TRAILER CLAUSES IN A WORLD WITHOUT NONCOMPETES

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INTRODUCTION

In April 2024, the Federal Trade Commission (FTC) issued its highly anticipated final rule banning most noncompete agreements.[1] Though a federal district court quickly ruled that the FTC lacked the authority to issue the rule,[2] and the Commission has abandoned the rule under the Trump Administration,[3] the proposed rule highlights the widespread criticism of noncompete agreements. In fact, of the 26,000 comments received on the proposed rule, 25,000 supported the ban.[4] Moreover, four states have already banned noncompetes,[5] and scholars[6] and legislators[7] are increasingly critical.

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1 *See* Press Release, Fed. Trade Comm'n, FTC Announces Rule Banning Noncompetes (Apr. 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes [https://perma.cc/7A3M-Z4W8]; Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (held invalid by Ryan, LLC v. FTC, 746 F. Supp. 3d 369, 389–90 (N.D. Tex. 2024)).

2 *Ryan*, 746 F. Supp. 3d at 389–90.

3 *See* Press Release, Fed. Trade Comm'n, Federal Trade Commission Files to Accede to Vacatur of Non-Compete Clause Rule (Sep. 5, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/09/federal-trade-commission-files-accede-vacatur-non-compete-clause-rule [https://perma.cc/UE4P-9BEU].

4 Non-Compete Clause Rule, 89 Fed. Reg. at 38344.

5 California, North Dakota, and Oklahoma have banned noncompete agreements since the nineteenth century. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38424 n.767. Minnesota recently passed a ban in 2023, though the ban only applies to new noncompetes. *See* MINN. STAT. § 181.988 (2025); MINN. STAT. § 645.21 (2025).

6 *See infra* Section II.C.

7 *See, e.g.*, *Banning Noncompete Agreements: Benefits for Workers, Businesses, and the Economy: Hearing Before the Subcomm. on Econ. Pol'y of the S. Comm. on Banking, Hous. & Urb. Affs.*, 118th Cong. 1 (2024) (statement of Sen. Elizabeth Warren, Chair, Subcomm. on Econ. Pol'y).

Even if the future of noncompetes seems bleak, businesses will still want to protect the same interests secured by noncompete agreements. For example, these agreements protect against the risk of competitors poaching employees in whom a business invested considerable resources training and retaining.[8] Moreover, noncompetes are a strong safeguard against the disclosure of confidential information, such as a recipe or customer list, that may not rise to the level of a trade secret or other intellectual property form.[9]

In justifying its ban, the FTC identified several ways that businesses could achieve those goals in a world without noncompetes.[10] The FTC pointed to existing trade secrecy laws, patent law, nondisclosure agreements, and employee invention assignments as possible alternatives for protecting confidential information, intellectual property, and other sensitive activities.[11] And the FTC suggested fixed duration contracts and offering better benefits as options for discouraging employees from moving to a competitor.[12]

This Note explores a possible response to a ban in a situation where noncompetes are often salient: inventive employees. For those workers, who often have the most access to valuable information and training, businesses may look to using employee invention assignments with trailer clauses. In a trailer clause, an employee agrees to assign inventions to the employer if (1) the inventions are created during a specified period following their employment, and (2) the inventions relate to the employer's field of work. [13]

Whether turning to trailer clauses would be beneficial for society, workers, and businesses is debatable. This Note takes no normative position on such a shift to trailer clauses. Instead, this Note will demonstrate that they could function as tools for employers to secure confidential information and trade secrets and guard against indirect competition in the absence of noncompetes. For that reason, businesses and legal practitioners may find this analysis useful, but the analysis also illustrates for policymakers the potential pitfalls in banning noncompetes.

Part I provides an overview of noncompete agreements and reform efforts directed at noncompetes. Part II will examine employee

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8 Jonathan M. Barnett & Ted Sichelman, *The Case for Noncompetes*, 87 U. CHI. L. REV. 953, 969–71 (2020).

9 Alan J. Meese, *Don't Abolish Employee Noncompete Agreements*, 57 WAKE FOREST L. REV. 631, 688 (2022); *see also* Ingersoll-Rand Co. v. Ciavatta, 542 A.2d 879, 893–94 (N.J. 1988).

10 *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38424.

11 *Id.*

12 *Id.*

13 *See infra* notes 98–103 and accompanying text (defining "trailer clause" and describing common trailer clauses).

invention assignment agreements with trailer clauses, with particular attention on recent cases and scholarship. Finally, Part III will consider the legal implications for employers and employees if employers choose to use trailer clauses as a means of recreating the protections of noncompete agreements.

I. NONCOMPETE AGREEMENTS

A. *Overview*

A recent study estimates that eighteen percent of the U.S. labor force is subject to a noncompete agreement.[14] That equates to roughly 30 million American workers.[15] Though these agreements are generally more prevalent among higher-earning and higher-educated workers,[16] noncompete agreements may affect workers across skill levels from engineers to hairstylists.[17] As a result, interest in noncompete agreements has surged in recent years.[18] A plethora of scholars have lined up on both sides of the debate,[19] and even bipartisan congressional action has responded to recent research.[20]

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14 J.J. Prescott, Norman D. Bishara & Evan Starr, *Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*, 2016 MICH. ST. L. REV. 369, 461 (2016). Some evidence suggests that this number may be growing. *See* Norman D. Bishara, Kenneth J. Martin & Randall S. Thomas, *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 28–29 (2015) (documenting an increase over time in noncompete agreements in CEO contracts); CONN. GEN. ASSEMBLY LAB. & PUB. EMPS. COMM., JOINT FAVORABLE REPORT ON SB-906: AN ACT CONCERNING NONCOMPETE AGREEMENTS, at 4 (2021) (statement of Sal Luciano, President, Conn. AFL-CIO) (noting an increase in noncompete agreements for entry-level and low-wage jobs).

15 *See Civilian Labor Force Level*, FED. RSRV. BANK ST. LOUIS (Sep. 4, 2026, 08:29 CDT), https://fred.stlouisfed.org/series/CLF16OV [https://perma.cc/929E-4TVD].

16 *See* Meese, *supra* note 9, at 698.

17 *See* Prescott et al., *supra* note 14, at 461; Steven Greenhouse, *Noncompete Clauses Increasingly Pop Up in Array of Jobs*, N.Y. TIMES (June 8, 2014), https://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html [https://perma.cc/2L4M-YAPT].

18 *See supra* notes 1–7 and accompanying text; *see also* Barnett & Sichelman, *supra* note 8, at 959 n.19 (describing how articles in major media outlets have highlighted this interest in noncompetes).

19 *See infra* notes 24–25 and accompanying text (discussing the competing views on noncompete agreements).

20 For example, in 2023, Senators Christopher Murphy (D-Conn.) and Todd Young (R-Ind.) introduced the "Workplace Mobility Act of 2023" that would have severely restricted noncompete agreements. *See Following FTC's Lead, Senators Renew Efforts to Ban Non-Compete Agreements*, HUSCH BLACKWELL (Feb. 15, 2023), https://www.huschblackwell.com/newsandinsights/following-ftcs-lead-senators-renew-efforts-to-ban-non-compete-agreements [https://perma.cc/T37P-V2E6]. The bill was cosponsored by Senators Tim Kaine (D-Va.) and Kevin Cramer (R-N.D.) and had been introduced previously in 2019 and 2021. *Id.* Representatives Scott Peters (D-Calif.) and Mike Gallagher (R-Wis.) introduced an

Despite the surge in interest, the debate is nothing new. In the first recorded case where a noncompete agreement was at issue, the court stated that the obligation not to compete with a former employer is "against common law."[21] For centuries courts followed this proposition that contractual restraints on a person's pursuit of their livelihood are unenforceable.[22] However, by 1711, the English courts had altered that rule, determining that noncompete agreements are enforceable if they are "reasonable."[23]

Today, the debate over noncompetes divides into two camps: those who argue that noncompete agreements are rarely, if ever, reasonable,[24] and those who argue that noncompete agreements may be reasonable under certain conditions.[25] However, today's debates over noncompetes are mediated by scholarship in law and economics and

identical bill in the House in 2023. *Id.* And similar legislation was introduced by Senators Marco Rubio (R-Fla.) and Maggie Hassan (D-N.H.). Taylor Giorno, *FTC Votes to Ban Noncompete Agreements*, THE HILL (Apr. 23, 2024, 14:53 ET), https://thehill.com/business/4615452-ftc-votes-to-ban-non-compete-agreements/ [https://perma.cc/QGM6-8UYC].

21 *See* 1 WILLIAM CONSTANGY, NONCOMPETE LAW *Early English Cases* § 1.03, LEXIS (2025).

22 *Id.*

23 *See, e.g.*, Mitchel v. Reynolds, (1711) 24 Eng. Rep. 347, 347 (QB) (holding that contractual restraints preventing oneself from engaging in trade in particular areas are valid if there is "reasonable consideration").

24 *See, e.g.*, ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING 27–41 (2013) ("[T]he enforceability of noncompetes from a fairness perspective limits employees' right to work and to freely choose their employer." *Id.* at 37.); Yochai Benkler, *Law, Innovation, and Collaboration in Networked Economy and Society*, 13 ANN. REV. L. & SOC. SCI. 231, 235 (2017) (arguing that a lack of noncompetes promotes innovation through a high rate of knowledge flowing among various groups); Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements*, 52 WM. & MARY L. REV. 873, 921 (2010) (arguing that not only do noncompete agreements result from unequal bargaining power and conflict with the freedom to contract but also that they are ineffective tools for protecting intellectual property); Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 ANTITRUST L.J. 165, 167 (2020) (advocating more intrusive scrutiny of such agreements); Sandeep Vaheesan & Matthew Jinoo Buck, *Non-Competes and Other Contracts of Dispossession*, 2022 MICH. ST. L. REV. 113, 115–19 (arguing that noncompete agreements impose significant harms on employees and the public at large).

25 *See, e.g.*, Barnett & Sichelman, *supra* note 8, at 963 (arguing that a reasonableness standard for noncompete agreements is the best mechanism for balancing increasing innovation and protecting employee mobility); Meese, *supra* note 9, at 632–33 (asserting that economic theory and empirical evidence supports the use of noncompete agreements in certain contexts); Eyasu Yirdaw, *Preventing the Noncompete Apocalypse: Why the FTC Has It Wrong*, 5 CORP. & BUS. L.J. 124, 125 (2024) (arguing that states should be free to decide based on the economic realities in their state whether or not to enforce noncompete agreements).

innovation policy,[26] with each side ultimately claiming that their position better promotes economic growth.[27]

Indeed, businesses traditionally defend noncompete agreements on the grounds that they promote innovation because they protect the information and human capital that is vital to the businesses' success.[28] Businesses have little incentive to innovate when they cannot protect the spoils of their hard work.[29] Though other areas of law such as intellectual property provide similar protections,[30] noncompete agreements enhance that protection by securing the resources (i.e., the employees) used to develop an innovative product.[31]

Investment in new technology is typically thought to be the engine of innovation, and intellectual property law rewards such investments. However, innovation also depends on investments in human capital.[32] But to make those investments through training and sharing confidential information, the business needs assurances that they can recoup the costs of that investment.[33] The business does not want to risk their investment being misappropriated by a rival firm.[34] Noncompete agreements address that risk for businesses by offering an additional safeguard. And courts recognize that "in the modern business environment, [noncompete agreements] can be 'important business tools'

26 *See* Barnett & Sichelman, *supra* note 8, at 957, 962 (describing the role of "innovation policy analysis," *id.* at 957, and economic efficiency policy concerns in shaping the debate).

27 *Contrast* Benkler, *supra* note 24 (arguing that noncompete agreements inhibit innovation), *with* Meese, *supra* note 9, at 677–705 (citing empirical evidence for the proposition that noncompetes may increase innovation).

28 *See* Griffin Toronjo Pivateau, *Preserving Human Capital: Using the Noncompete Agreement to Achieve Competitive Advantage*, 4 J. BUS. ENTREPRENEURSHIP & L. 319, 331 (2011).

29 *See* Jon Chally, Note, *The Law of Trade Secrets: Toward a More Efficient Approach*, 57 VAND. L. REV. 1269, 1273–78 (2004) (describing the close connection between the incentive to innovate and the availability of legal protection); Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 650–53 (1960) (same).

30 *See, e.g.*, Robert P. Merges, *The Law and Economics of Employee Inventions*, 13 HARV. J.L. & TECH. 1, 5–7 (1999) (discussing, among other things, the "shop right" doctrine, *id.* at 6); *see also infra* note 89 and accompanying text (same). Notably, there is also confidential information that employers/businesses wish to keep from their competitors or the public that does not rise to the level of a trade secret or otherwise warrant protection from intellectual property laws. *See* Ingersoll-Rand Co. v. Ciavatta, 542 A.2d 879, 893–94 (N.J. 1988).

31 *See* Meese, *supra* note 9, at 688; *see also Ingersoll-Rand*, 542 A.2d at 894.

32 *See* Blake, *supra* note 29, at 650–51; *see also* Mike Isaac, Eli Tan & Cade Metz, *A.I. Researchers Are Negotiating $250 Million Pay Packages. Just Like N.B.A. Stars.*, N.Y. TIMES (Aug. 1, 2025), https://www.nytimes.com/2025/07/31/technology/ai-researchers-nba-stars.html [https://perma.cc/B4BF-VVZL] (detailing how Big Tech companies like Meta, Microsoft, OpenAI, and Google have poached key employees with offers of pay packages worth hundreds of millions of dollars).

33 *See* Blake, *supra* note 29, at 650–53.

34 *See* Meese, *supra* note 9, at 688.

which prevent individuals from 'learning [employers'] trade secrets, befriending their customers and then moving into competition with them.'"[35]

But different states have taken different approaches to regulating noncompetes, creating a complex legal landscape for businesses that seek to innovate through investments in human capital. For instance, a few states categorically prohibit the enforcement of noncompete agreements.[36] Meanwhile, most states enforce noncompetes according to a "reasonableness" test, but not every state applies the test in the same manner.[37] Even further, a state may impose additional requirements for creating an enforceable noncompete agreement.[38]

B. *Existing Law: The Reasonableness Test*

Most states rely on their own state common law to regulate noncompete agreements.[39] And looking to state law on noncompetes generally means applying the reasonableness test.[40] But what makes an agreement "reasonable"? Though courts look upon noncompete agreements with skepticism,[41] a noncompete agreement is generally

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35 Rullex Co. v. Tel-Stream, Inc., 232 A.3d 620, 624 (Pa. 2020) (second alteration in original) (quoting Hess v. Gebhard & Co., 808 A.2d 912, 918 (Pa. 2002)); *accord* Healthcare Servs. of the Ozarks, Inc. v. Copeland, 198 S.W.3d 604, 610 (Mo. 2006); *see also Ingersoll-Rand*, 542 A.2d at 887, 892–94 (discussing this motivation in the context of trailer clauses).

36 These states are California, North Dakota, Oklahoma, and Minnesota. *See supra* note 5 and accompanying text.

37 *See infra* Section I.B; *see also* Mark J. Garmaise, *Ties That Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment*, 27 J.L. ECON. & ORG. 376, 390 (2011).

38 For instance, a state may require additional consideration to support the agreement. *See, e.g.*, Labriola v. Pollard Grp., Inc., 100 P.3d 791, 794 (Wash. 2004) (requiring independent consideration for a noncompete entered into after employment begins).

39 *See* OFF. OF ECON. POL'Y, U.S. DEP'T OF TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 5 (2016); *see also* Kim A. Leffert, Andrew S. Rosenman & Ruth Zadikany, *United States: Restrictive Covenants*, MAYER BROWN (July 25, 2024), https://www.mayerbrown.com/en/insights/publications/2024/07/restrictive-covenants-us [https://perma.cc/B6JX-Q8MJ].

40 Vaheesan & Buck, *supra* note 24, at 120.

41 *See, e.g.*, Amanda Howard Real Est., LLC v. Lee, 387 So.3d 120, 124–25 (Ala. 2023) (noting that Alabama statutes carry forward the common law's disfavor of noncompete agreements); Socko v. Mid-Atl. Sys. of CPA, Inc., 126 A.3d 1266, 1274–75 (Pa. 2015) (noting that Pennsylvania courts have historically disfavored noncompete agreements); Summits 7, Inc. v. Kelly, 886 A.2d 365, 371 (Vt. 2005) (noting that noncompete agreements "run counter to that public policy favoring the right of individuals to freely engage in desirable commercial activity" (quoting Vt. Elec. Supply Co. v. Andrus, 315 A.2d 456, 458 (Vt. 1974))); Lake Land Emp. Grp. of Akron, LLC v. Columber, 804 N.E.2d 27, 30 (Ohio 2004) ("Generally, courts look upon noncompetition agreements with some skepticism and have cautiously considered and carefully scrutinized them.").

enforceable where there is a legitimate business interest, reasonable geographic and time limitations, and no violation of public policy.[42]

First, courts look to whether the noncompete agreement secures a legitimate business interest. Whether there is a legitimate business interest at stake will depend on the facts of the case,[43] but some facts generally give rise to such an interest. For example, courts have held that preserving customer relationships counts as a legitimate business interest.[44] An employer may also have a legitimate interest in the investments it makes in trade secrets[45] or in developing human capital, such as in training and educating its employees.[46]

Second, a court will review the geographic and time restraints that the noncompete imposes on the employee. However, what geographic and time restraints are reasonable may depend on "the employer's interest served by those restrictions."[47]

Finally, a court may consider the noncompete agreement's effects on public policy. This inquiry may be a general step that reflects a

42 *See infra* notes 43–49 and accompanying text (discussing each requirement for an enforceable noncompete); 104 AM. JUR. PROOF OF FACTS 3D § 3, Westlaw (database updated Aug. 2026).

43 *See, e.g.*, White v. Mederi Caretenders Visiting Servs. of Se. Fla., LLC, 226 So.3d 774, 786 (Fla. 2017) (arguing that since a "legitimate business interest" cannot be "precisely" defined, trial courts are better positioned to review the "legitimacy" of a protected interest based on the record presented to them). Some states may apply a multi-factor test, while others may apply a totality-of-the-circumstances test in determining whether a legitimate business interest exists. *E.g.*, Reliable Fire Equip. Co. v. Arredondo, 965 N.E.2d 393, 400–04 (Ill. 2011) (contrasting the two approaches and adopting the latter).

44 *See, e.g.*, Star Direct, Inc. v. Dal Pra, 767 N.W.2d 898, 908–09 (Wis. 2009) (holding that the plaintiff-business had a legitimate interest in prohibiting contact with recent past customers by an employee subject to a noncompete agreement); Palmer & Cay of Ga., Inc. v. Lockton Cos., 629 S.E.2d 800, 802 (Ga. 2006) (holding that an employer has a legitimate interest in the customer relationships its former employee established or nurtured while working for the employer).

45 *See* Ingersoll-Rand Co. v. Ciavatta, 542 A.2d 879, 888 (N.J. 1988). *Ingersoll-Rand* goes even further to find that an employer may have a legitimate business interest in information that does not rise to the level of a trade secret. *Id.* at 893–94.

46 *See* Exxon Mobil Corp. v. Drennen, 452 S.W.3d 319, 327–28 (Tex. 2014); Cmty. Hosp. Grp., Inc. v. More, 869 A.2d 884, 897 (N.J. 2005). However, such training must be more than "some general skill or training acquired while working for the employer." Chambers-Dobson, Inc. v. Squier, 472 N.W.2d 391, 399 (Neb. 1991).

47 Coates v. Heat Wagons, Inc., 942 N.E.2d 905, 915 (Ind. Ct. App. 2011); *see also* Assurance Data, Inc. v. Malyevac, 747 S.E.2d 804, 808 (Va. 2013) (noting that the particular circumstances may permit seemingly overbroad geographic and time restrictions); Estee Lauder Cos. v. Batra, 430 F. Supp. 2d 158, 181–82 (S.D.N.Y. 2006) (permitting a world-wide restriction but limiting its duration to five months).

state's policy against noncompetes generally,[48] or this inquiry may reflect specific statutory prohibitions on certain kinds of noncompetes.[49]

Even if a court deems a noncompete agreement unreasonable, some states permit reforming an agreement to make it enforceable. Courts, depending on the jurisdiction, take one of several approaches to reforming unreasonable noncompetes.[50] The merits of each approach are contested,[51] but the effect remains: Only reasonable noncompete agreements are enforceable.[52]

However, many scholars and politicians are increasingly arguing that noncompetes are *never* reasonable.[53] And the FTC's recent proposal to ban noncompetes is case in point.

C. The FTC's Proposed Rule Banning Noncompete Agreements

Despite the fact that the FTC may have lacked the authority to issue the rule,[54] and that the Trump administration ultimately did not support it,[55] the FTC's proposed rule was a serious effort at reform and

48 *See supra* note 41 and accompanying text.

49 *See, e.g.*, DEL. CODE ANN. tit. 6, § 2707 (2025) (voiding noncompete agreements "between and/or among physicians").

50 Vaheesan & Buck, *supra* note 24, at 127–28 (describing the various approaches); *see also* Jerry Cohen, Karen Breda & Thomas J. Carey Jr., *Employee Noncompetition Laws and Practices: A Massachusetts Paradigm Shift Goes National*, 103 MASS. L. REV. 31, 47–49 (2022) (comparing each approach in detail).

51 *See, e.g.*, Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672 (2008) (criticizing the blue pencil approach). In general, commentators worry about the incentive that reforming unreasonable agreements gives to employers. *See id.* at 695–96. Since employees will often not know the law surrounding noncompetes, employers may draft overly broad agreements, anticipating that employees will accept the strict provisions at face value. *See* Vaheesan & Buck, *supra* note 24, at 128. Scholars call this the "*in terrorem*" effect. Blake, *supra* note 29, at 682; *see also* Vaheesan & Buck, *supra* note 24, at 143; Cohen et al., *supra* note 50, at 48.

52 This description of what makes a noncompete agreement "reasonable" only gives a broad outline of the different requirements that jurisdictions may impose on noncompete agreements. In practice, these requirements vary widely. *See* Garmaise, *supra* note 37, at 389–90 (describing broadly the various restrictions across states).

53 *See supra* note 24 and accompanying text (citing sources arguing for this position); *see also supra* note 7 (citing statement of Sen. Elizabeth Warren criticizing noncompete agreements); *infra* Section I.D (discussing recent state efforts to ban or severely curtail noncompete agreements); *cf. supra* note 20 and accompanying text (discussing a bipartisan congressional proposal to significantly restrict the enforceability of noncompete agreements).

54 *See* Ryan, LLC v. FTC, 746 F. Supp. 3d 369, 389–90 (N.D. Tex. 2024).

55 *See* Robert Freedman, *FTC Noncompete Ban Likely Dead Under Trump*, LEGAL DIVE (Nov. 8, 2024), https://www.legaldive.com/news/noncompete-ban-likely-dead-under-trump-greg-care-Orly-Lobel/732438/ [https://perma.cc/KS7X-3AWA]. President Trump's choice to chair the FTC, Andrew Ferguson, was highly critical of the proposed rule while serving as a commissioner on the FTC. *See* Off. of Comm'r Andrew N. Ferguson,

the product of extensive research.[56] For that reason, examining the rule's structure and treating it as a general model for potential bans on noncompete agreements helps illuminate how businesses might respond to such a prohibition.

The FTC's final rule stated "that it is an unfair method of competition—and therefore a violation of section 5 [of the FTC Act]—for employers to, *inter alia*, enter into non-compete clauses with workers on or after the final rule's effective date."[57] All noncompetes, except preexisting agreements with "senior executives," would have been unenforceable after the effective date.[58] "Workers" under the rule were natural persons, irrespective of any status under state or federal law, and may have included not only employees but also independent contractors, interns or externs, volunteers, apprentices, or sole proprietors providing a service.[59] The rule required "clear and conspicuous" notice by the effective date to workers subject to a noncompete agreement that such agreement would no longer be enforceable after the effective date.[60] Additionally, the rule did not apply to noncompete agreements made as part of a good-faith sale of a business entity.[61]

However, for the purposes of this Note, the most relevant part of the rule was its definition of a noncompete clause:

> [The final rule] defines ''non-compete clause'' as a term or condition of employment that either ''prohibits'' a worker from, ''penalizes'' a worker for, or ''functions to prevent'' a worker from (A) seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or (B) operating

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Dissenting Statement of Comm'r Andrew N. Ferguson Joined by Comm'r Melissa Holyoak: In the Matter of the Non-Compete Clause Rule Matter Number P201200 (June 28, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-noncompete-dissent.pdf [https://perma.cc/3V54-BMBJ]; THE HARVARD SALIENT, *FTC Chairman Andrew Ferguson & Harvard Law Professor Adrian Vermueule: CORE Conference 2025*, at 35:17–35:40 (Youtube, Feb. 24, 2025), https://www.youtube.com/watch?v=ty3s-zjLQFk/ (questioning whether the FTC should continue defending the rule). President Trump himself has made use of noncompete agreements for his campaign staff, further suggesting he is unlikely to favor a total ban on noncompetes. *See* Freedman, *supra*. But most tellingly, the Trump Administration voluntarily dismissed the appeal of the district court's order staying the rule's effectiveness. Unopposed Motion to Voluntarily Dismiss Appeal, Ryan, LLC v. FTC, No. 24-10951 (5th Cir. Sep. 5, 2025).

56 *See* Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38342 (May 7, 2024) (held invalid by *Ryan,* 746 F. Supp. 3d at 389–90).

57 *Id.*

58 *Id.*

59 *Id.* at 38502.

60 *Id.* at 38503.

61 *Id.* at 38342.

> a business in the United States after the conclusion of the employment that includes the term or condition.[62]

In essence, that definition would have created a three-part test for identifying a proscribed noncompete clause. First, the rule used the term "prohibits" to identify those agreements that expressly restrict a worker from accepting other work or starting their own business.[63] Second, the term "penalizes" applied where the agreement imposes some penalty—such as requiring a worker to pay liquidated damages or forego certain benefits—if the worker accepts other work or starts their own business.[64] Third, the rule used the catchall term "functions to prevent" for those agreements and terms that do not expressly prohibit or penalize a worker for leaving but ultimately achieve the same effect.[65] The FTC argued that this third element is not intended to capture other types of restrictive employment agreements, such as nondisclosure or nonsolicitation agreements; rather, the intent was to follow existing caselaw in banning broad or onerous terms that functionally prohibit or penalize a worker for accepting other work or starting their own business.[66]

The FTC's rule emphasized substance over form in determining whether a noncompete agreement exists. That strategy makes sense considering the FTC's motivations in adopting the rule—in particular targeting the allegedly damaging economic effects of noncompetes.[67] The FTC cited numerous public comments in its proposal that described how noncompetes "suppressed [employees'] wages, harmed working conditions, negatively affected [employees'] quality of life, reduced the quality of the product or service [the employees'] company provided, prevented [the] business from growing and thriving, and created a climate of fear that [deterred] competitive activity."[68]

However, the rule was not without gaps. First, a worker could not seek damages or injunctive relief; rather, only the FTC could

62 *Id.* at 38363.

63 *Id.* at 38364.

64 *Id.*

65 *Id.*

66 *Id.* However, whether such a close distinction would effectively be drawn in practice is debatable. Perhaps courts would not defer to this interpretation of the rule, and a more expansive prohibition could result in practice.

67 *See id.* at 38343.

68 *Id.* at 38344. Such negative economic effects were particularly concerning to the FTC due to the prevalence of noncompetes: An estimated one in five American workers are subject to a noncompete, including a large share who are low-wage workers. *Id.* at 38346. Given the scope of the problem and varying levels of sophistication among the parties involved, a rule focusing on substance rather than form was likely necessary to achieve the FTC's goals.

investigate violations and seek injunctive relief on behalf of the worker.[69] Second, the rule did not cover several major industries, including many financial institutions, common carriers, air carriers, stockyard companies, and most nonprofits.[70] Third, the rule also made no distinction between low- and high-wage workers, which is questionable given the vast differences in training and information available to those workers in the course of employment.[71]

D. Continuing State-Level Reform Efforts

Although federal efforts to restrict noncompetes have attracted much attention, states continue to be centers of policy experimentation on noncompete agreements.[72] Consequently, future restrictions on noncompete agreements are more likely at the state level.[73]

Currently, four states have complete bans on noncompete agreements.[74] California, North Dakota, and Oklahoma have longstanding bans dating to the nineteenth century,[75] while Minnesota passed its ban

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69 *See* Stewart J. Schwab, *Noncompete Law, the Uniform Act, and the FTC Proposed Rule*, 34 U. FLA. J.L. & PUB. POL'Y 279, 291 (2024).

70 *See id.* at 288.

71 *See id.* at 287–88. Schwab gives the example of top corporate officers who have access to strategic plans and trade secrets and often negotiate noncompete clauses since it is hard to protect this wealth of knowledge otherwise. *Id.* at 288. However, the same argument would likely apply to employees engaged in research such as engineers or chemists who similarly gain vast knowledge that their employers have likely spent large sums of time and money to develop. *See* Ingersoll-Rand Co. v. Ciavatta, 542 A.2d 879, 893–94 (N.J. 1988).

72 *See* Paul Starkman & Daniel Kinsella, *States Are Charting Their Own Course on Employment Noncompetes*, BLOOMBERG LAW: US LAW WEEK (Apr. 24, 2024, at 10:58 EDT) https://news.bloomberglaw.com/us-law-week/states-are-charting-their-own-course-on-employment-noncompetes [https://perma.cc/4SD3-NTF7] (arguing that states are determined to implement their own solutions for addressing noncompete challenges).

73 Some have argued that the states should be the focal point for any changes to the enforceability of noncompete agreements. *See* Alexander T. MacDonald, *The FTC's Ahistorical Attack on Noncompetes*, THE FEDERALIST SOC'Y: FEDSOC BLOG, (Jan. 24, 2023), https://fedsoc.org/commentary/fedsoc-blog/the-ftc-s-ahistorical-attack-on-noncompetes [https://perma.cc/L3RY-XGVC] (arguing that the FTC's attempt to impose a national ban on noncompetes cuts short the state process of policy experimentation).

74 *See* sources cited *supra* note 5.

75 Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38424 n.767 (May 7, 2024) (held invalid by Ryan, LLC v. FTC, 746 F. Supp. 3d 369, 389–90 (N.D. Tex. 2024)). That historical development seems somewhat odd, though it is likely in line with the original common law rule. *See supra* notes 21–22 and accompanying text. At least in the case of California, the longstanding ban may be "a serendipitous result of the historical coincidence between the codification movement in the United States and the new state's efforts at developing a coherent legal system out of its conflicting inheritance of Spanish, Mexican, and English law." Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 579 (1999).

on noncompetes in 2023.[76] Other states have considered joining them recently, including Arizona, Illinois, Indiana, Maine, Ohio, Rhode Island, Texas, and Wisconsin.[77] Although the proposed legislation in those states has not succeeded,[78] opponents of noncompete agreements are knocking at the doors of many statehouses.

Aside from complete bans on noncompetes, states have enacted and are considering income- and industry-specific restrictions. For example, nine states and the District of Columbia restrict noncompetes to individuals earning above a certain threshold.[79] Industry-specific restrictions are similarly common but cover a wide variety of occupations.[80]

Despite the growth in state-level restrictions on noncompetes, experience has shown that restrictions may create law on the books but not in practice. For example, California prohibits noncompetes, but many major employers use noncompete agreements in their contracts with California employees.[81] The rationale for doing so is likely that

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76 *See* Act of May 24, 2023, ch. 53, 2023 Minn. Laws 49 (codified at MINN. STAT. § 181.988).

77 *State Noncompete Law Tracker*, ECON. INNOVATION GRP., https://eig.org/state-noncompete-map/ [https://perma.cc/D9EJ-75PC] (Mar. 24, 2026); John R. Fitzgerald & Pauline R. Wizig, *States with Pending Legislation to Ban Employee Noncompetes: Maine Poised to Be Next State to Enact a Ban*, FOLEY & LARDNER LLP: LAB. & EMP. L. PERSPS. (Mar. 25, 2024), https://www.foley.com/insights/publications/2024/03/states-ban-employee-noncompetes-maine/ [https://perma.cc/J4JP-EA2G].

78 *See* sources cited *supra* note 77.

79 *See State Noncompete Law Tracker*, *supra* note 77. Those nine states are Colorado, Illinois, Maine, Maryland, New Hampshire, Oregon, Rhode Island, Washington, and Tennessee. *Id.* In addition, Virginia recently amended their laws to restrict noncompetes to only employees who are not eligible for overtime pay under the Fair Labor Standards Act, thus broadening their previous income-based restriction on noncompetes. *See* George W. Ingham, Amy Folsom Kett & Saydee Schnider, *Virginia to Ban Non-Competes for Non-Exempt Employees, Effective July 1, 2025*, HOGAN LOVELLS CADWALADER (May 13, 2025), https://www.hlc.com/en/publications/virginia-to-ban-noncompetes-for-nonexempt-employees-effective-july-1-2025 [https://perma.cc/SEG8-LHCP].

80 *See, e.g.*, DEL. CODE ANN. tit. 6, § 2707 (2025) (physicians); VT. STAT. ANN. tit. 26, § 281 (2025) (cosmetology and barbershop students); ARIZ. REV. STAT. ANN. § 23-494 (2025) (broadcast employees); 820 ILL. COMP. STAT. ANN. 90/10(e) (West 2025) (construction workers); NEV. REV. STAT. ANN. § 613.195 (West 2025) (hourly employees). The ABA Model Rules of Professional Conduct, which many states have adopted, prohibit noncompetes for attorneys. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 5.6 (A.B.A. 2018).

81 In California, employers routinely impose noncompete agreements on employees hoping that they are unaware of the prohibition. *See* Alexander J.S. Colvin & Heidi Shierholz, *Noncompete Agreements: Ubiquitous, Harmful to Wages and to Competition, and Part of a Growing Trend of Employers Requiring Workers to Sign Away Their Rights*, ECON. POL'Y INST. (Dec. 10, 2019), https://www.epi.org/publication/noncompete-agreements/ [https://perma.cc/LHA2-RT8L] (finding that 29.3% of workplaces in California subject all employees to noncompetes and that 45.1% of workplaces have at least one employee subject to a noncompete despite California's prohibition on noncompetes).

employees, unaware that such agreements are unenforceable, will abide by them, creating an "*in terrorem*" effect discouraging those employees from looking to join a rival.[82] To address that issue, California passed new legislation in 2023 prohibiting employers from entering into employment agreements that include void provisions.[83] The statute makes signing void agreements a civil violation and creates a private right of action for which aggrieved employees may recover actual damages.[84] The possibility for employers to ignore noncompete restrictions may pose future reform challenges for policymakers as well as ethical questions for employers grappling with a noncompete ban. Nonetheless, some empirical research suggests that since firms do not always enforce noncompetes, the chilling "*in terrorem*" effect may not actually prohibit employees from joining rivals or starting their own firm.[85]

II. EMPLOYEE INVENTION ASSIGNMENTS AND TRAILER CLAUSES

Despite the flurry of activity at the state and federal level aiming to restrict noncompete agreements, the economic reality has changed little. Employers still need to protect their trade secrets and investments in employees. Firms have little incentive to invest in growth and innovation without the power to reduce the risk that an employee may abuse that investment by competing with the firm, developing an invention for their own benefit, or otherwise abusing the information to which they gain access through their employment.[86]

Practitioners are already considering how employers may look to other tools to achieve similar goals.[87] Even the FTC suggested that many of the goals underpinning noncompete agreements, in

82 *See* Robert W. Gomulkiewicz, *Leaky Covenants-Not-to-Compete as the Legal Infrastructure for Innovation*, 49 U.C. DAVIS L. REV. 251, 277 (2015) (describing the "*in terrorem*" effect of noncompete agreements); Blake, *supra* note 29, at 682 (same); *see also* Vaheesan & Buck, *supra* note 24, at 143 (same); Cohen et al., *supra* note 50, at 48 (same).

83 *See* Lena Kempe, *California's Noncompete Law Has Immediate Effects for Business*, BLOOMBERG L. (Feb. 6, 2024, at 04:30 ET), https://news.bloomberglaw.com/us-law-week/californias-noncompete-law-has-immediate-effects-for-business [https://perma.cc/BB3E-EBH5].

84 *See* CAL. BUS. & PROF. CODE § 16600.5 (West 2025).

85 *See* Gomulkiewicz, *supra* note 82, at 277–80.

86 *See* Blake, *supra* note 29, at 650–51.

87 *See, e.g.*, Anna Pletcher, Julia Schiller & Mike Rosenblatt, *What California Can Teach Us About a World Without Non-Competes*, ANTITRUST SOURCE, Dec. 2023, at 1, 8 (discussing employee assignment clauses as a possible solution); Anthony L. McMullen & Dylan Botteicher, *The FTC's New Rule Banning Noncompetes: How to Help Employers Going Forward*, ARK. LAW., Summer 2024, at 14, 16–17.

particular protecting investments in employees, may be accomplished through other means.[88]

One way to protect information available to inventive employees is through employee invention assignment agreements with trailer clauses.

A. *Overview*

Generally, an employer has a right in an invention created by an employee within the scope of their employment.[89] Various common law doctrines including shop right, fiduciary duty, and contract are possible sources of that right.[90] However, how and when those common law doctrines apply is unclear.[91] And the outcome can depend significantly on how a court interprets the scope of employment.[92] As a result, employers most commonly use contractual arrangements to supplant the application of common law doctrines and explicitly allocate the property rights between themselves and employees.[93] Often, employers require that prospective employees "assign[] title to any invention made during employment to the employer."[94] An employee invention assignment grants employment as consideration for those rights.[95] The use of such an employee invention assignment during the

88 *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3505–07 (proposed Jan. 19, 2023).

89 *See* Merges, *supra* note 30. If an employee is specifically hired to invent, they must surrender their inventions to their employer. *See* Teets v. Chromalloy Gas Turbine Corp., 83 F.3d 403, 408 (Fed. Cir. 1996). If an employee is not hired to invent but nonetheless creates an invention using the resources of the employer, then the employer obtains an irrevocable, non-exclusive license to the invention. *See* Mechmetals Corp. v. Telex Comput. Prods., Inc., 709 F.2d 1287, 1291 (9th Cir. 1983). That license is known as a "shop right." *See id.*

90 *See* William P. Hovell, Note, *Patent Ownership: An Employer's Rights to His Employee's Invention*, 58 NOTRE DAME L. REV. 863, 864–80 (1983).

91 *See* Henrik D. Parker, Note, *Reform for Rights of Employed Inventors*, 57 S. CAL. L. REV. 603, 608 (1984).

92 *See* Robert L. Gullette, *State Legislation Governing Ownership Rights in Inventions Under Employee Invention Agreements*, 62 J. PAT. OFF. SOC'Y 732, 738 (1980) (discussing the unsatisfactory results for both employers and employees resulting from the application of common law doctrines).

93 *See* Hovell, *supra* note 90, at 875.

94 *See* Merges, *supra* note 30, at 7; *see also* Steven Cherensky, Comment, *A Penny for Their Thoughts: Employee-Inventors, Preinvention Assignment Agreements, Property, and Personhood*, 81 CALIF. L. REV. 595, 617 (1993) (noting that agreeing to an assignment of IP rights is often a condition of employment); Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 TEX. L. REV. 789, 814 (2015) (same).

95 *See* Merges, *supra* note 30, at 8. Some agreements may offer additional consideration, but that is rare. *See* Cherensky, *supra* note 944, at 623 n.128; Lobel, *supra* note 944, at 814.

period of employment is valid,[96] but some states have passed legislation limiting their validity in certain circumstances.[97]

However, what happens if an employee "finalizes" or "perfects" their invention after the termination of employment? An employee, acting in good faith, may not discover the exact or final details of the invention until after their employment is terminated. In fact, many employees may leave to pursue their inventions full-time. Additionally, an employee, acting in bad faith, may seek to delay completion or announcement of an invention until after their employment ends in order to avoid the operation of an invention assignment clause.

To address this risk, an employer may include a "trailer clause" in the invention assignment.[98] In a typical trailer clause, "the employee covenants to assign all post-employment inventions to the employer if they relate to the employer's field of work."[99] Though varying based on a jurisdiction's law and the needs of a business, a trailer clause may be limited in duration or territorial scope.[100] A trailer clause also does not grant an employer a right to inventions made outside the scope of the employee's former duties or made on and with a later employer's time and money.[101] But regardless of their scope, both courts[102] and commentators[103] frequently criticize trailer clauses.

B. *Conflicted Caselaw*

Historically, employee invention assignments with trailer clauses have received mixed reviews in courts. In 1914, the Second Circuit criticized employee invention assignments, arguing that such a "clause would be an extremely harsh one; it might even be found

96 *See, e.g.*, Ingersoll-Rand Co. v. Ciavatta, 542 A.2d 879, 886 (N.J. 1988) ("Such contracts requiring an employee to assign to the employer inventions designed or conceived during the period of employment are valid."); *see also infra* Section II.B.

97 *See, e.g.*, CAL. LAB. CODE §§ 2870–72 (West 2025); DEL. CODE ANN. tit. 19, § 805 (2025); 765 ILL. COMP. STAT. Ann. 1060/1–3 (West 2026); KAN. STAT. ANN. § 44-130 (2025); MINN. STAT. § 181.78 (2025); N.J. STAT. ANN. § 34:1B-265 (West 2025); N.Y. LAB. LAW § 203-f (McKinney 2025); N.C. GEN. STAT. §§ 66-57.1 to -57.2 (2025); UTAH CODE ANN. §§ 34-39-1 to -3 (LexisNexis 2025); WASH. REV. CODE §§ 49.44.140–.150 (2025); *cf.* Amanda Shoemaker, Note, *The Case for a Uniform Invention Assignment Agreement Act (UIAAA)*, 109 CORNELL L. REV. 1259 (2024) (arguing for a uniform statute on employee invention assignment agreements rather than varied state statutes).

98 Trailer clauses are also known as "holdover clauses." *See, e.g.*, *Ingersoll-Rand*, 542 A.2d at 887.

99 Peter Caldwell, *Employment Agreements for the Inventing Worker: A Proposal for Reforming Trailer Clause Enforceability Guidelines*, 13 J. INTELL. PROP. L. 279, 285 (2006).

100 *See id.*

101 *See* Dorr-Oliver, Inc. v. United States, 432 F.2d 447, 452 (Ct. Cl. 1970).

102 *See infra* Section II.B.

103 *See infra* Section II.C.

unconscionable, for it mortgages [a person's] inventive faculties to [his employer]."[104] And fifty years later, the Sixth Circuit emphasized the same point, writing that "[t]he law does not look favorably upon covenants which place 'a mortgage on a man's brain, to bind all its future products.'"[105]

Courts still display the same hostility today,[106] but there are conditions under which an assignment and trailer clause will be found valid. Courts will uphold an employee invention assignment with a trailer clause if it is reasonable, applying a test similar, if not identical, to the test for determining the validity of a noncompete agreement.[107] In *Ingersoll-Rand*, the New Jersey Supreme Court considered the enforceability of a trailer clause for the first time and determined that the state's caselaw on the enforceability of noncompete agreements was applicable.[108] The court ruled that it "will enforce [trailer clauses] to the same extent that [it] will enforce similar post-employment restrictive agreements," such as noncompete agreements, and evaluate whether the agreement "would be reasonably necessary to protect [the employer's] 'legitimate interests,' would cause 'no undue hardship' on the employee, and would 'not impair the public interest.'"[109]

Courts generally follow this approach and assess the validity of an employee invention assignment with a trailer clause through a reasonableness test as with noncompete agreements. For example, the South Carolina Supreme Court also applied a reasonableness test based on

104 Standard Plunger Elevator Co. v. Stokes, 212 F. 893, 896 (2d Cir. 1914).

105 New Britain Mach. Co. v. Yeo, 358 F.2d 397, 405 (6th Cir. 1966) (quoting De Long Corp. v. Lucas, 176 F. Supp. 104, 127 (S.D.N.Y. 1959), *aff'd,* 278 F.2d 804 (2d. Cir. 1960)).

106 *See, e.g.*, Whitewater W. Indus., Ltd. v. Alleshouse, 981 F.3d 1045, 1052 (Fed. Cir. 2020) (quoting *Stokes*, 212 F. at 896).

107 Applying a noncompete rule and analysis to determine the validity of an employee invention assignment with a trailer clause seems to the standard practice. *See* N. Harris Comput. Corp. v. DSI Invs., LLC, 608 F. Supp. 3d 511, 520–21 (W.D. Ky. 2022) (noting the use of this practice to address a "dearth of case law," *id.* at 521, on trailer clauses and applying a similar reasonableness analysis). Although this approach is dominant in the caselaw in this area, there are questions as to whether this approach is appropriate for inventive issues that trailer clauses govern. At least one commentator has questioned whether a noncompete-style analysis to evaluate employee invention assignments with trailer clauses is appropriate for the interests involved in these types of provisions. *See* Caldwell, *supra* note 99, at 281 ("[T]his approach is misguided because the variables on which non-competition analysis depends were not designed to protect the interests associated with inventive subject matter."). Although this Note proceeds analytically as if a noncompete-style analysis is the proper approach to evaluating employee invention assignment agreements with trailer clauses, that is not the only approach.

108 Ingersoll-Rand Co. v. Ciavatta, 542 A.2d 879, 888 (N.J. 1988).

109 *Id.* at 892 (quoting Whitmyer Bros. v. Doyle, 274 A.2d 577, 582 (N.J. 1971)). The court held that the assignment agreement and trailer clause may be valid under this test. *Id.* at 892–95. However, it determined that the trailer clause in this case was unenforceable because it "would work an undue hardship on the defendant." *Id.* at 895, 895–96.

the same test for the enforceability of restrictive employment covenants.[110] The court determined that the agreement was necessary to protect the employer's legitimate business interests and that the trailer clause's one-year term was reasonable.[111] Additionally, the court found that the trailer clause was not unduly harsh or oppressive because the employee was still "entitled to any invention that does not result from his work [for the employer]; thus, he is still of great value to future employees [sic]."[112] The court recognized not only legitimate business interests requiring protection but also that such protection did not impose an undue burden since the employee's employment prospects and future inventions would not necessarily be restricted by the trailer clause. Because a trailer clause does not directly restrict an individual's ability to pursue employment, "there is a fundamental difference between non-competition agreements and intellectual property assignment agreements."[113]

Other courts reach a different conclusion when applying the reasonableness test, holding that employee invention assignments with trailer clauses are unreasonable. Though the court's ruling in *Ingersoll-Rand* greatly expanded the enforceability of trailer clauses through a broader definition of legitimate business interests,[114] the court in that case actually held that the trailer clause at issue was unenforceable.[115] The court found that enforcing the trailer clause would be unreasonable because it would impose an undue hardship on the defendant.[116] After all, the court noted, the employee was not hired to invent, had his previous inventions rejected by the company, and testified he conceived of the invention on his own time after he was fired without any valuable information that he gained from the employer.[117]

However, the more common approach to invalidating employee invention assignments with trailer clauses is holding that they violate public policy. General principles of protecting the free movement of ideas and employees may persuade a court to see trailer clauses as void against public policy.[118] Similarly, state laws prohibiting or limiting the

110 Milliken & Co. v. Morin, 731 S.E.2d 288, 292–93 (S.C. 2012).

111 *Id.* at 295.

112 *Id.*

113 Preston v. Marathon Oil Co., 684 F.3d 1276, 1285 (Fed. Cir. 2012) (quoting Preston v. Marathon Oil Co., 277 P.3d 81, 87 (Wyo. 2012)).

114 *Ingersoll-Rand*, 542 A.2d at 894; *see* Marc B. Hershovitz, Note, *Unhitching the Trailer Clause: The Rights of Inventive Employees and Their Employers*, 3 J. INTELL. PROP. L. 187, 205–06 (1995); *see also infra* notes 156–63 and accompanying text.

115 *Ingersoll-Rand*, 542 A.2d at 895.

116 *Id.* at 896.

117 *Id.* at 895–96.

118 *See, e.g.*, Guth v. Minn. Mining & Mfg. Co., 72 F.2d 385, 388–89 (7th Cir. 1934); GTI Corp. v. Calhoon, 309 F. Supp. 762, 773 (S.D. Ohio 1969).

use of restrictive covenants may also prohibit or limit the use of employee invention assignments with trailer clauses.[119]

Additionally, beyond the mere validity of the assignment and trailer clause, courts must also consider discrete issues related to the interpretation of those provisions. The cases cited above often encountered difficulties in determining the scope and effect of provisions in the employee invention assignment and accompanying trailer clause,[120] suggesting that there are factual and drafting challenges that may frustrate an employer's ability to enforce these provisions.

Thus, like noncompete agreements, employee invention assignments with trailer clauses have a complicated relationship with the courts. On the one hand, courts favor the need for employers to guard the training and information given to highly valuable inventive employees.[121] An employer may have

> legitimate interests in protecting information that is not a trade secret or proprietary information, but highly specialized, current information not generally known in the industry, created and stimulated by the research environment furnished by the employer, to which the employee has been "exposed" and "enriched" solely due to his employment.[122]

On the other hand, courts do not ignore the similarly important need to protect employees from unjust restrictions on their employment.[123] Courts may risk effectively "clos[ing] the doors of employment" (at least temporarily) for an employee on the basis of an applicable trailer clause.[124]

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119 This issue is particularly pronounced in California where Section 16600 applies. Whitewater W. Indus., Ltd. v. Alleshouse, 981 F.3d 1045, 1053 (Fed. Cir. 2020) (applying California law); *see also* CAL. BUS. & PROF. CODE § 16600 (West 2025). Although Section 16600 targets noncompete agreements, the statute is to be interpreted "broadly, in accordance with Edwards v. Arthur Andersen LLP." BUS. & PROF. § 16600(b)(1) (citation omitted). And indeed, courts do read it broadly. *See, e.g.*, *Whitewater*, 981 F.3d at 1053–55 (analyzing cases applying California law to employee invention assignments and trailer clauses).

120 *See, e.g.*, Preston v. Marathon Oil Co., 684 F.3d 1276, 1285–88 (Fed. Cir. 2012); *see also* Jamesbury Corp. v. Worcester Valve Co., 443 F.2d 205, 210–13 (1st Cir. 1971) (holding that the employee "had not made an invention, within the meaning of the employment contract when he left Rockwood, because he had not put any of his ideas down in any tangible form," *id.* at 213); SinoMab BioScience Ltd. v. Immunomedics, Inc., No. 2471, 2009 WL 1707891, at *14 (Del. Ch. June 16, 2009) (examining the effect of a presumption in favor of the employer in the assignment agreement and whether the employee's invention was a "new creation[]" covered by the agreement and trailer clause).

121 *See, e.g.*, *Ingersoll-Rand*, 542 A.2d at 894; *see also infra* notes 156–63 and accompanying text.

122 *Ingersoll-Rand*, 542 A.2d at 894.

123 *See, e.g.*, *GTI Corp.*, 309 F. Supp. at 773; *Whitewater*, 981 F.3d at 1053–56.

124 *See* Guth v. Minn. Mining & Mfg. Co., 72 F.2d 385, 388 (7th Cir. 1934).

Courts must work to balance these competing interests, and the limited caselaw on this issue leaves courts with little guidance on how to conduct that balancing. Nonetheless, in contrast to noncompetes, courts seem to recognize a stronger interest for businesses in needing to protect the special information held by inventive employees and guard against abuses of such trust and access by former employees or their new employer.

C. *Current Scholarship*

Commentators' views on employee invention assignments with trailer clauses are as conflicted as the views of judges. And the divide is largely the same.

Scholars critical of invention assignments with trailer clauses focus on the restrictive effects of these types of assignments. As with the courts, commentators find that public policy should make employee invention assignments with trailer clauses unenforceable. In particular, commentators note that the restrictions in trailer clauses inevitably "exist in tension with the mobility interests of employees" such that an employee's right to earn a living may be compromised.[125] Additionally, trailer clauses may violate public policy on anti-competition grounds.[126] "Employees have a right to compete with their former employers."[127]

Some scholars also argue that employee invention assignments with trailer clauses are unenforceable because they are unconscionable.[128] Unconscionability requires both procedural and substantive unconscionability,[129] and whether an agreement is unconscionable is highly fact specific.[130] Substantive unconscionability especially depends on the terms and subject matter covered by the trailer clause.[131] But procedural unconscionability may be present in each trailer clause.[132] After all, job hunters are unlikely to consider invention rights an important factor.[133] And prospective employees, if they can even negotiate at all, are unlikely to use their little bargaining power to extract

125 Emily A. Sample, Note, *Assigned All My Rights Away: The Overuse of Assignment Provisions in Contracts for Patent Rights*, 104 IOWA L. REV. 447, 479 (2018).

126 *See* Hershovitz, *supra* note 114, at 209–10.

127 *Id.* at 210.

128 *See, e.g.*, Elizabeth Knuppel, Note, *"A Mortgage on a Man's Brain": The Unconscionability of Overly Broad Intellectual Property Assignment Clauses in Employment Contracts*, 100 TEX. L. REV. 971 (2022).

129 *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).

130 *See, e.g.*, OTO, L.L.C. v. Kho, 447 P.3d 680, 699 (Cal. 2019).

131 *See* Knuppel, *supra* note 128, at 985.

132 *See id.* at 981.

133 *See id.* at 984.

invention rights,[134] particularly when the employment agreement is made pre-invention.[135] As a result, many employee invention assignment agreements with trailer clauses could in theory be found void because they are unconscionable.

However, many scholars take the opposite view: Employee invention assignment agreements with trailer clauses provide a valuable protective mechanism for businesses.[136] Moreover, granting employers property rights in their employees' inventions may lead to the most efficient use of resources by encouraging businesses to invest in innovation.[137] Employer ownership of invention rights through employee invention assignments and trailer clauses may also reduce inefficiencies, for example:

> (1) bargaining and transaction costs, particularly employee holdups; (2) the difficulties of monitoring and compensating the members of R&D groups; (3) principal-agent problems, in particular the danger that employee ownership would over-reward inventive tasks at the expense of other job requirements; and (4) a change in the implicit risk allocation between employer and employee.[138]

By clearly providing for employer ownership, the risk of those inefficiencies clogging innovation is reduced.[139]

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134 *See* Mark B. Baker & Andre J. Brunel, *Restructuring the Judicial Evaluation of Employed Inventors' Rights*, 35 ST. LOUIS U. L.J. 399, 410 (1991).

135 *See* Knuppel, *supra* note 128, at 984.

136 *See, e.g.*, Barnett & Sichelman, *supra* note 8, at 988–89.

137 Shlomit Yanisky Ravid, *Rethinking Innovation and Productivity Within the Workplace Amidst Economic Uncertainty*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 143, 176–77 (2013). Many employers invest by providing access to rewards or an "exit option" for employee inventions. *See* Merges, *supra* note 30, at 45, 37–52 (describing "employee reward plans" and the availability of an "exit option" where employers help their employees spin off their inventions into startup companies). Such bonuses or support in forming a spin-off firm may encourage employees to pursue inventions within the firm; it may be that "[o]wnership is too blunt an instrument" to incentivize employees to create inventions. *See id.* at 37. Yet, some scholars doubt the effectiveness of such incentives because they may restrict the future involvement of the inventor (who likely cares the most about the invention's continued development), paradoxically leading to less innovation. *See* Julie Manning Magid, *Monetize vs. Incentivize: Contracting for Healthcare Innovation*, 19 U. PA. J. BUS. L. 369, 401 (2017).

138 Merges, *supra* note 30, at 12.

139 *See id.* at 12–37.

D. Connecting Noncompetes and Trailer Clauses

Scholars have connected trailer clauses and noncompete agreements based on their effects.[140] For example, one commentator notes that trailer clauses achieve the same effect as a noncompete agreement, albeit through a more "circuitous route."[141] That commentator argues that "[w]hile a trailer clause technically does not prohibit an inventive employee from working for a competitor, business competitors do not desire to hire individuals obligated under such a clause because" any new work product may not benefit them, and thus "[a]t best, employers . . . will under-utilize the [restricted] employees' inventive skills so as not to develop conflicts with prior trailer clauses."[142] Whether those effects would be permissible in a world with restrictions on noncompete agreements (let alone normatively beneficial) is debatable. Although the next Part will examine whether new restrictions on noncompete agreements would or would not capture trailer clauses,[143] there is a clear connection between the goals and effects of noncompete agreements and employee invention assignments with trailer clauses.[144]

Is that connection accurate? Yes. There are two reasons why. First, the business objectives underlying both types of restrictive covenants are similar. Though what constitutes a legitimate business interest for a noncompete and employee invention assignment agreement with a trailer clause differs,[145] the ultimate goal is to protect the investment that a firm has made in its personnel and the benefits the firm derives from that investment. A business must entrust more information to employees as it grows.[146] But a firm will be reluctant to entrust further information without meaningful legal protections, thus stifling growth, "unless the risk of loss to the employer through breach of the trust can be held to a minimum."[147] Ultimately, for inventive employees on whom this Note focuses, the firm is acting to ensure that *it* and not

140 *See, e.g.*, Hershovitz, *supra* note 114, at 198–99; Caldwell, *supra* note 99, at 285 ("A trailer clause is a provision in an intellectual property agreement which is phrased much like a non-competition clause.").

141 Hershovitz, *supra* note 114, at 198.

142 *Id.* at 198–99.

143 *See infra* Part III.

144 And in fact, as noted above, practitioners and the FTC have also identified the similarities between noncompetes and employee invention assignments with trailer clauses. *See supra* notes 87–88 and accompanying text.

145 *See infra* notes 156–63 and accompanying text.

146 *See* Blake, *supra* note 29, at 650 ("Optimum division of labor and specialization cannot take place unless confidential business information relating to technology, processes, plans, development activity, customers, and the like, is entrusted to appropriate employees.").

147 *Id.* at 651.

another party profits from the firm's efforts—whether by competing directly with the firm (in the case of noncompetes)[148] or competing more indirectly by appropriating the firm's investment in human capital, intellectual property, and other confidential information (in the case of trailer clauses).[149]

Second, both employee invention assignment agreements with trailer clauses and noncompetes function to deter employees from leaving their employer because of their potential *in terrorem* effects.[150] Of course, both types of restrictive covenants may be enforced, but as the caselaw shows, enforcing these agreements may be easier said than done. But whether ultimately enforceable or not, trailer clauses and noncompetes derive at least some of their power from simply being in the employment agreement.[151] Because of these provisions, employees may balk at leaving their current firm, and prospective future employers may prefer a different candidate.

Despite these similarities, there are also two key differences between employee invention assignment agreements with trailer clauses and noncompetes. First, at least one scholar has argued that "[t]he limited nature of trailer clause restrictions tends to make courts somewhat more receptive to them than outright non-compete agreements, for the obvious reason that affected employees can remain in the industry under trailer clauses."[152] And the caselaw seems to agree.[153] Though a trailer clause may have *in terrorem* effects that restrict employment, that is not the goal. Rather, the intent, at least ostensibly, is to ensure that the time and money of the employer are not misappropriated by a former employee to develop an invention for their own benefit.[154] And the language of the trailer clause reflects this objective by not explicitly prohibiting an employee from working for a competitor, in the same industry, or for their own account.[155] As a result, the

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148 *See supra* notes 28–35 and accompanying text.

149 *See supra* notes 121–22 and accompanying text; *see also infra* notes 156–63 and accompanying text.

150 *See supra* notes 51 and 82 (discussing the *in terrorem* effect).

151 *See supra* notes 51 and 82. Given the *in terrorem* effect, even legally powerless clauses can retain significant soft power.

152 William Lynch Schaller, *Jumping Ship: Legal Issues Relating to Employee Mobility in High Technology Industries*, 17 LAB. LAW. 25, 72 (2001).

153 *See* Milliken & Co. v. Morin, 731 S.E.2d 288, 292, 295 (S.C. 2012) (noting the differences between trailer clauses and noncompetes in this respect); Preston v. Marathon Oil Co., 684 F.3d 1276, 1285 (Fed. Cir. 2012) ("[T]here is a fundamental difference between non-competition agreements and intellectual property assignment agreements." (quoting Preston v. Marathon Oil Co., 277 P.3d 81, 87 (Wyo. 2012))).

154 *See Milliken*, 731 S.E.2d at 292.

155 *See id.*

concerns regarding restrictions on employees are less prevalent with trailer clauses compared to noncompete agreements.

Second, there may be a more expansive definition of legitimate business interests for trailer clauses compared to noncompetes. For example, the Restatement (Second) of Contracts lists three core protectable interests for noncompetes: "(1) the customer relationship or good will; (2) trade secrets or other confidential information; or (3) in the context of employment relationships, unique attributes or skills possessed by an employee."[156] However, in some cases, those common law categories have been loosened by lower courts,[157] and some states may recognize the "protection of information beyond what the law deems a trade secret."[158] After all, "it is unimaginable that someone who steals property, business opportunities, and the labor of the firm's staff would get a free pass just because none of what he filched is a trade secret."[159]

The court in *Ingersoll-Rand* provided the paradigm version of this logic. The court wrote:

> Today, large corporations maintain at great expense modern research and development programs that involve synergistic processes. Such "think tanks" require the free and open exchange of new ideas among the members of a research staff using the employer's body of accumulated information and experiences. This creative process receives its impetus and inspiration from the assimilation of an employer's advanced knowledge and a spontaneous interaction among colleagues, co-employees, and superiors. . . .
>
> . . . [T]he protection afforded by [trailer clauses] . . . may under certain circumstances exceed the limitation of trade secrets and confidential information. . . . [E]mployers may have legitimate interests in protecting information that is not a trade secret or proprietary information, but highly specialized, current information not generally known in the industry, created and stimulated by the research environment furnished by the employer, to which the employee has been "exposed" and "enriched" solely due to his employment.[160]

Whether that logic extends to noncompete agreements is not clear but unlikely since "the extension to business information that is

156 Hui Shangguan, *A Comparative Study of Non-Compete Agreements for Trade Secret Protection in the United States and China*, 11 WASH. J.L. TECH. & ARTS 405, 415 (2016) (citing RESTATEMENT (SECOND) OF CONTRACTS § 188 cmts. b, c (A.L.I. 1981)).

157 *Id.*

158 Lobel, *supra* note 94, at 810–11 (noting how courts in a variety of contexts have applied a more expansive definition of what may constitute protectable confidential information for a business).

159 Hecny Transp., Inc. v. Chu, 430 F.3d 402, 404 (7th Cir. 2005).

160 Ingersoll-Rand Co. v. Ciavatta, 542 A.2d 879, 893–94 (N.J. 1988).

not protected under trade secret law is inconsistent with the principle that an employer has no legitimate interest in preventing a past employee from using his or her general skills and knowledge in competition."[161] But given that a trailer clause is about protecting intellectual property and other confidential information rather than guarding against direct competition (as a noncompete agreement does),[162] the broader definition of a legitimate business interest expounded in *Ingersoll-Rand* seems to be on solid footing for trailer clauses.[163] As a result, trailer clauses may prove *more* effective than noncompetes where a business is reliant on inventive employees or extensive research expenditures and confidential information.

III. TRAILER CLAUSES IN A WORLD WITHOUT NONCOMPETES

Trailer clauses may become an attractive alternative for employers where noncompete agreements are banned or severely restricted. An employee invention assignment agreement with a trailer clause produces similar effects to a noncompete agreement. Not only is the caselaw analysis similar, but as demonstrated above, a business's underlying goals for using a noncompete agreement and a trailer clause, as well as the potential effects on employees and competitors, are similar. The question remaining is whether regulatory and statutory restrictions on noncompetes may also similarly affect employee invention assignment agreements with trailer clauses. If they similarly restrict trailer clauses, then businesses are advised to look elsewhere for solutions to secure their inventive employees. But if the restrictions do not have the same effect on trailer clauses, then businesses may turn to trailer clauses as a substitute for noncompete agreements for inventive employees.[164] Moreover, policymakers should consider whether existing or future restrictions should or should not cover both trailer clauses and noncompetes.

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161 Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 128 (2008) (arguing that employees using information not protected by trade secret laws or other intellectual property protections are not engaged in the type of unfair competition that noncompetes are intended to cover).

162 *See* Milliken & Co. v. Morin, 731 S.E.2d 288, 292 (S.C. 2012); Preston v. Marathon Oil Co., 684 F.3d 1276, 1285 (Fed. Cir. 2012).

163 *See Ingersoll-Rand*, 542 A.2d at 893–94.

164 As an aside, many inventive employees are likely already subject to trailer clauses, since a well-advised employer would be unlikely to risk employees taking rights in inventions developed primarily with the employer's resources and assistance. Nonetheless, the discussion here is still relevant because employers may expand who they subject to trailer clauses or may view the use of trailer clauses differently if they are helpful substitutes for noncompetes.

A. Applying the Proposed FTC Rule

Although the Trump Administration is unlikely to further pursue a ban on noncompetes,[165] the proposed FTC rule provides a helpful model for what future reform efforts may look like. After all, significant research and public comment produced the now-abandoned rule;[166] a legislator or presidential administration may try to use it as a starting point for policymaking decisions in the future. Additionally, the three-pronged test outlined above provides a useful tool for considering the operation and effects of a trailer clause.

The proposed FTC rule focused on the substance rather than the form of the restrictive covenant.[167] For that reason, the mere name of the covenant as an "Employee Invention Assignment" will obviously not end the inquiry. Rather, applying the rule would require asking whether the agreement with a trailer clause "prohibits," "penalizes," or "functions to prevent" an employee from seeking employment or operating a business after the employment relationship has terminated.[168]

There is no issue with a trailer clause directly prohibiting or penalizing an employee in the general trailer clause context here.

As a result, the key issue for the application of the proposed FTC rule is whether a trailer clause "functions to prevent" a former employee from seeking employment or operating a business. On the one hand, a trailer clause may create an *in terrorem* effect like a noncompete. A potential employer may hesitate to hire an applicant subject to a trailer clause. That potential employer is likely considering the inventive employee for a similar role and may fear that any intellectual property developed during the term of the trailer clause could suddenly have a litigation risk attached to it. If there are other candidates, then a potential employer may look to them first. For that reason, one may argue that the trailer clause is functioning to prevent the employee's job search. Similarly, an employee may not be able to start a business due to concerns that an invention on which they plan to base their business may be caught in a dispute with their former employer.

Yet, formally at least, the trailer clause is not preventing anything. The employee is still free to work for that potential employer or start their own business. Doing so, even for a competitor or in the same industry, would not breach the agreement. Unlike a noncompete where

165 *See supra* note 55 and accompanying text.

166 *See supra* note 56 and accompanying text.

167 *See supra* Section I.C.

168 *See* Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38363 (May 7, 2024) (held invalid by Ryan, LLC v. FTC, 746 F. Supp. 3d 369, 389–90 (N.D. Tex. 2024)); *see also supra* Section I.C.

such actions would very likely breach the agreement, those same actions here would not breach the trailer clause. From this perspective, though the employee may face challenges in finding a new job or risks in starting a new business, the employee's right to pursue their profession is not violated. Accordingly, any choice by a potential employer not to incur the risks posed by a trailer clause is no different from an employer's choice to avoid other risks in hiring a new employee.

Thus, it is not clear that the FTC rule would have prohibited trailer clauses. Whether a court found the rule did or not would seem likely to depend on how textual the judge is. A textualist may find that the employee is not "prevented" from pursuing employment opportunities within the meaning of the regulation. In contrast, a purposivist judge may be more inclined to find that the purpose of the regulation was to avoid any restrictions on the employee's mobility.[169]

B. Applying State Laws

Instead, what may prove most troublesome for employers using trailer clauses are state laws. A trailer clause would not only be affected by state common law but also particular state statutes.

First, trailer clauses would face a range of common law precedents depending on the state.[170] How courts apply those precedents will likely vary, meaning that trailer clauses may not be a secure alternative in every state.

Second, courts may invalidate an employee invention assignment with a trailer clause based on a state's law restricting noncompetes.[171] Despite the analysis above, a court could find that a state statute on noncompetes prohibits or restricts trailer clauses.

Third, some states directly regulate employee invention assignment agreements with trailer clauses.[172] However, these state statutes typically only seek to curtail the scope of inventions covered by the assignment agreement or providing other requirements such as notice or additional consideration.[173]

Thus, though the state laws generally would not prevent businesses from turning to trailer clauses in the wake of a noncompete ban, employers choosing to incorporate trailer clauses would need to be mindful of any relevant state law.

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169 Yet, the FTC stated that the rule was not intended to capture employee invention assignments which may push a purposivist judge to find the opposite way. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38424.

170 *See supra* Section II.B (discussing the applicable caselaw on trailer clauses).

171 *See supra* note 119 and accompanying text.

172 *See supra* note 97 and accompanying text.

173 *See supra* note 97.

C. Alternatives

Despite the potential attractiveness of trailer clauses as a tool to help businesses no longer able to use noncompetes, are there other tools that could also be useful?

Practitioners have compiled nonexhaustive lists of other potential tools.[174] Even the FTC proposed some tools.[175] Those suggestions are wide-ranging and may depend on state law, but generally nonsolicitation and nondisclosure agreements could play a role similar to trailer clauses where noncompetes are banned.[176] However, further research and analysis is likely needed to explore the merits of using one of the other devices and any potential advantages or disadvantages compared to using trailer clauses.[177]

Nonetheless, one alternative strategy bears mentioning in this Note. As discussed above, noncompetes and trailer clauses have an *in terrorem* effect.[178] Businesses may choose to simply continue using a noncompete and hope that the employee is unaware of its unenforceability.[179] Such contracting should raise ethical questions for the employer, but the strategy may be effective. For this reason, policymakers must consider not only what substitutes like trailer clauses might be available but also how businesses may react to any regulations.

CONCLUSION

Employers and businesses will always have an interest in protecting their investments. And for some, their most valuable investment is their inventive employees. They grant inventive employees training, access, and information to help drive the firm's innovation. Traditionally, employers have used noncompete agreements to incentivize inventive employees to remain with the firm. If noncompetes are banned or severely limited, that need will not disappear. Rather, employers will look to other means, and one of those means may be employee invention assignment agreements with trailer clauses. Though that option may prove promising for businesses, that development risks imperiling employees in agreements that are relatively untested in court.

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174 *See* Pletcher et al., *supra* note 87, at 9–11; McMullen & Botteicher, *supra* note 87, at 16.

175 *See* Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38424 (May 7, 2024) (held invalid by Ryan, LLC v. FTC, 746 F. Supp. 3d 369, 389–90 (N.D. Tex. 2024)).

176 *See id.* at 38424, 38446.

177 *See, e.g.*, Camilla A. Hrdy & Christopher B. Seaman, *Beyond Trade Secrecy: Confidentiality Agreements That Act Like Noncompetes*, 133 YALE L.J. 669 (2024) (arguing that many confidentiality agreements are "de facto noncompetes," *id.* at 678–79).

178 *See supra* notes 51 and 82 (discussing the *in terrorem* effects).

179 *See supra* notes 51 and 82 and accompanying text.

Critically, this conclusion should be insightful for policymakers as well. Restricting noncompete agreements is not a panacea. Employers have the motivation and means to restrict employment even without them—at least as current proposals are written. For that reason, policymakers should consider what their restrictions are meant to do and draft their regulations accordingly. Are they creating a roadblock that protects employees from unfair restrictive covenants with their employers? Or are policymakers merely creating an obstacle for employers that can be hurdled with a few adjustments?

The future looks bleak for noncompete agreements, but the ultimate effect on public policy, employees, and employers remains to be seen.