it reasonable when, by its terms, it is unreasonable as negotiated.

A frequent carve out provision in these states bans the use of noncompetes for physicians,[51] which essentially seems related to common law bans on attorney non-compete agreements that are universally based on public policy concerns about client and patient access to the professional of their choice. The State of Louisiana is an interesting case in that it has changed often in the last few years and added an exemption for "automobile sellers."[52] This non-traditional professional

exemption suggests, like Oregon's broadcaster exemption or South Dakota's exemption for independent insurance salesman,[53] that some discrete lobbying story is behind the targeted treatment of a specific occupation. Other states have attempted to target certain types of well-compensated and high-ranking employees, such as Colorado's limitation on noncompetes except for "executive and management personnel and officers and employees constituting professional staff to executive and management personnel."[54]

The other notable element of modern statutes addressing noncompetes and other restrictive employment covenants is found where the common law reasonableness test is refined in a statute. For example, both Louisiana[55] and Florida[56] have limitations that state that restrictions of two years or more create a rebuttable presumption that the time restriction is unreasonable. Florida's statute adds that it has a rebuttable presumption that six months or less is a reasonable time restriction in a noncompete.[57]

There are also several jurisdictions that are currently faced with proposed legislation related to codifying case law or changing existing statutes concerning post-employment competitive restrictions. Of those, there are a few notable emerging legislative proposals that seek to add new experiments to the types of existing employee post-employment restrictive covenants statutes. This sort of experimentation among the the states as policy laboratories is a well-known concept in political science, particularly related to state-level experiments in social welfare and education legislation and programs.

While untested, there are some interesting new approaches emerging in some of the proposals. For instance, the Massachusetts Legislature is considering adopting a noncompete statute that requires that a proposed noncompete be given to an incoming employee at least seven days before the employment commences.[58] Further, the legislation attempts to restrict the applicability. Perhaps most interesting, the legislation specifically endorses the concept of garden leave and exempts such provisions from the threshold of a one-year period as being presumptively reasonable.[59] The garden leave provision also superficially calculates the minimum reasonable amount of garden leave as a lump sum payment of 50% of the employee's base salary or $35,000. Although it has an existing restrictive covenant statute, Oklahoma has pending revisions that, like Massachusetts, set a monetary minimum of per year income at $100,000 for the employee to support the enforcement of a noncompete agreement.[60] Illinois' proposed statute goes into detail about the job task required to have the employee as a key professional and thus eligible to be subject to a noncompete.[61]

2. A TYPOLOGY OF POST-EMPLOYMENT CONTRACTUAL RESTRICTIONS LEGISLATION MODELS

From the above discussion of the various modern statutory approaches to post-employment competitive restrictions on employees – both in place and proposed – four types of statutes can be identified. The first two are at the opposite ends of the spectrum as defined by the common law approach because under these any restrictive covenants related to competition can be banned or simply interpreted as in the common law. The third and fourth, and more recent attempts, give some guidance to the courts, employers, and employees when they encounter restrictive covenants by defining the permissible application and scope of these agreements.

First, some statutes simply repeat the common law reasonableness test. State legislation in this category includes the basic Wisconsin restrictive covenant statute. I call these types of statutes Common Law Reiteration Statutes because they generally codify the reasonable test and legitimate business interests found in most common law evaluations of restrictive covenants. Second, there are the statutes in California and North Dakota that provide, without any exceptions, an outright ban on noncompetes or other restrictive covenants. These are straightforward in their simplicity. For example, California's oft-cited Bus. & Prof. Code § 16600 states, "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."[62] This type of law, because of its very nature, can be logically named Anti-Restrictive Covenant Statutes.

The third category is theoretically more interesting because it represents a series of new approaches that recognize the pros and cons of allowing noncompetes, but also try to bring some semblance of predictability to court interpretations of disputed contracts. These statutes, as in Florida and Louisiana, set strict boundaries around the enforceable boundaries of noncompetes. For instance, these statutes set specific limitations on what length of time and for what geographic scope a restriction will be considered presumptively reasonable or unreasonable. I call these Reasonable Scope and Duration Statutes because they aim to solidify the often criticized case-by-case traditional reasonableness evaluation from the courts.

I label the fourth category of statutes as Professional or Management Carve Out Statutes because they set a threshold for what types of employees can be subject to, or in some cases, exempted from, restrictive covenants. Like the Colorado example, these states focus on "key professionals" or highly-compensated managers, presumably because those employees can fend for themselves and the public policy problem of employer abuse and overreaching is lessened. As in the proposed Oklahoma statute, some states are beginning to place a salary floor for noncompete coverage, which may act as a surrogate for the type of employees deemed properly covered by a noncompete or other restrictive covenant.

These Professional or Management Carve Out Statutes are also theoretically interesting and attempt, like the Reasonable Scope and Duration Statutes, to make restrictive covenant enforcement more predictable for the parties and for policy makers and the courts. However, unlike Professional or Management Carve Outs, the Scope and Duration laws are relatively simple to administer in that they provide bright line rules for evaluating restrictive covenants. Some of the Professional or Management Carve Out Statutes, such as in Louisiana or Oregon, exempt seemingly odd professional groups

like car salesmen or broadcasters, which may be evidence of piecemeal lobbying by various professions. Interestingly, these statutes are targeting professionals or managers because they have a high-level of value of human capital, as opposed to other rank and file employees at a level where knowledge protection and investment arguments from employers seem like more specious reasons to restrict post-employment freedoms. It is those lesser-skilled and often entry level or lower-compensated employees that are most often cited as reasons to ban noncompetes on public policy fairness and equity grounds.

III. PUBLIC POLICY ANALYSIS OF THE STATUTE TYPES AND RECOMMENDATIONS

This final section presents a holistic public policy analysis of what state policy makers, through the vehicle of restrictive covenant legislation, should consider when formalizing a policy related to whether to restrict or allow post-employment restrictions. Because most states have some form of at least moderate enforcement of covenants not to compete, they are also likely to allow garden leave provisions. Therefore, the second portion of this section is more firmly normative in nature by recommending a course or action for a policy makers interested in furthering various generally accepted policy goals.

As an initial question, should states move away from a "common law only" approach to determining the legitimacy of employee restrictive covenants? The answer seems to be an obvious "yes," since doing so could help eliminate a general criticism of noncompete litigation as unpredictable. With more predictability stemming from well-crafted legislation, the courts could better evaluate and resolve disputes over knowledge ownership, which tend to arise in the noncompete context. In addition, legislative guidance on the boundaries of a state's public policy related to the time an employer can "lock up" an employee for noncompete or garden leave purposes is also a straightforward way to provide guidance to the courts and to the contracting parties.

The next question is, then, which type of statute will best address the policy goals of a given jurisdiction? As a jumping off point, the two states that ban employee restrictive covenants (and do so by statute) arguably decided on a best and predictable policy for their needs some time ago. These are the clear examples of the Anti-Restrictive Covenant Statute jurisdictions. However, despite some bluster from commentators, it is clear that not every state can create a Silicon Valley economy by adopting California's wholesale ban on noncompetes. Other states have the opportunity to follow the California model, but choose not to. This acknowledgment leads to the conclusion that states often have another policy they would codify or perhaps adopt some hybrid version of the emerging types of statutes.

The second type of statute option, the standard Common Law Reiteration Statute, is a step in the right direction in terms of a jurisdiction stating its policy of allowing employee restrictive covenants. However, the mere codification of the reasonableness test found in the common law does not create much more predictability for the parties. This is because no real public policy guidance is provided to the courts to interpret these contracts. Reiterating the common law alone also does not address the overreaching problem of unscrupulous employers, nor does it address the knowledge ownership issues that are increasingly important in the modern workplace.

The third option for a piece of legislation that could consolidate this disparate area of law is the Reasonable Scope and Duration Statute. These attempts are more useful than the reiteration statutes because they not only supplement the common law, but they more clearly define the public policy of the state by making a pronouncement about the parameters of enforcement. This generates more predictable and uniform contracts that can reduce employer overreaching and reduce an immeasurable chilling effect on employees contemplating a move under the constraint of a restrictive covenant.

While business interests may resist relatively modest limits on time and scope for these restrictions, the fact that a statute is in place that covers all firms in the jurisdiction may create a more level playing field for competitors who are recruiting employee talent from the same sources. There could, however, be a sort of race to the bottom for states to attract firms at the expense of employee freedom by raising duration limits and increasing the scope of enforcement.[63]

Finally, the Professional or Management Carve Out Statutes also have positive aspects as well as drawbacks. These types of statutes are relatively untested because they are recent additions to the restrictive covenant policy mix. It some instances, they have added logical and principled policy choices to the discussion, such as exempting doctors from noncompete enforcement or allowing for liquidated damages only for doctor's restrictive covenants as a way to protect patient access. These statutes are also attractive in that they can target types of highly-trained and well-compensated managers whose human capital development and professional level of sophistication fits with the appropriate use of restrictive covenants to address the risk of unfair competition. However, the fact that some of these statutes have expanded to cover lesser-recognized professions suggest that they are types of laws that are more subject to piecemeal revision in reaction to political pressure. For instance, while a carve out to exempt physicians or a provision to include "key professionals" in noncompete coverage may be rooted in sound public policy, other exemptions seem less principled or well-reasoned.

Ultimately, which type of statute or statues hold the most promise to serve as a vehicle for those desirable, well-reasoned, and principled public policy choices? Rather than settling on one type of statute, in fact the best course for most state may be a hybrid approach that combines the benefits of the Reasonable Scope and Duration Statutes and the Professional or Management Carve Out Statutes.

Admittedly, post-employment contractual restrictions are, but their nature, blunt instruments with which employers attempt to insulate themselves from competition so employers may tend to maximize their position to their short term

advantage in a given employee situation. For that reason, statutes that take the unpredictability and uncertainty of restrictive covenant boundaries out of play can be useful. Moreover, statues that set limits on the type of employees that are subject to restrictive covenants will force employers to properly assess the "business value" of top employees and compensate them accordingly in exchanges for future-enacted restrictions. This may increasingly include the more fair option of garden leave where the employee is clearly compensated for the opportunity cost of the restriction. This hybrid approach will allow a state to actually articulate its policy and have it presented in a predictable and cogent manner, which is not available in the common law case-by-case default reasonableness approach. From a policy standpoint, having legislation addressing post-employment restrictions at all will be beneficial for the parties involved. To the extent that a policy is actually formalized, the process may also help eliminate some nonsensical professional carve outs in favor of universal standards.

There is also rhetorical and agenda-setting value to a state formalizing its public policy in a piece of legislation, particularly if the statute is made part of a greater set of policies related to business regulation and employee rights. One additional observation is that with in a more complicated and complex workplace with greater reliance on technology and the realities of globalization, restrictive covenant policy is more important than ever. Human capital law and policy is increasingly relevant to a firm's desire to maintain competitive advantage and generate usable technical information. Because so much more of a firm's competitive position is now tied up in the knowledge and skills of its workforce, having predictable and business-conscious rules are essential for states. Moreover, to the extent that states can anticipate future problems related to employees crossing jurisdictional lines before, during, and after employment across one or more jurisdictions, it will become easier for employees to be mobile and reach their greatest professional capacity. Better formulated rules now will also guard against future employer overreaching, particularly concerning the more vulnerable workers earlier in their careers or those that are relatively low-skilled and poorly compensated. With this understanding as a backdrop it is much more likely that the restrictive covenant policy experiments underway at the state-level will evolve in a faster and more beneficial way then when changes are made haphazardly without a public policy strategy in place.

CONCLUSION

As scholars have explored the changing workplace and the evolving new psychological contract between employers and employees the complexity of the public policy choices of the states has become apparent. While the common law has evolved somewhat to address both employee rights and business competitive advantage and knowledge ownership concerns, there is much promise to the prospect of adding more well-reasoned legislation to the policy debate. Once potentially useful approach is to move in the direction of a hybrid form of legislation that harnesses the benefits of the Reasonable Scope and Duration Statute and the Professional or Management Carve Out Statute models. This approach can assist the states in both articulating their actual public policy choices and allowing for more predictable and fair enforcement of post-employment restrictive covenants.

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* Assistant Professor of Business Law & Ethics at the Stephen M. Ross School of Business at the University of Michigan.

[1] *See e.g.*, Kenneth G. Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 IND. L.J. 1 (2001).

[2] *See* Norman D. Bishara, *Balancing Innovation from Employee Mobility with Legal Protection for Human Capital Investment: 50 States, Public Policy, and Covenants Not to Compete in an Information Economy*, 27 BERKELEY J. EMP. & LAB. L. 287 (2006).

[3] *See, e.g.*, Joan T.A. Gabel & Nancy R. Mansfield, *The Information Revolution and its Impact on the Employment Relationship: An Analysis of the Cyberspace Workplace*, 40 AM. BUS. L.J. 301, 323 (2003) (describing employment relationships, contractual obligations, and other legal issues in a technology-rich workplace).

[4] *See* Katherine V.W. Stone, *The New Psychological Contract: Implications for the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001)

[5] *See, e.g.*, Norman D. Bishara & Michelle Westermann-Behaylo, *The Law and Ethics of Restrictions on an Employee's Post-Employment Mobility*, 49 AM. BUS. L.J. 1 (2012).

[6] *See, e.g.*, 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 (2008).

[7] *Id. at* 164.

[8] *See* Alan Hyde, *Should Noncompetes Be Enforced?: New Empirical Evidence Reveals the Economic Harm of Non-compete Covenants*, REGULATION, Winter 2010, at 6 (adapted from a chapter in RESEARCH HANDBOOK ON THE LAW AND ECONOMICS OF LABOR AND EMPLOYMENT LAW (Michael Wachter & Cynthia Estlund eds., forthcoming 2012)).

[9] *See, e.g.*, Matt Marx, Deborah Strumsky & Lee Fleming, *Mobility, Skills, and the Michigan Non-Compete Experiment*, 55 MGMT. SCI. 875 (2009) (studying a natural experiment where the State of Michigan's noncompete policy changed inadvertently and finding lower rates of mobility among engineers under a public policy of noncompete enforcement).

[10] *See generally* Bishara and Westermann-Behaylo, *supra* note 5.
[11] *See* Stone, *The New Psychological Contract*, *supra* note 4, at 729-31.
[12] Garrison & Wendt, *supra* note 6, at 167-68 (citations omitted).
[13] *See, e.g.*, Alison Davis-Blake & Joseph P. Broschak, *Outsourcing and the Changing Nature of Work*, 35 ANNU. REV. SOCIOL. 321, 322 (2009) (discussing contingent employee relationships and that the practice of outsourcing actually "changes the nature of tasks, the design of jobs, and the design of subunits and interunit relationships, thus changing the experience of employment, including the tasks that individuals perform, whom individuals interact with when performing their work and the nature and frequency of that interaction, and the compensation individuals receive for their work.").
[14] *See generally* Norman D. Bishara & David Orozco, *Using the Resource-Based Theory to Determine Covenant Not to Compete Legitimacy*, 87 IND. L.J. 979 (2012).
[15] *See* Dau-Schmidt, *Employment in the New Age of Trade and Technology*, *supra* note 1, at 1 (stating that these changes have undermined the long-term employment relationships and brought the market into the firm in ways that have not been previously experienced").
[16] *Id*. at 2.
[17] For a discussion of the role of globalization in creating challenges for restrictive covenant enforcement and policies, including key examples, see Marisa Pagnataro, *'The Google Challenge': Enforcement of Noncompete and Trade Secret Agreements for Employees Working in China*, 44 AM. BUS. L.J. 603, 606-14 (2007).
[18] Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 631 (1960) citing the well-known early case of *Mitchel v. Reynolds*, (I P. Wms. 181, 24 Eng. Rep. 347) (Q.B. 1711).
[19] Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. Rev. 575 (1999).
[20] *Id*.
[21] *See e.g.*, Marx, et. al, *Mobility, Skills, and the Michigan Non-Compete Experiment*, *supra* note 9. *See also* Bruce Fallick et al., *Job Hopping in Silicon Valley: Some Evidence Concerning the Micro-Foundations of a High Technology Cluster*, 88 REV. ECON. & STAT. 472 (2006) (testing Gilson's thesis by measuring higher rates of employee mobility in Silicon Valley's tech workplaces, as compared to other California industries or industries within a sample of states allowing at least some noncompete enforcement) and Mark J. Garmaise, *Ties That Truly Bind: Non-competition Agreements, Executive Compensation, and Firm Investment*, 27 J.L. ECON. & ORG. 376 (2009).
[22] *See, e.g.*, Hyde, s*upra* note 8, at 9.
[23] Stone, *supra* note 4. *See also* Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163 (2001) and Tracy L. Staidl, *The Enforceability of Noncompetition Agreements When Employment is At-Will: Reformulating the Analysis*, 2 EMPL. RTS. & EMPLOY. POL'Y J. 95, 101-08 (1998) (discussing the element of adequate consideration to support a noncompete).
[24] *See* Kate O'Neill, *Should I Stay or Should I Go? – Covenants Not to Compete in a Down Economy – A Proposal for Better Advocacy and Better Judicial Opinions*, 6 HASTINGS BUS. L. J. 83, 84 (2010) (advocating that courts "minimize[e] the enforcement of covenants not to compete where the assenting employee lacks significant bargaining power while preserving employers' abilities to enforce these covenants against employees who enjoy such power").
[25] *See* Eric A. Posner & George G. Triantis, *Covenants Not to Compete from an Incomplete Contracts Perspective* (U. Chi. Working Papers 2d, Paper No. 137, 2001), *available at*: http://www.law.uchicago.edu/files/files/137.EAP_.covenants.pdf.
[26] Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEG. STUD. 93 (1981).
[27] *See* Larry A. DiMatteo, *Strategic Contracting: Contract Law as a Source of Competitive Advantage*, 47 AM. BUS. L.J. 727, 765 (2010) ("The often litigated covenant not to compete in the employment setting serves two strategic purposes: proprietary protection and strategic coercion."). Professor DiMatteo continues that employers seek to enforce covenants not to compete to protect "the employer's proprietary property that has been disclosed to the employee and that the employer seeks to protect" as well as "to deter employee movement to a competitor." He further concludes that the property protection purpose is furthered by bargaining for a noncompete that will be enforceable when an "employer shows that there is some proprietary interest trade secrets, knowhow, client contacts, access to key employees, specialized training, databases, and compilations that are susceptible to being harmed if used or disclosed to a new employer." *Id*.
[28] *See* Norman D. Bishara, *Balancing Innovation from Employee Mobility with Legal Protection for Human Capital Investment*, *supra* note 2.
[29] *See generally* Bishara & Orozco, s*upra* note 14.
[30] Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PENN. L. REV. 379 (2006).
[31] *Id*. at 415-420.
[32] Norman D. Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenant Not to Compete Agreements, Trends, and Implications for Employee Mobility Policy*, 13 U. PENN. J. BUS. L. 753 (2011).

[33] *See* Terry M. Dworkin & Elletta S. Callahan, *Buying Silence*, 36 AM. BUS. L.J. 151, 169-71 (1998).
[34] *See* E. Lee Reichert, *Mergers & Acquisitions in Cyberspace: Navigating the Black Holes*, 6 U.C. DAVIS BUS. L.J. 123, 132-3 (2005) (stating that a reasonableness evaluation is applied in most states, but that "noncompetition law can vary dramatically among jurisdictions"). *See also* Bishara, *Fifty Ways to Leave Your Employer*, *supra* note 32.
[35] *See generally* BRIAN MALSBERGER, ed., COVENANTS NOT TO COMPETE, A STATE-BY-STATE SURVEY (2009; and supplement).
[36] *See generally* Bishara, *Fifty Ways to Leave Your Employer*, *supra* note 32.
[37] BDO Seidman v. Hirshberg, 93 N.Y.2d 382, 389 (1999), *citing* Reed, Roberts Assocs. v. Strauman, 40 N.Y.2d 303, 308 (1976). In BDO v. Hirshberg the New York Court of Appeals added, "New York has adopted this prevailing standard of reasonableness in determining the validity of employee agreements not to compete" and that "'In this context a restrictive covenant will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee'." (citing Reed, Roberts Assocs. v Strauman, 40 N.Y.2d 303, 307 (1976)). *Id*. at 389.
[38] *See* Hyde, *Should Noncompetes Be Enforced*, *supra* note 8, at 9 (citing New Jersey for a paucity of venture capital funding and an active start-up community, in part because the state "vigorously enforces noncompetes" and is one of approximately three states with some form of an inevitable disclosure doctrine in the common law).
[39] *Id*.
[40] *See generally* Bishara & Westermann-Behaylo, *supra* note 5.
[41] *See generally* Garrison & Wendt, *supra* note 6, at 148-164. *See also* Eleanore R. Godfrey, *Note: Inevitable Disclosure of Trade Secrets: Employee Mobility v. Employer's Rights,* 3 J. HIGH TECH. L. 161, 176-177 (2004).
[42] *See* Bishara & Westermann-Behaylo, *supra* note 5.
[43] *Id*.
[44] LexisNexis, *50 State Comparative Legislation / Regulations: Covenants not to Compete* (December 2010).
[45] Even North Dakota and California, the two states with near complete bans on covenants not to compete will allow contractual restrictions on post-employment competition related to whether an owner's sale of a business is permissible. *See* Norman D. Bishara, *Balancing Innovation from Employee Mobility with Legal Protection for Human Capital Investment, supra* note 2, at 294 (fn. 19).
[46] For a recent discussion of California's strong public policy against noncompetes, see the California Supreme Court case of Edwards v. Arthur Andersen, LLP, 44 Cal. 4th 937, 949-50 (2008) (restating California's public policy stance and dismissing calls for a "narrow restraint" exception the policy).
[47] *See* Gabel & Mansfield, *supra* note 3, at 321-22.
[48] WIS. STAT. ANN. § 103.465 (2011). Entitled, "Restrictive covenants in employment contracts" the statute states:

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

Id.
[49] NEV. REV. ST. § 613.200 (2011), "Prevention of employment of person who has been discharged or who terminates employment unlawful; criminal and administrative penalties; exception."
[50] OR. REV. STAT. § 653.295 (2011), "Noncompetition agreements; bonus restriction agreements." For an overview of the broadcasting industry noncompete statute in Oregon and other states, see Melissa Rassas, *Explaining the Outlier: Oregon's New Non-Compete Agreement Law & the Broadcasting Industry*, 11 U. PA. J. BUS. L. 447 (2009). *See also* New York's "Broadcast Employees Freedom to Work Act," N.Y. LAB. L. § 202-k (2008).
[51] *See, e.g.*, Colorado's statute, COLO. REV. ST. ANN. § 8-2-113 (2011) "Unlawful to intimidate worker--agreement not to compete."
[52] LSA. REV. ST. §23:921 (2011), "Restraint of business prohibited; restraint on forum prohibited; competing business; contracts against engaging in; provisions for."
[53] S.D. COD. L. § 53-9-8 (2011) Contracts in restraint of trade void—Exceptions."
[54] COLO. REV. ST. ANN. § 8-2-113, *supra* note 51.
[55] *See* LSA REV. ST. §23:921, *supra* note 52.
[56] FLA. STAT. § 542.335 (2011), "Valid restraints of trade or commerce."
[57] *Id*.
[58] Proposed Amendments to MASS. GEN L. Chapter 149 § 1; *available at*: http://www.massachusettsnoncompetelaw.com/uploads/file/Noncompete%20Bill%20-%202011%20As%20Filed%201-20-2011.pdf.

[59] *Id*.
[60] Proposed Amendments to15 OKL. ST. ANN. § 219A (March 13, 2012) (2011 Oklahoma Senate Bill No. 1771, Oklahoma Second Regular Session of the Fifty-Third Legislature; "noncompetition agreements; modifying requirements for certain agreements.").
[61] Proposed House Bill No. 16, Illinois Ninety-Seventh General Assembly (Feb. 3, 2012).
[62] CAL. BUS. & PROF. CODE § 16600 (2011) (the exception allowed in California, as in other states, is for covenants not to compete appurtenant to the sale of a business where a former owner can be restricted from competition for a reasonable time and scope to protect the good will of the business).
[63] Recent research using a market for law analysis did not find evidence of such state-based opportunistic behavior regarding current U.S. noncompete policy. *See* Bishara, *Fifty Ways to Leave Your Employer*, *supra* note 32. *But see* Timothy P. Glynn, *Interjurisdictional Competition in Enforcing Non-Compete Agreements: Regulatory Risk Management and the Race to the Bottom*, 65 WASH. & LEE L. REV. 1381 (2008).