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GENTLEMEN PREFER BONDS: HOW EMPLOYERS FIX THE TALENT MARKET

Orly Lobel*

The labor market is precisely as the name indicates: a market. The currency of this market is talent. Competition principles apply in equal force to the labor market as to the product market, with the added effect that human capital is a living resource—its quality is endogenous to the competition for it. Competition among firms in the product markets spurs innovation, competitive pricing, and higher quality products and services. Competition among firms over talent ensures higher wages, better work conditions, and higher quality human capital. The strength of competition in the labor market depends on a range of factors, but a key measure of competition is the number of alternatives available for employees to consider. A powerful armor employed by companies to reduce alternative job opportunities is the restrictive covenant. The purpose of this article, written for a symposium on frontier in antitrust law, is threefold. First, it explains that beyond the traditional non-compete, firms use many restrictive covenants that prevent competition in the talent market. The article introduces this broader landscape of anti-competitive restrictions that are routinely placed on employees including horizontal collusion between employers agreeing to fix wages or refraining from poaching each other's employees and vertical arrangements between employers and employees, which include employees agreeing not to solicit customers or former co-workers post-employment, exit penalties, and overreaching NDAs and pre-innovation assignment clauses, which reach beyond IP and trade secrecy protections and into information that should remain in the competitive markets public domain, such as customer lists, compensation information, and general know-how. Second, while many of the harms potentially caused by non-competes are well-documented, the article introduces a neglected aspect of

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For thoughtful comments and conversations, the participants at the Santa Clara Symposium on Antitrust Law. For excellent research assistance, I thank Robert Bitman, Laurel Carothers, Leehee Falek, Julia Kapchinskiy, and Ashley Reddy. Sasha Orman and Elizabeth Parker provided superb library support and smart suggestions.

labor market concentration: the perpetuation of wage gaps and inequalities. The article argues that mobility restrictions have a disproportionate effect on certain protected identities—primarily women, minorities, and older workers. In particular, I provide an original analysis of the effects of restrictive covenants on the gender wage gap and present supporting empirical evidence. Third, the article considers a pervasive problem in the landscape of restrictive covenants: the prevalence of unenforceable contractual terms. I argue that the problem of unenforceable anti-competitive restrictions in employment contracts calls for a proactive approach, including notice requirements in employment contracts, regulatory action and penalties that target these contracts, including the attorney that drafted them, before litigation has been pursued, and a private right of action, including class actions by employees who have been harmed by unenforceable contracts.

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I. INTRODUCTION

The labor market is precisely as the name indicates: a market. The currency of this market is talent. Competition principles apply in equal force to the labor market as to the product market, with the added effect

that human capital is a living resource—its quality is endogenous to the competition for it. Competition among firms in the product markets spurs innovation, competitive pricing, and higher quality products and services. Competition among firms over talent ensures higher wages, better work conditions, and higher quality human capital. The strength of competition in the labor market depends on a range of factors, but a key measure of competition is the number of alternatives available for employees to consider. A powerful armor employed by companies to reduce alternative job opportunities is the restrictive covenant.

Employment agreements routinely include requirements for workers to refrain from accepting a competitor's job offer or competing with their former employer through a rival business for a specified period in a certain geographic area.[1] The Treasury Department recently estimated that such clauses bind nearly thirty million workers.[2] A study of executive employment contracts found that seventy percent of firms used non-compete contracts with their top employees.[3] As this article argues, these numbers, although high, are incomplete and do not reflect the full range of anti-competitive practices that are on the rise. Restrictive covenants are broader than the mere formal non-compete clause that is worded as an absolute prohibition of taking on a competitive position.[4] Moreover, horizontal agreements by employers can be designed to subvert policy limitations on employee restrictive covenants and have the same effects of reducing outside job opportunities.

The purpose of this article is threefold. First, it explains the broader landscape of anti-competitive restrictions that are routinely placed on employees. Section I presents the range of covenants employers regularly use to restrict job mobility. These restrictive covenants include horizontal collusion between employers agreeing to fix wages or refraining from poaching each other's employees. Mobility restrictions also include vertical arrangements between employers and employees, such

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1. *See generally* ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING (2013); *see, e.g.*, Sophie Quinton, *These Days, Even Janitors Are Being Required to Sign Non-Compete Clauses*, USA TODAY (May 27, 2017, 8:28 AM), https://www.usatoday.com/story/money/2017/05/27/noncompete-clauses-jobs-workplace/348384001/.

2. U.S. DEP'T OF TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 6 (Mar. 2016); Evan Starr, J.J. Prescott, & Norman D. Bishara, *Non-competes in the U.S. Labor Force* 2, 16 (Univ. of. Mich. L. & Econ. Research Paper No. 18-013, 2019).

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

4. *See generally* Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 TEX. L. REV. 789 (2015) [hereinafter The New Cognitive Property]; *see also infra* Section II ("Beyond Non-Competes: Restrictive Covenants as Mobility Penalties").

as employees agreeing not to solicit customers or former co-workers post-employment; to incur penalty for competition; and to avoid building on their professional knowledge, reaching beyond trade secrecy protections and into information that should remain in the competitive markets public domain, such as customer lists, compensation information, and general know-how. Second, while many of the harms potentially caused by non-competes are well-documented, the article explores a neglected aspect of labor market concentration: the perpetuation of wage gaps and inequalities. Section II argues that mobility restrictions have a disproportionate effect on certain protected identities—primarily women, minorities, and older workers. In particular, Section II provides an original analysis of the effects of restrictive covenants on the gender wage gap and presents supporting empirical evidence. Third, the article presents a pervasive problem in the landscape of noncompete law: the prevalence of unenforceable contractual terms. Section III argues that the problem of unenforceable anti-competitive restrictions in employment contracts calls for a proactive approach, including notice requirements in employment contracts; regulatory action and penalties that target the contracts before litigation has been pursued; and a private right of action, including class actions by employees who have been harmed by unenforceable contracts.

II. BEYOND NON-COMPETES: RESTRICTIVE COVENANTS AS MOBILITY PENALTIES

Non-competes have been on the rise in the past decade. In a 2019 report, economist Evan Starr noted that "[t]he use of non-competes is so pervasive that even volunteers in non-profit organizations, in states that do not even enforce them, are asked to sign away their post-employment freedom."[5] Legal scholar Rebecca Morrow characterized non-competes as having "extensive negative growth effects, negative distributional effects, and negative ethical effects."[6] As I wrote in my article *The New Cognitive Property*, "[i]n blunt economic terms, the deadweight loss from controls and restrictions over human capital is the person herself who is prevented from using her talent, skill, and passion."[7] Yet, the deadweight loss and harms go beyond the individual who is restricted by the covenant. The effects are market-wide. As one article describes, the

5. Evan Starr, *The Use, Abuse, and Enforceability of Non-Compete and No-Poach Agreements: A Brief Review of the Theory, Evidence, and Recent Reform Efforts*, ECON. INNOVATION GROUP 2 (Feb. 2019), https://eig.org/wp-content/uploads/2019/02/Non-Competes-2.20.19.pdf.

6. Rebecca N. Morrow, *Noncompetes as Tax Evasion*, 96 WASH. U. L. REV. 265, 276 (2018).

7. The New Cognitive Property, *supra* note 4, at 93.

empirical literature on restrictive covenants has coalesced in finding that the use of non-competes and non-compete enforceability (1) reduces the overall mobility of employees and (2) redirects departing employees away from competitors toward non-competing ventures in other industries.[8] Moreover, restrictive covenants reduce entrepreneurship, innovation, and overall job growth.[9]

The scholarly literature and policy have focused on clauses that are worded as formal non-competes. A formal non-compete clause prohibits an employee's ability to engage (1) in competitive work, (2) in a geographic area, and (3) for a period of time following his or her departure from a current employer.[10] In most states, these clauses are enforced if they are deemed reasonable in court, and reasonableness is determined on a case-by-case basis that considers multiple factors, including whether the company has a legitimate business interest to require non-competes—usually understood as the protection of trade secrets, and whether this interest is offset by employee hardship or the public's interest in competition.[11] I have written extensively about non-competes, the jurisdictional variation in their enforcement, and the mounting evidence of their harmful effects on the market.[12] Beyond the traditional non-

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8. Evan Starr, J.J. Prescott & Norman D. Bishara, *Noncompetes and Employee Mobility* 16-17 (Univ. of. Mich. L. & Econ. Research Paper No. 16-032, 2019); Natarajan Balasubramanian et al., *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers*, U.S. CENSUS BUREAU CTR. FOR ECON. STUDIES 32 (Stud. Paper No. CES-WP-17-09, 2017) (finding that higher enforceability of post-employment restrictions is associated with longer job spells, i.e., fewer jobs over time, and a greater chance of leaving the state).

9. Orly Lobel, *The Spinoff Advantage: Human Capital Law and Entrepreneurship,* ENTREPRENEURSHIP AND THE LAW (Brian Broughman & Gordon Smith Eds., forthcoming) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3473207.

10. *See* Orly Lobel, *Intellectual Property and Restrictive Covenants*, ENCYCLOPEDIA OF LAB. AND EMP. L. AND ECON. 520 (Dau-Schmidt, Harris & Lobel eds., 2009).

11. Orly Lobel, *Enforceability TBD: From Status to Contract in Intellectual Property Law*, 96 B.U. L. REV. 869, 884, 885-86 (2016).

12. *See, e.g.*, LOBEL, *supra* note 1; On Amir & Orly Lobel, *Driving Performance: A Growth Theory of Noncompete Law*, 16 STAN. TECH. L. REV. 833 (2013); Lobel, *Enforceability TBD*, *supra* note 11, at 869; The New Cognitive Property, *supra* note 4; On Amir & Orly Lobel, *How Noncompetes Stifle Performance,* HARV. BUS. REV. (Jan.–Feb. 2014), https://hbr.org/2014/01/how-noncompetes-stifle-performance; Orly Lobel, *Aggressive Talent Wars Are Good for Cities*, HARV. BUS. REV. (Oct. 4, 2013), https://hbr.org/2013/10/aggressive-talent-wars-are-good-for-cities; Orly Lobel, *The Benefits of Talent Mobility*, BLOOMBERG (Sept. 16, 2013, 9:21 AM), https://www.bloomberg.com/news/articles/2013-09-16/the-benefits-of-talent-mobility; Orly Lobel, *By Suppressing Mobility, Noncompete Pacts Suppress Innovation*, N.Y. TIMES (June 11, 2014, 4:46 PM), https://www.nytimes.com/roomfordebate/2014/06/10/should-companies-be-allowed-to-make-workers-sign-noncompete-agreements/by-suppressing-mobility-noncompete-deals-suppresses-innovation?smid=fb-share; Orly Lobel, *Choose Your Battles to Win the Talent War,* CHIEF EXEC. (July 19, 2013), https://chiefexecutive.net/choose-your-battles-to-win-the-talent-war/; Orly Lobel, *My Ideas, My Boss's Property*, N.Y. TIMES (April 13, 2014), https://www.nytimes.com/2014/04/14/opinion/my-ideas-my-bosss-property.html; James Bessen & Orly

compete, however, a range of contractual restrictions operate to reduce labor market competition. In this section, I introduce examples of these mobility restrictions. As a scholar of labor market mobility, I have seen many variations of restrictive covenants. The purpose here is not to offer an exhaustive list, but rather to demonstrate the range of such practices and to suggest that policymakers need to turn more attention to these restraints and their effects on labor market competition. Below, I divide the range of restrictive covenants into *horizontal collusions*, which are practices and agreements between competitors to reduce competition in the labor market, and *vertical arrangements*, or restrictive covenants that are drafted by employers into their contracts with employees.

A. Horizontal Collusions

1) Do-Not-Hire Agreements

In the early 2000s, a massive antitrust investigation into so-called "gentlemen's agreements" in Silicon Valley to not recruit each other's employees resulted in a settlement for hundreds of millions of dollars with a class of sixty thousand engineers.[13] The scandal provides a window into the broader ways in which corporate America, through contract and litigation patterns, engages in anticompetitive practices in the labor market, and what can be done to prevent these practices. In an attempt to subvert California's strong mobility policy, which voids all restraints on trade including employee non-competes[14], the leaders of major tech companies—Apple, Google, Intel, Intuit, Lucasfilm and Pixar, Adobe, and eBay—entered into agreements not to actively call and recruit (and, in some agreements, not to hire at all) the employees of competitors. Upon discovery of the agreements, the Antitrust Division of the United States Department of Justice filed a complaint against these leading corporations in 2010. It deemed do-not-hire agreements collusive restraints on trade and competition.[15] The Department of Justice described the

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Lobel, *Stop Trying to Control How Ex-Employees Use Their Knowledge*, HARV. BUS. REV. (Oct. 2014); Orly Lobel, *Why California is Such a Talent Magnet*, HARV. BUS. REV. (Jan. 2016), https://hbr.org/2016/01/why-california-is-such-a-talent-magnet.

13. *See generally In re* High Tech Emp. Antitrust Litig., 985 F.Supp.2d 1167 (N.D. Cal. 2013); *see also, e.g.*, United States v. eBay, Inc., 968 F.Supp.2d 1030 (N.D. Cal. Sept. 27, 2013); *see also*, Garrison v. Oracle Corp., 159 F.Supp.3d 1044 (N.D. Cal. 2016); *In re* Animation Workers Antitrust Litig., 123 F.Supp.3d 1175 (N.D. Cal. 2015).

14. *See* CAL. BUS. & PROF. CODE §§ 16600 et seq.; CAL. BUS. & PROF. CODE §§ 17200 et seq.

15. U.S. Dep't of Justice, Remarks as Prepared for Delivery by Assistant General Attorney Bill Baer at the Conference Call Regarding the Justice Department's Settlement with eBay Inc. to End Anticompetitive "No Poach" Hiring Agreements (May 1, 2014), https://www.justice.gov/sites/default/files/atr/legacy/2014/05/01/305619.pdf [hereinafter DOJ Baer Remarks].

corporations' practices as "blatant and egregious," and concluded that such agreements are *per se* violations of federal antitrust law.[16] The Department of Justice (DOJ) further stated:

> These actions by the Antitrust Division remind us all that the antitrust laws guarantee the benefits of competition to all consumers, including working men and women. The agreements we challenged here not only harmed the overall competitive process but, importantly, harmed specialized and much sought after technology employees who were prevented from getting better jobs and higher salaries. Stifling opportunities for these talented and highly-skilled individuals was bad for them and bad for innovation in high-tech industries.[17]

Following the Silicon Valley settlements, the DOJ announced that, moving forward, the department intends to criminally prosecute wage-fixing and no-poaching agreements among competitors.[18] Since the Silicon Valley cases, more instances of horizontal collusion have been investigated. In 2018, the DOJ brought action against two rail equipment manufacturers, Knorr and Wabtec, for suppressing competition for workers.[19] The lawsuit alleged that for years the companies had

16. *Id.*

17. *Id.* In 2013, the Ninth Circuit certified a private class of 64,000 former employees in their claims that these abovementioned non-solicitation horizontal agreements depressed wages in the industry. The 2014 proposed settlement of $324.5 million was denied by District Court Judge Lucy Koh as it fell short of the actual harm caused by the unlawful agreements. *See generally* Order Deny. Pls.' Mot. for Prelim. Approval of Settlements with Adobe, Apple, Google, and Intel, *In re* High-Tech Emp. Antitrust Litig., No. 11-CV-02509-LHK, (N.D. Cal. Aug. 8, 2014) (Dckt. No. 974). Eventually a higher settlement of $415 million was reached. *In re* High-Tech Emp. Antitrust Litig., No. 11-CV-02509-LHK, 2015 WL 5158730, at *4 (N.D. Cal. Sept. 2, 2019). A similar class action was filed and settled against Disney, DreamWorks, Lucasfilm Ltd, and Sony Pictures Animation. *See* Nitsch v. Dreamworks Animation SKG, No. 14-04062, 2016 WL 4424965 (N.D. Cal. July 6, 2016).

18. Press Release, U.S. Dep't of Justice, Justice Department and Federal Trade Commission Release Guidance for Human Resources Professionals on How Antitrust Law Applies to Employee Hiring and Compensation (Oct. 20, 2016); *see also* Division Update Spring 2018, U.S. Dep't of Justice, *No More No-Poach: The Antitrust Division Continues to Investigate and Prosecute "No-Poach" and Wage-Fixing Agreements* (Apr. 10, 2018) [hereinafter DOJ, No More No-Poach].

19. *See generally* Complaint, United States v. Knorr-Bremse and Westinghouse Air Brake Technologies Corp., No. 1:18-cv-00747 (D.D.C. Apr. 3, 2012) (Dckt. No. 1) [hereinafter Knorr & Wabtec Complaint]; *see also* Press Release, U.S. Dep't of Justice, Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees (Apr. 3, 2018) [hereinafter DOJ, Knorr & Wabtec Press Release]; DOJ, No More No-Poach, *supra* note 18. There have also been similar developments implicating antitrust violations in Europe. For example, in Spain the National Commission for Markets and Competition (CNMC) fined a cartel €14m in the freight forwarding industry for their no-poaching agreements, which infringed both EU and Spanish law. *See* Comision Nacional de la Competencia, Resolucion (July 31, 2010), https://www.cnmc.es/sites/default/files/104188_7.pdf; *Spain: Competition Authority (CNC) Imposes Fine on Freight Forwarding Cartel*, https://ec.europa.eu/competition/ecn/brief/04_2010/es_freight.pdf; Melissa Lipman, *Spain*

maintained unlawful agreements not to compete for each other's employees, and in addition entered into no-poach agreements with each other as well as a third company, Faiveley.[20] The eventual settlement required Knorr and Wabtec to implement notification and compliance measures intended to preclude their entry into these types of agreements in the future. The D.C. Circuit Court of Appeals prohibited each defendant from "attempting to enter into, entering into, maintaining, or enforcing any No-Poach Agreement or No-Poach Provision" that is not "ancillary to a legitimate business collaboration."[21] Following the settlement, which was approved in July 2018, a number of private lawsuits were filed against Knorr and Wabtec by their employees.[22] Also recently, in the context of talent wars between two universities, a North Carolina federal judge granted a class certification in 2018 of medical faculty from the University of North Carolina and Duke University concerning a lawsuit over anti-competitive, no-hire arrangements between the two medical schools.[23]

2) Wage-Fixing

The coordination between employers on terms and conditions of their employees presents another pattern of collusive attempts to suppress labor market competition.[24] Wage-fixing, whether explicit or implicit, follows the same logic as price-fixing: by deciding to collude on salaries, employers agree not to compete over the value of the talent in the industry.[25] For example, several hospitals were recently accused of

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Fines 7 Shippers €14m Over Freight Cartel, LAW360 (Aug. 5, 2010), https://www.law360.com/articles/185511/spain-fines-7-shippers-14m-over-freight-cartel.

20. Knorr & Wabtec Complaint, *supra* note 19, at 2; *see also* DOJ, Knorr & Wabtec Press Release, *supra* note 19.

21. United States v. Knorr-Bremse AG, No. 1:18-cv-00747-CKK, 2018 WL 4386565, at *1-2 (D.D.C. July 11, 2018).

22. Jeffrey May, *Justice Department Settlement in 'No-Poach' Case Against Rail Equipment Suppliers Approved*, WOLTERS KLUWER (July 13, 2018); Hausfeld LLP, *Knorr and WABTEC Employees File Antitrust Lawsuit to Recover Damages Stemming from Employers' "No-Poach" Conspiracy*, GLOBENEWSWIRE (Apr. 16, 2018, 12:09 PM), https://www.globenewswire.com/news-release/2018/04/16/1472241/0/en/Knorr-and-WABTEC-Employees-File-Antitrust-Lawsuit-to-Recover-Damages-Stemming-From-Employers-No-Poach-Conspiracy.html.

23. Seaman v. Duke Univ., No. 1:15-CV-462, 2018 WL 671239, at *1-2 (M.D. N.C. Feb. 1, 2018).

24. *See generally* Michael Lindsay, Jaime Stilson, & Rebecca Bernhard, *Employers Beware: The DOJ and FTC Confirm that Naked Wage-Fixing and "No-Poaching" Agreements Are Per Se Antitrust Violations*, 16 ANTITRUST SOURCE 1 (Dec. 2016).

25. *See* John Johnson, Jesse David, & Paul A. Torelli, *Empirical Evidence and Class Certification in Labor Market Antitrust Cases*, 25 ANTITRUST 60, 63 (Fall 2010).

conspiring with each other to hold down the wages of nurses.[26] In 2007, the DOJ filed an action against the Arizona Hospital & Healthcare Association for acting on behalf of most hospitals in Arizona in setting a uniform bill rate schedule for hospitals to pay temporary and per diem nurses.[27] The case resulted in a consent judgment.[28]

A similar action was brought against the Utah Society for Healthcare Human Resources Administration, a society of HR professionals at Utah hospitals, for exchanging wage information about registered nurses for the purpose of matching one another's wages and thereby depressing the pay of registered nurses in Salt Lake County and elsewhere in Utah.[29] In Illinois, the Federal Trade Commission (FTC) brought action against several nursing homes, where the companies agreed to boycott a nurse registry that attempted to raise its prices for temporary nursing care services.[30] According to the FTC, nurse registries "compete among themselves to provide temporary nursing services at the price and quality nursing homes desire," and "[c]ompetition among nursing homes for temporary nursing services ensures an adequate supply of quality nurses."[31] The FTC also brought a case against the Council of Fashion Designers of America for attempting to reduce compensation for models.[32] In this case the Council and the fashion designers "agreed not to compete for modeling services and agreed to determine modeling fees collectively, rather than allow prices to be determined in a competitive market" to reduce the wages they paid for models.[33]

However, collusion can also happen through implicit coordination, not just by explicit agreement. In 2016, the Department of Justice Antitrust Division and Federal Trade Commission jointly issued an Antitrust

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26. *See, e.g.*, Merenda v. VHS of Michigan, Inc., 296 F.R.D. 528 (E.D. Mich. 2013); Fleischman v. Albany Medical Center, No. 06-cv-0765, 2008 U.S. Dist. LEXIS 57188 (N.D.N.Y. July 28, 2008).

27. *See* Complaint at ¶ 4, United States et al. v. Ariz. Hosp. & Healthcare Ass'n and AzHHA Serv. Corp., No. CV07-1030-PHX (No. 1) (D. Ariz. May 22, 2007).

28. Final Judgment, *Arizona Hospital*, No. CV07-1030-PHX, (No. 17), https://www.justice.gov/atr/case-document/final-judgment-17.

29. *See* Complaint at ¶¶ 25-27, United States of America v. Utah Soc'y for Healthcare Human Resources Administration, No. 94C282G (D. Utah Mar. 14, 1994); United States v. Utah Soc'y for Healthcare Human Res. Admin., No. 94C282G, 1994 U.S. Dist. LEXIS 17531 (D. Utah Oct. 27, 1994).

30. *See generally In re* Debes Corp. et al., 115 F.T.C. 701 (1992).

31. *Id.* at 703-04.

32. *See generally* Council of Fashion Designers of America, 120 F.T.C. 817 (1995); *see also* Press Release, Council of Fashion Designers of America, F.T.C. (June 9, 1995); Council of Fashion Designers of America, Proposed Consent Agreement With Analysis to Aid Public Comment, 60 FED. REGISTER (No. 127) (July 3, 1995).

33. Complaint, *In re* Council of Fashion Designers of America et al., 120 F.T.C. 817, 819 (1995) (No. C-3621).

Guidance for Human Resource Professionals.[34] The guidance explains that any sort of agreement between companies over the range of employee salaries or other terms of compensation is a *per se* illegal wage-fixing agreement. Even evidence of parallel behavior in the absence of direct evidence of oral or written agreement can lead to an inference of collusion.[35] As a scholar of employment contracts, I see many parallel agreements of industry competitors with striking similarities in their terms and conditions that should raise red flags for regulators of labor market competition.

3) Collusion Among Franchises, Leagues, and Associations

The new Antitrust Guidance carves out an exception for "legitimate joint ventures (including, for example, appropriate shared use of facilities)."[36] Legitimate joint ventures are not considered *per se* illegal under the antitrust laws, but the Antitrust Guidance would require further inquiry into their anticompetitive effects to determine whether they violate antitrust laws.[37] In conversations with federal antitrust regulators, it appears that they may view franchises as joint ventures and would subject such entities to less scrutiny for coordination of wage or no-poach agreements.[38] This carve-out is misguided.

A series of new class actions continue to expose franchisee no-hire agreements.[39] Since February 2017, private plaintiffs have filed class actions targeting the no-poach clauses in the franchise agreements of many fast food franchises including Carl Karcher Enterprises (Carl's

34. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *Antitrust Guidance for Human Resource Professionals* 1 (2016).

35. *Id.*

36. *Id.*

37. *Id.*

38. *See* Nicole L. Castle & Matt Evola, *INSIGHT: DOJ Distinguishes 'No-Poach' Franchise Agreements*, BLOOMBERG L. (Mar. 21, 2019), https://news.bloomberglaw.com/mergers-and-antitrust/insight-doj-distinguishes-no-poach-franchise-agreements; Corrected Statement of Interest of the United States of America, Stigar v. Dough Dough Inc. et al., No. 2:18-cv-00244, at *11-13 (E.D. Wash. Mar. 8, 2019) (No. 45).

39. A. Chris Young, *Legal Challenges to No-Poach Provisions in Franchise Agreements*, 23 DISTRIBUTION 1, 1 (2019).

Jr.),[40] McDonald's,[41] Pizza Hut,[42] Jimmy John's,[43] Arby's,[44] Cinnabon,[45] Little Caesars,[46] Burger King,[47], and Dunkin Donuts.[48] While these cases are currently in the process of litigation, federal courts have issued preliminary decisions that provide insight on how they may be resolved.

In the *McDonald*'s case, the court held that the standard of review for determining whether no-poach provisions in franchise agreements violated antitrust law was the "quick look" test.[49] The quick look test is a truncated form of analysis used to determine whether an antitrust violation has been committed in situations where a defendant's conduct appears so likely to have caused anticompetitive effects that it is unnecessary for a court to complete a full analysis.[50] Generally, the standard is only applied when an individual untrained in economics or economic theory could conclude a given arrangement would cause anticompetitive effects on a market.[51] Judge Alonso of the Northern District of Illinois, applying the quick look standard, found that "[e]ven a person with a rudimentary understanding of economics would understand that if competitors agree not to hire each other's employees, wages for employees will stagnate."[52]

However, obstacles remain for private plaintiffs taking on no-poach provisions in franchise agreements. In the *Jimmy John's* case in the Southern District of Illinois, the court delayed its decision on the standard of review until after discovery, which focused the analysis on the

40. Class Action Compl., Bautista v. Carl Karcher Enters., No. BC 649777 (Sup. Ct. Cal. Feb. 8, 2017) (No. 1).

41. Class Action Compl., Deslandes v. McDonald's USA, LLC, No. 17-cv-04857 (N.D. Ill. June 28, 2017) (No. 1).

42. Class Action Compl., Ion v. Pizza Hut, LLC, No. 4:17-cv-00788 (E.D. Tex. Nov. 3, 2017) (No. 1), *voluntarily dismissed without prejudice by* 17:cv-00788 (E.D. Tex. July 16, 2018) (No. 45).

43. Butler v. Jimmy John's Franchise, LLC, 331 F. Supp. 3d 786 (S.D. Ill. Jul. 31, 2018).

44. Class Action Compl., Richmond v. Bergey Pullman, Inc., et al, No. 2:18-cv-00246 (E.D. Wa. August 3, 2018) (No. 1).

45. Order Denying Defs.' Mot. to Dismiss, Yi v. SK Bakeries, LLC, et al., No. 18-5627 RJB (W.D. Wa. Nov. 13, 2018) (No. 33).

46. Class Action Compl., Ogden v. Little Caesars Enterprises, Inc., et al., No. 2:18-cv-12792 (E.D. Mi. Sept. 7, 2018) (No. 1).

47. Class Action Compl., Michel v. Restaurant Brands Int'l Inc., et al., No. 1:18-cv-24304 (S.D. Fl. Oct. 18, 2018) (No. 1).

48. Class Action Compl., Avery v. Albany Shaker Donuts LLC, et al., No. 1:18-cv-09885 (S.D. N.Y. Oct. 25, 2018) (No. 1).

49. Deslandes v. McDonald's USA, LLC, No. 17-cv-04857, 2018 U.S. Dist. LEXIS 105260, at *20 (N.D. Ill. June 25, 2018).

50. *See* 10A Fletcher Cyc. Corp. § 4982.03 (Sept. 2018) (Rule of Reason—Quick Look Analysis); Edward Brunet, *Antitrust Summary Judgment and the Quick Look Approach*, 62 S.M.U. L. REV. 493, 499-504 (2009).

51. *See* California Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999).

52. Deslandes v. McDonald's USA, LLC, No. 17-cv-04857, 2018 U.S. Dist. LEXIS 105260, at *20 (N.D. Ill. June 25, 2018).

language of the particular no-poach agreement.[53] The Pizza Hut franchise agreement's no-poach clause applies only to management-level employees, which defendants argued is necessary to promote investment in employee training.[54]

The Attorney General Office of Washington has been particularly diligent in uncovering no-poach agreements among franchises, reaching agreements with more than fifty companies. These companies comprise mostly in the fast food industry, but also the hotel industry, car repair services such as Jiffy Lube, and tax preparation services such as H&R Block.[55] Attorney General Ferguson has also gone as far as bringing litigation against one company, Jersey Mike's Subs, and has formed coalitions with other state attorneys general for nationwide changes.[56] In February 2019, seven food chains—Einstein Bros. Bagel, Express Employment Professionals, FASTSIGNS, L&L Franchising, The Maids, Westside Pizza, and Zeek's Pizza—signed legally binding agreements to stop adding no-poach clauses to their franchise contracts and to eliminate nationwide no-poach clauses from existing contracts.[57] This brings the number of companies that signed such agreements with the Washington Office of Attorney General to fifty-seven total.[58]

In the context of professional sports leagues, in October 2018, a California court held that a "show cause" penalty in the National Collegiate Athletic Association (NCAA) bylaws was void under Cal. Bus. & Prof. Code § 16600, which voids any contract that restrains trade or the pursuit of one's profession.[59] In this case, the penalty effectively restricted universities from hiring sanctioned coaches.[60] While the member school could appear before the NCAA Committee on Infractions and "show cause" as to why it should not be penalized for hiring the coach and how it would monitor the coach going forward, the court determined

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53. *See* Butler v. Jimmy John's Franchise, LLC, 331 F. Supp. 3d 786, 797 (S.D. Ill. July 31, 2018).

54. *See* Class Action Compl. at 2, Ion v. Pizza Hut, LLC, No. 4:17-cv-00788 (E.D. Tex. Nov. 3, 2017) (No. 1), *voluntarily dismissed without prejudice by* 17:cv-00788 (E.D. Tex. July 16, 2018) (No. 45).

55. Washington State Office of Attorney General, *AG Ferguson's Initiative to End No-Poach Clauses Nationwide Continues with Seven Additional Chains* (Dec. 20, 2018), https://www.atg.wa.gov/news/news-releases/ag-ferguson-s-initiative-end-no-poach-clauses-nationwide-continues-seven; Washington State Office of Attorney General, *AG Ferguson's Initiative Ends No-Poach Clauses at Four More Corporate Chains Nationwide* (Aug. 8. 2019), https://www.atg.wa.gov/news/news-releases/ag-ferguson-s-initiative-ends-no-poach-clauses-four-more-corporate-chains.

56. *Id*.

57. *Id.*

58. *Id.*

59. McNair v. Nat'l Collegiate Athletic Ass'n, No. BC462891, at ¶¶ 18-19 (Super. Ct. Cal. Oct. 9, 2018) (No. 1).

60. *Id.* at ¶ 3.

that the practical reality was that the NCAA bylaws disincentivized and deterred universities from hiring certain coaches.[61] Therefore, the bylaws were deemed void in California as an unlawful restraint.[62] The court determined that "the restrictive covenants provide a much greater restriction than a single non-compete agreement between employee and employer… [restricting an employee's] ability to practice his profession … in every state in the country."[63] Finally, the court emphasized that "it is clear that the legislature intended to broadly remove any impediments in contracts by which the right to engage in business and occupations of one's choosing could be abridged."[64]

In the context of a medical facility consortium, the Ninth Circuit recently interpreted Cal. Bus. & Prof. Code § 16600 in such a way that a "no-employment" provision in a settlement agreement can constitute an unlawful restraint of trade under California law.[65] In *Golden v. California Emergency Physicians Medical Group et al.*, plaintiff-physician Donald Golden filed a race discrimination claim against a consortium of over a thousand emergency physicians in several Western states, after he lost his staff membership at Seton Coastside Medical Facility.[66] In the discrimination settlement, he was asked to sign an agreement not to be rehired by any of the consortium hospitals, not just the hospital in which he had worked.[67] Golden claimed that this presented a restrictive covenant that would restrain him from pursuing his profession.[68] The matter was referred to a magistrate judge, who recommended that Golden be compelled to sign the agreement.[69] The district court adopted the magistrate's recommendation, and Golden appealed, arguing that the no-employment provision of the agreement violated California policy on job mobility.[70] Judge Diarmuid F. O'Scannlain agreed, writing that "[we] have no reason to believe that the State has drawn section 16600 simply to prohibit 'covenants not to compete' and not also other contractual restraints on professional practice."[71]

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61. *Id.* at ¶¶ 3, 18.
62. *Id.* at ¶ 19.
63. *Id.* at ¶ 18.
64. *Id.* at ¶ 15.
65. Golden v. Cal. Emergency Physicians Med. Group et al., 782 F.3d 1083, 1092-93 (9th Cir. 2015).
66. *Id.* at 1084.
67. *Id.* at 1084-85.
68. *Id.* at 1085.
69. *Id.*
70. *Id.*
71. *Cal. Emergency Physicians*, 782 F.3d at 1093.

4) Mergers & Acquisitions, and Labor Market Monopsonies

Recent economic research reveals that most local labor markets are highly concentrated, as defined by the Department of Justice and Federal Trade Commission's Horizontal Merger Guidelines.[72] Market concentration means that many American workers have few choices of employers in their industry, and sometimes literally only one employer.[73] In 1933, economist Joan Robinson coined the term 'monopsony' to describe employer market power over wages and work.[74] Labor market monopsony (the dominance employers exercise in job markets), is both a result and a contributor to the rising attempts of employers to include restraints on mobility in employment contracts.[75] Recent research shows that employees signing restrictive covenants do not receive a high wage differential, further indicating monopsonistic conditions in those markets which reduce wages and cause harm to the employees.[76] New empirical evidence has brought attention to the prevalence and harmful effects of labor market monopsonies in contemporary industries: "Economists and policymakers increasingly recognize the existence of employer monopsony power in labor markets based on direct evidence of collusion between employers and non-compete agreements, as well as indirect evidence of minimum wage impacts on employment, wage-setting, and wage discrimination."[77]

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72. The Horizontal Merger Guidelines classify markets as unconcentrated, moderately concentrated, and highly concentrated. U.S. DEP'T OF JUSTICE & F.T.C., HORIZONTAL MERGER GUIDELINES § 5.3 (2010). For recent research on labor market concentration see*, generally*, Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2018); José Azar, Ioana Marinescu, Marshall Steinbaum & Bledi Taska, *Concentration in U.S. Labor Markets: Evidence from Online Vacancy Data* 1 (IZA - Inst. of Labor Econ. Discussion Papers, No. 11379, 2018), https://www.econstor.eu/bitstream/10419/177183/1/dp11379.pdf. Other research has found that employer-side concentration in local labor markets has increased since the 1970s. Efraim Benmelech, Nittai Bergman & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* 4, 19 (Jan. 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3146679&download=yes.

73. *See* José Azar, Ioana E. Marinescu & Marshall Steinbaum, *Labor Market Concentration* A.2 (IZA - Inst. of Labor Econ. Discussion Papers, No. 11254, 2017), https://www.econstor.eu/bitstream/10419/177058/1/dp11254.pdf; Benmelech et al., *supra* note 72, at 10.

74. Joan Robinson, *The Economics of Imperfect Competition* 215 (St. Martin's Press 2d ed. 1969) (1933); *see also* Suresh Naidu, Eric A. Posner, & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 549-50 (Dec. 2018).

75. *See* Balasubramanian et al., *supra* note 8; Starr, *supra* note 8.

76. Starr, *supra* note 2, at 33; *see also* Naidu et al., *supra* note 74, at 545.

77. Hiba Hafiz, *Picketing in the New Economy*, 39 CARDOZO L. REV. 1845, 1871-72 (2018); *see also* Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L. J. 1031, 1042 (Summer 2019); José Azar, Ioana Elena Marinescu, Marshall Steinbaum, & Bledi Taska, *Concentration in Us Labor Markets: Evidence from Online Vacancy Data* 16-17 (NBER Working Paper No. w24395, 2018).

In a 2018 article, Naidu, Suresh, and Posner stated that "a wave of industry consolidation has given employers greater bargaining power in labor markets."[78] They offer examples of consolidation of markets affecting the employment contracts and wages of professions such as physicians and pilots.[79] Even without non-compete restrictions, the nature of job market searches and the costs of job switching for employees create job markets prone to employer monopsonies. Economists Kenneth Burdett and Dale T. Mortensen developed a model of labor markets, with a large number of identical workers and identical firms, where search frictions naturally lead employers to have monopsony power.[80] Alan Manning, in his influential book *Monopsony in Motion*, uses the support of his empirical work to show how workers must spend time and effort to find jobs, and therefore the employer can reduce compensation—including wages, benefits, and workplace amenities—or fail to increase compensation despite the worker's performance, because the employer knows that the employee has high switching costs in finding an alternative job.[81]

In 2016, the Council of Economic Advisors concluded that "employers may be better able to exercise monopsony power today than they were in past decades . . . [F]orces that undermine competition tend to reduce efficiency, and can lead to lower output, employment, and social welfare."[82] Such restraints imposed by employers "can lead to inefficient reductions in employment and output, where some workers who would have been willing to work at the competitive market wage are never hired, and the output they would have produced is produced less efficiently by other firms if at all."[83] The Council warns that the extensive use of employment non-competes threatens to undermine efficiencies offered by free market competition.[84] Labor concentration indexes document the competitive choices employees have in the job market. The growing evidence on labor market monopsonies suggests that beyond the harms of collusive agreements between competing employers,

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78. Naidu et al., *supra* note 74, at 546.

79. Naidu et al., *supra* note 74, at 546-47.

80. *See generally* Kenneth Burdett & Dale T. Mortensen, *Wage Differentials, Employer Size, and Unemployment*, 39 INT'L ECON. REV. 257 (1998).

81. *See generally* Alan Manning, *Monopsony in Motion: Imperfect Competition in Labor Markets* (2003); *see also* Alan Manning, *Imperfect Competition in the Labor Market*, 4B HANDBOOK OF LABOR ECONOMICS 973, 973-1042 (2011).

82. COUNCIL OF ECON. ADVISORS, LABOR MARKET MONOPSONY: TRENDS, CONSEQUENCES, AND POLICY RESPONSES 1, 10 (Oct. 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf.

83. *Id.* at 3.

84. *See id.* at 1 (warning of a "growing concern about an additional cause of inequity—a general reduction in competition among firms, shifting the balance of bargaining power toward employers").

more attention should be given to how mergers and acquisitions result in stronger monopsonies that further lock in employees to a single employer.

B. Vertical Restraints

Non-competes have become a standard feature in employment agreements. But beyond traditional non-competes, employers also regularly require their employees to sign a wide and constantly expanding variety of restrictive clauses designed to reduce the outside options of employees. These include non-solicitation of customers and co-workers, pre-innovation assignment agreements of all future patents, copyrights—as well as non-patentable and non-copyrightable ideas, non-disclosure agreements that reach beyond what is defined as secret under trade secrecy laws, and exit penalties.[85] As I wrote in my article *The New Cognitive Property*: "Through this web of extensively employed mechanisms, knowledge that has traditionally been deemed part of the public domain becomes proprietary."[86] I discuss each of these categories briefly below. Importantly, however, this is not meant to be an exhaustive list. New versions of mobility restrictions continue to appear in employment contracts. As one commentator wrote about employers attempting to avoid California's prohibition of non-competes by seeking loopholes, "both the legislature and the courts are wise to creative tricks, and both have stated, in no uncertain terms, that they will not waver."[87]

1) Non-Solicitation of Customers & Co-workers

Non-solicitation of customers clauses prohibits employees from competing in the industry over the clients and customers—and, often, those defined in the contract as "prospective customers"—of their former employers. It is easy to understand why such clauses are effectively non-competes: without customers and clients, the point of market competition is moot. On November 1, 2018, the California Court of Appeals invalidated employee non-solicitation clauses, deeming such clauses unlawful restraints on trade under Section 16600.[88] The court referenced the broad statutory language in concluding that it was within the court's discretion to invalidate the non-solicitation provision because "unless a contractual restraint falls into one of section 16600's three statutory

85. The New Cognitive Property, *supra* note 4, at 790.
86. *Id.* at 791.
87. Nina B. Ries, *Understanding California's Ban on Non-Compete Agreements*, HUFFINGTON POST (Feb. 23, 2017).
88. AMN Healthcare Inc. v. Aya Healthcare Services Inc., 28 Cal. App. 5th 923, 935 (2018).

exceptions . . . it ostensibly is void."[89] Indeed, outside of California, courts also understand non-solicitation clauses to be equivalent to non-competes, and assess both under a standard of reasonableness to determine enforceability.[90]

Non-solicitation of former employees prohibitions are similarly anti-competitive, creating a list of off-limit workers; once again effectively creating non-competes that cover not only the employee who signs the agreement but also affecting the entire workforce of the employer, who cannot receive outside offers from their former co-workers.[91] As I have written in my article *The New Cognitive Property*:

> Non-poaching and non-hiring clauses round out the list of untouchables—expanding ownership from clients to co-workers—by stripping former employees of their professional network . . . All of these clauses, targeting the connections formed between former employees and their professional networks, impose a competition penalty on former employees and function equivalently to non-competes.[92]

2) Pre-Innovation Assignment Clauses

Pre-innovation assignment agreements regularly go beyond the subjects that intellectual property deem commodifiable. They also regularly reach into the future, propertizing innovation that has not yet been conceived. In my book *You Don't Own Me*, I tell the story of Carter Bryant, an employee of the world's largest toymaker, Mattel, who signed the same standard contract that so many American workers are asked to sign.[93] The pre-innovation assignment clause assigned to Mattel all his future creativity and innovation with no obligation of Mattel to reward any such innovation beyond Carter's base salary.[94] The contract defined "inventions" in the broadest possible way: "'Inventions' includes, but is not limited to all discoveries, improvements, processes, developments,

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89. *Id.*

90. *See, e.g.*, Cox v. Altus Healthcare & Hospice, Inc., 706 S.E.2d 660, 664 (Ga. Ct. App. 2011) (concluding "that the nonsolicitation clause was an unreasonable restriction on business"); Cap Gemini Am., Inc. v. Judd, 597 N.E.2d 1272, 1287 (Ind. Ct. App. 1992) (concluding that nonsolicitation provisions were unenforceable because they contained no limitations on time, personnel, or geographical location); Sharvelle v. Magnante, 836 N.E.2d 432, 440 (Ind. Ct. App. 2005) (holding that a nonsolicitation agreement was overbroad in scope).

91. David L. Johnson, *The Parameters of "Solicitation" in an Era of Non-Solicitation Covenants*, 28 A.B.A. J. LAB. & EMP. L. 99, 99 (2012); *see also* DAVID J. CARR, THE PROTECTION OF TRADE SECRETS, CONFIDENTIAL INFORMATION AND GOODWILL: DRAFTING ENFORCEABLE CONFIDENTIALITY, NON-COMPETE AND NON-SOLICITATION AGREEMENTS: 10 TRICKS AND TRAPS (2002) (listing nonsolicitation agreements alongside noncompete and trade secret agreements as contractual protections against industrial espionage).

92. The New Cognitive Property, *supra* note 4 at 830-31.

93. *See generally* ORLY LOBEL, YOU DON'T OWN ME: HOW MATTEL V. MGA ENTERTAINMENT EXPOSED BARBIE'S DARK SIDE (2017).

94. *Id.* at 22-4.

design, know-how, computer data programs, and formulae, whether patentable or unpatentable."[95]

The story of the creation of Bratz dolls, a competitor toy to Barbie, reveals how an assignment clause is used by a corporation as a sledgehammer to prevent an employee from leaving his employer to compete in the industry. Assignment clauses at times even attempt to directly and explicitly reach into the future after the employee has left her employer.[96] These clauses, termed "trailer" or "holdover" clauses, state that after the employee leaves her job, her former employer owns any invention within a specified period.[97] Generally, jurisdictions enforce trailer clauses using an analogous lens to non-compete enforcement: the rule of reason.[98]

In California, where non-competes are void, the courts have also voided clauses that explicitly reach into the post-employment period. For example, in *Applied Materials, Inc. v. Advanced Micro-Fabrication Equipment, Inc.*, the Court held an employer's assignment clause invalid because it required assignment of inventions related to the employee's work with the employer within one year after termination of employment.[99] The Court held that the assignment clause was void under Section 16600 as an unlawful restriction on employee mobility because the assignment clause operated to restrict the employee's job opportunities after he left the employer.[100] Importantly, however, assignment agreements do not have to explicitly reach post-employment in order to impose post-employment restrictions, courts must be sensitive to patterns and language that effectively reduce competition because of the substantive breadth of the assignment and the manner in which the former employer attempts to enforce the clause. [101]

3) NDAs

Nondisclosure agreements (NDAs) have become standard in employment contracts. NDAs regularly include information beyond traditionally defined secrets under trade secrecy laws -typically a formula or process that is not generally known and that the company derives value

95. *Id.*
96. Marc B. Hershovitz, *Unhitching the Trailer Clause: The Rights of Inventive Employees and Their Employers*, 3 J. INTELL. PROP. L. 187, 188 (1995).
97. *Id.* at 188 n.4.
98. *See id.* at 199-201.
99. Applied Materials, Inc. v. Advanced Micro-Fabrication Equip. (Shanghai) Co., 630 F. Supp. 2d 1084, 1089 (N.D. Cal. 2009).
100. *Id.* at 1090-91.
101. *Id.* at 1089.

from its secrecy.[102] More expansive inclusions of information as proprietary in NDA, beyond the traditional categories of trade secrets, include general know-how, client lists, and salary information.[103] They also may include a prohibition on disparaging the former employer.[104] The Uniform Trade Secrets Act, adopted by the vast majority of states, defines trade secrets broadly.[105] Similarly, the Defend Trade Secrets Act—the first federal trade secrecy law, enacted by Congress in 2016, includes a broad and non-exhaustive list of information that can be deemed trade secrets.[106] Even so, NDAs often attempt to go beyond these statutory definitions when defining information as "confidential" or "proprietary." In particular, contracts sometimes signal to employees that even general skills learned on the job, although known in the industry, are proprietary under the non-disclosure agreement.[107] Some jurisdictions will not enforce NDAs in a way that extends to information that is not a trade secret.[108] Many courts, however, do not limit the reach of NDAs, extending protection to information that is general know-how or could be obtained by public means, such as common-sense customer lists that could be easily compiled by any competitor.[109]

One prevalent example that has harmful effects is deeming compensation information secret. The ability to reveal one's salary to co-

102. Orly Lobel, *NDAs Are Out of Control. Here's What Needs to Change*, HARV. BUS. REV. (Jan. 30, 2018), https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change.

103. *See generally* Rochelle Cooper Dreyfuss & Orly Lobel, *Economic Espionage as Reality or Rhetoric: Equating Trade Secrecy with National Security*, 20 LEWIS & CLARK L. REV. 419 (2016); Lobel, *NDAs Are Out of Control*, *supra* note 102; Orly Lobel, *The DTSA and the New Secrecy Ecology*, 1 BUS. ENTREPRENEURSHIP & TAX L. REV. 369 (2017); Orly Lobel, *The Uber-Waymo Lawsuit: It Should Be Easy to Poach Talent, But Not IP*, HARV. BUS. REV. (June 9, 2017), https://hbr.org/2017/06/the-uber-waymo-lawsuit-it-should-be-easy-to-poach-talent-but-not-ip.

104. *See, e.g.*, Quicken Loans v. NLRB, 839 F.3d 542, 546 (D.C. Cir. 2016) (analyzing a "Mortgage Banker Employment Agreement" that contained both a "Proprietary/Confidential Information Rule" and a "Non-Disparagement Rule"); *see also* Lobel, *NDAs Are Out of Control*, *supra* note 102.

105. *See generally Uniform Trade Secrets Act with 1985 Amendments*, WORLD INTELL. PROP. ORG. (Feb. 11, 1986), https://www.wipo.int/edocs/lexdocs/laws/en/us/us034en.pdf.

106. Orly Lobel, *The DTSA and the New Secrecy Ecology*, 1 BUS. ENTREPRENEURSHIP & TAX L. REV. 369, 370-72 (2017).

107. *Id.* at 370-71.

108. *See, e.g.*, Hauck Mfg. Co. v. Astec Indus., Inc., 375 F. Supp. 2d 649, 656-57 (E.D. Tenn. 2004); Diamond Power Int'l, Inc. v. Davidson, 540 F. Supp. 2d 1322, 1345 (N.D. Ga. 2007).

109. Chin, Wiseman, Callahan & Lowe, Cal. Prac. Guide: Employment Litigation § 14:455 (The Rutter Group 2018) ("It is not settled whether a former employee's use of a former employer's confidential information *that is not protected as a trade secret* constitutes unfair competition."); *see, e.g.*, Firetrace USA, LLC v. Jesclard, 800 F. Supp. 2d 1042, 1046-50 (D. Ariz. 2010), *appeal dismissed by* 459 Fed. Appx. 906 (Fed. Cir. 2011); Hecny Transp., Inc. v. Chu, 430 F.3d 402, 404 (7th Cir. 2005); Dow Corning Corp. v. Jie Xiao, No. 11-10008-BC, 2011 WL 2015517, at *14 (E.D. Mich. May 20, 2011).

workers and others in the industry is protected by both federal and state law. The National Labor Relations Board (NLRB) holds that prohibiting any employee—unionized or not—from discussing salaries violates their rights under the National Labor Relations Act to engage in concerted activity for mutual aid.[110] The NLRB has specifically held confidentiality agreements invalid when they contain provisions that prohibit employees from disclosing certain personnel information unless authorized by the Company.[111] Many state laws also make it illegal for any employer to prohibit pay discussions among employees, including aiding or encouraging other employees to exercise their rights under the law.[112] Digital platforms such as LinkedIn, Glassdoor, Salary.com, and SalaryExpert make compensation information easily searchable.[113] Employers have attempted to claim that use of knowledge in recruitment efforts by a former employee of a co-worker can amount to a breach of an NDA. Effectively, such claims have the same effect of employee non-solicitation clauses. An NDA that attempts to include compensation information fails factually and normatively.

4) Exit Penalties

Restrictive covenants are frequently linked to liquidated damages or to benefits that the employee must forfeit as a penalty for competition. Noncompetes and other restrictive covenants often appear in employee benefit or incentive plans as a condition for receipt of vested benefits. A

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110. *See generally* National Labor Relations Act, 29 U.S.C. §§ 151-169 (1935); Press Release, Nat'l Labor Relations Bd., Board Finds Houston Engineering Firm Unlawfully Fired Employee for Discussing Salaries with Coworkers (Feb. 15, 2013), https://www.nlrb.gov/news-outreach/news-story/board-finds-houston-engineering-firm-unlawfully-fired-employee-discussing; Exec. Order No. 13,665, 79 Fed. Reg. 20,749 (Apr. 11, 2014) (increasing penalties for employers who violate the right of employees to disclose and discuss salaries).

111. Debbie Berman, Andrew Vail & Licyau Wong, *Employment Agreements: Employers Need to Pay Attention to Growing Government Activism,* IP WATCHDOG (Jan. 22, 2017), https://www.ipwatchdog.com/2017/01/22/employment-agreements-employers-government-activism/id=77161/; Quicken Loans, Inc, 359 N.L.R.B. 533 (2013); Flex Frac Logistics, 358 N.L.R.B. 1131 (2012); Costco Wholesale Corp., 358 N.L.R.B. 1099 (2012).

112. CAL. LAB. CODE § 1197.5(k)(1) ("An employer shall not prohibit an employee from disclosing the employee's own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise his or her rights under this section.").

113. Benjamin Arendt, *Glassdoor? Google? LinkedIn? Any Which Way, the Future of Recruiting Is Transparency*, TALENT DAILY (June 6, 2018, 4:16 PM), https://www.cebglobal.com/talentdaily/glassdoor-google-linkedin-any-which-way-the-future-of-recruiting-is-transparency/; Queenie Wong, *Are You Getting Paid Enough? LinkedIn Launches Salary Tool*, MERCURY NEWS (last updated Nov. 3, 2016, 6:27 AM), https://www.mercurynews.com/2016/11/02/are-you-getting-paid-enough-linkedin-launches-salary-tool/; Susan Adams, *How Companies Are Coping With The Rise of Employee-Review Site Glassdoor*, FORBES (Feb. 24, 2016, 3:49 PM), https://www.forbes.com/sites/susanadams/2016/02/24/how-companies-are-coping-with-the-rise-of-employee-review-site-glassdoor/.

century ago, the Supreme Court in California—a jurisdiction that voids most non-competes—invalidated a provision in a Sale of Stock contract that would have required a metal worker to pay $5,000 if he worked for or acquired an interest in any other foundry in California, Oregon, or Washington within three years of the date of the sale.[114] The Court in *Chamberlain v. Augustine* concluded that, under Section 16600, the $5,000 penalty imposed on Augustine was a "restraint of a substantial character" on his metalworking trade, explaining that "[t]he statute makes no exception in favor of contracts only in partial restraint of trade."[115] In another earlier case, *Muggill v. Reuben H. Donnelley Corp.*, the California Supreme Court examined an employment clause that would terminate certain retirement benefits if a former employee engaged in competition with his former employer.[116] The court concluded that the provision was unenforceable, and explained that Section 16600 voids penalties, not only absolute non-competes.[117] More recently, under a statute functionally identical to Section 16600, the Supreme Court of North Dakota reached the same conclusion:

> The contract restrains Werlinger [the employee] from competing with MSI [the employer] by requiring that he "purchase the freedom" to compete with MSI by forfeiting money that MSI would otherwise pay to him. The contract restrains Werlinger from competing with MSI by "imposing a penalty if he does so" in the form of a forfeiture of money otherwise due to him if he should elect to compete with MSI.[118]

Similarly, in a case involving Merrill Lynch and two of its employees, the New York Court of Appeals held that a forfeiture-for-competition clause was unenforceable: "[a]n employer should not be permitted to use offensively an anti-competition clause coupled with a forfeiture provision to economically cripple a former employee and simultaneously deny other potential employers his services."[119] Indeed, in jurisdictions that will enforce "reasonable" non-competes, courts have recognized that permitting a penalty clause without a reasonableness assessment is no different than blindly enforcing a non-compete while

114. Chamberlain v. Augustine, 156 P. 479, 480 (Cal. 1916).

115. *Id.* When Chamberlain v. Augustine was decided, Cal. Bus. & Prof. Code § 16600 was under Cal. Civ. Code § 1673 and is cited as such in the opinion. David R. Trossen, *Edwards and Covenants Not to Compete in California: Leave Well Enough Alone*, 24 BERKELEY TECH. L.J. 539, 540 (2009).

116. Muggill v. Reuben H. Donnelley Corp. 398 P.2d 147, 147 (Cal. 1965) (internal citations omitted).

117. *Id.* at 149.

118. Werlinger v. Mutual Serv. Casualty Ins. Co., 496 N.W.2d 26, 30 (N.D. 1993) (internal citations omitted).

119. Post v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 397 N.E.2d 358, 361 (N.Y. 1979).

ignoring the rule of reason.[120] For example, in *Pollard v. Autotote, Ltd.*, the Third Circuit applied Delaware law in holding that the legal standard applied to traditional non-competes is appropriate for forfeiture-for-competition provisions as well.[121] Siding with the employee, the court explained its reasoning: ''[A] covenant not to compete and a forfeiture-for-competition clause each restricts an employee's ability to accept alternate employment."[122] The court understood the term ''restriction on employment'' as broadly applying to the imposition of contractual penalties on the employee who decides to work elsewhere.[123]

Similarly, in *Deming v. Nationwide Mutual Ins. Co.*, the Supreme Court of Connecticut held that a forfeiture-for-competition provision involving ''substantial sums of money'' was a restraint against competition, reasoning that: "subjecting the employee to an economic loss undoubtedly is designed to deter competition.''[124] The court emphasized: "We would be unduly formalistic if we were to invalidate a covenant not to compete that was in direct restraint of trade, but approve a forfeiture provision that indirectly accomplished the same result."[125] To reiterate the words of the court here, policymakers and adjudicators would be remiss as well if they were unduly formalistic in the field of restrictive covenants. Employers attempt to prevent employee mobility in multiple, and not always mutually exclusive ways, and competition policy must recognize the essence of the practices and their effects on labor market competition.

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Whether restrictions on job mobility are formed horizontally, in agreements between employers, or vertically, in employment contracts themselves, these clauses are designed for the same purpose and to similar effects: decreasing labor market competition, locking employees into a single employer, and reducing outside opportunities. In 2017, Princeton Economist Alan Krueger wrote:

> New practices have emerged to facilitate employer collusion, such as noncompete clauses and no-raid pacts, but the basic insights are the same: employers often implicitly, and sometimes explicitly, act to prevent the forces of competition from enabling workers to earn

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120. *See e.g.*, Frame v. Merrill Lynch, Pierce, Fenner & Smith Inc. 20 Cal. App. 3d 668, 672-73 (1971); Deming v. Nationwide Mutual Ins. Co., 905 A.2d 623, 638 (2006). The Massachusetts Supreme Judicial Court similarly tests the reasonableness of forfeitures in analogy to non-compete covenants. Bohne v. Computer Associates Int'l., 514 F.3d 141, 144 (5th Cir. 2008); *see also* Holloway v. Fow, 572 A.2d 510, 517 (1990).

121. Pollard v. Autotote, Ltd., 852 F.2d 67, 72 (3d Cir. 1988).

122. *Id.* at 71.

123. *Id.* at 72.

124. Deming, 905 A.2d at 637-38.

125. *Id.* at 638.

> what a competitive market would dictate, and from working where they would prefer to work.[126]

All of the clauses described above contribute to the concentration of labor markets and the suppression of wages. In recent years, productivity and profit have gone up; yet wages have stagnated, consistent with these insights suggesting that the structure of the labor market benefits dominant employers and harms workers.[127] Researchers and policymakers should focus their attention toward these restrictions, vertical and horizontal, and their effects on mobility, competition, and wages.

III. COMPETITION AS THE ENGINE OF EQUALITY

Job mobility is organically patterned by identity and social realities. The relationship between mobility and equality is a relatively new and neglected aspect of the scholarship and public debates on non-competes. While researchers and policymakers now understand the harm of restrictive covenants to the workforce at large and to the economy, this Article calls attention to their additional disproportionate harmful effects on women's wages, as well as wages of minorities and older workers. These effects are multiple and include: (1) the realities of a stagnating gender and racial wage gap; (2) the compounded effects of restriction with the added search friction and mobility restrictions that some identities face; (3) behavioral effects of risk aversion and negotiation patterns that vary across identities; (4) the social network deficit that certain groups have which can only be corrected with richer professional networks; (5) variation in preferences for nonmonetary factors in a work environment—for example, variations in the significance of voice, diversity, and corporate cultures that are free of hostility; and (6) penalty and bias for competition or mobility that varies across identities.

First, mobility is the engine to eradicate the stagnating gender and racial wage gaps. In 1957, in his seminal book *The Economics of Discrimination*, Nobel Laureate Gary Becker predicted that with enough competition over employees, discrimination would be eliminated.[128] Becker believed that, even if some biased employers had a "taste for discrimination," a healthy and competitive market would correct that bias because underpaid and undervalued employees would be low-hanging fruit for competitive recruitment.[129] A recent decision of the Ninth Circuit Court of Appeals which interpreted the Equal Pay Act cites my

126. Alan B. Krueger, *The Rigged Labor Market*, MILKIN INST. REV. (Apr. 28, 2017), http://www.milkenreview.org/articles/the-rigged-labor-market.

127. *See The Productivity-Pay Gap*, ECON. POL'Y INST., https://www.epi.org/productivity-pay-gap/ (last updated July 2019).

128. GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 153, 159 (1957).

129. *See id.* at 153, 159.

book, *Talent Wants to Be Free*, for the proposition that employee mobility between competitors is key for a healthy economy, job growth, and equality.[130] The court stated that "the Equal Pay Act should not be an impediment for employees seeking a brighter future and a higher salary at a new job."[131] My forthcoming article, *Knowledge Pays: Reversing Information Flows & The Future of Pay Equity*, analyzes new federal and state legislative initiatives to eradicate the gender pay gap.[132] These initiatives have focused on disallowing salary history with previous employers to shape offers by competitors, in an attempt to ensure that job mobility is not hampered by past discrimination.[133]

In job markets, discovering one's value depends on the *frequency* with which one is exposed to information about one's price. In a market with infrequent bargains, the "price" of labor—that is, the terms and conditions of an employee's contract—will lag behind the employee's true market value.[134] When an employee discovers information regarding their undervalued labor compensation by receiving an external offer from a competing employer, the employee may use that information to negotiate a higher salary.[135] As I wrote in a New York Times editorial in 2017: "Workers bound by noncompetes cannot rely on outside offers and free-market competition to fairly value their talents. Without incentives to increase wages in-house, companies can allow salaries to plateau."[136] In other words, mobility is the primary way to eradicate existing wage gaps, which are even more pronounced for women of color. Wage secrecy, as described above, is aided by restrictive covenants that purport to prohibit employees from sharing compensation information or that list compensation information as trade secrets, and is a way to hide internal wage discrimination from employees.[137] When firms face external competition, they move to renegotiate and to improve salaries, both in reaction to an actual recruitment attempt, and as a preemptive act to bring

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130. Rizo v. Yovino*,* 887 F.3d 453, 471-72 (9th Cir. 2018) (McKeown, J., concurring) (citing ORLY LOBEL, TALENT WANTS TO BE FREE 49-75 (2013)), *vacated and remanded on other grounds in* Yovino v. Rizo, 139 S. Ct. 706 (2019).

131. *Id.*

132. *See* Orly Lobel, *Knowledge Pays: Reversing Information Flows & The Future of Pay Equity*, 120 COLUM. L. REV. 19-21 (forthcoming 2020).

133. *See id.* at 21.

134. *See* COUNCIL OF ECON. ADVISORS, *supra* note 82.

135. *Id.*

136. Orly Lobel, *Companies Compete but Won't Let Their Workers Do the Same*, N.Y. TIMES (May 4, 2017) https://www.nytimes.com/2017/05/04/opinion/noncompete-agreements-workers.html.

137. *See infra* Part I.A.2; Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 TEX. L. REV. 789, 790-91 (2015) (explaining that "[n]oncompete agreements are now required in almost every industry and position, stymieing job mobility and information flows").

the company in line with those external opportunities.[138] This means that not only will real wages catch up with corporate productivity, but with each move, past wage discrimination can be corrected and gaps can be bridged.

Second, talent mobility impediments, including non-competes and other post-employment restrictive covenants, can have disproportionate negative effects on women, and certain identities, including aging adult employees, who often already have greater employment search friction—their geographic constraints are on average greater and non-competes artificially add to these frictions.[139] As I wrote in a 2017 article in the New York Times, "while noncompete restrictions impose hardships on every worker, for women these restrictions tend to be compounded with other mobility constraints, including the need to coordinate dual careers, family geographical ties and job market re-entry after family leave."[140]

In *Knowledge Pays*, I research the current realities and reasons for the ongoing gender wage gap.[141] Economists agree that a significant portion of the gap cannot be explained by anything easily measured such as occupational segregation, experience, position, and skill.[142] One striking and pervasive finding is that the gender wage gap grows over time in a woman's career, and is greater for mothers, which the literature refers to as "the motherhood penalty."[143] Restrictive covenants increase the already higher costs women face in switching jobs. Women more frequently face the need to coordinate dual careers, to consider family geographical ties, and to navigate job market re-entry after family leave.[144] The literature describes the "two-body problem," offering both gender-neutral and gender-biased explanations to the prioritization of one spouse's career.[145] On the rational gender-neutral aspects, the family follows the higher earner, who, because of the persistent wage gap, still

138. *See* COUNCIL OF ECON. ADVISORS, *supra* note 82.

139. Lobel, *Knowledge Pays*, *supra* note 132, at 7.

140. Lobel, *Companies Compete*, *supra* note 136.

141. *See generally* Lobel, *Knowledge Pays*, *supra* note 132.

142. *Id.* at 7-9.

143. *See generally* Aline Bütikofer, Sissel Jensen & Kjell G. Salvanes, *The Role of Parenthood on the Gender Gap Among Top Earners*, CTR. FOR ECON. POL'Y RES. (Nov. 29, 2018), https://cepr.org/active/publications/discussion_papers/dp.php?dpno=13044; Shelley J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?,* 112 AM. J. SOC. 1297 (2007).

144. Lobel, *Companies Compete*, *supra* note 136; *see also* LOBEL, *supra* note 1; Claire Cain Miller, *The Gender Pay Gap is Largely Because of Motherhood*, N.Y. TIMES (May 13, 2017), https://www.nytimes.com/2017/05/13/upshot/the-gender-pay-gap-is-largely-because-of-motherhood.html.

145. *See* Alan Benson, *Rethinking the Two-Body Problem: The Segregation of Women into Geographically Dispersed Occupations*, 51 DEMOGRAPHY 1619, 1619-20 (2014).

is more likely to be the husband.[146] The empirical research shows that relocation decisions tend to prioritize a husband's career over the wife's.[147] The vicious circle of a gender pay gap means that the wife, the lower earner, makes her search secondary to the husband's primary job search. Therefore, she is frequently limited to search only in a geographically restricted labor market near the husband's job.

On the gender-based explanation, recent studies add that the prioritization not only follows rational financial decisions, but is fueled by traditional gender roles.[148] On average, women today still face work-family challenges more often than men, including higher expectations to manage home and work duties.[149] A commute, for example, is considered less acceptable for mothers than for fathers.[150] Because of the two-body problem, economists find that skilled, dual-career couples, or "power couples," are increasingly concentrated in large metropolitan areas.[151] Non-competes that include geographic restrictions on post-employment competition loom larger and are effectively more restrictive on women. As I wrote in *Talent Wants to be Free*, jurisdictions like California that support talent flow win out: "Places that can accommodate the desire for job mobility and professional growth of both husband and wife are likely to experience a *double brain gain*."[152]

Notably, these effects may also be generally true for older demographics. Careers have a patterned span: "Geographically, our life cycles also develop in a way that moves from broader to narrower choice sets."[153] Older employees will tend to be more bound to a community because of family constraints, and non-competes will have a greater deterrent effect under such circumstances. Even if a restrictive covenant does not specify a geographic restriction, post-employment competition

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146. *Id.* at 1620 (Benson specifically discusses gender-neutral reasoning).

147. *See generally* Olav Sorenson & Michael S. Dahl, *Geography, Joint Choices, and the Reproduction of Gender Inequality*, 81 AM. SOC. REV. 900 (2016); William T. Bielby & Denise D. Bielby, *I Will Follow Him: Family Ties, Gender-Role Beliefs, and Reluctance to Relocate for a Better Job*, 97 AM. J. SOC. 1241 (1992).

148. *See generally* Benson, *supra* note 145, at 1619.

149. Juliana Menasce Horowitz, *Despite Challenges at Home and Work, Most Working Moms and Dads Say Being Employed is What's Best for Them*, PEW RES. CTR. (Sep. 12, 2019), https://www.pewresearch.org/fact-tank/2019/09/12/despite-challenges-at-home-and-work-most-working-moms-and-dads-say-being-employed-is-whats-best-for-them/; Lesley Evans Ogden, *Working Mothers Face a "Wall" of Bias—But There Are Ways to Push Back*, SCIENCEMAG.ORG (Apr. 10, 2019), https://www.sciencemag.org/careers/2019/04/working-mothers-face-wall-bias-there-are-ways-push-back.

150. Meghan Walsh, *How a Bad Commute Is Worse for Women Than Men*, PBS NEWS HOUR (Feb. 20, 2015), https://www.pbs.org/newshour/nation/commuting-driving-women-workforce.

151. *See* Dora L. Costa & Matthew E. Kahn, *Power Couples: Changes in the Locational Choice of the College Educated, 1940–1990,* 115 Q. J. ECON. 1287, 1310 (2000).

152. LOBEL, *supra* note 1, at 215 (emphasis added).

153. *Id.* at 214.

nearby presents a greater risk that the former employer will know about the new job, view it as a threat, and take legal action.

In addition to the compounded effects of wage gap and mobility constraint, women may disproportionately have non-monetary preferences in selecting an employer.[154] The #MeToo movement has publicized how women often want to leave a job because the corporate environment is hostile, not just because they have a higher paying offer with a competitor.[155] Women are more likely to have non-monetary preferences for a workplace that values diversity and is free of discrimination and hostility.[156] If a woman, for example, discovers that her employer systematically allows harassment of its female employees, she will have a strong interest in examining other opportunities in the market. If she is bound by a non-compete, the lock-in can push her outside of the industry altogether. Professional detours and employees leaving an industry not only harm the workers themselves but also dilute the talent pool of a region.

Fourth, women experience several behavioral differences in the job market that pattern negotiations and mobility. More vulnerable workers who traditionally face exclusion or experience bias—women, minorities, and immigrants—are more likely to be risk averse, less likely to negotiate against a restrictive covenant, and more likely to incur a penalty when they do in fact negotiate. In *Knowledge Pays*, I present the research on women's negotiation deficit, failing on average to ask for better terms and conditions of employment, as well as on a negotiation penalty—the negative reaction women are likely to receive from their employers when they ask for better terms.[157] Moreover, when workers come from a weaker environment, building a professional network through mobility and thick industry ties is crucial. In *Talent Wants to be Free*, I write:

> Networks are the great equalizer of professional growth. If someone was born into a poor environment and received little guidance from their immediate network of close kin, professional networks can serve as a substitute to family ties. A recent study examined this question of how the likelihood of entrepreneurial activity of one individual is impacted by the prior family experiences or by the career experiences of that individual's coworkers. The study found that a

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154. Valentina Zarya, *What Women Want from Their Employers, in 5 Simple Charts*, FORTUNE (Jan. 20, 2016), https://fortune.com/2016/01/20/what-women-want-charts/.

155. Liz Elting, *Why Women Quit*, FORBES (Aug. 21, 2019), https://www.forbes.com/sites/lizelting/2019/08/21/why-women-quit/#b18751016fa7.

156. *Id.*; *see also* Erika Beras, *Poll: Nearly Half of the Women Who Experienced Sexual Harassment Leave Their Jobs or Switch Careers*, MARKETPLACE (Mar. 9, 2018), https://www.marketplace.org/2018/03/09/new-numbers-reflect-lasting-effects-workplace-harassment-women/.

157. Lobel, *Knowledge Pays*, *supra* note 132, at 23.

> person's peers increase his or her likelihood of becoming an entrepreneur in two ways: by enhancing the *capacity* to perceive entrepreneurial opportunities and by increasing *motivation* to pursue those opportunities. Both of these effects are the strongest for those without exposure to entrepreneurship in their family, suggesting that market ties can serve as substitutes for community ties.[158]

A recent article by economist Matt Marx finds that the enforceability of employee non-competes leads women to postpone entrepreneurial ventures.[159] The study examined quarterly employment histories for all workers in twenty-four states and the District of Columbia from 1993-2011.[160] It found that women in states with stronger non-compete enforcement are more likely to wait until the employer dissolves to start what would have been rival ventures.[161] Marx suggests that the causal mechanisms may include that firms target women employees in non-compete lawsuits and that women face higher relative costs of possible litigation.[162] The article reviews the gender of more than 11,000 defendants in non-compete lawsuits, and does not find disproportionate targeting of women.[163] This of course does not mean that women are not targeted disproportionately at the stages of inclusion of restrictive covenants upon hiring and promotion, exit interviews, informal threats, cease and desist letters, or arbitration proceedings that remain uncounted and unseen. The study does finds that women face higher relative costs in defending against litigation and in returning to paid employment if they leave their startups, a circumstance which Marx terms women's re-entry wage penalty.[164]

Empirical evidence about the relationship between mobility and equality is growing. Studies into labor market concentration have found that when outside options are limited, discrimination is more pronounced.[165] A recent study funded by the National Science Foundation

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158. LOBEL, *supra* note 1, at 81-82 (citing generally Ramana Nanda & Jesper B. Sørensen, *Workplace Peers and Entrepreneurship,* 56 MGMT. SCI. 1116 (2010)) (emphasis added).

159. *See* Matt Marx, *Employee Non-compete Agreements, Gender, and the Timing of Entrepreneurship* 5-8 (May 4, 2018), https://ssrn.com/abstract=3173831.

160. *Id.* at 2.

161. *Id.*

162. *Id.* at 3.

163. *Id.*

164. *Id.* at 3.

165. *See, e.g.*, Ekkehart Schlicht, *A Robinsonian Approach to Discrimination*, 138 J. INST. & THEOR. ECON. 64 (1982); Michael R. Ransom & Ronald L. Oaxaca, *New Market Power Models and Sex Differences in Pay*, 28 J. LAB. ECON. 267 (2010); Boris Hirsch, Thorsten Schank & Claus Schnabel, *Differences in Labor Supply to Monopsonistic Firms and the Gender Pay Gap*: *An Empirical Analysis Using Linked Employer-Employee Data from Germany*, 28 J. LAB. ECON. 291 (2010). For the theoretical framework upon which these studies are based, see generally JOAN ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION (2d ed., 1969).

(NSF), the National Institute on Aging, and the Sloan Foundation explained that "only recently have studies considered the impact that imperfect competition in the labor market may have on the gender pay differential."[166] The study found that women in the workforce face higher levels of frictions than males, which can in turn contribute to lower mobility and lower earnings.[167]

Evidence is also emerging about the effects of reduced job mobility on racial inequality. A recent economics study presented a search model that revealed an inverted U-shaped relationship between labor mobility and race-based wage differentials.[168] The study examined an exogenous mobility shock on the European soccer labor market.[169] A ruling from the European Court of Justice in 1995 lifted mobility restrictions on soccer players, similar to policy changes that void non-competes in states that previously enforced them, like studies of Michigan and Hawaii.[170] The study found evidence that racial discrimination disappeared with relaxed mobility constraints.[171] The researchers concluded:

> Removing constraints on mobility, such as quotas, work permits, or restrictive contracting rules, may improve the capacity of workers to move from prejudiced to unprejudiced firms and reduce discrimination. When mobility is constrained, a firm is able to act on its prejudice because of the low cost of doing so.[172]

Mobility and discrimination is still an understudied field of research, but the evidence is growing that restricting employees from moving competitively in the job market has harmful effects on equality. If Becker was correct in that discrimination will be eradicated by eliminating market failure, we need to remember that market failure includes anticompetitive restraints which fuel labor market monopsonies.

IV. UNENFORCEABLE CONTRACTS CALL FOR EX-ANTE PROACTIVE

166. Douglas A. Webber, *Firm-Level Monopsony and the Gender Pay Gap*, 55 INDUS. REL. 323, 323 n.*, 343-44 (2016).

167. *Id.* at 344; *see generally* David Card, Ana Rute Cardoso, Jörg Heining & Patrick Kline, *Firms and Labor Market Inequality: Evidence and Some Theory*, 36 J. LAB. ECON S1, S13 (2018); Sydnee Caldwell & Emily Oehlsen, *Monopsony and the Gender Wage Gap: Experimental Evidence from the Gig Economy* 1 (Nov. 29, 2018) (unpublished manuscript), https://sydneec.github.io/Website/Caldwell_Oehlsen.pdf.

168. Pierre Deschamps & Jose De Sousa, *Labor Mobility and Racial Discrimination*, CEPREMAP 19-20 (Feb. 4, 2015), http://www.cepremap.fr/depot/docweb/docweb1501.pdf.

169. *Id.* at 2.

170. *Id.* at 3.

171. *See id.* at 25.

172. *Id.* at 3.

POLICIES

A. The Inadequacy of Defensive Voidance

Until very recently, the critique of non-competes mostly entered into judicial decisions when a former employer brought an action against an employee. Courts consider the harms of mobility suppression when determining whether a restrictive covenant is enforceable. In California such covenants are void because they "restrain trade and the pursuit of one's profession," and in other jurisdictions because they are "unreasonable." The insight that restrictive covenants are harmful has thus primarily been employed in a defensive manner.

Courts have largely adopted three approaches to void non-competes: (1) red-pencil, (2) blue-pencil, and (3) reformation.[173] Red-penciling means that the court will deem a non-compete clause with any overbroad provision to be void in its entirety.[174] Blue-penciling courts strike any overbroad provisions and enforce a revised version of the non-compete clause[175], while reformation states rewrite overbroad clauses by "narrow[ing] the covenant so that it conforms to the actual requirements of the parties."[176] As the White House's report on non-compete agreements explains, red-penciling "provide[s] disincentives for employers to write non-compete contracts that are unenforceable by refusing to enforce and making void a non-compete contract that contains any unenforceable provisions."[177]

Still, these decisions are made on an individual basis when an employee is sued for breach of a restrictive covenant that she had signed long before. The outcomes of these decisions are highly unpredictable, and happen only after an employee has risked a lawsuit to pursue her career.

A merely defensive approach is no longer adequate. Many states are rethinking their non-compete policies and, in October 2016, the White House issued a Call for Action urging states to limit the use of post-employment restrictions.[178] I was part of the White House Working

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

174. *Id.*; *see, e.g.*, Star Direct, Inc. v. Dal Pra, 767 N.W.2d 898, 917 (Wis. 2009); Ward v. Process Control Corp., 277 S.E.2d 671, 673 (Ga. 1981).

175. WHITE HOUSE, *supra* note 173. *See, e.g.*, Valley Med. Specialists v. Farber, 982 P.2d 1277, 1286 (Ariz. 1999).

176. Reddy v. Cmty. Health Found. of Man, 298 S.E.2d 906, 916 (W. Va. 1982); *see also* WHITE HOUSE, *supra* note 173; *see, e.g.*, Hillard v. Medtronic. Inc., 910 F. Supp. 173, 177-78 (M.D. Pa. 1995).

177. WHITE HOUSE, *supra* note 173.

178. Press Release, White House, Fact Sheet: The Obama Administration Announces New Steps to Spur Competition in the Labor Market and Accelerate Wage Growth (Oct. 25,

Group that resulted in the Call for Action, and in August 2016, I presented my research on employee mobility at the White House. One of the recommendations included in the President's Call for Action to the states was to require advance notice to prospective employees that a job offer includes a requirement to sign a restrictive covenant.

B. Advance Notice

Beyond the recommendation of banning non-competes for most workers, the White House Call for Action urged states to improve transparency and fairness of non-compete agreements by, for example, disallowing non-competes unless they are proposed before a job offer or a significant promotion has been accepted and consideration is provided over and above continued employment.[179] A new bill before Congress—The Mobility and Opportunity for Vulnerable Employees Act (the MOVE Act)—proposes a full or partial ban on non-competes, in addition to barring non-compete agreements for low wage workers; the bill would similarly require companies to give notice to job applicants ahead of time if they will be asked to sign such a contract.[180] This notice is significant because, as explained in my article *Enforceability TBD: From Status to Contract in IP*, employees are often unaware of the restrictions they sign when they accept a new job.[181] Restrictive covenants are often introduced not only after the employee has accepted the job, but also after the employee has already begun working, and:

> [n]otice, or the absence of notice, affects not only the decision of whether to accept a certain job under particular terms but also affects decision about whether to seek more information about the firm's practices in enforcing the restrictive covenant. Notice could also produce more information as to the enforceability of such restrictions in different jurisdictions.[182]

More important than oral notice about the requirement of a restrictive covenant would be a requirement to inform employees about their right to mobility. The Defend Trade Secrets Act (DTSA), enacted by Congress in 2016, provides a model for such a mandatory notice that must be inserted in all employment contracts.[183] The DTSA gives employees immunity from criminal or civil liability for reporting illegalities

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2016), https://obamawhitehouse.archives.gov/the-press-office/2016/10/25/fact-sheet-obama-administration-announces-new-steps-spur-competition.

179. *Id.*

180. *See id.*; 18 U.S.C. § 1833(b).

181. Orly Lobel, *Enforceability TBD: From Status to Contract in Intellectual Property*, 96 B.U. L. REV. 869, 871 (2016).

182. *Id.*

183. 18 U.S.C. § 1833(b)(1).

even if it entails revealing trade secrets.[184] The Act requires notice of this immunity "in any contract or agreement with an employee that governs the use of a trade secret or other confidential information."[185] Similarly, states that ban non-competes should require employers to insert into employment contracts, potentially in proximity to a lawful non-disclosure clause, a clause about the rights of an employee to compete their employer post-employment. Or the DTSA could be amended to require in addition to the notice-of-immunity on whistleblowing, a notice on the limits of trade secrets and that general know-how and information that is readily ascertainable from public searches cannot be deemed secret and proprietary.

C. Class Actions

The cases that actually arrive to court to enforce a restrictive covenant are merely the tip of the iceberg of how these covenants shape the labor market and industry. As Professor Harlan Blake wrote:

> For every covenant that finds its way to court, there are thousands which exercise an *in terrorem* effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor, or who are anxious to maintain gentlemanly relations with their competitors. Thus, the mobility of untold numbers of employees is restricted by the intimidation of restrictions whose severity no court would sanction.[186]

The class actions in the context of collusive horizontal agreements are an important model for the more pervasive practice of vertical restraints, appearing routinely in employment contracts in every industry. Indeed, the antitrust lens is important. Section 1 of the Sherman Antitrust Act makes illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States."[187] To establish a prima facie case a plaintiff must allege (1) some form of concerted action by (2) two or more persons that (3) unreasonably restrains interstate commerce.[188]

As I wrote in *Talent Wants to be Free*, "[t]hough we have begun to shine the spotlight on guild and cartel practices and recognized them as impeding healthy market competition, quietly in the shadows human capital controls have exploded in size and power, creating an

184. *Id.* at § 1833(b)(3).
185. *Id.* at § 1833(b)(3)(A).
186. Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 682-83 (1960).
187. 15 U.S.C. § 1 (2004).
188. *In re* Nasdaq Market-Makers Antitrust Litig., 894 F. Supp. 703, 710 (S.D.N.Y. 1995).

anticompetitive iceberg."[189] California's Business and Professions Code Section 16600 and Section 1 of the federal Sherman Act share the language of prohibiting contracts "in restraint of trade."[190] Indeed, until the 1907 enactment of the Cartwright Act (Bus. & Prof. Code §§ 16700 *et seq.*), Business & Professions Code section 16600 was California's only antitrust law regulating trade in California.[191] California courts have further determined that employers using litigation to enforce an unlawful restrictive covenant can be liable under section 17200 of the California Business Code, which prohibits unfair practices.[192]

The essence of antitrust law is to prohibit firms from acting to reduce market competition in both consumer and labor markets. Class actions are particularly suitable in the area of unlawful restrictive covenants because they are frequently unilateral uniform contracts of adhesion presented to an entire workforce; the restrictive terms are generally identical; no single employee will usually have sufficient financial resources or financial stake in pursuing litigation alone; and the harms of the restriction pervade the workforce, by depressing wages for the entire class of employees.

D. Regulatory and Enforcement Action

A new petition, which I helped coordinate, was filed in March 2019 to the FTC by the Open Markets Institute, the AFL-CIO, Service Employees International Union (SEIU), and over sixty other signatories—including labor organizations, public interest groups, and dozens of legal scholars.[193] The petition calls on the FTC to use its regulatory power, in its charge with the interpretation of Section 5 of the FTC Act's

189. LOBEL, *supra* note 1, at 221.

190. *Compare* 15 U.S.C. § 1 (2004), *with* CAL. BUS. & PROF. CODE § 16600 (2019).

191. Julian O. Von Kalinowski & John J. Hanson, *The California Antitrust Laws: A Comparison with Federal Antitrust Laws*, 6 UCLA L. REV. 533, 540 n.50 (1959).

192. *See, e.g.*, Robinson v. U-Haul Co. of California, 4 Cal. App. 5th 304, 313, 316 (2016) (granting attorney fees, compensatory damages, and a permanent injunction against former employer that initiated and threatened litigation to enforce a non-compete for purportedly anticompetitive purposes); Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 187 (1999) (stating that an unfair business practice "threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation on the law, or otherwise significantly threatens or harms competition."). The California courts have also found that an employer may not fire an employee for refusing to sign an agreement containing provisions in direct violation of public policy. Latona v. Aetna United States Healthcare, Inc., 82 F. Supp. 2d 1089, 1097 (C.D. Cal. 1999).

193. *Petition to the Federal Trade Commission for Rulemaking to Prohibit Worker Non-Compete Clauses*, OPEN MKTS. INST. (Mar. 20, 2019), https://openmarketsinstitute.org/petitions/here-is-a-petition/; *Petition Before the Federal Trade Commission for Rulemaking to Prohibit Worker Non-Compete Clauses*, OPEN MKTS. INST. (Mar. 20, 2019), https://openmarketsinstitute.org/wp-content/uploads/2019/03/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf.

prohibition on "unfair methods of competition,"[194] to issue a federal rule to ban the practice of non-competes nationwide.[195] The petition further calls to prohibit employers from presenting non-compete clauses as a condition of employment and establish an FTC cause of action against employers who use, or seek to use, non-competes with their employees.[196]

Related to a possible FTC rule, the Workforce Mobility Act of 2018 is a new bill that seeks to prohibit and prevent enforcement of covenants not to compete on employees who "engage in commerce or in the production of goods for commerce."[197] Under the proposed bill, employers would be fined for each employee affected, or for each week the employer was in violation.[198] The House version goes further to say that a covenant not to compete may violate antitrust laws.[199]

States also have the authority to pursue action against companies who engage in fraudulent or illegal acts, and state attorneys general have begun to be active in the field of employment restrictive covenants.[200] Illinois and New York in particular have been leading the way in conducting proactive investigations into employers for requiring their

194. 15 U.S.C. § 45; *see also* FTC v. Ind. Fed. of Dentists, 476 U.S. 447, 454 (1986) (internal citations omitted) ("The standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons."); FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) ("[L]egislative and judicial authorities alike convince us that the Federal Trade Commission does *not* arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws." (emphasis added)).

195. *Petition Before the Federal Trade Commission for Rulemaking to Prohibit Worker Non-Compete Clauses*, OPEN MKTS. INST. (Mar. 20, 2019), https://openmarketsinstitute.org/wp-content/uploads/2019/03/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf.

196. *Id.*; *see also* Josh Eidelson, *Labor Groups Petition U.S. FTC to Ban Non-Compete Clauses*, BLOOMBERG (Mar. 20, 2019, 10:22 AM), https://www.bloomberg.com/news/articles/2019-03-20/labor-groups-petition-u-s-ftc-to-prohibit-non-compete-clauses.

197. Workforce Mobility Act of 2018, S. 2782, 115th Cong. § 2 (2018) (as introduced in Senate, Apr. 26, 2018).

198. *Id.* at § 3(b).

199. Workforce Mobility Act of 2018, H.R. 5631, 115th Cong. § 3 (2018), https://www.congress.gov/bill/115th-congress/house-bill/5631/text.

200. For example, the New York Attorney General has authority to enjoin "repeated fraudulent or illegal acts . . . or persistent fraud or illegality in the carrying on, conducting or transaction of business." N.Y. EXEC. L. § 63(12); *see also* Aruna Viswanatha, *Sandwich Chain Jimmy John's to Drop Noncompete Clauses from Hiring Packets*, WALL ST. J. (June 21, 2016, 9:00 PM), https://www.wsj.com/articles/sandwich-chain-jimmy-johns-to-drop-noncompete-clauses-from-hiring-packets-1466557202; Aruna Viswanatha, *Legal Publisher in Settlement to Drop Noncompete Agreements for Employees*, WALL ST. J. (June 15, 2016, 12:01 AM), https://www.wsj.com/articles/legal-publisher-in-settlement-to-drop-noncompete-agreements-for-employees-1465963260 (settlement between New York Attorney General and Law360).

workforce to sign unenforceable contracts.[201] As Illinois's Attorney General wrote:

> Harms suffered by individual workers are comparable to harms suffered by individuals bound by some unenforceable term buried in a "terms and conditions" agreement or privacy policy. The collective damage in either scenario creates a state interest, which state attorneys general are in a unique position to protect.[202]

State attorneys general are also looking at ways to educate employees about unlawful non-competes. Illinois's Consumer Fraud and Deceptive Business Practices Act prohibits "unfair methods of competition and unfair or deceptive acts or practices."[203] The state's attorney general office explains that:

> An 'unfair practice' is one that (1) offends public policy as established by statute, common law or otherwise, (2) is immoral, unethical, oppressive, or unscrupulous, or (3) causes substantial injury to consumers. A non-compete that violates existing common law or statutory restrictions could satisfy each prong of this test, creating a cause of action in states with similar consumer protection statutes or strong unfair competition laws.[204]

Ex ante regulatory action addresses the critical problem in the law of non-competes of vast uncertainties, misinformation, and psychological *in terrorem* effects. One study finds nearly 40% of workers reported rejecting an offer for employment from a competitor because of a non-compete clause, despite working in a state like California that void non-competes.[205]

In most states, where non-competes are enforced using a standard of reasonableness, there is great variation in the case law, described by one court as "a sea—vast and vacillating, overlapping and bewildering. One can fish out of it any kind of strange support for anything, if he lives so long."[206] Another way to create uncertainty, and attempt to evade the

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201. *See, e.g.*, OFFICE OF THE ATTORNEY GENERAL STATE OF ILLINOIS, OVERUSE OF NON-COMPETITION AGREEMENTS: UNDERSTANDING HOW THEY ARE USED, WHO THEY HARM, AND WHAT STATE ATTORNEYS GENERAL CAN DO TO PROTECT THE PUBLIC INTEREST 1 (June 13, 2018).

202. *Id.*

203. 815 ILL. COMP. STAT. 505/2 (1973); OFFICE OF THE ATTORNEY GENERAL STATE OF ILLINOIS, OVERUSE OF NON-COMPETITION AGREEMENTS: UNDERSTANDING HOW THEY ARE USED, WHO THEY HARM, AND WHAT STATE ATTORNEYS GENERAL CAN DO TO PROTECT THE PUBLIC INTEREST 8 (June 13, 2018), https://lwp.law.harvard.edu/files/lwp/files/webpage_materials_papers_madigan_flanagan_june_13_2018.pdf.

204. OFFICE OF THE ATTORNEY GENERAL STATE OF ILLINOIS, *supra* note 203, at 8.

205. Starr, *supra* note 8, at 7.

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

laws of lower enforcing states, is choice of law and choice of forum provisions.[207] Even for sophisticated employees, an unenforceable restrictive covenant that uses the language of reasonableness in imposing a restraint on trade has an effect on employee behavior: "Regardless of their validity and enforceability, covenants not to compete chill the free movement of employees and eliminate competition among actual and potential employers."[208] From an economic standpoint, a company can have a rational financial interest in requiring its employees to agree to contractual terms that are unenforceable: "Essentially, California businesses employ them as a scare tactic, attempting to retain staff and restrict their growth."[209] Recent empirical research shows that some California employers do include covenants not to compete in their standard employment contracts in high rates.[210] The empirical data shows that developing a reputation as a litigious employer has the effect of decreasing the likelihood that anyone in the company will leave.[211] In other words, employers use litigation and the threat of litigation to signal to the workforce and competitors that employees will not be allowed to leave peacefully. California courts have held that a new employer who agrees to respect an unlawful restrictive covenant between a job candidate and a former employer will be liable for wrongful termination and that such an agreement between the two employers is unlawful under Section 16600, emphasizing that "the employer should not be allowed to accomplish by indirection that which it cannot accomplish directly."[212]

Again, commentators who have addressed the chilling effects of using unenforceable contracts have, for the most part, focused on the remedies a court should adopt in reaction to the problem. But proactive action attacking the very existence of unlawful restrictions in employee covenants is key for a healthy competitive labor market. In addition to

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

208. Phillip J. Closius & Henry M. Schaffer, *Covenants Not to Compete—A Proposal for Reform*, 57 S. CAL. L. REV. 531, 532 (1984).

209. Matt Straz, *Do You Really Need a Non-Compete Agreement?*, ENTREPRENEUR (Aug. 1, 2016), https://www.entrepreneur.com/article/279812#.

210. J.J. Prescott, Norman Bishara & Evan P. Starr, *Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*, 2016 MICH. ST. L. REV. 369, 461 (2016) ("Non-enforcing states like California and North Dakota . . . have an estimated noncompete incidence of approximately 19.3%, which is actually higher than the corresponding level for every enforceability quintile.").

211. Rajshree Agarwal, Martin Ganco & Rosemarie H. Ziedonis, *Reputations for Toughness in Patent Enforcement: Implications for Knowledge Spillovers via Inventor Mobility,* 30 STRATEGIC MGMT. J. 1349, 1370 (2009) ("Just as a reputation for predatory pricing may enhance monopoly advantage by curtailing entry, so may a reputation for aggressive initiation of patent infringement lawsuits limit knowledge transfer through a key conduit: mobile employees.").

212. *See, e.g.*, Silguero v. Creteguard, Inc., 187 Cal. App. 4th 60, 69-70 (2010).

enforcement action by state attorneys general and class action lawsuits, a private right of action by employees on behalf of their co-workers can provide a viable channel of enforcement. This is particularly true in light of Supreme Court cases interpreting the Federal Arbitration Act that deem enforceable pre-dispute arbitration clauses, including class waivers, in employment contracts.[213]

A model for such actions can be the Private Attorneys General Act of 2004 ("PAGA"), created by the California Legislature to allow private individuals to sue their employers on behalf of the Labor Commissioner for violations of the Labor Code.[214] An employee bringing a PAGA claim helps enforce the Labor Code, with a monetary reward for doing so: an employee bringing a suit receives 25% of all civil penalties recovered.[215] PAGA's recovery structure incentivizes aggrieved employees in workplaces where other employees are similarly wronged to pursue collective action on behalf of all workers. This type of legislative measure, creating the remedy of private enforcement on behalf of government, is known as a *qui tam* action, and has existed for hundreds of years in both England and other American states. Employers have sought to challenge employees' PAGA rights through the use of employment arbitration agreements which contain class action and representative action waivers.[216] In *Iskanian v. CLS Transportation Los Angeles*,[217] the California Supreme Court reversed and remanded, holding that although a class action waiver in an employment arbitration agreement was valid under California law because of the broad scope of the FAA, a waiver of PAGA representative actions in any forum were "contrary to public policy," and were not preempted by the authority of the FAA.[218]

Three years after *Iskanian*, the U.S. Supreme Court confronted the issue of the enforceability of class action waivers in employment arbitration agreements in *Epic Systems Corporation v. Lewis*.[219] In *Epic*, the Supreme Court held in a 5-4 decision that the FAA allowed employers to uphold class action waiver clauses contained in employment

213. *See* Douglas Brayley et al., *U.S. Supreme Court Upholds Class Action Waivers in Arbitration Agreements*, ROPES & GRAY (May 24, 2018), https://www.ropesgray.com/en/newsroom/alerts/2018/05/US-Supreme-Court-Upholds-Class-Action-Waivers-in-Arbitration-Agreements. *See, e.g.*, Epic Systems Corp v. Lewis, 138 S. Ct. 1612, 1633 (2018) (enforcing employer's arbitration agreement regarding class waivers).

214. McKenzee D. McCammack, *PAGA is the New Qui Tam: Changing the Landscape of Employment Law in California*, 48 W. ST. U. L. REV. 199, 219 (2016).

215. *Id.* at 200-01.

216. McCammack, *supra* note 214, at 202-203.

217. Iskanian v. CLS Transp. L.A., LLC, 59 Cal. 4th 348 (2014).

218. *Id.* at 383.

219. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1633 (2018).

arbitration agreements.[220] The Court distinguished the National Labor Relations Act (NLRA) as regulating the organization of unions and collective bargaining, not dispute resolution agreements between employers and employees.[221] Notably, the majority stated that the policy behind allowing the waiver of class actions was "debatable," but ultimately found the law, and specifically the FAA, clear on the fact that employer arbitration agreements should enforced as written.[222]

Even in light of *Epic*, a recent California Court of Appeal decision has confirmed the *Iskanian* holding of PAGA waivers in employment arbitration agreements as unenforceable as contrary to public policy.[223] The Court noted that a PAGA claim is not preempted by the FAA because "the claim is a governmental claim," and *Epic* addressed the issue of the enforceability of an "*individualized* arbitration requirement."[224] California and other states can continue to provide employees with an unwaivable collective action right against injurious employers. One of the greatest injuries that employers can impose on their workforce is the elimination of exit and outside opportunities.

V. CONCLUSION

This Article, written for the symposium on frontiers in antitrust law in Silicon Valley, presents the broad and dynamic field of research on labor mobility as it relates to talent competition policy. It analyzes three aspects that have been underdeveloped in the growing field of human capital policy: (1) understanding that restrictive covenants do not simply come in the form of a contract formally labeled "non-compete" but include a whole range of practices and restrictive clauses that similarly function to suppress exit and voice and act to reduce mobility and strip employees from their human capital; (2) On top of the general harms to the labor market, there is a disproportionate harm to certain identities when mobility is restricted, focusing in particular on gender effects, but also showing evidence of the relations between racial inequality and the existence of labor monopsonies and mobility restrictions; (3) The Article argues for shift away from merely inquiring retrospectively whether a restrictive covenants is enforceable at the defensive stage of a breach of contract lawsuit. Rather, the Article calls for more proactive solutions, including antitrust and regulatory tools.

220. *Id.*
221. *Id.* at 1624-25.
222. *Id.* at 1632.
223. Correia v. NB Baker Elec., Inc., 32 Cal. App. 5th 602, 619 (2019).
224. *Id.* (emphasis added). *See also* Tanguilig v. Bloomingdale's, Inc., 5 Cal. App. 5th 665, 679-80 (2016) (a PAGA claim cannot be compelled to arbitration without the state's consent).