Held Hostage: The Use of Noncompete Clauses to Exploit Workers and a Statutory Framework to Protect Them

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1. INTRODUCTION

Noncompete agreements are among the most commonly used methods to restrict employment.[1] Although they have been in use for centuries, courts have also consistently viewed them with suspicion.[2] Generally speaking, noncompete agreements were initially used to protect business interests from employees who had access to proprietary information and then leave to work for the competition. A court would enforce a noncompete if the employer could demonstrate that 1) the employee had access to trade secrets, confidential information, or customer relationships and 2) the restriction on employment in the noncompete agreement is reasonable in both time and scope.[3]

Over time, however, employers began to include noncompete agreements in contracts with low-level employees who had limited or no access to proprietary information. These low-level employees are often called "vulnerable workers."[4] For example, Jimmy John's and Amazon signed noncompete agreements with low-wage workers, e.g., delivery drivers, according to several high-profile reports.[5] Due to the proliferation of the use of noncompete agreements, there has been significant research published in recent years about whether noncompete agreements are good business and when, if at all, they should be used. Moreover, there has been a growing legislative response to noncompete agreements—several states have enacted laws that limit them in various ways.[6]

One of the most important articles on noncompete agreements is the 2014 Noncompete Survey Project. The article summarizes much of the current scholarship regarding noncompete clauses in its "Problems, Assumptions and Solutions" section.[7] It also contains an empirical study of 11,529

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[1] U.S. Department of the Treasury, *The State of Labor Market Competition*, p15 (2022).
[2] See Michael Pierce, *The Value of a Per Se Rule Against Enforcing Noncompetition Agreements*, 2 Bus. & Bankr. L.J. 39, 1-37, 2, (Fall, 2014).
[3] See Rachel Arnow-Richman, *The New Enforcement Regime: Revisiting the Law of Employee Competition (and the Scholarship of Professor Charles Sullivan) with 2020 Vision,*50 Seton Hall L.Rev. 1223-1259, 1228-1229, (2020).
[4] Id. 1231-1232.
[5] See Norman D. Bishara and Evan Starr, *Business Law Fall Forum: The Incomplete Noncompete Picture,* 20 Lewis & Clark L. Rev. 497, 499, (2016).
[6] See generally a map of the US depicting the current limits on noncompetes, Chris Marr, *Employee Noncompete Clause Limits Adopted by Three More States* (October 10, 2022 1:42pm), https://news.bloomberglaw.com/daily-labor-report/employee-noncompete-clause-limits-adopted-by-three-more-states.
[7] See James J. Prescott, Norman D. Bishara, and Evan Starr*, Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*. Mich.St.L.Rev. 2016, no. 2 (2016): 369-464.

observations taken from an online workforce sample of workers in the 18-75 age group who work in the private sector or public healthcare system.[8] The study attempts to understand the reality of noncompete clauses as they are actually operating in society rather than discussing them anecdotally.

Noncompete clauses have also recently been in the news due to media interest, several states' consideration of new legislation that governs noncompetes, and official communications from both the White House and the U.S. Department of Treasury. In 2016, the U.S. Department of the Treasury Office of Economic Policy issued a report regarding noncompete agreements and their economic implications for society. The report noted that noncompete agreements have some societal benefits but also impose significant costs to workers.[9] On April 15, 2016, The Obama White House signed executive order 13725, called "Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy."[10] This order was followed on October 25, 2016 with the Obama White House's Call to Action and Fact Sheet, which reiterated the Treasury report findings that noncompete agreements are anticompetitive and harm workers.[11] The Trump administration did not continue the call to action, but that administration did question noncompete agreements for medical doctors (pursuant to its concern for promoting choice and competition in health care).[12] Finally, on July 9, 2021, the Biden White House issued an executive order asking the FTC to ban or limit noncompete agreements. The Biden administration came to similar conclusions as the Obama Administration: noncompete agreements are anticompetitive and harm workers.[13] Biden's White House Competition Council, created by Biden's executive order 14036, has not yet worked on noncompete agreements as of their third meeting, as revealed in a readout on September 26, 2022.[14] Despite these reports, calls to action, and councils, there has not, at the federal level, been a restriction of noncompete agreements in the U.S.

Author, Professor Ficht,[15] became interested in noncompete regulation when an undergraduate business student requested a review of an internship employment contract the student intended to sign. While reviewing the contract, Professor Ficht was shocked to see that the intern would have

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[8] Id. P. 397 and 414.

[9] Office of Economic Policy U.S. Department of the Treasury, *Non-compete Contracts: Economic Effects and Policy Implications*, 1-36, 3. March 2016.

[10] Obama White House Executive Order 13725, *Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy* (October 10, 2022) https://obamawhitehouse.archives.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers.

[11] Obama White House Call to Action, Fact Sheet, October 25, 2016. (October 10, 2022), https://obamawhitehouse.archives.gov/the-press-office/2016/10/25/fact-sheet-obama-administration-announces-new-steps-spur-competition.

[12] Michelle Andrews, *Did Your Doctor Disappear Without a Word? A Noncompete Clause Could Be the Reason* (October 10, 2022), https://www.nytimes.com/2019/03/15/business/physician-non-compete-clause.html.

[13] Biden White House Executive Order 14036*, Promoting Competition in the American Economy*, (October 10, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/

[14] Biden White House, Readout of the Third Meeting of the White House Competition Council, September 26, 2022 (October 10, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/26/readout-of-the-third-meeting-of-the-white-house-competition-council/

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to agree to a three-month noncompete with the large international retailer. This noncompete agreement would essentially prevent the student from meaningfully participating in fall recruitment fairs, as employers would be leery to hire an employee who is currently bound to a noncompete agreement. The noncompete agreement thus severely limits the student's options: the student would need to seek employment outside of the internship experience, seek employment in an industry not considered a competitor to the intern's potential employer, or wait until the spring semester to seek employment. This restriction puts the student at a significant disadvantage to the student's fellow colleagues and holds that student hostage to her employer, restricting her ability to secure post-graduation employment. The primary goal of an internship is to gain job skills as a student in order to secure full time employment after graduation. The fact that employers are making interns sign noncompete agreements gives students the chance to attain the goal of an internship, while restricting those students' ability to achieve the ultimate goal of post-graduation employment.

This project takes a qualitative approach to analyze the use of noncompete clauses in employment contracts with low-wage workers, such as student interns. We argue that states' current statutes against noncompete agreements with low-wage workers leaves those workers vulnerable to exploitation, and we provide recommendations for how to legislate against these exploitative noncompetes in a way that protects the vulnerable from exploitation.

To do this, we first discuss whether and how noncompete agreements are being enforced in the U.S. (Section 2). We conclude that noncompetes with student interns and low-wage employees are not enforceable, but they are nevertheless being used in employment contracts. Next, we discuss states' current attempts to regulate the use of noncompetes even if noncompetes are not enforceable (Section 3), and we then assess whether these regulations are effective (Section 4). We conclude that they are not. Then, we give reasons why noncompete clauses in employment contracts with low-wage employees is wrongfully exploitative of those workers (Section 5). These reasons set the stage for the final section, in which we describe provisions that must be present in noncompete legislation to protect vulnerable workers from exploitation via noncompete agreements (Section 6). To do so, we use Virginia's noncompete bill as an exemplary model. We conclude that other states should pass noncompete legislation similar to the law passed in Virginia.

2. ARE NONCOMPETE AGREEMENTS IN CONTRACTS WITH LOW-WAGE EMPLOYEES ENFORCEABLE?

Generally, noncompete clauses are enforceable if the following factors are present:

1. the restriction is "no greater than is necessary to protect the employer's legitimate business interest,"
2. the agreement is not excessively severe or oppressive in restricting the employee's ability to find another job or make an income, and
3. the promise does not violate a clear mandate of State public policy.

With respect to the first factor above, a court will determine whether the restriction imposed by the noncompete is valid by reviewing the function, geographic scope, and duration of the

noncompete clause.[16] With this in mind, the noncompete clause that Professor Ficht's student was asked to sign states:

> "non-competition: I agree that during my employment with the Company and for a period of three (3) months after receiving or providing notice that my employment with the Company will cease, for whatever reason, I will not accept a position or engage, directly or indirectly whether as a proprietor, stockholder, partner, officer, employee, independent contractor, agent or otherwise, in any activity whereby I provide a product and/or service that competes with the products and/or services that I provided on behalf of the Company." (See internship agreement, Part 4b, pg 4, attached as EXHIBT 1.)

The first issue that must be addressed to determine whether the noncompete cited above is enforceable is whether the employer has a protected business interest in the work of the student intern. If an employer does not have this protected business interest, the noncompete is not enforceable. As stated above, most states are in general agreement that in order to enforce the noncompete there must be some "protectable interest," such as a trade secret, confidential information, or a client list to which the worker has had access.[17] Therefore, the question at present is: will the student intern have access to (at least some of) the company's valuable trade secrets during the three-month internship? It seems highly unlikely that during a brief tenure with this company that the intern would gain access to such proprietary information. Anecdotally, the authors have heard many students state after their internships that the work they were given was very administrative in nature. Such low-level work would not qualify as a "protected interest." Even if the summer intern does gain access to proprietary information such as customer lists, this information could be protected by the use of a confidentiality clause rather than the highly intrusive noncompete clause. In fact, the employment agreement binding Professor Ficht's student already had a confidentiality clause inserted in the agreement (See Exhibit 1, attached, Part 3, pg 2). Therefore, the above noncompete clause, as it applies to this summer intern, does not protect a business interest and is therefore unenforceable.

In recent years, some employers have argued for the enforceability of noncompete agreements by claiming a proprietary interest in their employee's work experience. Two States, Florida and Kentucky, allow an employer to claim a protected interest in employees' "general skills training."[18] These employers claim that a noncompete is the most effective way to protect its investment in employee training and to encourage investment in its workforce. In the case of a summer camp counselor who was made to sign a noncompete agreement, the owner of the camp claimed that he had a protectable interest in the "training and fostering of our counselors."[19] Brandon Long argues that repayment agreements are a fairer and better way to protect employer

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[16] See Paramount Termite Control v. Rector, 238 Va. 171, 174 (1989).

[17] See James J. Prescott, Norman D. Bishara, and Evan Starr, Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project. Mich.St.L.Rev. 2016, no. 2 (2016): 369-464, 457.

[18] See James J. Prescott, Norman D. Bishara, and Evan Starr, *Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*. Mich.St.L.Rev. 2016, no. 2 (2016): 369-464, 457. Emphasis ours.

[19] Steven Greenhouse, Noncompete Clauses Increasingly Pop Up in Array of Jobs, The New York Times (June 8, 2014) https://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html last accessed August 7, 2018, 4:38pm. It is unclear what he meant by the "fostering" of the camp counselor, but one can assume he meant the counselor's experience.

investment in employees than restricting the employee's career mobility. Long argues that noncompete agreements restrict employees more than is necessary.[20]

Although it is settled law that companies can protect trade secrets and certain types of information such as customer lists, it is more controversial whether employers have the ability to protect their investment in employee training. Many courts view their investment in training as a cost of doing business, and it is therefore not a protected business interest.[21] A survey of 105 non-compete cases reveals that employer investment in employee training in those cases was not significant.[22] Although courts have at times protected employers' investments if the cost is significant, generally courts have not concluded that training is a protectable interest.[23] If job training is not sufficient to warrant a protectable interest, then one would assume the courts would likewise rule that general work experience is likewise not sufficient to warrant a protectable interest.

Several states have affirmed that general skills attained by an intern or employee are not an employer's protectable interest. A Massachusetts court refused to enforce a noncompete, stating that job skill and knowledge alone are insufficient bases for a protectable business interest.[24] An Arkansas court held that since the employer had provided no specialized training or confidential information to their employee, the employer had no protectable interest in the employee.[25] A Tennessee court found that even a real estate appraiser had no specialized training, knew no confidential information, and had no special relationship to the employer's clients that would count as a protected interest of the employer. Importantly, the court also found that the skills the real estate appraiser did have inured to the real estate appraisers' *exclusive* benefit. Thus, the real estate appraiser's employer did not have a protectable business interest in the knowledge or skills of the appraiser.[26] These cases set a precedent that employee experience is not a right of the employer but is uniquely the right of the employee.

Although there is limited case law available, one can extrapolate that a college intern does not receive the type of costly training or experience that would lead courts to enforce a noncompete. In addition, since the nature of an internship is to provide value to the student gaining work experience, to allow the employer to claim a protected interest in that work experience undermines the very nature of the internship. With respect to low-wage employees, if these employees access proprietary information, a more suitable mechanism to protect the employer is through a confidentiality clause rather than restrict the mobility of the employee.

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[20] Brandon Long, *Protecting Employer Investment in Training: Noncompetes vs. Repayment Agreements*. 54 Duke. L.J. 1295-1320, 1297. (March 2005).
[21] Brandon Long, *Protecting Employer Investment in Training: Noncompetes vs. Repayment Agreements*. 54 Duke. L.J. 1295-1320, 1311, (March 2005).
[22] Id.
[23] Id.
[24] J. Gregory Grisham, Beyond the Red-Blue Divide: An Overview of Current Trends in State Non-Compete Law, The Federalist Society Review, Vol. 18, 42-47, 46. (Jan 3, 2018) https://fedsoc.org/commentary/publications/federalist-society-review-volume-18 citing Elizabeth Grady Face First, Inc. v. Garabedian, 2016 WL 1588816 (March 2016
[25] Id. P 47.
[26] Id. P 46, citing Davis v. Johnstone Group Inc., 2016 WL908902 (Tenn Ct. App. 2016)

Further, as of the date of this article, a few states have listed minimum salary thresholds in order for a noncompete agreement to be valid. In Illinois for example, any noncompete agreement entered into after January 1, 2022, where the employee earns $75,000 or less, is prohibited.[27] Thus, a student intern would be unable to be noncompeted in a state like Illinois that has a minimum salary threshold. Moreover, by virtue of case law in Illinois, courts have found that noncompetes cannot be enforced unless the employee works for the employer for two years; if the employment agreement is less than two years, there is insufficient consideration provided by the employer.[28]

In fact, a review of cases in the State of Virginia finds no court that has upheld a noncompete clause against a student intern. A more extensive search of internship noncompete litigation around the country similarly finds no such case law. Such precedent should apply to low-wage workers as well, since low-wage workers are similar to student interns except that they are full time, permanent employees. Low-wage workers are typically low-skilled workers who, like student interns, do not have access to proprietary information, or, if they do, a confidentiality clauses should be sufficient to protect the employer's interests.

Despite the lack of noncompete cases against student interns and the unenforceability of such agreements were there to be such a case, we know that student interns are being asked to sign noncompete agreements. Newspaper articles, social media posts, blog posts, etc. describe interns signing noncompete contracts around the country. For example, one New York Times article reports that a Boston University graduate student was asked to sign a one-year noncompete "pledge" for an entry level social media job with a marketing firm. Another college student signed a one-year noncompete for a summer internship with an electronics firm. As mentioned above, another college student was required to sign a one-year noncompete clause to be a camp counselor.[29]

3. STATES' CURRENT ATTEMPTS TO REGULATE THE USE OF NONCOMPETE AGREEMENTS

There are three types of noncompete reform occurring in legislatures in the U.S.:

1) Vulnerable worker bans, which seek to void noncompete agreements for low-wage workers or workers who are classified as "vulnerable,"
2) Middle of the Road statutes, which impose specific substantive and procedural limits on noncompete agreements, and
3) California-style bans, which seek to void noncompete agreements entirely.[30]

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[27] Illinois Freedom to Work Act (IFWA) 820 ILCS 90/1-90/10 (September 21, 2021).
[28] See *Fifield v. Premier Dealer Services, Inc.,* 2013 IL App (1st) 120327.
[29] Steven Greenhouse, Noncompete Clauses Increasingly Pop Up in Array of Jobs, The New York Times (June 8, 2014) https://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html last accessed August 7, 2018, 4:38pm. Although the camp counselor position was not considered a summer internship, it was a short-term summer job for a college student and lacks the same protected business interests described above for summer internships.
[30] See Rachel Arnow-Richman, *The New Enforcement Regime: Revisiting the Law of Employee Competition (and the Scholarship of Professor Charles Sullivan) with 2020 Vision,*50 Seton Hall L.Rev. 1223-1259, 1231, (2020).

States that have passed noncompete bans for low-wage workers (legislation of type one above) include Nevada, Maryland, Illinois, Oregon, Washington, Rhode Island, Maine, New Hampshire, and Virginia.[31] The definition of "low-wage worker" varies significantly by state. A **Nevada** noncompete law voids noncompete agreements for all hourly workers. **Maryland** bans noncompete agreements for workers who earn less than $31,200 a year.[32] In **Illinois**, a low wage earner is a worker who earns less than $75,000 annually. **Oregon** prohibits noncompetes for workers that earn less than $100,533 a year.[33] **Washington** defines "low-wage earners" as workers who earn less than $107,301.04.[34] **Rhode Island** considers a low-wage worker to be a worker who earns on average less than 250% of the federal poverty level.[35] In **Maine**, noncompetes are not allowed for workers who earn less than 400% of the federal poverty level.[36] **New Hampshire** set the limit at twice the federal minimum wage, which is currently $30,000.[37] (Virginia's law will be discussed in the last section of this article.) Thus, if an employer has operations across the country, it will have a difficult time keeping track of the varying salary thresholds around the country.[38] They would be well advised to use the highest threshold, currently Washington state, and not ask employees in any state to sign a noncompete who earns less than its threshold. By following this plan, the employer can be sure to not violate one of the salary thresholds across the country.

In terms of Middle of the Road statutes (legislation of type two above), some states are seeking to limit substantive terms, establish procedural protections, and impose penalties for employers that violate the law.[39] For example, Connecticut passed a law that caps the duration of a noncompete for physicians to one year. New Hampshire's noncompete agreements are limited to six months. Massachusetts, New Hampshire, and a pending bill in New Jersey require garden leave, in which an employer must compensate an employee once a restraint takes effect.[40] Some procedural requirements that states have included in their noncompete legislation include advance notice of the noncompete agreement and an opportunity to review the agreement. Other states require employers to display a "poster" with information on state regulations on noncompetes, similar in kind to the posters commonly mandated by federal employment laws.[41]

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[31] Chris Marr, *Employee Noncompete Clause Limits Adopted by Three More States*, (October 10, 2022), https://news.bloomberglaw.com/daily-labor-report/employee-noncompete-clause-limits-adopted-by-three-more-states. See also,

[32] James Billings-Kang, *Maryland Low-Wage Workers Are Exempt from Non-Compete Clauses*, (October 10, 2022) https://www.tradesecretslaw.com/2019/08/articles/legislation-2/maryland-low-wage-workers-are-exempt-from-non-compete-clauses/

[33] Id.

[34] See https://www.marktysonlaw.com/blog/update-washington-non-compete-earnings-thresholds-for-2022 (October 10, 2022).

[35] R.I. Gen. Laws section 28-59-2. http://webserver.rilin.state.ri.us/Statutes/TITLE28/28-59/28-59-2.htm

[36] 26 M.R.S.A. section 599-A3. https://legislature.maine.gov/statutes/26/title26sec599-A.html

[37] Supra, note 36.

[38] See generally, Roy Maurer, *State Laws Limiting Noncompetes Vary Significantly*, (October 10, 2022), https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/state-laws-limiting-noncompetes-vary-significantly.aspx

[39] See Rachel Arnow-Richman, *The New Enforcement Regime: Revisiting the Law of Employee Competition (and the Scholarship of Professor Charles Sullivan) with 2020 Vision,*50 Seton Hall L.Rev. 1223-1259, 1238, (2020).

[40] Id. P 1239.

[41] Id. P. 1240

Concerning California-style bans (legislation of type three above), currently California,[42] North Dakota,[43] Oklahoma,[44] and the District of Columbia[45] do not enforce noncompete clauses (there are exceptions, but they are limited, e.g., the sale of a business, including goodwill and partnership agreements). Many of these statutes make it clear that they do allow an employer to enforce non*solicitation* agreements. Oklahoma even revised its law to make this provision clearer due to litigation on the issue.[46] The regulations in the above states, however, include neither specification regarding civil penalties for employers who violate noncompete laws nor attorney fees for employees who successfully fight against unlawful attempts to enforce noncompetes. (One exception: a California statute enforced by the State Attorney General allows for civil penalties to be assessed on "any person who engages in unfair competition;" the penalty shall not exceed $2,500 for each violation.)[47]

4. ARE CURRENT ATTEMPTS TO REGULATE THE USE OF NONCOMPETE AGREEMENTS EFFECTIVE?

When states do not include penalties for violating the noncompete ban in their legislation, it is difficult to enforce that noncompete ban, and when states do not enforce their noncompete ban, employers continue to use noncompetes. The regulation is thereby rendered ineffective. The 2014 Noncompete Survey Project cited above found states who do not enforce noncompetes by statute have an estimated noncompete incidence of approximately 19.3%, which is higher than the corresponding level for every enforceability quintile in the study.[48] In short, the relationship between noncompete incidence and enforceability is weak.[49]

The authors of that study state that the fact that employees believe that the noncompete is enforceable is what drives employers to continue to use noncompetes.[50] If employees are told that they are under a noncompete and cannot work for a competitor, the employee may continue working for their employer, believing that the agreement is enforceable even when the agreement is void. Unsuspecting employees may erroneously believe that all contract language is enforceable.[51] Even in California, where there is an explicit penalty for violating the statute, there is very little information regarding the frequency at which the California Attorney General files civil penalty cases against offending employers. Thus, despite the strict California-style bans, which void noncompetes, and the potential for financial penalties being assessed,

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[42] CA Bus & Prof Code §16600-16607
[43] N.D.C.C. §9-08-06.
[44] 15 OK Stat §15-217 (2014).
[45] See generally, Stephanie Ferguson, DC Mayor Signs Ban on Non-Competes into Law, (October 10, 2022) https://www.uschamber.com/employment-law/dc-mayor-signs-ban-on-non-competes-into-law
[46] Daniel Joshua Salinas, New Oklahoma Law Clarifies Enforceability of Non-Solicitation of Employee Covenants. https://www.tradesecretslaw.com/2013/05/articles/restrictive-covenants/new-oklahoma-law-clarifies-enforceability-of-non-solicitation-of-employee-covenants/ (October 10, 2022).
[47] CA Bus & Prof Code §17206
[48] See James J. Prescott, Norman D. Bishara, and Evan Starr, Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project. Mich.St.L.Rev. 2016, no. 2 (2016): 369-464, 461.
[49] Id.
[50] Id.
[51] Id P 462, citing, Pauline Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 Cornell L. Rev. 105, 106 (1997).

employers continue to use noncompete agreements because employees will sign them, unaware that they are void. Employees' erroneous belief in the enforceability of the agreement keeps them held hostage to their employer, preventing them from seeking new employment opportunities elsewhere.

It is a fair assumption that employers are aware that employees are misinformed about the enforceability of noncompetes and use this ignorance to their advantage. The U.S. Department of Treasury found that stricter noncompete enforcement is associated with both lower wage growth and lower initial wages.[52] If noncompetes are not enforced but employees believe they are law-bound not to find employment elsewhere for a time after leaving their current employer, they are likely not to leave. And if employees feel they cannot leave, they are missing opportunities for salary increases. It is often observed that an employee must leave an employer in order to significantly increase their salary, and absent a substantial change in their role, an employee will not see large pay raises with their current employer.

The fact that noncompetes are effective even when they are void can be further explained by the *in terrorem* effect.[53] The *in terrorem* effect occurs when employees behave in ways less likely to lead to litigation.[54] As noted in the literature, for every covenant that makes its way to court, there are thousands which exercise an *in terrorem* effect on employees.[55] Forty percent of employees who had signed noncompete agreements cited the noncompete as the reason for declining a job offer.[56]

Further, although there have been several significant laws passed by various states since 2016, very few of the statutes allow employees to recover attorney fees in the event they must sue their employer regarding an illegal use of a noncompete agreement. Nevada does include a provision for attorney fees, but few other states do.[57] This is a significant oversight on behalf of the states passing noncompete legislation. One practicing attorney in South Carolina asserted that he can usually get a determination regarding the validity of a noncompete through a declaratory judgment action for less than $10,000. He noted that the cost of defending a noncompete lawsuit can vary greatly but can easily cost $10,000-$20,000. He personally had one case cost $40,000.[58]

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[52] U.S. Department of the Treasury Office of Economic Policy, Non-compete Contracts: Economic Effects and Policy Implications. March 2016, p19.
[53] Id, general discussion of chilling effect of non-competes p387.
[54] Id, p388.
[55] Alan Frank Pryor, Balancing the Scales: Reforming Georgia's Common Law in Evaluating Restrictive Covenants Ancillary to Employment Contracts, 46 Ga.L.Rev. 1117, (Summer 2012), 1117-1156, 1130.
[56] Rachel Arnow-Richman, *The New Enforcement Regime: Revisiting the Law of Employee Competition (and the Scholarship of Professor Charles Sullivan) with 2020 Vision,*50 Seton Hall L.Rev. 1223-1259, 1251, (2020) citing to Evan Starr, J.J. Prescott & Norman Bishara, The Behavioral Effects of (Unenforceable) Contracts, 16 (Mich. L. & Econ., Research Paper No. 16-032, 2019), http://dx.doi.org/10.2139/ssrn.2858637
[57] Dawn Mertineit, Nevada Amends Non-Compete Statute Protecting Low-Wage Workers and Imposing Award for Attorney's Fees for Certain Violations, (October 10, 2022), https://www.tradesecretslaw.com/2021/06/articles/restrictive-covenants/nevada-amends-non-compete-statute-protecting-low-wage-workers-and-imposing-award-of-attorneys-fees-for-certain-violations/
[58] W. Andrew Arnold, Reality Check: Costs of Noncompetes: Action vs. Inaction. http://www.scnoncompetelawyer.com/reality-check-costs-of-noncompetes-action-vs-inaction/ (October 10, 2022).

Practically speaking, student interns, summer camp counselors, and low-wage earners are not going to be able to pay upwards of $10,000 to $40,000 to determine whether their noncompete is valid or to fight their employer. For employees, the legal expenses in employment law are often barriers to access the court. Low-wage workers simply cannot afford to take the matter to the court, because they cannot present the case adequately themselves and they cannot afford legal representation.

To summarize, the current statutory scheme is not effective in protecting workers in ways that the noncompete laws were meant to protect them. Most state statutes do not assess a significant financial penalty when an employer is found using banned noncompetes. There are only a few statutes that award attorney fees to prevailing employees, and most statutes do not require employers to give truthful information regarding the enforceability of noncompete agreements.

5. NONCOMPETE AGREEMENTS AS WRONGFULLY EXPLOITATIVE

As we will argue in this section, employers have a moral responsibility not to include noncompete clauses in low-wage contracts, because including noncompete clauses in these contracts is wrongfully exploitative. Some researchers have argued in favor of allowing the use of noncompete clauses in even low-wage worker contracts because of the benefits to employers. These defenses include the following:

1. Noncompete contracts are used to protect trade secrets, which can promote innovation.
2. By reducing the probability of employee exit, they increase the likelihood that the employer will invest in the employee with costly training.
3. Employers with historically high turnover rates can use noncompete agreements to match with workers that have a low interest in job switching.[59]

To add to these considerations, there is the longstanding belief in freedom of contract—generally, courts will enforce contract terms without attempting to protect one of the parties from their own ignorance or poor negotiations. Nevertheless, courts have been routinely willing to review noncompete agreements and strike them down if they are unreasonable.[60]

Some other researchers have argued against noncompete clauses, citing the negative effects of noncompete clauses on workers:
1. Workers' bargaining power is reduced after signing a noncompete clause, which contributes to lower wages.
2. Noncompete agreements sometimes induce workers to leave their occupations entirely, nullifying accumulated training and experience in their fields.[61]

[59] U.S. Department of the Treasury Office of Economic Policy, *Non-compete Contracts: Economic Effects and Policy Implications*. March 2016.
[60] Michael Pierce, *The Value of a Per Se Rule Against Enforcing Noncompetition Agreements*. 2 Bus. & Bankr. L.J.39 1-37, 1. Fall 2014.
[61] U.S. Department of the Treasury Office of Economic Policy, *Non-compete Contracts: Economic Effects and Policy Implications*. March 2016.

There is growing consensus that the negative societal effects outweigh the positives. The common refrain by noncompete objectors is that noncompete agreements stifle wages and economic growth.[62] Internships encourage economic growth by providing a student with a temporary assignment to allow the student to gain work experience in order to obtain full-time employment after graduation (internships can be paid or unpaid and are sometimes for college credit). Low-wage employment also encourages economic growth. Low-wage workers are often able to increase their wages by transitioning to a new position or employer. An economic study of college graduates found that employees who made three job changes at specific points in their careers gained wage increases amounting to nearly thirty-two percent higher than employees who did not change jobs.[63] By restricting employee mobility, noncompete agreements stifle this economic growth.

The argumentative strategy against the use of noncompete clauses in this article does not begin with societal effects. Instead, the strategy here will be to show that including noncompete clauses in contracts with low-wage workers is wrongfully exploitative toward those workers. Exploitation in the context of transactions[64] occurs when one party takes advantage of another's vulnerability for its own benefit.[65] The ethics literature contains many reasons for the wrongfulness of exploitative transactions[66]—those transactions do not respect the inherent value of a person,[67] violate the norm to protect the vulnerable,[68] take opportunistic advantage of another's vulnerabilities to derive a benefit,[69] fail to meet one's duty of beneficence,[70] prevent equitable access to products,[71] extract excess benefits,[72] extract excess benefits from someone who cannot reasonably refuse the offer,[73] gain by inflicting relative losses on disadvantaged

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[62] See Rachel Arnow-Richman, *The New Enforcement Regime: Revisiting the Law of Employee Competition (and the Scholarship of Professor Charles Sullivan) with 2020 Vision,* 50 Seton Hall L.Rev. 1223-1259, 1241, (2020).
[63] Norman D. Bishara and Michelle Westermann-Behaylo, The Law and Ethics of Restrictions on an Employee's Post-Employment Mobility, 49 Am. Bus. L.J. 1-60, 8-9 (Spring, 2012).
[64] Exploitation can also occur within particular relationships that do not typically involve transactions, as when someone satisfies another's desperate need for love and affection to secure "advantages in their relationship that he would not otherwise be able to secure." Denis G. Arnold & Norman Bowie, *Sweatshops and Respect for Persons*, 13 BUS. ETHICS Q., 221, 247 (2003). In addition, exploitation can occur within structures, as when institutions or systems disproportionately and significantly benefit one group at another group's expense.
[65] This definition is not moralistic because its truth conditions do not require any moral concepts. The definition, for example, does not include 'unfair', 'wrongful', or any other moral term. In this way, the claim that exploitation is wrongful is not tautologous; rather, the wrongfulness of exploitation can be a matter of debate.
[66] For a short summary of the philosophical literature on exploitation, see Matt Zwolinski & Alan Wertheimer, *Exploitation* in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., Sum. 2017 ed. 2016) https://plato.stanford.edu/archives/sum2017/entries/exploitation/
[67] RUTH J. SAMPLE, EXPLOITATION: WHAT IT IS AND WHY IT'S WRONG 57 (2003); Denis G. Arnold & Norman Bowie, *Sweatshops and Respect for Persons*, 13 BUS. ETHICS Q., 221(2003); NORMAN BOWIE & PATRICIA WERHANE, MANAGEMENT ETHICS 83-4 (2005).
[68] Robert Goodin*, Exploiting a Situation and Exploiting a Person* in MODERN THEORIES OF EXPLOITATION 166, 187-9 (Andrew Reeve ed., 1987).
[69] Allen Wood, *Exploitation*, 12 SOC. PHIL. & POL'Y 136, 141-7 (1995).
[70] Jeremy Snyder, *Needs Exploitation*, 11 ETHICAL THEORY & MORAL PRAC. 389 (2008).
[71] Jeremy Snyder, *What's the Matter with Price Gouging?*, 19 BUS. ETHICS Q. 275, 279 (2009); Jeremy Snyder, *Efficiency, Equity, and Price Gouging: A Response to Zwolinski*, 19 BUS. ETHICS Q. 303, 304-5 (2009).
[72] Chris Meyers, *Wrongful Beneficence: Exploitation and Third World Sweatshops*, 35 J. OF SOC. PHIL. 319, 327 (2004).
[73] Mikhail Valdman, *A Theory of Wrongful Exploitation*, 9 PHIL. IMPRINT 1 (2009).

parties,[74] or are unfair relative to a baseline that is determined by what would take place in a competitive market[75] or "what could maximally obtain in a just state of affairs."[76] Although we believe many of these reasons apply to the inclusion of noncompete clauses in low-wage workers' employment contracts, we will not take a position on which of these reasons explain the wrongfulness of wrongful exploitation. Instead, we will draw from agreement among ethicists to make the case that inclusion of noncompete clauses in contracts with low-wage workers is wrongfully exploitative.

The literature on transactional exploitation distinguishes between two types of exploitation: procedural exploitation and substantive exploitation.[77] We argue that inclusion of noncompete clauses in vulnerable worker employment contracts is exploitative in both ways.
Procedural exploitation occurs when one party is taken advantage of in the process of the transaction itself, as when one party deceives another about the terms of a contract that are significantly unfavorable to the deceived party. Since agreement to the terms of the contract is part of the transaction itself, deception about those terms constitutes procedural exploitation. Procedurally exploitative contracts are unconscionable precisely because the transaction is exploitative.[78]

Inclusion of noncompete clauses in contracts with low-wage workers is procedurally exploitative for at least two reasons. First, as was mentioned above, even low-wage workers were aware that their employment contract contains a noncompete clause, these workers are often unaware that noncompete clauses are not enforceable. Employers' inclusion of noncomplete clauses despite those clauses' unenforceability is a way of deceiving potential workers by taking advantage of those workers in virtue of their lack of legal knowledge. Such deception is wrongful when executed in a context in which the recipient of the deception can be reasonably expected to trust the deceiver, and in contract situations low-wage workers reasonably trust that their potential employers include terms that are relevant because they are enforceable.

Second, as mentioned above, the cost of discovery about the enforceability of noncompetes is excessive for low-wage workers. By including noncompete clauses in low-wage worker contracts, employers take advantage of these workers in virtue of their lack of resources for discovery. By analogy, employers' inclusion of noncompete clauses in these contracts is akin to including a clause in the contract prohibiting employees from purchasing any product from a competitor and telling the potential employee that it will cost $10,000 for the potential employee to request that the employer consider striking out the clause—a cost that no low-wage worker can reasonably be expected to incur.

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[74] Robert Mayer, *What's Wrong with Exploitation?*, 24 J. OF APP. PHIL. 137, (2007); Robert Mayer, *Sweatshops, Exploitation, and Moral Responsibility*, J. OF SOC. PHIL. 605, 610 (2007).
[75] ALAN WERTHEIMER, EXPLOITATION 230-1 (1996); JOEL FEINBERG, HARMLESS WRONGDOING 178 (1988).
[76] Andras Miklos, *Exploiting Injustice in Mutually Beneficial Market Exchange: The Case of Sweatshop Labor*, 156 J. OF BUS. ETHICS, 59, 60 (2019).
[77] The distinction is a common distinction in contemporary work on exploitation, first made by Wertheimer, Supra, at 16-28, and reiterated in Zwolinski and Wertheimer, supra note 66, § 2.
[78] Wertheimer, supra note 75, 37-76.

There is widespread agreement among ethicists that procedural exploitation of the kind just described is wrongful.[79] The primary disagreement among ethicists concerning procedural exploitation is not whether procedural exploitation is wrongful but is instead about what feature of the transaction explains the wrongfulness of procedural exploitation.[80] Inclusion of noncompete contracts in vulnerable workers' employment contracts is, then, wrongfully exploitative.

Substantive exploitation, in contrast to procedural exploitation, occurs in the transaction's outcome, which is determined by the terms of the transaction. Substantive exploitation can occur even if both parties are clear and knowledgeable about the terms of the contract, both consent to the agreement, and the agreement is beneficial for both parties relative to the parties not having transacted at all.[81] One example of substantive exploitation commonly given in the literature involves a hiker who agrees to sell a cheap but effective antidote for $1,000,000 to another hiker who has just received a fatal snake bite but who does not have access to any other antidotes.[82] The exploitation present in that case is not procedural, because the afflicted hiker clearly understands and consents to the terms of the transaction and is benefitted more than were the rescuer not to have offered the antidote to the afflicted hiker at all.[83]

Inclusion of noncompete clauses in vulnerable worker contracts is substantively exploitative (in addition to being procedurally exploitative, as argued above). Substantive exploitation occurs when a vulnerable party, because of the party's vulnerability, does not have leverage in negotiations, so the advantaged party artificially and excessively inflates costs to the vulnerable party, benefits to the advantaged party, or both. In the hiker example above, the afflicted hiker is particularly vulnerable, enabling the hiker who possesses the antidote to excessively inflate the antidote's price to extract a large profit. Likewise, student interns, needing work experience, and low-wage workers who are low-skilled, are in a vulnerable position without leverage in contract negotiations. The employer, who has the advantage in the transaction, can artificially and excessively inflate costs to these workers by making a condition for employment that they restrict their post-employment options (or making the worker believe their options are so restricted). The cost of adhering to a noncompete condition is excessive for these workers—as was argued above, noncompete contracts restrict employment options and so prevent job mobility and substantive pay increases. (In cases in which interns or low-wage employees do have access to client lists or other proprietary information, employers could include confidentiality clauses instead of noncompete clauses in employment contracts.) The costs to

[79] Most of the reasons for the wrongfulness of exploitative transactions in general, given in the first paragraph of this section, can be applied to explain the wrongfulness of procedural exploitation.
[80] See Zwolinski & Wertheimer, supra note 66, § 2.3.2; Meyers, supra note 41, 320.
[81] The disadvantaged party is benefitted when compared to the parties not having transacted at all, though in an exploitative relationship the disadvantaged party is not benefitted relative to a "fair" transaction, or one that would have occurred in a competitive market that does not take into account specific features of the transactee. See Feinberg, supra note 75, at 178; Wertheimer, supra note 75, at 230-1.
[82] See Benjamin Powell & Matt Zwolinski, *The Ethical and Economic Case against Sweatshop Labor: a Critical Assessment*, 107 J. OF BUS. ETHICS, 449, 466 (2012); Hallie Liberto, *The Exploitation Solution to the Non-Identity Problem*, 167 PHIL. STUD. 73, 75 (2014); Meyers, supra note 72, 324; Valdman, supra note 73, 4.
[83] That the inflicted hiker was benefitted is demonstrated by the fact that the inflicted hiker reasonably consents to the terms of the transaction. Had the inflicted hiker valued their life at less than $1,000,000, the inflicted hiker would not have agreed to pay that amount for the antidote.

these low-wage workers is thus excessively disproportionate to the benefits to the employer for including noncompete clauses in employment contracts.[84]

The moral permissibility of substantively exploitative acts is more controversial than the permissibility of procedurally exploitative acts; some ethicists argue for the permissibility of specific instances of substantive exploitation, such as price gouging[85] and the use of sweatshop labor.[86] On the other hand, many ethicists use examples of substantive exploitation, such as price gouging (the kind of exploitation present in the hiker example above) as paradigm examples of wrongful exploitation.[87]

Further, the strongest arguments for the moral permissibility of the most-argued-for forms of exploitation—price gouging and sweat shop labor—rely on the idea that exploitation is permissible if it either prevents additional costs to the exploited party (in the case of sweatshop labor) or prevents dire costs to other parties in need (in the case of price gouging). Such arguments, meant to morally excuse or justify price gouging and sweatshop labor, cannot be utilized to excuse or justify the inclusion of noncompete clauses in low-wage worker employment contracts. First, regarding sweatshop labor, proponents of the permissibility of using sweatshop labor maintain that increasing wages or factory conditions for sweatshop laborers would harm those laborers because it would lead to the removal of that employment option (the sweatshop option) entirely—if employers were required to increase wages or improve factory conditions in one region, those employers would instead opt to use workers from other regions where increased wages and improved conditions are not required.[88] This reason for the permissibility of sweatshop labor does not transfer to inclusion of noncompete clauses in low-wage workers' contracts. Low-wage workers would not be harmed were employers required not to use noncompete clauses in their employment contracts; employers do not have a better alternative source of inexpensive labor than student interns and low-wage workers even if these workers are not under (the presumption of) noncompete agreements.

Second, regarding price gouging, proponents of the moral permissibility of price gouging argue that price gouging best enables parties without access to essential products (vulnerable parties) to

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[84] Employers might object that costs to interns are not excessively disproportionate to the benefit to the employer; the benefit to the employer is instead merely a way of covering their costs of training, and the employer has the right to secure what they take to be one of their assets—the employee's experience. As was argued above, however, the employees' experience is an asset that belongs to the employee, not the employer; thus, securing that asset is not an employer's right and thus is not a cost that legitimizes increased costs to the potential intern.

[85] See Matt Zwolinski, *The Ethics of Price Gouging*, 18 BUS. ETHICS Q. 347 (2008); Matt Zwolinski, *Price Gouging, Nonworseness, and Distributive Justice*, BUS. ETHICS Q. 295 (2009); Matt Zwolinski, *Price Gouging and Market Failure*, in ESSAYS ON PHILOSOPHY, POLITICS & ECONOMICS: INTEGRATION AND COMMON RESEARCH PROJECTS 333 (Gerald Gaus, Julian Lamont & Christi Favor eds., 2010); Michael Huemer, *What's Wrong with Price Gouging*, WHAT'S WRONG (July 6, 2021, 12:17 PM) https://whatswrongcvsp.com/2017/08/30/whats-wrong-with-price-gouging/

[86] Matt Zwolinski, *Sweatshops, Choice, and Exploitation*, 17 BUS. ETHICS Q. 689 (2007); Matt Zwolinski, *Structural Exploitation*, 29 SOC. PHIL. & POL'Y 154 (2012); Joshua Preiss, *Global Justice and the Limits of Economic Analysis*, 24 BUS. ETHICS Q. 55 (2014); Powell & Zwolinski, supra note 82.

[87] Hallie Liberto states that the sale in the hiker case is "uncontroversially an instance of wrongful exploitation." Liberto, supra note 82, 75. The case, with some variations, is also used as a paradigmatic example of wrongful, substantive exploitation in Valdman, supra note 82, 4 and Meyers, supra note 82, 324.

[88] See, e.g., Zwolinski, supra note 86, 295.

receive essential products.[89] Inflated prices send a signal to outside markets that there is a need for the product where the price is high, which motivates sellers to enter from outside markets, increasing the supply of essential products in the area of need.[90] This kind of argument, however, cannot be utilized to justify inclusion of noncompete contracts in vulnerable worker employment contracts, since employers (not vulnerable populations) are the only benefactors of noncompete agreements. So, even if price gouging benefits vulnerable parties and so is permissible for that reason, inclusion of noncompete agreements does not benefit vulnerable parties and so is not permissible for that reason.

As stated above, many ethicists do not endorse the above arguments for the moral permissibility of forms of substantive exploitation such as price gouging and use of sweatshop labor. However, the strongest arguments for the permissibility of price gouging and sweatshop labor cannot be co-opted to defend inclusion of noncompete clauses in vulnerable worker employment contracts. There are, then, good reasons for maintaining that it is substantively exploitative to include noncompete clauses in these employment contracts. There are thus good reasons to maintain that inclusion of noncompete clauses in low-wage worker contracts is thus wrongfully exploitative, both procedurally and substantively.

6. EFFECTIVE NONCOMPETE REGULATION: VIRGINIA'S NONCOMPETE LAW

In the previous section, we argued that employers' inclusion of noncompete clauses in low-wage workers' employment contracts is wrongfully exploitative. As we described in even earlier sections, current attempts at regulating the use of noncompete agreements is ineffective. In this section, we describe conditions that effective noncompete regulations must meet. It is only by passing effective regulation that vulnerable workers can be protected from exploitation via noncompete agreements. To show what effective regulation looks like, we use Virginia's noncompete bill as an exemplary model.

The U.S. Department of the Treasury made the following recommendations to reform the current statutory scheme regarding noncompetes:
1. Increase transparency in the offering of noncompetes,
2. Encourage employers to use enforceable noncompetes, and
3. Require that firms provide consideration to workers bound by noncompetes.[91]

However, these recommendations to do not go far enough to make a meaningful difference for employees. As argued in Section 4, banning noncompetes does not affect meaningful change because employees may not understand that noncompetes are illegal, and they may be unable to afford an attorney to fight the noncompete even in states where noncompetes are banned. Thus, more needs to be done to ensure that employers use noncompetes only when they truly have a protected business interest that can only be protected with a noncompete agreement. The cost of having an invalid noncompete must be high enough that the employer will cease using invalid

[89] Price gouging, in the legal and moral sense, only applies to essential products, that is, products that substantively aid in consumer survival. In this sense, one cannot price gouge luxury goods. See Zwolinski, supra note 85, 349.
[90] See, e.g., Zwolinski, supra note 85, 362-4.
[91] U.S. Department of the Treasury Office of Economic Policy, Non-compete Contracts: Economic Effects and Policy Implications. March 2016, p24-25.

noncompetes and engaging in the *in terrorem* effect. To effect this change, Professor Ficht proposed a statute to Senators Wagner and DeSteph in the Virginia legislature in 2019 and 2020 respectively. The proposed statute included the following provisions:

1. Virginia should ban all noncompete agreements for classes of employees that have no true protected business interest, such as student interns, apprentices, and low-wage workers. As described earlier in this manuscript, employers have no true protectable business interest in employees that fall within those classifications (an employee's work experience is not the employer's protected interest). If these employees have access to confidential information, employers can effectively protect confidential information through confidentially clauses. To ensure that these vulnerable employees are not exploited, Virginia should pass a statute that bans all noncompetes for low-wage workers. (The bill defines "low-wage" to include workers who earn less than the average weekly wage of the Commonwealth, currently approximately $68,000.) Independent contractors should also be covered by the law.

2. Civil penalties should be assessed against an employer who knowingly uses an invalid noncompete. As with the California law cited above, the State Attorney General can file these claims against employers. However, even with a $2,500 penalty per violation in California, California has not been able to curb the use of invalid noncompetes. Thus, the suggested penalty in the Virginia bill is higher—$10,000 per violation.

3. The proposed bill should allow employees subject to an illegal noncompete to bring civil action against the employer, enjoining the illegal conduct of the employer, ordering payment for liquidated damages, and awarding lost compensation, damages and reasonable attorney fees and costs. As noted earlier in this manuscript, the provision for attorney fees for employees who successfully pursue the invalidation of their noncompete is essential to protecting vulnerable employees. The ability to recover attorney fees will do for noncompete litigation what it did for civil rights litigation under Title VII; it will allow employees access to the courts when they currently do not have such access. Employees will be more likely to pursue claims if attorneys are willing to take their cases, and attorneys are more likely to take a case when they believe they are likely to prevail and are able to secure an award for attorney fees. In addition, this right of attorney fees should also inure to the new employer in the event that a new employer agrees to hire an employee with a questionable noncompete agreement. Thus, the new employer can take on the litigation on behalf of the employee and recover attorney fees if it prevails.

4. Similar to the Right to Know Laws we see with OSHA and Title VII, the statute should require employers to post information in high visibility areas of their business to explain the parameters of their state's noncompete law (a "poster notice.") When an employee is hired, the employer must give notice to the employee that noncompete agreements are unenforceable in certain situations in Virginia. Fines should be assessed to the employer for failure to give this required notice.

5. There should be a nonretaliation provision in the law to prevent an employer from firing employees who contest their noncompete agreement.

Currently, the authors are unaware of any state that has passed a law encompassing these five suggestions. New York had a pending bill in 2018 which came close to the above cited suggestions. The New York bill required notice to employees of the noncompete law, banned noncompetes for low-wage workers, and provided a $5,000 civil fine for violating the statute.[92] The bill had been touted as the toughest noncompete legislation in the country. However, New York's legislation lacked the attorney fee provision, which we believe is necessary to fully enable employees to protect themselves from exploitative employers. This bill, New York Senate Bill 4610, failed to pass. In January 2022, Governor Hochul pledged to ban noncompete agreements with workers who earn less than the median wage in New York.[93] As of October 2022, however, New York has failed to pass a noncompete statute.

Fortunately, Professor Ficht was successful in lobbying for the passing of the proposed statute in Virginia. All five of the suggested provisions were included in the law. The law was signed by Governor Northam in April 2020 and became effective on July 1, 2020. To date, it is still one of the strongest noncompete laws in the country.[94]

7. CONCLUSION

In conclusion, although there has a been a bevy of noncompete statutes proposed and passed around the country, only the Virginia statute effectively protects vulnerable workers against exploitative contracts. We recommend that other states follow Virginia's lead and pass noncompete legislation that will effectively protect workers from exploitative contracts that hold employees hostage by restricting their ability to increase their pay, enhance their standard of living, and achieve their professional goals.

[92] New York Senate Bill 4610, known as the New York MOVE Act.

[93] See generally, https://cmmllp.com/what-employers-should-know-about-employee-non-compete-agreements-in-2022/ (October 10, 2022).

[94] See generally, Title 40.1-28.7:8 https://law.lis.virginia.gov/vacode/title40.1/chapter3/section40.1-28.7:8/ (October 10, 2022).