WOULD YOU LIKE REFORM WITH THAT?: REEXAMINING NONCOMPETE LAWS IN TEXAS

Comment

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I. INTRODUCTION: WHAT'S IN A SANDWICH?

"I'll have a Big John, hold the tomatoes, please," you say, finally getting your opportunity to order your favorite sandwich from Jimmy John's.[1] The teenager behind the counter begins by cutting the bread, then passes it to the next teenager, who applies what is advertised as "[m]edium rare choice roast beef," then finally passes it to the last teenager, who lazily tosses lettuce on the meat, slathers a generous dollop of mayonnaise on the bread, and wraps the completed sandwich with the speed that comes from hours of monotonous work in the food service industry.[2] After paying for your sandwich, you walk out of Jimmy John's and head back to your car, wondering whether its delivery service really is as fast as advertised; you decide that it is probably not, then put the inner workings of a sandwich franchise out of your mind for the rest of the day.[3]

Jimmy John's advertises that it uses fresh ingredients and offers healthy alternatives and "freaky fast" delivery.[4] What Jimmy John's does not advertise, however, is that, in all likelihood, the bored teenagers who assemble the sandwiches signed a noncompete agreement when they were hired.[5]

Noncompete agreements have been a part of jurisprudence in the English-speaking world for over 600 years, and the law continues to develop to this day.[6] A recent issue confronted by the United States Senate is whether low-wage employees, such as sandwich makers and food delivery drivers, should be bound by noncompete agreements.[7] Both large and small companies ask low-wage employees to sign noncompete agreements; however, an overwhelming percentage of noncompete agreements are signed by employees in management positions, who are more likely to have leverage

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1. *#2 Big John*, JIMMY JOHN'S SANDWICHES, http://www.jimmyjohns.com/menu (last visited Oct. 13, 2016).

2. *Id.*

3. *Id.*

4. *Id.*

5. Dave Jamieson, *Jimmy John's Makes Low-Wage Workers Sign 'Oppressive' Noncompete Agreements*, HUFFINGTON POST (Oct. 13, 2014, 4:03 PM), http://www.huffingtonpost.com/2014/10/13/jimmy-johns-non-compete_n_5978180.html.

6. Dyer's Case (1414) 2 Hen. V. fol. 5, pl. 26 (K.B.). Though the opinion in *Dyer's Case* was written in Law French, it is a case from England, where English was spoken even in 1414. Paul Raffield, *The Ancient Constitution, Common Law and the Idyll of Albion: Law and Lawyers in Henry IV, Parts 1 and 2*, 22 LAW & LITERATURE 18, 35–36 (2010). It should be noted that this Comment uses the spelling "noncompete" when describing these agreements. While some jurisdictions, experts, and contracts use various spellings, the unhyphenated "noncompete" is the most frequently used spelling in Texas court decisions. *See, e.g.*, Wall v. Trinity Sand & Gravel Co., 369 S.W.2d 315, 316 (Tex. 1963); Gonzales v. Norris of Hous., Inc., 575 S.W.2d 110, 111 (Tex. Cir. App.—Houston [14th Dist.] 1978, writ. ref'd n.r.e.).

7. Mobility and Opportunity for Vulnerable Employees Act (MOVE Act), S. 1504, 114th Cong. (2015).

when negotiating their employment contracts.[8] The use of noncompete agreements with low-wage employees is itself a unique issue, but it also raises questions about noncompete agreements in general.[9] This Comment addresses issues associated with both noncompete agreements for low-wage employees and noncompete agreements in general.[10]

The United States Senate has proposed legislation that would make it illegal to enforce noncompete agreements against "low-wage employees."[11] The Senate proposed the bill, known as the Mobility and Opportunity for Vulnerable Employees Act (MOVE Act), to "protect people who are simply trying to make ends meet."[12] The MOVE Act is a landmark proposal because if passed, it will become the first federal legislation to control noncompete agreements.[13] The MOVE Act purports to protect low-wage employees—employees who make less than $15 per hour or $31,200 per year—by making it illegal to enter into noncompete agreements with them.[14] Additionally, the Act mandates that companies wishing to have an employee noncompete agreement must disclose that fact "at the beginning of the process for hiring such employee."[15] For a business that violates either one of these provisions, the MOVE Act provides penalties that can be assessed against the business.[16]

The MOVE Act would have a major effect on all states, including Texas, because the law could substantially alter existing state law.[17] Texas has a long history of regulating noncompete agreements, both legislatively and judicially.[18] If this proposed federal legislation passes, it could displace over 100 years of Texas jurisprudence.[19] This Comment examines the history of noncompete agreements, discusses the arguments for and against enforcing noncompete agreements, and makes recommendations for how to render efficient regulation that still promotes free trade in Texas.[20]

Part II of this Comment provides a brief account of noncompete jurisprudence at common law in the United States and Texas. Part III summarizes the current climate of noncompete agreement law in the United

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8. *See, e.g.*, Richard Harroch, *Negotiating Employment Agreements: Checklist of 14 Key Issues*, FORBES (Nov. 11, 2013, 3:02 PM), www.forbes.com/sites/allbusiness/2013/11/11/negotiating-employment-agreements-checklist-of-14-key-issues/#cba3e1475fe.

9. *See infra* Part IV.

10. *See infra* Parts IV–V.

11. MOVE Act, S. 1504, 114th Cong.

12. Press Release, Al Franken, Senator, Sen. Franken Introduces Bill to Ban Non-Compete Agreements for Low-Wage Workers (June 3, 2015), http://www.franken.senate.gov/?p=press_release&id=3167.

13. MOVE Act, S. 1504, 114th Cong.

14. *Id.* The Act also mandates that the definition of low-wage employee be adjusted for inflation each year. *Id.*

15. *Id.*

16. *Id.*

17. *See infra* Part III.

18. *See infra* Part II.

19. *See infra* Part II.

20. *See infra* Parts II–V.

States and particularly in Texas. Next, Part IV discusses the arguments made by both critics and proponents of noncompete agreements. Part V provides recommendations to improve noncompete laws in Texas to maximize employee production and employer profits. Finally, Part VI offers a concluding summary of this Comment's message.

II. FROM MUTTON TO MICROWAVES: THE HISTORY OF NONCOMPETE AGREEMENTS

The freedom to work can be traced to biblical times.[21] Ecclesiastes 3:13 says "that every man should eat and drink, and enjoy the good of all his labor, it is the gift of God."[22] Of course, biblical authors were probably not contemplating the idea that teenage sandwich makers would be signing noncompete agreements. However, the concept of working to provide for one's family was as important then as it is now.[23]

Experts believe the first common law case involving a noncompete agreement was decided by the King's Bench in 1414.[24] In that case, known as *Dyer's Case*, the court held that noncompete agreements were unlawful and immoral restraints of trade.[25] In fact, one of the judges was so repulsed by the idea of restraining trade through noncompete agreements that he declared, "[P]er Dieu si le plaintiff fuit icy il irra al prison, tanque il ust fait fyne au Roye."[26] In English, the judge's exclamation translated to, "By God, if the plaintiff were here he would go to prison until he paid a fine to the King."[27]

The decision in *Dyer's Case* stood as the law of the land for almost 300 years before being overturned by *Mitchel v. Reynolds* in 1711.[28] In *Reynolds*, the court decided that noncompete agreements could be enforced as long as they were reasonable restraints of trade and were supported by adequate consideration.[29] The case involved a baker, Mitchel, who rented a bakery from another baker, Reynolds, on the condition that Reynolds not open another bakery in the area for the length of the lease.[30] Reynolds opened another bakery in the area before the five-year lease expired, and Mitchel sued for damages.[31] The *Reynolds* court held that the restraint was reasonable

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21. *Ecclesiastes* 3:13.

22. *Id.*

23. *Id.*; *see also* 1 *Timothy* 5:8 ("But if any provide not for his own, and especially for those of his own house, he has denied the faith and is worse than an unbeliever.").

24. Dyer's Case (1414) 2 Hen. V. fol. 5, pl. 26 (K.B.).

25. *Id.*

26. *Id.*

27. *Id.* (English translation obtained from Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 636 n.33 (1960)).

28. Mitchel v. Reynolds (1711) 24 Eng. Rep. 347, 353 (Q.B.).

29. *Id.* at 348.

30. *Id.* at 347.

31. *Id.*

for two reasons.[32] First, the court noted that noncompete agreements have advantages, such as preventing the saturation of the market with one industry.[33] Second, the court held that the consideration was adequate because the restraint of trade was exactly equal to the term of the lease, so at no point would Reynolds not be paid for his restraint from baking.[34] The court ultimately decided that reasonable restraints of trade should be enforced.[35]

In the 300-plus years since that decision, most jurisdictions in the United States have not wavered from the reasonability standard put forth in *Reynolds*.[36] With a few exceptions, each state will enforce noncompete agreements as long as some sort of reasonability standard is met.[37]

Texas began regulating noncompete agreements with the Anti-Trust Act of 1889.[38] The Anti-Trust Act of 1889 made unreasonable restraints illegal, and that logic, more or less, governed judicial interpretation of noncompete agreements in Texas until 1983.[39]

Beginning with *Welsh v. Morris*, Texas courts developed a test for determining reasonability and enforceability of noncompete agreements.[40] In *Welsh*, the Texas Supreme Court upheld a noncompete agreement associated with the sale of a business.[41] In that case, the Welsh brothers sold their undertaker business to Morris.[42] The sales contract included a noncompete clause that barred the Welsh brothers from starting another undertaker service in the same city as long as Morris's business was there.[43] When the Welshes eventually started another undertaker service in the same city, Morris sued to enjoin them from competing against him and for damages.[44] The trial court found that the noncompete clause was valid and entered judgment for Morris.[45] The Texas Supreme Court affirmed,

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32. *Id.* at 350, 353.
33. *Id.*
34. *Id.*
35. *Id.* at 353.
36. *See infra* Part III.
37. *See 50 State Noncompete Survey*, BECK REED RIDEN LLP (Sept. 16, 2012), http://www.beckreedriden.com/50-state-noncompete-survey/ (providing a fifty-state survey of noncompete laws); *infra* Part III.
38. 1889 TEX. GEN. LAWS 141.
39. *Id.*; TEX. BUS. & COM. CODE ANN. §§ 15.50–.52 (West 2015). The Texas Business and Commerce Code has governed noncompete agreements in Texas since being introduced into law in 1983. *Id.*
40. *See, e.g.*, Welsh v. Morris, 16 S.W. 744, 745–46 (Tex. 1891).
41. *Id.* at 746.
42. *Id.* at 745.
43. *Id.*
44. *Id.*
45. *Id.*

holding that the noncompete agreement was a valid and reasonable part of the sales contract, for which there was adequate consideration.[46]

Over the years, Texas courts continued to be catalysts for the evolution of noncompete agreement law.[47] For example, *Kennedy v. Winfrey* established that in noncompete agreements associated with the sale of a business, the breaching competitor has the burden of proving a lack of adequate consideration.[48] Similarly, *Foxworth-Galbraith Lumber Co. v. Turner* involved the sale of a lumberyard that included a noncompete agreement stating that the seller would not open a lumber business within ten miles of the buyer's business.[49] The seller signed the noncompete agreement, then started a new lumberyard twelve miles away and proceeded to actively solicit business from the area around the buyer's business.[50] The Texas Supreme Court held that buying a business was essentially buying a client base and that any intentional manipulation of a client base violated a noncompete agreement, even if the other parameters of the agreement were met.[51] The Court effectively stated that the exchange of goodwill for the promise not to compete was the very spirit of noncompete agreements in sales of businesses.[52]

Another important development in the evolution of noncompete agreements in Texas was the idea of an option contract put forth in *Wall v. Trinity Sand & Gravel Co.*[53] In *Wall*, an employee signed an optional noncompete agreement that could be exercised by the employer.[54] Under the terms of the agreement, the employer could exercise his option and contractually prevent the employee from competing with him for up to ten years for the extra consideration of $5,000 per year.[55] Though the dispute in the case was more about the payment of the consideration, the Court, in dicta, maintained that such an option contract was a valid technique for drafting and enforcing noncompete agreements.[56] This is an important idea—one that

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46. *Id.* at 745–46. While the noncompete agreement in *Welsh* had a *reasonable* temporal limit of "so long as the said S.B. Morris is in the business," there have been questions in the legal community about whether a noncompete agreement that covers an employee's lifetime would be reasonable. *Id.*; *see, e.g.*, Toulmin v. Becker, 124 N.E.2d 778, 785 (Ohio Ct. App. 1954). While there is almost no case law on the subject, at least one Ohio court held that lifetime noncompete agreements were indefinite and therefore unreasonable. *Toulmin*, 124 N.E.2d at 785. *But see* Tobin v. Cody, 180 N.E.2d 652, 657 (Mass. 1962) (stating that lifetime noncompete agreements in sales of businesses are not unreasonable per se).

47. *See, e.g.*, Foxworth-Galbraith Lumber Co. v. Turner, 46 S.W.2d 663, 664 (Tex. 1932); Kennedy v. Winfrey, 163 S.W. 1018, 1019 (Tex. Civ. App.—Dallas 1914, no writ).

48. *Kennedy*, 163 S.W. at 1019.

49. *Turner*, 46 S.W.2d at 663.

50. *Id.* at 663–64.

51. *Id.* at 665–66.

52. *Id.* at 665.

53. Wall v. Trinity Sand & Gravel Co., 369 S.W.2d 315, 316–17 (Tex. 1963); *see infra* Part V.

54. *Wall*, 369 S.W.2d at 316–17.

55. *Id.*

56. *Id.* at 317–19; *see also infra* Part V.

has the potential to influence how noncompete agreements are drafted going forward.[57]

One major component of a valid noncompete agreement is that it must protect a legitimate business interest.[58] Defining "legitimate business interest" has been an important part of noncompete agreement litigation in Texas.[59] In *Gonzales v. Norris of Houston, Inc.*, the court, in dicta, offered a succinct and practical example of a legitimate business interest.[60] In *Gonzales*, a former employee violated a noncompete agreement by opening a competing business in Houston.[61] The employer sued the employee for violating the noncompete agreement, and the employee countered by arguing the language of the agreement was vague.[62] The court disagreed with the employee's contention and further held that the noncompete agreement was valid because there was value in preventing a former employee from opening a new business and poaching customers.[63] The *Gonzales* ruling is important because it established that even though there may not be a way to put a dollar amount on each poached customer, it is understood that wanting to prevent a client base from abandoning a business is a legitimate business concern that would make a noncompete agreement reasonable.[64] With this idea of legitimate business interest in mind, one wonders whether a nineteen-year-old, former Jimmy John's employee would actually begin working at Subway and actively poach Jimmy John's customers.[65]

The cases above provide a historical context for how Texas has construed noncompete agreements. This case law set the stage for how Texas courts interpret the modern Business and Commerce Code's statutory regulation of noncompete agreements today.[66]

III. THE MENU: MODERN APPROACHES TO NONCOMPETE AGREEMENTS

There is no federal law governing noncompete agreements between employers and employees in the United States.[67] Because there is no federal noncompete law, noncompete agreements are essentially construed fifty

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57. *See infra* Part V.

58. *See* Gonzales v. Norris of Hous., Inc., 575 S.W.2d 110, 112–13 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.).

59. *See id.*

60. *Id.* While the term never actually appeared in *Gonzales*, the court addressed legitimate business interests by implication. *Id.*

61. *Id.* at 111.

62. *Id.* at 113.

63. *Id.* at 112.

64. *Id.* at 111–13.

65. Jamieson, *supra* note 5; *see infra* Parts IV–V.

66. TEX. BUS. & COM. CODE ANN. § 15.50(a) (West 2015).

67. *See 50 State Noncompete Survey*, *supra* note 37. *But see* Lektro-Vend Corp. v. Vendo Co., 403 F. Supp. 527, 529–31 (N.D. Ill. 1975), *rev'd*, 433 U.S. 623 (1977) (analyzing a noncompete agreement included in the sale of a business under the Sherman Anti-Trust Act).

different ways.[68] While this generalization of noncompete interpretation in the United States is principally true, it is also true that among those fifty different methods of interpretation, there are three distinct trends for how states regulate noncompete agreements.[69] At one extreme, there is the "California Approach," which promulgates a statutory ban on noncompete agreements.[70] At another extreme, there is the "New Jersey Approach," which is more lenient to employers wishing to enforce noncompete agreements.[71] And finally, there is the middle ground approach, which is used by most states, including Texas.[72]

A. California's Role: 86 the Noncompetes

The California Approach calls for a statutory ban on noncompete agreements between employers and employees.[73] Seemingly, California and its counterparts follow the original common law approach that noncompete agreements are inherently repugnant.[74] Only California and a handful of other states follow this approach.[75] California, Montana, and North Dakota statutorily ban all noncompete agreements between employers and employees; however, these states allow an exception for the sale of the goodwill of a business and for the dissolution of a partnership.[76] Oklahoma takes a slightly different approach by banning noncompete agreements while still maintaining that former employees cannot directly poach customers.[77]

Critics of noncompete agreements favor the California Approach.[78] This approach, however, has many shortcomings, and ultimately the negatives outweigh the positives.[79] Because of the potential anti-capitalistic drawbacks, Texas should not fully adopt the policy of statutorily banning noncompete agreements.[80]

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68. *See 50 State Noncompete Survey*, *supra* note 37.

69. *See* CAL. BUS. & PROF. CODE § 16600 (West 2016); TEX. BUS. & COM. § 15.50(a); *infra* Section III.B.

70. *See infra* Section III.A.

71. *See infra* Section III.B.

72. *See infra* Section III.C.

73. CAL. BUS. & PROF. § 16600. *But see id.* § 16601 (allowing noncompete agreements in certain situations, including the sale of a business or goodwill).

74. Dyer's Case (1414) 2 Hen. V. fol. 5, pl. 26 (K.B.).

75. *See* CAL. BUS. & PROF. § 16600; MONT. CODE ANN. § 28-2-703 (West 2015); N.D. CENT. CODE ANN. § 9-08-06 (West 2016); OKLA. STAT. ANN. tit. 15, § 219A (West 2016); *50 State Noncompete Survey*, *supra* note 37.

76. *See* CAL. BUS. & PROF. § 16600; MONT. CODE ANN. § 28-2-703; N.D. CENT. CODE ANN. §-9-08-06.

77. *See* OKLA. STAT. tit. 15, § 219A; *see also* Tetra Techs., Inc. v. Hamilton, No. 07–1186–M, 2007 WL 4462438, at *2 (W.D. Okla. Dec. 14, 2007) (stating that the employer seeking enforcement of a noncompete agreement has the burden of proving that the former employee "directly" poached customers under Title 15, § 219A).

78. *See infra* Section IV.A.3.

79. *See infra* Section IV.B.2.

80. *See infra* Part V.

While Texas shows no signs of moving toward the California Approach, there is at least one state that may be taking a step in that direction.[81] New York, a state once seen as being friendly to noncompete agreements similar to New Jersey, may be on the brink of making history in the realm of noncompete agreements.[82] While New York does not have a statutory ban on noncompete agreements and would fall into the group of states following the New Jersey Approach, the New York Legislature has a proposed version of the MOVE Act (NY MOVE Act).[83] The language in the NY MOVE Act is nearly identical to that of the MOVE Act.[84] If passed, this would be the first state law to explicitly make noncompete agreements signed by low-wage employees unenforceable.[85]

B. Jersey Tomatoes: Gratuitous "Legitimate Business Interests"

While California is known for its statutory ban on noncompete agreements, not all states follow this line of thought.[86] These states, such as New Jersey, presumably adhere to the logic of *Reynolds* as opposed to *Dyer's Case*.[87] As long as a noncompete agreement is reasonable, states following the New Jersey Approach will err on the side of enforcement.[88]

New Jersey courts have a reputation for "vigorously enforc[ing] noncompetes."[89] This is partially because New Jersey has adopted the doctrine of inevitable disclosure as it relates to enforcing noncompete agreements.[90] The doctrine of inevitable disclosure is defined as the "legal theory that a key employee . . . cannot avoid misappropriating the former employer's trade secrets."[91] In other words, New Jersey courts will enforce noncompete agreements if the employer can prove that the employee will inevitably disclose important trade information.[92] This is a low standard to

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81. *See* New York State Mobility and Opportunity for Vulnerable Employees Act (NY MOVE Act), Assemb. B. 8108, 238th Gen. Assemb., Reg. Sess. (N.Y. 2015).

82. *See id.*

83. *See id.*; *infra* Section III.B.

84. MOVE Act, S. 1504, 114th Cong. (2015).

85. *See* NY MOVE Act, Assemb. B. 8108. This Act remains unpassed as of October 25, 2016.

86. *See infra* Sections III.B–C.

87. *See* Mitchel v. Reynolds (1711) 24 Eng. Rep. 347, 348 (Q.B.); *cf.* Dyer's Case (1414) 2 Hen. V. fol. 5, pl. 26 (K.B.).

88. *See, e.g.*, Solari Indus., Inc. v. Malady, 264 A.2d 53, 56 (N.J. 1970).

89. Alan Hyde, *Should Noncompetes Be Enforced?*, 33 REGULATION 6, 9 (2011).

90. Nat'l Starch & Chem. Corp. v. Parker Chem. Corp., 530 A.2d 31, 33 (N.J. Super. Ct. App. Div. 1987).

91. *Inevitable-disclosure doctrine*, BLACK'S LAW DICTIONARY (10th ed. 2014).

92. *Parker Chem. Corp.*, 530 A.2d at 33; *see also* LifeCell Corp. v. Tela Bio, Inc., No. SOM-C-12013-15, 2015 WL 4082323, at *10, *18, *37 (N.J. Super. Ct. Ch. Div. May 12, 2015) (discussing the inevitable-disclosure doctrine as it applies to the enforcement of noncompete agreements). In *LifeCell*, the court indicated that the inevitable-disclosure doctrine could be especially effective when a former employer is seeking a preliminary injunction to prevent a former employee from violating the noncompete agreement until a trial court can determine the ultimate enforceability of the agreement. *Id.*

meet and is one of the reasons New Jersey has a reputation for liberally enforcing noncompete agreements.[93]

Adding to its employer-friendly reputation with regard to enforcing noncompete agreements, New Jersey does not have a general statutory regulation of such agreements.[94] This suggests that instead of interpreting statutes, judges are left to apply a court-made reasonability test to each case that comes before the bench.[95]

In *Solari Industries, Inc. v. Malady*, the Supreme Court of New Jersey asserted that a noncompete agreement can be enforced as long as "it simply protects the legitimate interests of the employer, imposes no undue hardship on the employee, and is not injurious to the public."[96] Effectively, the *Solari* court set forth a three-part test to determine whether a noncompete agreement should be enforced.[97]

In the years since *Solari*, New Jersey courts have defined "legitimate business interest" and "undue hardship."[98] In *Coskey's Television & Radio Sales & Service, Inc. v. Foti*, the court stated that employers have a legitimate business interest in protecting "trade secrets, confidential business information and customer relationships."[99] In *Community Hospital Group, Inc. v. More*, the Supreme Court of New Jersey stated that determining undue hardship requires analyzing the difficulty with which the employee can find other work in his field and the severity of any burden the agreement places on the employee.[100] The court further stated that the reason for the employee's departure could also help determine undue hardship.[101] For instance, if the employee quits voluntarily, there is less likely to be an undue hardship because the employee put himself in that situation.[102] If, however, the employer fires the employee, then there is a better chance of proving undue hardship.[103] This court-made standard can create inconsistencies because it essentially relies on juries to interpret reasonability, business

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at *10. Furthermore, the issue of inevitability is settled by a trier of fact, weighing the probability that the employee will disclose information. *Id.*

93. Hyde, *supra* note 89, at 9.

94. JAMES P. FLYNN & AMY E. HATCHER, NON-COMPETE LAWS: NEW JERSEY 1 (2015), www.ebglaw.com/content/uploads/2014/06/Flynn-Hatcher-Non-Compete-Laws-New-Jersey.pdf; *see also* N.J. ADMIN. CODE § 13:42-10.16 (2016) (providing statutory regulation on restraints of trade among licensed psychologists).

95. *See* Solari Indus., Inc. v. Malady, 264 A.2d 53, 56 (N.J. 1970).

96. *Id.*

97. *Id.*

98. Cmty. Hosp. Grp., Inc. v. More, 869 A.2d 884, 895 (N.J. 2005); Coskey's Television & Radio Sales & Serv., Inc. v. Foti, 602 A.2d 789, 794 (N.J. Super. Ct. App. Div. 1992).

99. *Foti*, 602 A.2d at 794.

100. *More*, 869 A.2d at 898.

101. *Id.*

102. *Id.*

103. *Id.*

interests, and undue hardships in a way that is ultimately less uniform than a statute.[104]

The New Jersey Approach is considered an extreme, and only a few states follow it.[105] Indeed, most states follow a middle-ground approach to enforcing noncompete laws.[106]

C. Texas Toast: Interpretation Over-Medium

Texas is a prime example of a state somewhere in the middle—geographically and ideologically—of California and New Jersey.[107] In Texas, Chapter 15 of the Business and Commerce Code regulates noncompete agreements.[108] Section 15.50 is the most pertinent regulation of noncompete agreements because it sets out the objective reasonability standard by which courts measure the agreements' enforceability.[109]

The Business and Commerce Code provides minimum conditions that parties must meet for a noncompete agreement to be enforceable.[110] The first condition is that noncompete agreements must be "ancillary to or part of an otherwise enforceable agreement at the time the agreement is made."[111] In other words, parties must make noncompete agreements in connection with or as part of enforceable employment contracts.[112] Second, noncompete agreements must contain "limitations as to time, geographical area, and scope of activity to be restrained."[113] Parties have widely litigated the scope and reasonability of these proscribed limitations.[114] Next, the Business and Commerce Code mandates that the restraints of trade are "reasonable."[115] Finally, to be enforceable, a noncompete agreement must "not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee."[116] In essence, the Business and Commerce Code

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104. *See infra* Section IV.A.

105. *See* Hyde, *supra* note 89, at 6; *50 State Noncompete Survey*, *supra* note 37.

106. *See* Hyde, *supra* note 89, at 6; *infra* Section III.C.

107. *See, e.g.*, TEX. BUS. & COM. CODE ANN. § 15.50 (West 2015) (providing a reasonability test similar to New Jersey's but in statutory form).

108. *See id.* §§ 15.05, .50, .51.

109. *See id.* § 15.50(a).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *See, e.g.*, *infra* notes 131–52 and accompanying text (explaining the process of judicial analysis in noncompete agreements in Texas).

115. TEX. BUS. & COM. § 15.50(a). Courts generally define "reasonable" as the least restrictive means necessary to protect the employer's business interest. *See id.* Courts will use this guideline when determining whether the temporal, geographical, scope of employment, or other restrictions in noncompete agreements are valid and reasonable restraints of trade. *See, e.g.*, Marsh USA Inc. v. Cook, 354 S.W.3d 764, 769, 776–78 (Tex. 2011).

116. TEX. BUS. & COM. § 15.50(a).

provides employers with a guideline for drafting noncompete agreements and, if necessary, a test by which courts can determine their enforceability.[117]

Further, § 15.50 includes an express ban on noncompete agreements for physicians.[118] This ban is similar to industry-specific bans in place in many states, including Massachusetts.[119] The idea is that preventing a physician from practicing medicine because of a noncompete clause is against public policy.[120] Doctors provide care for and develop important rapports with patients, and it would not be fair to deny patients care from a specific doctor because of a noncompete agreement.[121]

The Business and Commerce Code also provides procedures for determining enforceability and guidelines for courts when it comes to awarding damages and amending noncompete agreements.[122] Section 15.51 provides courts with the authority to award damages, injunctive relief, or both to the employer in the event the employee breaches the agreement.[123] Furthermore, the Business and Commerce Code establishes which party has the burden of proving the purpose of the agreement.[124] Finally, the Business and Commerce Code allows courts to amend any unreasonable limits on time, geographical area, or scope to make the noncompete agreement reasonable, then enforce it according to those terms.[125]

Texas courts have generally interpreted the Business and Commerce Code in a way that promotes free trade and holds employers to a high standard when determining the enforceability of noncompete agreements.[126] First, Texas courts will not enforce noncompete agreements that are "against public policy and therefore substantively unconscionable."[127] Violations of public policy include "injuring society by depriving the wider public of someone's talents and enterprise," interfering with a person's livelihood, and imposing unreasonable geographical restraints within the noncompete agreement.[128] Some confusion exists on the public policy front, however, because the Business and Commerce Code specifically says that agreements or conspiracies in restraint of trade are illegal, with the notable exception of

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117. *See id.*

118. *Id.*

119. *Id.*; *see, e.g.*, MASS. GEN. LAWS ANN. ch.112, §§ 12X, 74D, 135C (West 2015); *infra* Part V.

120. Robert Steinbuch, *Why Doctors Shouldn't Practice Law: The American Medical Association's Misdiagnosis of Physician Non-Compete Clauses*, 74 MO. L. REV. 1051, 1054–55 (2009).

121. *Id.*

122. *See* TEX. BUS. & COM. § 15.51(a).

123. *Id.*

124. *See id.* § 15.51(b) (providing the situations in which either the employer or employee has the burden of proof).

125. *Id.* § 15.51(c).

126. *See* Marsh USA Inc. v. Cook, 354 S.W.3d 764, 768–71, 776–78 (Tex. 2011); Sec. Serv. Fed. Credit Union v. Sanders, 264 S.W.3d 292, 297 (Tex. App.—San Antonio 2008, no pet.); TMC Worldwide, L.P. v. Gray, 178 S.W.3d 29, 36–39 (Tex. App.—Houston [1st Dist.] 2005, no pet.); Zep Mfg. Co. v. Harthcock, 824 S.W.2d 654, 658–61 (Tex. App.—Dallas 1992, no writ).

127. *Sanders*, 264 S.W.3d at 297.

128. *Marsh*, 354 S.W.3d at 788; *Zep*, 824 S.W.2d at 658, 661.

reasonable noncompete agreements.[129] It is unclear why such a stark dichotomy exists in the Business and Commerce Code, but at least one court has explicitly stated that reasonable noncompete agreements are good for business and the development of industry.[130]

Texas courts have offered guidance to drafters of noncompete agreements by illustrating ways in which such agreements fulfill—and fail to fulfill—the statutory elements of enforceable noncompetes.[131] For example, in *TMC Worldwide, L.P. v. Gray*, the court asserted that the enforceability of noncompete agreements is a question of law for the courts.[132] Furthermore, *Light v. Centel Cellular Co. of Texas* addressed some issues with forming noncompete agreements with at-will employees.[133] For instance, because Texas is an at-will employment state, the consideration for a noncompete agreement cannot take away an employee's ability to terminate employment.[134] However, other promises can serve as consideration for a noncompete agreement, such as a promise to deliver confidential information to the employee followed by actual delivery of such information near the time the employee agrees not to compete.[135]

In *Zep Manufacturing Co. v. Harthcock*, the court offered a helpful insight into how courts analyze noncompete agreements in light of the Business and Commerce Code.[136] First, *Zep* addressed the § 15.50 requirement that a valid noncompete agreement be "ancillary to or part of an otherwise enforceable agreement" or else supported by separate consideration.[137] Because Texas is an at-will employment state, employment contracts must somehow alter that at-will status to be valid for the sake of noncompete agreements.[138] For instance, if an employment contract is a satisfaction contract—meaning employers can only fire an employee if they are genuinely dissatisfied with the employee's work—it successfully limits the otherwise at-will nature of Texas employment and creates a valid employment contract to which a noncompete agreement can be ancillary.[139] In other words, a valid employment contract—for the sake of attaching a noncompete agreement—should somehow limit employers' ability to fire an employee at their whim.[140] Such contracts still meet the requirements in *Light* because each party still has a right to terminate the employment, but

129. TEX. BUS. & COM. §§ 15.05(a), 15.50(a).
130. *See Marsh*, 354 S.W.3d at 769.
131. *See TMC Worldwide*, 178 S.W.3d at 36–39; *Zep*, 824 S.W.2d at 658–61.
132. *TMC Worldwide*, 178 S.W.3d at 36.
133. Light v. Centel Cellular Co. of Tex., 883 S.W.2d 642, 644 (Tex. 1994), *abrogated by Marsh*, 354 S.W.3d 764.
134. *Id.*
135. *TMC Worldwide*, 178 S.W.3d at 38.
136. *Zep*, 824 S.W.2d at 658–61.
137. *Id.* at 658 (quoting TEX. BUS. & COM. CODE ANN. § 15.50(a) (West Supp. 1992)).
138. *Id.* at 658–59.
139. *Id.*
140. *Id.* at 659.

that right is legally constricted in some way.[141] Of course, parties can always make a noncompete agreement after the initial employment contract, provided that valuable, independent consideration supports it.[142]

The *Zep* court also addressed the second clause in § 15.50(a), which states that any restraint of trade must reasonably limit the geographical area, time, and latitude of activity in the most minimal way necessary to protect a legitimate business interest.[143] The *Zep* court specifically addressed the mandate that there must be a reasonable limitation on the geographical area in which the employee cannot practice trade.[144] Generally, a reasonable geographical area is "the territory in which the employee worked while in the employment of his employer."[145] If a noncompete agreement does not contain any reference to a geographical area, it cannot conform to § 15.50(a) of the Business and Commerce Code and is thus unenforceable.[146]

In *Zep*, the court addressed the need for reasonable restraints on geographical area along with one of the remedies provided in § 15.51(c) when that criterion is not met.[147] Subsection (c) of § 15.51 grants the court the power to amend a noncompete agreement that is ancillary to a valid employment contract but does not reasonably limit geographical area, time, or scope of activity.[148] Specifically, the *Zep* opinion noted that while courts do have the power to amend noncompete agreements to make them enforceable, in doing so, the employer seeking to enforce the agreement forgoes its right to damages.[149] In other words, if an employer asks the court to amend the noncompete agreement under § 15.51(c), the employer must limit the available remedy to injunctive relief and cannot also sue for damages.[150] The employer in *Zep* requested that the court amend the noncompete agreement to render it enforceable but affirmatively asked for damages and not injunctive relief.[151] Because the employer did not seek injunctive relief, the court refused to amend the noncompete agreement.[152]

From California to New Jersey, there is a wide spectrum of ways in which courts interpret noncompete agreements.[153] Due to the variance in

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141. *See* Light v. Centel Cellular Co. of Tex., 883 S.W.2d 642, 644 (Tex. 1994), *abrogated by* Marsh USA Inc., v. Cook, 354 S.W.3d 764 (Tex. 2011).

142. *Zep*, 824 S.W.2d at 658.

143. *Id.* at 660–61; TEX. BUS. & COM. CODE ANN. § 15.50(a) (West 2015).

144. *Zep*, 824 S.W.2d at 660–61.

145. *Id.* at 660 (citing Justin Belt Co. v. Yost, 502 S.W.2d 681, 685 (Tex. 1973)).

146. *Id.* at 661.

147. *Id.*

148. TEX. BUS. & COM. § 15.51(c).

149. *Zep*, 824 S.W.2d at 661.

150. *Id.*; *see also* TEX. BUS. & COM. § 15.51(c) (providing the remedies available for employers and employees).

151. *Zep*, 824 S.W.2d at 661.

152. *Id.*

153. *See supra* Sections III.A–B.

judicial interpretation, there is no shortage of debate on whether noncompete agreement laws need reform.

IV. IS THERE A PROBLEM WITH YOUR ORDER?

This Comment uses examples to emphasize or otherwise provide insight into some of the arguments and analyses. To avoid the potentially confusing nature of labels like "Person X" and "Company A," these examples will involve "Kyle Fields," who—unless stated otherwise—is a college student. Kyle is making extra spending money by working at "Sully's Sandwiches," a sandwich restaurant that not only specializes in high quality sandwiches but will also deliver them directly to a customer's door. Sully's, a subsidiary of Olsen Food Services, has become incredibly popular and has over 2,000 stores scattered across forty-three states.

The current noncompete law varies widely across the country.[154] Because of this variance and the way some companies enforce noncompete agreements against low-wage employees, some business experts and legal authorities believe there is a problem that needs to be remedied.[155] There are, however, experts and authorities who claim there is not a problem with the way noncompete agreements are used in a legal context.[156] Such an ideological disagreement raises the question: Is there a problem or not?[157]

A. A Hair in the Soup: Yes, There Is a Problem

Of course there is a problem! What kind of world do we live in where high school students making sandwiches for minimum wage are asked to sign noncompete agreements?[158] Are we just moments away from finding out that Jimmy John's sends mercenary human resources representatives to Subway, Quiznos, and Schlotzky's restaurants around the country, checking to make sure the hygienically questionable teenager making sandwiches is not a former Jimmy John's employee in violation of his noncompete agreement?[159] Of course, the odds of any company checking the work history of low-wage workers at competitors' businesses are slim, if for no other reason than such agreements are difficult to enforce.[160]

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154. *See supra* Part III.
155. *See infra* Section IV.A.
156. *See infra* Section IV.B.
157. *See infra* Part IV.
158. Jamieson, *supra* note 5.
159. *Id.* While the noncompete situation is topical, it is, of course, doubtful that Jimmy John's or any other sandwich shop uses mercenary human resources representatives to travel the country, looking for vagrant former employees.
160. *See infra* Section IV.A.3.

For critics of noncompete agreements, there are many arguments to be made.[161] First, critics frequently argue that low-wage workers have very little bargaining power, so any noncompetes intended to be enforced against them are patently unfair and unreasonable.[162] Second, noncompete agreements are generally not enforceable against low-wage employees, so there is no point in allowing them to be drafted in the first place.[163] Last, noncompete clauses in general actually hinder overall employee performance.[164] This Comment addresses each of these arguments in turn.

1. There Is an Imbalance of Power Between Employers and Employees

In some states, courts consider bargaining power as one factor when determining the reasonability of a noncompete agreement.[165] For example, if Olsen Food Services is looking to hire a new vice president of marketing, odds are that the prospective employee would be business savvy and able to properly handle a negotiation that included a noncompete agreement.[166] Conversely, if Sully's Sandwiches was looking for delivery drivers or sandwich makers, like Kyle Fields, who just want to earn some spending money for the weekend, they probably do not have much business experience.[167] In fact, they are probably nineteen years old and more worried about what grade they got on their organic chemistry midterm than they are about trade secrets and the intricacies of sandwich-making.[168]

The imbalance of bargaining power argument is simple: low-wage employees are in a fundamentally weaker position and therefore have nothing to leverage against an employer when signing any sort of employment contract.[169] In addition to the common sense idea that people working for

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161. *See, e.g.*, On Amir & Orly Lobel, *How Noncompetes Stifle Performance*, HARV. BUS. REV., Jan.–Feb. 2014, http://hbr.org/2014/01/how-noncompetes-stifle-performance; Hyde, *supra* note 89 (discussing how noncompete agreements may do more harm than good).

162. *See infra* Section IV.A.1.

163. *See infra* Section IV.A.2.

164. *See infra* Section IV.A.3.

165. *See, e.g.*, Kroeger v. Stop & Shop Cos., Inc., 432 N.E.2d 566, 571 (Mass. App. Ct. 1982).

166. *See id.*

167. *See id.*

168. *See, e.g.*, *id.*; *supra* notes 1–4 and accompanying text (providing a hypothetical involving Jimmy John's employees). Additionally, it should be noted that this Comment is not intended to pick on the sandwich-making industry. While Jimmy John's does have its employees sign noncompete agreements, there have also been reports of summer camps, doggy daycares, hair salons, and other businesses requiring low-wage employees to sign noncompete agreements. *See* Steven Greenhouse, *Noncompete Clauses Increasingly Pop Up in Array of Jobs*, N.Y. TIMES (June 8, 2014), http://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html?_r=1. There are frequent references to sandwich shops because the Jimmy John's story was publicized and referenced in multiple analyses of the MOVE Act. *See* Claire Zillman, *Senators: Jimmy John's Workers Should Not Have to Sign Non-Competes*, FORTUNE (June 3, 2015, 4:41 PM), http://www.fortune.com/2015/06/03/non-compete-ban-bill-jimmy-johns/.

169. *See generally* Jordan Weissmann, *Ban Noncompete Agreements. Do It Now.*, SLATE: MONEYBOX (June 4, 2015, 4:39 PM), http://www.slate.com/blogs/moneybox/2015/06/04/forcing_low_

around minimum wage are less likely to challenge the almighty corporate structure, there are the equally simple ideas that most low-wage employees are either very young, very poor, or both.[170] How often would a person expect to see a middle-aged woman in designer clothes waiting tables for $2.13 an hour plus tips?[171] And in what world would you expect to see a forty-five-year-old man race his brand new Maserati into a Chuck E. Cheese parking lot because he was running late to his job as the restaurant's mascot?[172] While the middle-aged woman may have waited tables in college and the forty-five-year-old man may have been a mascot in high school, they would have taken those jobs so that they could earn money and gain the work experience to help them advance in their careers as managers and executives.[173]

Critics also say the very nature of a noncompete agreement is unfair to low-wage employees.[174] Noncompete agreements are part of legally binding contracts, and low-wage employees are less likely to review the contract before signing it, which automatically gives the company paramount leverage.[175] Executives may very well take a noncompete agreement to their lawyer to interpret any legalese and discuss any ramifications of signing the agreement before actually signing.[176] On the other hand, a low-wage employee—especially a high school or college student—is unlikely to pay a lawyer to scan a noncompete agreement before joining the workforce at a sandwich shop or doggy daycare.[177] Furthermore, it would be considered unusual, and perhaps even unreasonable, for low-wage employees to do so because it is not the norm, it can cost a significant amount of money that low-wage employees do not have, and if one high school student refuses to sign, the employer knows that there are probably several more who would gladly, and likely blindly, do so.[178]

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wage_workers_to_sign_noncompete_agreements_is_vicious_and_stupid.html (discussing how the balance of power may shift when analyzing noncompetes for low-wage workers to those for management).

170. *See* U.S. BUREAU OF LABOR STATISTICS, CHARACTERISTICS OF MINIMUM WAGE WORKERS, 2014, at 1–2 (2015), http://www.bls.gov/opub/reports/cps/characteristics-of-minimum-wage-workers-2014. pdf.

171. *See id.*

172. *See id.*

173. *See generally* Bureau of Labor Statistics, *May 2014 State Occupational Employment and Wage Estimates Texas*, U.S. DEP'T LAB. (May 2014), http://www.bls.gov/oes/2014/may/oes_tx.htm (providing salary data for several occupations in Texas).

174. *See* Weissmann, *supra* note 169.

175. *See id.*

176. *See id.*; *see also* Harroch, *supra* note 8 (asserting that "high level executives often use an experienced employment law attorney" to assist them in employment negotiations).

177. *See* Weissmann, *supra* note 169.

178. *See* Aaron Vehling, *Cos. Should Drop Noncompete Pacts for Low-Wage Workers*, LAW360 (June 5, 2015, 8:36 PM), http://www.law360.com/articles/664496/cos-should-drop-noncompete-pacts-for-low-wage-workers (discussing the high cost of challenging a noncompete); *see also* U.S. BUREAU OF LABOR STATISTICS, *supra* note 170 (asserting that most minimum-wage workers are young and do not have much expendable income). The logical conclusion from the Bureau of Labor Statistics' report on minimum wage employees is that because most of these workers are young, there must be many young

Critics of noncompete agreements point to the different situations described above as proof that enforcing noncompete agreements against low-wage employees is inherently unfair.[179] Broadly stated, because low-wage employees are generally young, short on funds, and hold more replaceable positions in a business, they do not have a leg to stand on when asked to sign a noncompete agreement with which they disagree.[180]

For example, if a forty-five-year-old person with twenty years of experience is negotiating a $200,000-per-year employment contract, he probably has specific skills that the prospective employer is looking for.[181] The prospective employee will have time to use all of his business acumen in deciding whether to take the job and will more than likely be able to negotiate around specific provisions of the employment contract he does not like.[182] For instance, he may offer to sign a noncompete agreement if he is given an extra week of vacation.[183] At this point, it is up to the employer to decide whether the employee will be valuable enough to sacrifice the extra week of vacation for the security of a noncompete agreement.[184] This is probably not how the situation would play out if a teenager was handed a noncompete agreement to sign on his first day of work as a summer camp counselor.[185]

The imbalance of power between low-wage employees and their employers is just one factor courts consider when determining the enforceability of a noncompete agreement.[186] Some would argue that this imbalance of power is a sign that noncompete agreements are patently unfair. While the imbalance of power criticized by noncompete detractors is an important argument against noncompete agreements, it is not the only one.

2. Most Noncompete Agreements Are Unenforceable Anyway

The next argument critics make for reform is that noncompete agreements, specifically those signed by low-wage employees, may not be

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people available for the jobs. *Id.* Furthermore, because they are young and without much expendable income, many low-wage employees would not spend hard-earned dollars to have an attorney review a noncompete. *Id.*

179. *See, e.g.*, Weissmann, *supra* note 169.

180. *See id.*

181. *See* Harroch, *supra* note 8.

182. *See id.*

183. *See id.*

184. *See id.*

185. *See id.* Harroch's article on Forbes.com is clearly geared toward professionals negotiating employment contracts. *See id.*

186. *See* Kroeger v. Stop & Shop Cos., Inc., 432 N.E.2d 566, 571 (Mass. App. Ct. 1982).

reasonable in the first place. So, what good is there in having those employees sign them?[187]

As an example, assume Sully's Sandwiches hires Kyle Fields as a delivery driver, for which he will earn $12 per hour.[188] In Kyle's employment contract, there is a provision banning him from working in any business that offers delivery services within 200 miles of Sully's for a period of five years.[189] Sully's is unlikely to make a delivery driver privy to company secrets, and the scope of the employment banned as well as the geographical and time restraints would probably be unreasonable in Texas.[190] Assuming this is an unreasonable restraint of trade, Kyle has nothing to worry about and can take a job at a different restaurant doing the same work, right?[191] Noncompete critics do not see the situation as being that simple.[192]

Critics believe that Kyle, being a low-wage employee, will probably be afraid to take another job because of the noncompete agreement.[193] The mere threat of litigation, even if it is borne of an unreasonable noncompete agreement, may prevent low-wage employees from taking jobs.[194] The argument then becomes if this would be an unreasonable restraint of trade anyway, then why even allow companies to put them into contracts?[195] Why not just have an across-the-board ban on noncompete agreements?[196]

The argument is further bolstered if the facts are changed slightly.[197] Suppose now that Sully's Sandwiches hires Kyle Fields as a sandwich maker at one of their many nationwide stores and asks Kyle to sign a noncompete agreement preventing him from working in any restaurant that sells sandwiches within three miles of any other Sully's Sandwiches in the country for a period of two years.[198] After working at Sully's Sandwiches for three years, Kyle was promoted to store manager but was unhappy with corporate. Kyle then leaves the company to start his own restaurant, Red Ace Subs.[199]

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187. Barry Kramer, *It's Time for States to Ban Non-Competition Agreements*, WASH. EXAMINER (Sept. 3, 2015, 12:01 AM), http://www.washingtonexaminer.com/its-time-for-states-to-ban-non-competition-agreements/article/2571308.

188. *See* Jamieson, *supra* note 5. This example is loosely based on the problem at Jimmy John's restaurants. *See id.* The Jimmy John's noncompete agreements ban employees from working at any business that generates at least 10% of its revenue from sandwiches and is within three miles of any Jimmy John's for a period of two years. *Id.*

189. *Id.*

190. *Id.*; *see also supra* Section III.C.

191. *See* Jamieson, *supra* note 5.

192. *See* Kramer, *supra* note 187; Weissmann, *supra* note 169.

193. Kramer, *supra* note 187.

194. *Id.*

195. *Id.*

196. *Id.*

197. Gonzales v. Norris of Hous., Inc., 575 S.W.2d 110, 111 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.). This example is a slight alteration of the facts in *Gonzales*. *Id.* For a review of the facts, see *supra* notes 60–64 and accompanying text.

198. *See* Jamieson, *supra* note 5.

199. *See Gonzales*, 575 S.W.2d at 111.

Kyle finds a location that is two states over from where he worked for Sully's and is preparing to open his own store when he notices a Sully's Sandwiches two miles away.[200] The noncompete agreement Kyle signed is probably still unreasonable because of the breadth of its geographical ban, but he is unsure so he chooses not to open his own restaurant.[201] Critics of noncompete agreements point to examples like this to show how noncompete agreements stifle capitalism and free trade.[202]

Critics assert that former employees, like Kyle, will not truly know if the noncompete agreement he signed was reasonable enough to be enforced until a jury says so.[203] Because getting a verdict may take just as long as waiting out the time restriction of the noncompete agreement, some employees will not bother pursuing their entrepreneurial desires or otherwise taking employment at a company similar to the one where they worked.[204] This delay effectively kills any opportunity employees may have, especially if they want to start their own business, because with the threat of a lawsuit, banks may refuse to give loans, potential investors may refuse to commit capital, and potential management may refuse to commit to their new job in a startup.[205]

The potentially anti-capitalistic repercussion of including a noncompete clause in an employment contract is why many critics think that noncompete agreements should be abolished altogether—not just for low-wage employees.[206] Critics assert that if unreasonable, unenforceable noncompete agreements can still serve to restrain free trade, then those agreements should be left out of contracts and banned altogether.[207] In addition to arguments about balance of power and the inherent unenforceability of noncompete agreements, critics also argue that noncompete agreements can actually stifle performance and hurt the industry.[208]

3. Noncompete Agreements Stifle Performance

Perhaps the strongest economic argument for banning noncompete agreements is that some studies have shown that subjecting employees to noncompete agreements actually reduced their production and hurt business in general.[209] Critics point to Silicon Valley in California as a prime example of how the absence of noncompete agreements can actually help business and

200. *Id.*
201. *Id.*
202. *See, e.g.*, Kramer, *supra* note 187.
203. *Id.*
204. *Id.*
205. *See id.*
206. *Id.*
207. *Id.*; Weissmann, *supra* note 169.
208. *See infra* Section IV.A.3.
209. Amir & Lobel, *supra* note 161.

stimulate performance.[210] California has a blanket statutory ban on noncompete agreements, and Silicon Valley is the world authority on technology development.[211] According to critics, the statutory ban on noncompete agreements has contributed to Silicon Valley's success and immeasurable progress.[212]

A study conducted by On Amir and Orly Lobel published in the *Harvard Business Review* yielded results suggesting that noncompete agreements can significantly stifle the quality of work employees produce.[213] The study included over one thousand people who performed an online task for a payment.[214] Half of the participants were not given any restrictions and served as a control group.[215] The other half were told that they would be invited to do another task, but they could not accept an invitation for the same type of task.[216] This restriction was designed to simulate a noncompete agreement.[217]

In the control group, 59% of the participants completed the task.[218] In the noncompete group, only 39% of the participants completed the task.[219] Additionally, the noncompete participants committed more errors, skipped more items, and generally spent less time on each task, which were all seen as indicators of lower levels of motivation.[220] According to Amir and Lobel, the significant decrease in motivation was due to the presence of the noncompete-like situation.[221] Amir and Lobel further concluded that the lack of motivation and drop in employee performance could be more damaging to a business than if the employee were to quit.[222] In other words, the reduced quality of work and resulting consequences—such as fewer sales, more payroll for less production, and more money spent on training—may actually cost the company more money than simply hiring new employees due to a higher turnover rate.[223]

According to the study, noncompete agreements make employees understand that by signing such an agreement, they are effectively limiting their employment opportunities in the future.[224] This thought coupled with the presumption that even an unenforceable noncompete agreement could

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210. *See, e.g.*, *id.*; Hyde, *supra* note 89, at 7; Kramer, *supra* note 187.
211. Amir & Lobel, *supra* note 161; *see* Hyde, *supra* note 89, at 7–8.
212. Amir & Lobel, *supra* note 161.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*

still deter an employee from seeking future employment leads to the conclusion that noncompete agreements are bad for company morale and decrease worker output.[225] Amir and Lobel noted that it is understandable that businesses want to protect the talent they get from employees.[226] "But," they said, "if the walls meant to protect human capital diminish the quality of that capital, they may not be worth building."[227]

There is a second part to this argument, which says that not only is employee performance negatively affected but industry itself also suffers.[228] This point is best exemplified by comparing two areas of the country known for their industry—Silicon Valley in California for its booming technology industry and Route 128 in Massachusetts for its once great but now stagnant technology industry.[229]

Over the past five decades, Silicon Valley and Route 128 have gone through inversely proportionate evolutions as hubs of American and worldwide technological progress.[230] Silicon Valley has gone from a small industrial community to a worldwide center of cutting-edge technology.[231] Conversely, Route 128 has fallen from the acme of technological advancement to a small group of individually successful firms—overall a lesser center of technology than its West Coast counterpart.[232]

California and Massachusetts approach noncompete agreements differently, and noted labor law professor Ronald Gilson believes the difference in attitude toward noncompete agreements has directly led to each area's level of success.[233] Professor Gilson has said that California's ban on noncompete agreements allows for a free flow of information between competing firms, which leads to quicker technological advancement and stronger industry all around.[234] Professor Gilson noted that while for the purposes of protecting trade secrets, noncompete agreements are "individually rational," they are "collectively suboptimal," and that California's ban on noncompete agreements creates conditions more conducive for business growth.[235]

Conversely, Professor Gilson contended that Massachusetts's laissez-faire approach to noncompete enforceability prevents such a wide

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225. *See infra* Section IV.A.3.
226. Amir & Lobel, *supra* note 161.
227. *Id.*
228. *See* 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, 586–87 (1999).
229. *See id.* at 586–94.
230. *Id.* at 586–87.
231. *Id.*
232. *Id.* at 586–87, 589–92.
233. *Id.* at 586–87; *see also supra* Part III.
234. Gilson, *supra* note 228, at 609–13.
235. *Id.*

spread of information, as seen in California.[236] Because information is not shared so freely between competitors, Route 128 firms have been slower to develop newer technologies and instead have moved to more vertical integration as a means of expanding as a business.[237] This lack of innovation coupled with the reduced motivation and employee output lead critics to the conclusion that noncompete agreements may have a negative effect on work environment and industry in general.

The arguments against how noncompete agreements are treated in the United States generally apply to all noncompete agreements, not just those signed by low-wage employees. Though there are compelling arguments for banning noncompetes, or at least seriously overhauling existing noncompete agreement laws, there are also counterarguments in favor of maintaining the status quo.

B. Bon Appétit: No, There Is Not a Problem

Of course there is not a problem! What kind of world do we live in where business owners are not allowed to protect the hard work they have poured into their company from employees being poached and trade secrets being unscrupulously obtained?[238] Besides, we already have laws saying that noncompete agreements will only be enforced if they are reasonable, so why do we need to change anything?[239] Plus, if all of these noncompete agreements are so difficult to legally enforce anyway, what is the harm in keeping them around?[240]

Of course these arguments, while abundant in passion, are not verbatim the well-reasoned support that proponents of noncompete agreements use to bolster their opinions.[241] There are, however, many legitimate arguments for keeping and enforcing noncompete agreements.[242] There are three distinct arguments: a public policy argument, an economic argument, and a legal argument.[243] Briefly, the public policy argument hinges on protecting business owners and the time, effort, and money they put into their employees.[244] The economic argument is a counterpoint to Section IV.A.3

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236. *Id.* at 603–06. Professor Gilson also mentions that Massachusetts's approach to noncompete enforceability is followed by a "great majority of states." *Id.* at 603. It should be noted that the Massachusetts laws are similar to those seen in Texas, which is why the comparison between California and Massachusetts is relevant to how noncompete agreements are interpreted in Texas. *Id.* at 603–06; *see supra* Section III.C.

237. Gilson, *supra* note 228, at 603–07.

238. *See* T. Leigh Anenson, *The Role of Equity in Employment Noncompetition Cases*, 42 AM. BUS. L.J. 1, 2 (2005).

239. *See supra* Section III.C.

240. *See supra* Section IV.A.3.

241. *See infra* Sections IV.B.1–3.

242. *See infra* Sections IV.B.1–3.

243. *See infra* Sections IV.B.1–3.

244. *See infra* Section IV.B.1.

and uses evidence that noncompete agreements are in fact good for business; therefore, noncompete agreements should be maintained and enforced when reasonable.[245] Finally, the legal argument centers on the historical freedom to contract and the basic elements of enforceable contracts that should make noncompete agreements binding.[246]

1. Noncompete Agreements Are Good for Public Policy

Unreasonable restraints of trade are universally recognized as having a negative effect on the public.[247] Reasonable restraints of trade, such as legal noncompete agreements, must then be enforced because they serve the public in a positive way.[248] Noncompete agreements further public policy by offering protection for both business owners' legitimate interests and certain equitable principles.[249]

Noncompete agreements will only be enforced if they are shown to protect a legitimate business interest.[250] While the exact definition of "legitimate business interest" has been, and likely will continue to be, hashed out in courts, there are two universally recognized legitimate business interests.[251] First, employers have a legitimate business interest in obtaining and maintaining a customer base.[252] Second, courts have recognized that there is a legitimate business interest in protecting trade secrets and other proprietary information.[253]

At one point in time, it may have been easy to distinguish these interests from the employees themselves, but in an era driven primarily by technology, it has become increasingly difficult to separate the human capital from the actual work product.[254] In other words, because more and more companies—especially in industries with many trade secrets, such as computer technology—spend so much time, money, and effort training their employees, it can become difficult to separate the employee from the work product.[255] For example, if Microsoft hires twenty people to write code for the same specific software, the company will pour large amounts of money

245. *See infra* Section IV.B.2.

246. *See infra* Section IV.B.3.

247. *See* TEX. BUS. & COM. CODE ANN. § 15.05(a) (West 2015); Sec. Serv. Fed. Credit Union v. Sanders, 264 S.W.3d 292, 297 (Tex. App.—San Antonio 2008, no pet.).

248. *See supra* Part III; *see also* Anenson, *supra* note 238, at 2, 13–14 (discussing various public policy reasons for enforcing noncompete agreements).

249. Anenson, *supra* note 238, at 2, 13–14.

250. *See* Gonzales v. Norris of Hous., Inc., 575 S.W.2d 110, 112–13 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.).

251. *See supra* Section III.C.

252. *See Gonzales*, 575 S.W.2d at 112–13; Anenson, *supra* note 238, at 13–14.

253. Peat Marwick Main & Co. v. Haass, 818 S.W.2d 381, 386 (Tex. 1991); Anenson, *supra* note 238, at 13–14.

254. Anenson, *supra* note 238, at 15–16.

255. *Id.*

into training those employees, revealing company information to them, and continuously checking for security breaches to ensure that the software is developed successfully.[256] Now suppose those employees stage a mass exodus to go open their own competing technology companies.[257] Unless Microsoft utilized noncompete agreements, those employees could take the training and skills they obtained at Microsoft and use them to open a competing company, writing almost identical software without technically violating any trade secret laws.[258] The defecting employees could then start their own companies and poach other employees from competitors in an effort to build a more successful business.[259] This "defect and raid" system seems to be a legal workaround to avoid breaking the law while still flirting with the line of misusing trade secrets.[260]

The defect and raid system works against public policy because it provides an incentive for employers to reduce the amount of money they put into their employees, encourages employee poaching, and creates the potential for the misappropriation of company information and customer relationships.[261] Noncompete agreements work to combat this potential abuse of the system by keeping ex-employees in check and incentivizing employers to invest more in their existing workforce.[262]

Unlawful restraints of trade are anticompetitive and against public policy, and there are arguments to be made for restricting the enforceability of noncompete agreements.[263] But without noncompete agreements, industry could potentially become so competitive that it hurts employers and employees more than it helps them.[264] Lawmakers have the power to strike the balance between the public policy arguments both in favor of and in opposition to noncompete agreements.[265]

Reasonable noncompete agreements are good for public policy; however, proponents use other arguments to justify noncompete agreements' continued presence in the American workplace.[266] Proponents also make an

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256. *See* Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163, 1203–04 (2001). This example is loosely based on the "brain drain" at Microsoft, in which several employees left at the same time to start several competing companies. *Id.* at 1204 n.138.

257. *Id.*

258. *See id.*

259. *See id.* (citing PETER CAPPELLI, THE NEW DEAL AT WORK: MANAGING THE MARKET DRIVEN WORKFORCE 182–85 (1999)).

260. *See id.*

261. *See* Anenson, *supra* note 238, at 3.

262. *Id.*

263. TEX. BUS. & COM. CODE ANN. § 15.05(a) (West 2015); *see supra* Sections IV.A.1–3.

264. *See* Arnow-Richman, *supra* note 256, at 1204 n.138 (citing CAPPELLI, *supra* note 259).

265. *See* Anenson, *supra* note 238, at 3.

266. *See infra* Section IV.B.2.

economic-based argument that noncompete agreements help increase competition and technological advancement.[267]

2. Noncompete Agreements Are Economically Advantageous

Critics of noncompete agreements often argue that these agreements hinder employee performance and are generally bad for business.[268] According to some economists, however, the exact opposite is true.[269] In fact, a myriad of economic arguments exist that directly contradict economic arguments made by noncompete critics.[270]

To begin with, critics often point to Silicon Valley's industry success as evidence that a noncompete ban is good for business.[271] However, many critics fail to mention that California's overall industry is on the decline compared to other states.[272] California has a 5.5% unemployment rate, which is thirty-sixth in the country and over 1% worse than noncompete-friendly states, such as Texas and Massachusetts.[273] This quells the argument that a noncompete agreement ban is patently good for the economy.[274] While other factors affect unemployment, critics often point to the success of Silicon Valley as evidence that a noncompete ban works.[275] This argument is flawed because it presumes that what is good for Silicon Valley is good for all businesses, but this argument may only provide some merit to industry-specific bans on noncompete agreements.[276]

The impact of California's business climate has actually driven businesses and entrepreneurs out of the state.[277] In 2011, companies left California at a rate five times higher than just two years earlier.[278] That year, the most popular states to which companies moved included Texas, Arizona, Colorado, Utah, Nevada, North Carolina, and Virginia—all states that are

267. *See infra* Section IV.B.2.

268. *See supra* Section IV.A.3.

269. *See, e.g.*, Dan Seligman, *The Case for Servitude*, FORBES (Mar. 1, 2004, 12:00 AM), http://www.forbes.com/forbes/2004/0301/070.html.

270. *See Phillip C. Korovesis et al.*, *I Wish They All Could Be California: Why Noncompete Critics Are Singing the Wrong Song*, COMMERCIAL LITIG., Mar. 2012, at 41, 41–44, https://www.butzel.com/files/Publication/5638cce2-5e46-4881-b8f3-ef81f1169ed7/Preview/PublicationAttachment/4853a76a-2ada-444b-861f-f9fb65782b36/120312artLIT.pdf; *supra* Section IV.A.3.

271. *See supra* Section IV.A.3.

272. Bureau of Labor Statistics, *Unemployment Rates for States, Seasonally Adjusted*, U.S. DEP'T. LAB., http://www.bls.gov/web/laus/laumstrk.htm (last updated Sept. 20, 2016).

273. *Id.*

274. *See generally Korovesis et al.*, *supra* note 270, at 42 (comparing California's unemployment rate to those states where noncompete agreements are traditionally enforced).

275. *See supra* Section IV.A.3.

276. *See infra* Part V.

277. Tami Luhby, *California Companies Fleeing the Golden State*, CNN MONEY (July 12, 2011, 12:51 PM), http://www.money.cnn.com/2011/06/28/news/economy/California_companies/.

278. *Id.*

more prone to enforcing reasonable noncompete agreements.[279] Furthermore, of those seven states, five have unemployment rates equal to or lower than California's.[280] For whatever reason companies stayed in California, it appears that there is no correlation between their success and California's ban on noncompete agreements.

Next, critics say that noncompete agreements stifle creativity and business performance; however, evidence to the contrary exists.[281] As mentioned in Section IV.B.1, evidence suggests that employers who use noncompete agreements actually invest more money into their employees and engage in more aggressive research and development projects.[282] With the ability to invest more money into the human capital at a company, businesses can nurture innovation while simultaneously protecting the employer's goodwill, trade secrets, and other legitimate business interests.[283] The bottom line is that noncompete agreements give businesses a strong reason to invest in their own workers.[284]

Finally, there is an important argument that critics of noncompete agreements tend not to acknowledge: banning noncompete agreements could potentially hurt all employees financially.[285] For example, if Kyle Fields worked for Sully's Sandwiches and, after receiving expensive training, quit to start Red Ace Subs in the same region as Sully's, then Kyle's knowledge, skills, and training, would undoubtedly be used to directly compete with Sully's.[286] After that, Sully's Sandwiches would be forced to compete with another business that does not have the same training expenses and to "labor under the burden of unfair competition as a result of the informational asymmetry presented by its direct competitor having an employee with intimate knowledge of its operations."[287] Of course, if Sully's was forced to operate at this disadvantage, then its profits could go down and it could institute layoffs or undertake some other cost-saving measure that could negatively impact its employees.[288] Theoretically, this could create an endless, vicious cycle: a small business opens using poached training, then has its employees poached by another startup and is forced to shut its doors.[289] Reasonable noncompete agreements help protect employers, employees, and society in general from this vicious cycle.[290]

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279. *Id.*
280. Bureau of Labor Statistics, *supra* note 272.
281. *Korovesis et al.*, *supra* note 270, at 42; *see supra* Section IV.A.3.
282. *See* Anenson, *supra* note 238, at 16–17; *Korovesis et al.*, *supra* note 270, at 43.
283. *Korovesis et al.*, *supra* note 270, at 64.
284. Seligman, *supra* note 269.
285. *Korovesis et al.*, *supra* note 270, at 44.
286. *See* Lowry Comput. Prods., Inc. v. Head, 984 F. Supp. 1111, 1113–16 (E.D. Mich. 1997).
287. Kelly Servs., Inc. v. Noretto, 495 F. Supp. 2d 645, 659 (E.D. Mich. 2007).
288. *Korovesis et al.*, *supra* note 270, at 44.
289. *See id.*
290. *Id.*

The economic reasons compounded with the public policy motivations for enforcing reasonable noncompete agreements are worthy counterparts to critics' arguments. There is, however, a third argument in favor of enforcing noncompete agreements: the legal argument.

3. Contract Law Supports Reasonable Noncompete Agreements

All lawyers and law students have some horror story about trying to grasp some antiquated concept in their first-year contracts class. Nevertheless, basic contract principles—such as consideration, detrimental reliance, and the right to contract—remain integral parts of modern business.[291] Contracts provide ways to enforce agreements and remedies in case those agreements are broken.[292] These basic contract principles support the enforcement of reasonable noncompete agreements.

A noncompete agreement is a form of contract or, at the very least, an important part of an existing contract.[293] Even the Restatement (Second) of Contracts (the Restatement) notes that noncompete agreements can be valid, provided they are at least ancillary to a valid transaction and do not impose a greater restraint than is necessary to protect the employer's legitimate business interest.[294] In general, noncompete agreements are heavily scrutinized and usually must meet rigid statutory requirements to be valid.[295] Even with stringent statutory requirements and close examination from courts, some lawyers estimate that only half of all noncompete agreements would survive a court's scrutiny.[296]

Because the Supreme Court has stated that people have an inherent right to contract, employers and employees should be allowed to enter into employment contracts, including noncompete agreements.[297] The law provides a set of guidelines by which noncompete agreements are scrutinized, and courts subsequently will carefully examine challenged noncompete agreements to ensure that free trade has not been unlawfully restrained.[298] When determining whether a noncompete agreement is enforceable, courts will take into account the imbalance of bargaining power between employers and employees "because the employee is likely to give

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291. *See* Frisbie v. United States, 157 U.S. 160, 165 (1895). It is worth noting that Justice Brewer went on to say that courts could certainly strike down employment contracts that were against public policy. *Id.* at 166. Even still, the Court stated that "generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property." *Id.*

292. *See* RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. 1981) (defining "contract" as "a promise or a set of promises for the breach of which the law gives a remedy").

293. *Covenant not to compete*, BLACK'S LAW DICTIONARY (10th ed. 2014).

294. RESTATEMENT (SECOND) OF CONTRACTS § 188(1)–(2).

295. *See id.* § 188 cmt. g (discussing general requirements of valid noncompete agreements), *e.g.*, TEX. BUS. & COM. CODE ANN. § 15.50 (West 2015.

296. Seligman, *supra* note 269.

297. Frisbie v. United States, 157 U.S. 160, 166 (1895).

298. *See, e.g.*, TEX. BUS. & COM. § 15.50.

scant attention to the hardship he may later suffer through loss of his livelihood."[299] In other words, while there is an acknowledged imbalance of power, statutes and courts are prepared to protect employees and the public from abusive employers by ensuring trade is not unlawfully restrained.[300]

Additionally, while there is no doubt some companies ask their low-wage employees to sign noncompete agreements, employees in mid- or upper-level positions, who are more likely to have leverage when negotiating their contracts, sign most noncompete agreements.[301] In fact, *Forbes* has even published a guide for executives for negotiating the best employment contracts, which includes a section on negotiating noncompete agreements.[302] There is a legitimate business interest in having managers, executives, salesmen, and research and development employees sign noncompete agreements because they protect the employer from having their goodwill, trade secrets, or company intelligence—such as training methods—unscrupulously used in competition.[303]

As for low-wage employees and noncompete agreements, the law provides protection from overbearing restraints.[304] It is unlikely that a court in Texas, or anywhere else, would uphold the noncompete agreements that sandwich makers at Jimmy John's sign.[305] For one thing, it is doubtful that anything a sandwich maker or delivery driver learns on the job could be protectable as a legitimate business interest.[306] For another, it is highly unlikely that the geographical restraints in the Jimmy John's noncompete agreement would be considered reasonable.[307] The law is designed to protect employees from abusive noncompete agreements, so low-wage employees should generally not have to worry about being bound by these agreements.[308]

Contract law is not designed to punish people; it is designed to protect people from potential abuse.[309] There are laws in place to protect all employees from employers, and there are specific contract-related laws governing how and when to enforce noncompete agreements.[310]

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299. RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. g.

300. *Id.*

301. *See generally* Ruth Simon & Angus Loten, *Litigation over Noncompete Clauses Is Rising*, WALL STREET J. (Aug. 14, 2013, 8:06 PM), http://www.wsj.com/articles/SB10001424127887323446404579011501388418552.

302. Harroch, *supra* note 8.

303. *See* Anenson, *supra* note 238, at 13–14.

304. TEX. BUS. & COM. CODE ANN. § 15.50 (West 2015); RESTATEMENT (SECOND) OF CONTRACTS § 188.

305. *See* TEX. BUS. & COM. § 15.50; Jamieson *supra* note 5.

306. *See supra* notes 58–65 and accompanying text (discussing legitimate business concerns that make noncompete agreements reasonable).

307. *See generally* TEX. BUS. & COM. § 15.50.

308. *See* RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. g.

309. *Contract*, BLACK'S LAW DICTIONARY (10th ed. 2014).

310. *See, e.g.*, TEX. BUS. & COM. § 15.50; RESTATEMENT (SECOND) OF CONTRACTS § 188.

Critics of noncompete agreements have valid arguments as to why these agreements should be banned among low-wage employees as well as compelling reasons for wanting to ban noncompete agreements altogether.[311] On the other hand, there are equally persuasive public policy, economic, and legal arguments for maintaining the status quo.[312] While there are arguments on each side of the debate, the status quo is not perfect, and there are recommendations to be made for improving noncompete jurisprudence.

V. THE SOUPE DU JOUR: RECOMMENDATIONS

A. First Course: Alter and Adopt the MOVE Act

The MOVE Act proposed to ban noncompetes for employees who make less than $15 per hour or $32,500 per year to solve the problem of abusive employers unfairly binding their low-wage employees with overburdensome noncompetes.[313] This proposal raised interesting questions not only about noncompete agreements for low-wage employees but also about noncompete agreements in general.[314] Are noncompete agreements economically harmful?[315] Are noncompete agreements for low-wage employees patently unfair?[316] Are there valid reasons for maintaining the noncompete agreement status quo?[317] While these questions are posed in the realm of gray rather than black and white and provide plenty of issues worthy of discussion and debate, there are some solutions that could improve the state of noncompete agreements in Texas.

The first and most important question this Comment answers is: Would adoption of the MOVE Act be positive for Texas?[318] The short answer is "yes"; however, the long answer is "yes" with some important caveats.[319] If Texas adopted the MOVE Act, regardless of its passage in the United States Congress, the state could become the first, or at least one of the first, in the country to specifically protect low-wage workers from potentially abusive noncompete practices.[320] While there are legitimate arguments that noncompete agreements are good for the economy, there is no doubt that

311. *See supra* Section IV.A.

312. *See supra* notes 247–310 and accompanying text (discussing various public policy reasons for enforcing noncompete agreements).

313. MOVE Act, S. 1504, 114th Cong. (2015).

314. *See supra* Part IV.

315. *See supra* Section IV.A.

316. *See supra* Section IV.A.1.

317. *See supra* Section IV.B.

318. *See supra* Part I.

319. MOVE Act, S. 1504, 114th Cong. (2015).

320. *See* NY MOVE Act, Assemb. B. 8108, 238th Gen. Assemb., Reg. Sess. (N.Y. 2015).

faceless corporations have a significant bargaining advantage over almost all low-wage employees.[321]

This imbalance of bargaining power can lead to abuse of and substantial disadvantage to low-wage employees if left unchecked.[322] In fact, as mentioned in Section IV.A, even unenforceable noncompete agreements can often deter employees from taking another job because they are afraid of being sued by their former employer.[323] Low-wage employees are generally not in a position to negotiate with employers when they are hired and are rarely financially able to withstand a potentially long and expensive lawsuit.[324] By making it impossible for businesses to force low-wage employees to sign noncompete agreements, these problems can be avoided.[325]

Of course, the obvious question arises: What if a low-wage employee has access to trade secrets, training methods, or other things that fall into the category of legitimate business interests?[326] In that case, the aforementioned caveats come into play, and the MOVE Act should be amended slightly.[327] The Achilles' heel of the MOVE Act is that sometimes employees who make less than $15 per hour may actually have access to things, such as training methods, goodwill, and other legitimate business interests.[328] Any legislation limiting noncompete agreements for low-wage employees should take this into consideration and provide guidance to employers who wish to protect themselves after an employee with sensitive information leaves the company.[329] For instance, the MOVE Act could have a provision stating that if a low-wage employee has consistent, direct access to customer lists, secret training methods, recipes, or unprotected secret technology, then the employer can, for additional consideration, ask that employee to sign a noncompete agreement.[330] To prevent employers from taking advantage of this pseudo-loophole, the MOVE Act could also statutorily limit the constraints in those noncompete agreements.[331] For example, the MOVE Act could provide that any low-wage employee who qualifies to be bound by a noncompete agreement may not be bound for more than six months or in a radius larger than fifteen miles from his former employer.[332] This would

321. *See supra* Section IV.A.1.
322. *See supra* Section IV.A.1.
323. *See supra* Section IV.A.1.
324. *See supra* Section IV.A.1.
325. *See supra* Section IV.A.1.
326. *See* TEX. BUS. & COM. CODE ANN. § 15.50(a) (West 2015).
327. *See supra* note 319 and accompanying text (stating that adoption of the MOVE Act comes with certain caveats).
328. *See* TEX. BUS. & COM. § 15.50(a).
329. *See id*.
330. *See supra* notes 58–65 and accompanying text (providing an example of a noncompete agreement protecting a legitimate business interest).
331. *See* MOVE Act, S. 1504, 114th Cong. (2015); *supra* Section IV.A.1.
332. *See* MOVE Act, S. 1504; TEX. BUS. & COM. § 15.50.

provide business owners with protection but still allow low-wage employees to seek similar employment no farther than fifteen miles away from the previous employer, which would prevent forced relocation and other unnecessary economic hardships.[333]

Another solution to increase the potential effectiveness of noncompete agreements without unnecessarily restraining trade beyond what is needed to protect employers' legitimate business interests would be to make all noncompete agreements option contracts.[334] Specifically, employees could either take monetary compensation and be bound by a noncompete agreement or pay employers a buyout fee in exchange for not being bound by a noncompete.[335] The following could be an example of an option noncompete agreement:

> At the conclusion of EMPLOYEE'S employment at COMPANY, EMPLOYEE will refrain from engaging in trade of a similar nature within fifteen miles of COMPANY for a period of two years. For refraining from this trade, COMPANY will pay EMPLOYEE a sum equal to fifty percent of EMPLOYEE'S last yearly salary attained at COMPANY. However, if at the time EMPLOYEE'S employment concludes, EMPLOYEE does not wish to be bound by the terms of this noncompete agreement, EMPLOYEE can pay COMPANY a sum equal to twenty-five percent of EMPLOYEE'S last yearly salary.[336]

An option contract like this would protect employees and employers alike.[337] Employees have the option of either accepting their fate as people bound by a noncompete agreement or, for a fee, having the freedom to take employment with a direct competitor of their former employer.[338] Of course, this mandate would be precluded if the employee fit the criteria of one protected by the MOVE Act.[339] Having statutory mandates could limit the possibility of abuse by employers while simultaneously protecting them from deceitful former employees.[340]

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333. *See supra* Section IV.A.1.

334. *See supra* notes 53–57 and accompanying text (providing an option contract example in which a noncompete agreement could be exercised by the employer in exchange for consideration).

335. *See, e.g.*, Wall v. Trinity Sand & Gravel Co., 369 S.W.2d 315, 316–17 (Tex. 1963).

336. *See Option*, BLACK'S LAW DICTIONARY (10th ed. 2014). It is worth noting that the numbers used in the example option contract are not necessarily a recommendation but simply placeholders. Obviously, businesses would be able to insert their own numbers, but if challenged, those numbers would need to comply with the existing reasonability test. *See* TEX. BUS. & COM. § 15.50.

337. *See supra* notes 53–57 and accompanying text (providing an example of an option contract designed to protect both the employer and employee).

338. *See supra* notes 53–57 (providing a specific example where monetary consideration is the bargaining chip for the noncompete agreement).

339. *See* MOVE Act, S. 1504, 114th Cong. (2015).

340. *See generally Wall*, 369 S.W.2d at 316–17.

B. Second Course: Take a Leaf from New Jersey's Cookbook

While the option contract solution would require legislative action, there is an improvement that Texas courts could begin making immediately.[341] Under the New Jersey Approach, judges will take into account the difficulty with which an employee could find other work in that field as well as circumstances surrounding the employee's departure from the company.[342] Judges in Texas should adopt this approach to help protect vulnerable employees from vindictive employers and vulnerable employers from vindictive employees.[343]

If Texas courts began analyzing the potential undue hardship put on an employee—for example, how difficult it will be for the employee to subsequently find work in that field—then courts would be able to prevent employees from being completely neglected and unable to find work.[344] This would be a weapon courts could wield in situations involving low-wage employees.[345] For instance, the Jimmy John's noncompete agreement prevents former employees from working at any restaurant that generates at least 10% of its revenue from sandwiches within three miles of a Jimmy John's for two years.[346] If the former employee has worked in food service for a while, it may be too difficult for that person to find work that is still in food service without violating the noncompete agreement.[347] If, however, courts weighed the undue hardship placed on the employee, then they could either invalidate the agreement or alter it to comply with the Business and Commerce Code and remain fair to the employee.[348]

Additionally, if courts considered the circumstances surrounding the employee's departure from the business, they could prevent harm to the employee, the employer, or both.[349] For instance, Texas courts could follow the logic set forth in the New Jersey case *Community Hospital Group, Inc. v. More* and give consideration to whether the employee was fired or quit on their own accord.[350] The *More* court reasoned that employees who quit should be required to meet a higher burden of proof when trying to avoid a noncompete agreement because they subjected themselves to it.[351] On the contrary, if the employee is fired, then courts should more heavily scrutinize

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341. *See* Section III.B.

342. Cmty. Hosp. Grp., Inc. v. More, 869 A.2d 884, 898 (N.J. 2005).

343. *Id.*

344. *See, e.g.*, *id.*

345. *See* First Amended Complaint ex. A, *In re* Jimmy John's Overtime Litig. (Nos. 14 C 5509, 15 C 1681, 15 C 6010) (N.D. Ill. Aug. 19, 2016).

346. *Id.*

347. *See, e.g.*, Gonzales v. Norris of Hous., Inc., 575 S.W.2d 110, 111–12 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.) (discussing employee movement within the same industry).

348. *See* Cmty. Hosp. Grp., Inc. v. More, 869 A.2d 884, 898 (N.J. 2005).

349. *See id.*

350. *Id.*

351. *Id.*

the noncompete agreement because the employer subjected the employee to it.[352]

C. Third Course: Add to the Existing Business and Commerce Code

As a final recommendation, there should perhaps be one small change to the existing Business and Commerce Code.[353] Though § 15.50(b) provides a strict ban on noncompete agreements for doctors, there is nothing about other industries in which personal relationships with consumers, patients, clients, or general members of the public are important.[354] In these professions, noncompete bans can be effective for public policy reasons because they ensure citizens will not be denied the due care or service to which they have become accustomed.[355]

For example, Massachusetts has a statutory ban on noncompete agreements for nurses.[356] The public policy reasons are similar to those supporting a noncompete ban for doctors: nurses provide invaluable health care and treatment to injured people, and it would be unfair to deny the public access to help when they are ill.[357] Texas would do well to adopt this same provision plus bans for other professions that provide immediate care or otherwise offer services for which a personal relationship with a client is of the utmost importance.[358] These professions could include social workers; lawyers; other agent-based industries, such as public relations and goodwill organizations, such as retirement homes or Meals on Wheels.[359]

The Business and Commerce Code already provides a good guideline for Texas businesses and employees with regard to handling noncompete agreements.[360] However, because no system is perfect, Texas would benefit greatly from adopting the recommendations in this Comment. By slightly altering and adopting the MOVE Act, Texas could help level the bargaining-power playing field between low-wage employees and their employers.[361] By mandating that all noncompete agreements should come in the form of option contracts, Texas could simultaneously protect employers from devious employees and employees from devious employers.[362] Finally, by ensuring that more industries are completely free of noncompete

352. *Id.*

353. *See* TEX. BUS. & COM. CODE ANN. § 15.50 (West 2015).

354. *Id.*; *see also* MASS. GEN. ANN. LAWS ch.112, §§ 12X, 74D, 135C (West 2015); *id.* ch. 149, § 186 (discussing noncompete bans for certain professions, such as nursing and broadcasting).

355. *See, e.g.*, TEX. BUS. & COM. § 15.50(a); *see also* MASS. GEN. LAWS ANN. ch. 112, §§ 12X, 74D, 135C; *id.* ch. 149, § 186.

356. MASS. GEN. LAWS ANN. ch. 112, § 74D.

357. *Id.*

358. *See, e.g.*, *id.* § 135C. This law bans noncompete agreements for social workers. *Id.*

359. *See id.*

360. *See, e.g.*, TEX. BUS. & COM. § 15.50(a).

361. *See supra* Section V.A.

362. *See supra* Section V.B.

agreements, Texas could uphold and further the public policy of ensuring that citizens are able to obtain the care they need, regardless of an employment contract.

VI. ORDER UP: CONCLUSION

"I'll have a Big John, hold the tomatoes, please," you say to the tired Jimmy John's employee at the register. "And I think I'll have a chocolate chip cookie, too," you add, deciding to indulge your sweet tooth. The Jimmy John's employees move with a kind of lazy efficiency and, in less than sixty seconds, hand you your sandwich and cookie, even going so far as to mumble a haggard, "Have a nice day." On the way back to your car, you consider the employees inside. Having read an old *Huffington Post* article, you wonder whether any of them signed a noncompete agreement.[363] Your thoughts are interrupted with a pang of hunger, and you put the inner workings of a sandwich shop out of your mind.

If passed, the MOVE Act would be a landmark law because it would provide the United States with the first-ever federal noncompete agreement legislation.[364] Additionally, the MOVE Act would alter over a century's worth of developed statutory noncompete regulation in Texas.[365] But that alteration would not be bad. In fact, if Texas were to adopt its own version of the Act, it could be seen as revolutionary in its handling of the relationship between employers and low-wage employees.[366] With a few modifications, the MOVE Act could help protect low-wage employees in Texas from potentially abusive employers.[367]

Low-wage employees, however, would not be the only beneficiaries of noncompete agreement reform.[368] The Texas Legislature could pass measures to protect the public from the potential harms of noncompete agreements by instituting industry-specific noncompete bans.[369] The Legislature could congruently mandate that all noncompete agreements be option contracts in order to protect employer and employee interests simultaneously.[370] In addition, Texas courts could consider specific facts when determining noncompete agreement enforceability.[371]

Texas has a reputation as a state where people can still realize the American Dream of starting with nothing and eventually living comfortably. By implementing these recommended changes, Texas could

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363. Jamieson, *supra* note 5.
364. *See supra* notes 11–20 and accompanying text (discussing how the MOVE Act will be effective).
365. *See supra* Section III.C.
366. *See supra* Part V.
367. *See supra* Section V.A.
368. *See supra* Section V.C.
369. *See supra* Section V.C.
370. *See supra* Section V.A.
371. *See supra* Section V.B.

further solidify that reputation. Hopefully, in the future, employers and employees alike will be able to sit back, relax, and just enjoy every sandwich.[372]

372. *See Late Night with David Letterman* (CBS television broadcast Oct. 30, 2002).