
PANEL IV
ENFORCEABILITY TBD:
FROM STATUS TO CONTRACT IN INTELLECTUAL
PROPERTY LAW

ORLY LOBEL*

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Much of the recent history of intellectual property has been a move from status to contract, resulting in an unchecked expansion of controls over knowledge beyond the boundaries once drawn in IP law. When employers introduce these contractual arrangements as standard HR provisions, they are imposed without negotiation and largely without notice. Oftentimes new employees are asked to sign these contracts as a “take it or leave it” condition to their continued employment. These provisions may appear in unilateral, generic individual employment contracts or as part of corporate handbooks and manuals. The problem is compounded with the breadth of the contractual clauses, which employ language and terms far more expansive than the recognized boundaries of intellectual property, resulting in uncertainty about their enforceability. The courts employ multifactor tests to determine, ex post, the “reasonableness” of such clauses as non-compete, non-disclosure, innovation assignment, and holdover clauses. These complicated provisions exact a high cost to innovation and job mobility, resulting in the chilling of talent flow and entrepreneurship. They also induce the vertical integration of firms to the detriment of knowledge exchanges and competition.

* Don Weckstein Professor of Employment and Labor Law, University of San Diego. I thank Amber Arnold, Keia Atkinson, and Michelle Loakes for their excellent research assistance. Thanks to Jim Bessen, Michael Meurer, and the participants of the Boston University “Notice and Notice Failure in Intellectual Property Law” Symposium for insightful commentary and input.

INTRODUCTION

In June 2015, Senate Democrats introduced a new bill before Congress, the Mobility and Opportunity for Vulnerable Employees Act (the “MOVE Act”), which would bar non-compete agreements for low wage workers.¹ The MOVE Act would also require companies to give job applicants advance notice before asking them to sign such a contract.² While non-competes have in recent years become near-standard clauses in many industries, the legislative initiative was triggered by reports about the non-competes expanding to other jobs, such as sandwich makers earning barely above minimum wage at the fast food chain Jimmy John’s³ and seasonal hourly warehouse workers at Amazon.com.⁴ Post-employment contract restrictions are now routinely imposed not just on high-ranking executives and high-tech engineers, but also on camp counselors,⁵ yoga instructors,⁶ and dog sitters.⁷ The MOVE Act primarily targets the use of non-competes against low-wage workers because its sponsors worry that non-competes depress wages and lock vulnerable workers in low-income jobs.⁸ The Act would ban non-compete clauses for workers making less than fifteen

¹ Mobility and Opportunity for Vulnerable Employees Act, S. 1504, 114th Cong. (2015) (stating one of the purposes of the bill as “to prohibit employers from requiring low-wage employees to enter into covenants not to compete”).

² *Id.* § 3(b) (“An employer who employs any low-wage employee, who in any workweek is engaged in commerce or in the production of goods for commerce . . . shall post notice of the provisions of this Act in a conspicuous place on the premises of such employer.”).

³ See Press Release, Congressman Joseph Crowley, Jimmy John’s Takes a Bite Out of Workers’ Rights (Oct. 22, 2014), <http://crowley.house.gov/press-release/jimmy-john-s-takes-bite-out-workers-rights-crowley-s-nchez-call-ftc-labor-department> [<https://perma.cc/4PSK-TJUT>].

⁴ See Jana Kasperkevic, *Amazon Removes Crazy Non-compete Clause from Hourly Workers’ Contracts*, BUS. INSIDER (Mar. 29, 2015, 10:42 AM), <http://www.businessinsider.com/amazon-removes-non-compete-clause-for-hourly-workers-2015-3> [<https://perma.cc/334Z-5KUR>].

⁵ 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> [<https://perma.cc/CA59-SECS>].

⁶ *Id.*

⁷ Dave Jamieson, *Doggy Day Care Chain Makes Pet Sitters Sign Noncompetes to Protect ‘Trade Secrets,’* HUFFINGTON POST (Nov. 24, 2014, 6:31 AM), http://www.huffingtonpost.com/2014/11/24/camp-bow-wow_n_6207544.html [<https://perma.cc/A9CM-C3YR>].

⁸ Press Release, Senator Chris Murphy, Murphy, Franken Introduce Bill to Ban Non-Compete Agreements for Low-Wage Workers (June 3, 2015), <http://www.murphy.senate.gov/newsroom/press-releases/murphy-franken-introduce-bill-to-ban-non-compete-agreements-for-low-wage-workers> [<https://perma.cc/NSX2-VQ5D>].

dollars per hour or the minimum wage in the employee's municipality.⁹ According to Senator Chris Murphy of Connecticut, "unfair use of non-compete agreements has a chilling effect on the upward economic mobility of low-wage workers and stifles their ability to climb out of poverty."¹⁰

The MOVE Act's notice requirement stems however from a broader recognition concerning all workers across all ranks: employees are frequently unaware of the contract restrictions they sign when they assume a new job. Notice, or the absence of notice, affects not only the decision to accept a certain job under particular terms but also whether to seek more information about the firm's practices in enforcing the restrictive covenant. Notice could also produce more information as to the enforceability of such restrictions in different jurisdictions.

While the MOVE Act is concerned with the spread of non-compete clauses because of the wages lost when employees are bound to one employer, this article shifts the focus from wages to innovation. It considers the ways in which contracts serve firms as means to enclose information beyond traditional intellectual property boundaries without adequate notice or debate. The article further expands the inquiry beyond the narrow focus on non-competes to human capital contractual restrictions more broadly. Non-competes are merely one aspect of human capital contracts. Human capital clauses include both employment and post-employment restrictions, such as innovation assignment clauses, non-disclosure agreements, non-solicitation clauses, and non-poaching clauses. Together, these contractual agreements comprise an integral part of intellectual property policy, shaping the flow of knowledge, skill, creativity, and inventiveness in innovation markets. The article presents the expansion of intellectual property law through employment contracts as an under-the-radar subversion of the boundaries and notice requirements set in traditional IP. In all stages of the contract relations—the hiring stage, the termination stage, and the adjudication stage—these contracts are ridden with uncertainty as to the substantive scope of the restrictions and the legal risks they entail.

This article proceeds as follows: Part I describes the increasing use of human capital contracts at work and the breadth of language typically employed in such contracts. Part II uses the lens of notice to understand the stages of the deal, which restricts the use of human capital beyond the traditional boundaries of intellectual property law. Human capital contracts are drafted under conditions of information asymmetry and characterized by a lack of bargaining. The contract is unilaterally drafted at a point in time when many variables are yet unknown and is often introduced after the employee has accepted the job offer and has already begun working. At times, the contractual

⁹ Dave Jamieson, *Democrats Want to Ban Noncompete Agreements for Low-Wage Workers*, HUFFINGTON POST (June 3, 2015, 6:51 PM), http://www.huffingtonpost.com/2015/06/03/non-compete-bill_n_7506156.html [<https://perma.cc/DMZ5-VXSV>].

¹⁰ Press Release, Senator Chris Murphy, *supra* note 8.

obligations appear in the corporate policy or handbook, rather than in an individual contract. As recent empirical studies show, misinformation regarding the nature of restrictive covenants and their legality is rampant.¹¹

Part III describes the point at which the employment relationship ends as a time when there is asymmetry in the incentives to litigate under the contract. The uncertainty during the departure stage is compounded by the unpredictability inherent in the adjudication phase, during which courts attempt to determine the scope of these contractual provisions and their enforceability on a case-by-case basis. Taken together, these phases in contract formation and enforcement illuminate the malleability and fuzziness of contractual employment-based IP. Part IV considers the costs embedded in IP expansion from status to contract, sans notice, and examines policy reforms currently underway.

I. THE RISE OF EMPLOYMENT CONTRACT IP

In the hit HBO show *Silicon Valley*, software giant Hooli hits start-up competitor Pied Piper with an intellectual property lawsuit.¹² The lawsuit is based entirely upon the contractual relationship that existed between Hooli and Pied Piper's founder Richard when he was an employee at Hooli.¹³ Subject to the terms of his employment contract, Hooli claims it owns Richard's invention—Pied Piper's algorithm.¹⁴ As the lawyer explains to Richard, it is “a classic intimidation lawsuit designed to freeze you.”¹⁵ Richard knows his invention had nothing to do with the short time he spent working at Hooli.¹⁶ He did not invent the algorithm while at work or use Hooli secrets or computers to create it.¹⁷ However, his lawyers advise him to “lawyer up” for the “low price” of \$2.5 million.¹⁸ On Hooli's end, executives devote more time building their case against their former employee than they do innovating and figuring out why their own product is laughably inferior.¹⁹ They plan behind closed doors to promote Richard's friend, a useless Hooli employee, with the goal of

¹¹ See, e.g., Evan Starr, Norman Bishara & JJ Prescott, Noncompetes in the U.S. Labor Force 51 (June 25, 2015) (unpublished manuscript) (on file with author) (“[O]nly 10% of noncompete signers report bargaining over their noncompete and that 40% of the non-bargainers did not know that they could bargain in the first place. Furthermore, about 20% of employees were afraid they would be fired if they tried to negotiate or were worried that it would create tension with the employer.”).

¹² *Silicon Valley: Sand Hill Shuffle* (HBO television broadcast Apr. 12, 2015).

¹³ *Silicon Valley: Runaway Devaluation* (HBO television broadcast Apr. 19, 2015).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Silicon Valley: The Lady* (HBO television broadcast May 3, 2015).

presenting him to the court as a creative genius who must have contributed to Richard's invention.²⁰ The timing of the lawsuit is highly strategic.²¹ Investors are excited about Pied Piper, but when the lawsuit is filed an investor tells Richard, "we're here to invest in innovation, not lawyers" and, regardless of the merits of the case, all the venture capitalists walk away.²² In addition to the contractual claim against Richard for patent assignment, Hooli also sues Pied Piper for hiring away one of their employees, Jared, in violation of Jared's non-compete clause.²³ Richard's lawyer does not dispute the non-compete breach, convinced that he should focus on the more important IP claim, yet, it is the non-compete clause that leads the arbitrator to void the entire employment contract because non-competes are void in California.²⁴ Up until this turn of events, Hooli's victory seemed imminent.²⁵

These twists and turns from near victory to ultimate loss all depend on technical contractual language and loopholes, which are the epitome of contemporary lawsuits between tech competitors. As employers grapple with an increasingly mobile workforce and vigorous global competition, the drafting and enforcement of human capital contracts have risen.²⁶ In a 2015 study, Evan Starr and his co-authors examine a large sample of occupations to track the spread of non-compete clauses in employment contracts.²⁷ They conclude that non-competes are a common feature of the labor market at large.²⁸ The study estimates that at least one in four employees have at some point signed a non-compete, with an upper estimate that approximately half the current labor market is bound by some form of restrictive covenant.²⁹ In their survey of over 11,000 labor market participants, the researchers found that

²⁰ *Id.*

²¹ *Silicon Valley: Runaway Devaluation*, *supra* note 13.

²² *Id.*

²³ *Id.*

²⁴ *Silicon Valley: Two Days of the Condor* (HBO television broadcast June 14, 2015).

²⁵ *Id.*

²⁶ ORLY LOBEL, TALENT WANTS TO BE FREE 13-46 (2013); Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 TEX. L. REV. 789, 790 (2015) ("Regulatory and contractual controls on human capital . . . are among the fastest growing frontiers of market battles.").

²⁷ Starr et al., *supra* note 11, at 2 ("We use new data collected specifically to study the use, implementation, and consequences of noncompetition agreements to answer three questions: (1) Why do noncompetes exist? (2) Who signs noncompetes? (3) What are the associated labor market consequences of noncompete agreements?").

²⁸ *Id.* ("In providing the first empirical assessment of the incidence of noncompetes in the U.S. labor force, we show that noncompetes are a standard part of the employment relationship in virtually every context . . .").

²⁹ *Id.*

such clauses exist not only in the for-profit world but also in non-profit jobs.³⁰ Employees as diverse as executives, engineers, physicians, sales personnel, and employees in education, finance, arts, and construction have been asked to sign them.³¹ Another new study examines a large sample of publicly available CEO employment contracts.³² The study finds that eighty percent of the contracts surveyed contained post-employment restrictions.³³ The research reports that the contracts typically include a concentration of restrictions, including non-competes, non-solicitation clauses, and non-disclosure clauses.³⁴ The study concludes that the language in these contracts has become more restrictive over time, and employers retain increasingly expansive enforcement rights.³⁵

A non-compete is a written employment agreement in which an employee covenants at the outset of the employment relationship that he or she will refrain from competing with the employer in specified ways for a period of time following the termination of the relationship. However, as the empirical study research shows, human capital and post-employment contracts are broader than merely the iconic non-compete clause.³⁶ Standard employment contracts commonly include additional restrictions such as non-solicitation, non-dealing, and non-disclosure clauses.³⁷ Additionally, these contracts frequently include innovation assignment agreements and clauses about loyalty during employment.³⁸ First, consider a clause that Amazon asks its employees to sign, which is about “attention, ability and effort” during the term of the contract:

ATTENTION AND EFFORT. During employment, Employee will devote Employee’s entire productive time, ability, attention, and effort to furthering Amazon’s best interests and will not (without Amazon’s prior

³⁰ *Id.* at 18 (finding that approximately one in twenty non-profit employees sign non-compete agreements).

³¹ *Id.* at 3 (“Individuals in higher-skill, knowledge-intensive occupations are the most likely to agree to a noncompete: engineering and architecture (30.1%), computer and mathematical (27.8%), business and financial (23.1%), and managers (22.7%). Yet even low-skill occupations such as office support (8.7%), installation and repair (10.5%), production (11.0%), and personal care services (11.8%) involve significant noncompete activity.”).

³² See Norman D. Bishara, Kenneth J. Martin & Randall S. Thomas, *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1 (2015).

³³ *Id.* at 3.

³⁴ *Id.*

³⁵ *Id.* at 51.

³⁶ *Id.* at 3.

³⁷ Lobel, *supra* note 26, at 797.

³⁸ *Id.* at 791 (explaining that assignment agreements generally extend beyond “subjects that IP deems commodifiable” and “propertiz[es] innovation that has not yet been conceived”).

written consent) carry on any separate professional or other gainful employment, including self-employment and contract work.³⁹

How would we interpret this contract? Does it cover the employee's productive time outside of the workplace? Does any creativity or inventiveness at any time during the term of the employee's employment belong to Amazon? Is the contract enforceable in states that prohibit firms from preventing their employees from moonlighting?

Consider now the scope of intellectual property as defined in a standard innovation assignment contract:

"Intellectual Property" shall mean the following subsisting throughout the world:

. . . inventions, invention disclosures, statutory invention registrations, trade secrets and confidential business information, know-how, manufacturing and product processes and techniques, research and development information, financial, marketing and business data, pricing and cost information, business and marketing plans and customer and supplier lists and information, whether patentable or nonpatentable, whether copyrightable or noncopyrightable and whether or not reduced to practice.⁴⁰

The broad language embedded in this clause is typical: it lists information that spans beyond the definition of trade secrets and explicitly includes information that is neither copyrightable nor patentable.⁴¹

Finally, consider a standard employee non-disclosure agreement ("NDA"), which by itself can be a few pages long:

In the performance of Employee's job duties with Company, Employee will be exposed to Company's Confidential Information. "Confidential Information" means information or material that is commercially valuable to Company and not generally known or readily ascertainable in the industry. This includes, but is not limited to:

(a) technical information concerning Company's products and services, including product know-how, formulas, designs, devices, diagrams, software code, test results, processes, inventions, research projects and product development, technical memoranda and correspondence;

(b) information concerning Company's business, including cost information, profits, sales information, accounting and unpublished financial information, business plans, markets and marketing methods,

³⁹ On file with author.

⁴⁰ See, e.g., Cynosure, Inc., Current Report (Form 8-K) (June 27, 2011).

⁴¹ See Matt Marx & Lee Fleming, *Non-compete Agreements: Barriers to Entry . . . and Exit?*, 12 INNOVATION POL'Y & ECON. 39, 42-43 (2012) (explaining that non-competes are a way to obtain broader protections than provided by patent, trademark and copyright law).

customer lists and customer information, purchasing techniques, supplier lists and supplier information and advertising strategies;

(c) information concerning Company's employees, including salaries, strengths, weaknesses and skills;

(d) information submitted by Company's customers, suppliers, employees, consultants or co-venture partners with Company for study, evaluation or use; and

(e) any other information not generally known to the public which, if misused or disclosed, could reasonably be expected to adversely affect Company's business.⁴²

Here too, the long list of inclusions is explicitly comprehensive. All these types of clauses typically appear in clusters. The terms that appear in the clauses are broad and often vague. As a result, the interpretation and enforceability of the terms will only be determined after the fact if the contract is challenged in court.

II. NOTICE AND THE CONTRACTUAL STAGE

Employers introduce human capital agreements at various points of the employment contract process.⁴³ Frequently, the contractual terms are introduced well after the employee has started working at the firm.⁴⁴ According to Starr's 2015 study, roughly thirty-two percent of the employees surveyed were asked to sign a non-compete agreement after they accepted the

⁴² *Employee Non Disclosure Agreement*, NDASFORFREE, <http://www.ndasforfree.com/NDAS/GetEmployee.html> [<https://perma.cc/3HUX-D52J>].

⁴³ See Thomas E. Jordan, *The Application of Contract Law to Georgia Noncompete Agreements: Have We Been Overlooking Something Obvious?*, 41 MERCER L. REV. 723, 731 (1990) (analyzing the application of contract law principles to non-compete agreements); Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements*, 52 WM. & MARY L. REV. 873, 873-74 (2010) (arguing that non-compete agreements should be unenforceable); Kenneth R. Swift, *Void Agreements, Knocked-Out Terms, and Blue Pencils: Judicial and Legislative Handling of Unreasonable Terms in Noncompete Agreements*, 24 HOFSTRA LAB. & EMP. L.J. 223, 226 (2007) (discussing the potential implications of non-compete agreements).

⁴⁴ See, e.g., *Curtis 1000, Inc. v. Suess*, 24 F.3d 941, 943 (7th Cir. 1994) (describing an employee who signed a non-compete agreement two weeks after being hired); *Midwest Sports Mktg., Inc. v. Hillerich & Bradsby of Can., Ltd.*, 552 N.W.2d 254, 259 (Minn. Ct. App. 1996) (describing a subagent agreement the employee signed two weeks after beginning working); *Cent. Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 31 (Tenn. 1984) (describing agreements of three employees signed three weeks, two weeks, and one day after hire); cf. *Hopper D.V.M. v. All Pet Animal Clinic, Inc.*, 861 P.2d 531, 536 (Wyo. 1993) (describing agreement signed nine months after promotion).

job.⁴⁵ Starr finds that bargaining over the terms of the contract is rare. Rather, the large majority of participants reported no negotiation over the terms of the non-competes.⁴⁶ Nearly half of the participants in Starr's study reported that they assumed they could not negotiate the terms of the post-employment restriction.⁴⁷

The timing of introducing human capital contracts is important. Employees are both less aware of what they are signing and less likely to negotiate the terms of the contract after they have completed their job search and have begun working for the new firm.⁴⁸ Because contract law governs the enforceability of these contracts, the various state courts determine whether the law requires notice, and if so, whether that notice is adequate.⁴⁹ Courts have varied significantly in their determinations regarding whether continued employment constitutes adequate consideration.⁵⁰

Some courts have analyzed this pattern of post-hiring introduction of the standard contractual restriction as contracts of adhesion. These courts have criticized employers for requiring employees to sign such restrictions when the

⁴⁵ E-mail from Evan Starr, Assistant Professor, Univ. of Md. Smith Sch. of Bus., to Orly Lobel, Professor, Univ. of San Diego Sch. of Law (Mar. 4 2016, 7:46 AM) (on file with author); *see also* Starr et al., *supra* note 11.

⁴⁶ Starr et al., *supra* note 11, at 44-45 (finding that only about ten percent of employees who signed a non-compete agreement reported bargaining over it); *see also* E-mail from Evan Starr, *supra* note 45 (reporting that women negotiated non-competes even less often than men, suggesting that expansion through contract of intellectual property restrictions may have a disparate impact on the human capital of women).

⁴⁷ Starr et al., *supra* note 11, at 44-45 (finding that 40.4% of respondents assumed they could not bargain over the terms of their non-compete).

⁴⁸ *Id.* at 4 (stating that skilled workers may feel stuck in their employment because few workers negotiate non-compete agreements and “transaction and [job] search costs appear to be high”).

⁴⁹ *See generally* Ferdinand S. Tinio, Annotation, *Sufficiency of Consideration for Employee's Covenant Not to Compete, Entered Into After Inception of Employment*, 51 A.L.R.3d 825 (1978).

⁵⁰ *See* Compass Bank v. Hartley, 430 F. Supp. 2d 973, 978 (D. Ariz. 2006) (holding that continued employment is sufficient to enforce “a covenant executed after the employment relationship has commenced, even where it continues to be on an at-will basis”); *see also* Lucht's Concrete Pumping, Inc. v. Horner, 255 P.3d 1058, 1061 (Colo. 2011) (recognizing that continuation of at-will employment provides adequate consideration for a non-compete agreement); *McInnis v. OAG Motorcycle Ventures, Inc.*, 35 N.E.3d 1076, 1083 (Ill. App. Ct. 2015) (stating that Illinois courts have generally found that “continued employment for a substantial period of time beyond the threat of discharge is sufficient consideration to support a restrictive covenant in an employment agreement”). *But see* Ozburn-Hessey Logistics, LLC v. 721 Logistics, LLC, 40 F. Supp. 3d 437, 455 (E.D. Pa. 2014) (finding that “continuation of the employment relationship” does not constitute adequate consideration to support a restrictive covenant “even if the relationship had previously been terminable at the will of either party”).

employee lacks sufficient leverage to challenge the restrictions placed upon them.⁵¹ Some jurisdictions, such as Minnesota,⁵² North Carolina,⁵³ Pennsylvania,⁵⁴ and South Carolina,⁵⁵ require new, independent consideration for a non-compete agreement to be valid when it is executed subsequent to the employment contract. These courts look for additional benefits conferred upon the employee in consideration for agreeing to the non-compete. For example, in a Pennsylvania Supreme Court case, the court held that a non-compete could be valid only if it was signed ancillary to the commencement of employment, or if additional consideration was provided.⁵⁶ In such a framework, employers must grant new benefits such as a promotion, additional training, or a change in compensation, commission, duties, or nature of employment.⁵⁷ For

⁵¹ *Prudential Sec., Inc. v. Plunkett*, 8 F. Supp. 2d 514, 519 (E.D. Va. 1998) (characterizing a non-compete agreement at issue as a “contract of adhesion” that was strictly construed against enforcement); *Vortex Protective Serv., Inc. v. Dempsey*, 463 S.E.2d 67, 69 (Ga. Ct. App. 1995) (stating that non-compete agreements inure employees by diminishing their means of procuring livelihoods and “depriv[ing] them[] of the power to make future acquisitions, and expose them to imposition and oppression”); *Bennett v. Storz Broad. Co.*, 134 N.W.2d 892, 898 (Minn. 1965) (explaining that non-compete agreements “are looked upon with disfavor, cautiously considered, and carefully scrutinized”); Norman D. Bishara & Cindy A. Schipani, *A Corporate Governance Perspective on the Franchisor-Franchisee Relationship*, 19 STAN. J.L. BUS. & FIN. 303, 328 (2014) (explaining how courts often use a reasonableness test “to balance the parties’ interests and to evaluate whether the geographic restriction in a non-compete agreement is broader than necessary to protect the legitimate interests”).

⁵² *See, e.g., Conway v. C.R. Bard, Inc.*, 76 F. Supp. 3d 826, 830 (D. Minn. 2015) (claiming that “if an employer asks an existing employee to sign a non-compete agreement, that agreement must be supported by new, independent consideration”).

⁵³ *See, e.g., RLM Commc’ns, Inc. v. Tuschen*, 66 F. Supp. 3d 681, 691 (E.D.N.C. 2014) (“In sum, because the covenant not to compete is not included within the employment agreement . . . the covenant must be supported by ‘new consideration’ to be valid.”).

⁵⁴ *See, e.g., Maint. Specialties, Inc. v. Gottus*, 314 A.2d 279, 281 (Pa. 1974) (“[A] restrictive covenant is enforceable if supported by new consideration, either in the form of an initial employment contract or a change in the conditions of employment.”).

⁵⁵ *See, e.g., Baugh v. Columbia Heart Clinic, P.A.*, 738 S.E.2d 480, 489 (S.C. Ct. App. 2013) (“[W]hen a covenant [not to compete] is entered into after the inception of employment, separate consideration, in addition to continued at-will employment, is necessary in order for the covenant to be enforceable.” (quoting *Poole v. Incentives Unlimited, Inc.*, 548 S.E.2d 207, 209 (S.C. 2001))).

⁵⁶ *Pulse Techs. Inc. v. Notaro*, 67 A.3d 778, 782 (Pa. 2013).

⁵⁷ *See, e.g., Menzies Aviation (USA), Inc. v. Wilcox*, 978 F. Supp. 2d 983, 998 (D. Minn. 2013) (stating that a non-compete agreement was not enforceable because the employee did not receive “[a] promotion, special training, or other benefit in return for signing the Non-Compete”); *Cox v. Dine-A-Mate, Inc.*, 501 S.E.2d 353, 356 (N.C. Ct. App. 1998) (holding that, as a matter of public policy, North Carolina law requires separate consideration for a non-compete signed after an employment contract to be enforceable).

example, if an employer wishes to add a non-compete clause to a fully integrated and executed employment contract, the employer must offer the employee additional benefits as consideration for the clause. Merely allowing the employee to keep his job is insufficient consideration for the added non-compete clause and would be unenforceable in jurisdictions that follow this rule.

Other jurisdictions, such as Arizona,⁵⁸ New York,⁵⁹ and Texas,⁶⁰ take the opposite view: that continued employment does constitute adequate consideration for a subsequently executed non-compete agreement, at least when it was ancillary to the employment contract. In these jurisdictions, a restrictive covenant must meet the requirements of a valid contract and “be incidental or ancillary to an otherwise enforceable contract.”⁶¹ Additionally, these states analyze how the “promise of continued employment validates a covenant executed after the employment relationship has commenced, even where it continues to be on an at-will basis.”⁶² However, some courts consider the stand-alone promise of continued employment for an at-will employee as illusory because “the employer could fire the employee and escape the obligation to perform.”⁶³ Thus, some courts look for “a nexus between the covenant not to compete and the interest being protected,”⁶⁴ and for an

⁵⁸ See, e.g., *Mattison v. Johnston*, 730 P.2d 286, 290 (Ariz. Ct. App. 1986) (holding that the continued employment of a terminable-at-will employee is sufficient consideration to support a restrictive covenant executed by the employee more than two years after commencement of employment).

⁵⁹ See, e.g., *Gazzola-Kraenzlin v. Westchester Med. Grp., P.C.*, 782 N.Y.S.2d 115, 117 (N.Y. App. Div. 2004) (finding that “the plaintiff’s continued employment by the defendant . . . constituted good and sufficient consideration for the restrictive covenants, notwithstanding the at-will nature of the employment relationship”).

⁶⁰ See, e.g., *Tom James of Dall., Inc. v. Cobb*, 109 S.W.3d 877, 886 (Tex. App. 2003) (“If an otherwise enforceable agreement exists, the covenant not to compete must be ‘ancillary to or a part of’ that agreement ‘at the time the agreement is made.’ To meet this requirement: (1) the consideration given by the employer in the otherwise enforceable agreement must give rise to the employer’s interest in restraining the employee from competing; and (2) the covenant must be designed to enforce the employee’s consideration or return promise in the otherwise enforceable agreement.”) (citing *Light v. Centel Cellular Co.*, 883 S.W.2d 642, 644 (Tex. 1994), *abrogated by Marsh USA Inc. v. Cook*, 354 S.W.3d 764 (Tex. 2011)).

⁶¹ *Compass Bank v. Hartley*, 430 F. Supp. 2d 973, 978 (D. Ariz. 2006) (quoting *Am. Credit Bureau v. Carter*, 462 P.2d 838, 840 (Ariz. Ct. App. 1969)).

⁶² *Id.*

⁶³ *Light*, 883 S.W.2d at 645 n.6.

⁶⁴ *Marsh USA Inc.*, 354 S.W.3d at 780. The Supreme Court of Texas found that “[a]warding to Cook stock options to purchase MMC stock at a discounted price provided the required statutory nexus between the noncompete and the company’s interest in protecting its goodwill” and that “[e]xercising the stock options to purchase MMC stock triggered the restraints in the noncompete.” *Id.* at 777.

“otherwise enforceable contract” which contains “mutual, nonillusory promises.”⁶⁵ In order for the non-compete to be enforceable, the agreement must be anchored in or ancillary to an otherwise enforceable contract.

It is increasingly common for firms to include the restrictive covenants in an electronic version sent to the employee after the commencement of work. Institutions typically prefer using standardized terms in contract design because of the increased certainty found in boilerplate provisions.⁶⁶ Rachel Arnow-Richman has argued that these employment agreements have become a form of standardized agreements of adhesion, resembling “shrinkwrap contracts” with “pay now, terms later” agreements between companies and consumers.⁶⁷ “Shrinkwrap” contracts bind consumers to the terms of a contract only after the consumer has purchased the product, because the terms are contained within the product’s packaging.⁶⁸ Similarly, “cubewrap” human capital agreements appear in the employee’s cubicle and are often signed without being fully reviewed by the employee before beginning work.⁶⁹

In a recent case in which a Delaware court enforced such a “cubewrap” agreement, an employee had only received an electronic copy of an equity compensation agreement which included a non-compete agreement.⁷⁰ In lieu of signing the agreement, she was asked to hit the “Accept” button on a pop-up notification on her screen.⁷¹ The court explained:

[The employer’s] method of seeking [the employee’s] agreement to the post-employment restrictive covenants, although certainly not the model of transparency and openness with its employees, was not an improper form of contract formation. . . . [The employee] admits that she clicked the checkbox next to which were the words “I have read and agree to the terms of the Grant Agreement.” This functions as an admission that she had the opportunity to review the agreement (even if she now states she

⁶⁵ *Hunn v. Dan Wilson Homes, Inc.*, 789 F.3d 573, 584 (5th Cir. 2015) (citing *Marsh USA Inc.*, 354 S.W.3d at 773).

⁶⁶ Albert Choi & George Triantis, *Market Conditions and Contract Design: Variations in Debt Contracting*, 88 N.Y.U. L. REV. 51, 52 (2013) (“Contracting parties are reluctant to take the risk of departing from provisions that have been interpreted and enforced by the courts.”).

⁶⁷ Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 ARIZ. L. REV. 637, 639-40 (2007) (discussing the increased number of standardized employment agreements).

⁶⁸ *Id.* at 640 n.6.

⁶⁹ *Id.* at 640-41.

⁷⁰ *Newell Rubbermaid Inc. v. Storm*, No. 9398-VCN, 2014 WL 1266827, at *1 (Del. Ch. Mar. 27, 2014) (describing an employer that sought to enjoin a former employee from actions that violated a restricted stock unit agreement that the employee agreed to electronically).

⁷¹ *Id.*

did not read it despite her representation that she did) upon which [the employer] was entitled to rely. Her actions of clicking the checkbox and “Accept” button were manifestations of assent. . . . It is not determinative that the 2013 Agreements were part of a lengthy scrolling pop-up. [The employee’s] failure to review fully the terms (on a 10-page readily accessible agreement) to which she assented also does not invalidate her assent.⁷²

A similar issue of awareness and adhesion arises when the non-compete agreement is included in the employee handbook or manual instead of an individualized employment contract. In most jurisdictions, for an employee handbook to constitute a binding contract, the employer must demonstrate that:

- (1) the language of the policy statement contains a promise clear enough that an employee would reasonably believe that an offer has been made,
- (2) the statement was disseminated to the employee in such a manner that the employee was aware of its content and reasonably believed it to be an offer, and
- (3) the employee accepted the offer by commencing or continuing work after learning of the policy statement.⁷³

As a result, employee handbooks, manuals, and company rules are all generally recognized as potential parts of the employment contract, and handbooks regularly contain human capital provisions such as non-solicitation clauses.⁷⁴ The introduction of these clauses through company-wide policy books helps explain why empirical studies indicate a significant number of employees are either unaware or unsure of whether they are employed under binding post-employment human capital restrictions.⁷⁵

As we will consider in the next section, even if employers give the employee an opportunity to bargain for the covenant, the employee typically has no frame of reference to evaluate the fairness and risk of the covenant’s

⁷² *Id.* at *7.

⁷³ *Ricco v. Sw. Surgery Ctr., LLC*, 73 F. Supp. 3d 961, 972 (N.D. Ill. 2014) (quoting *Dinkins v. Varsity Contractors, Inc.*, No. 04 C 1438, 2005 WL 599979, at *14 (N.D. Ill. Mar. 10, 2005)); see also Natalie Bucciarelli Pedersen, *A Subjective Approach to Contracts?: How Courts Interpret Employee Handbook Disclaimers*, 26 HOFSTRA LAB. & EMP. L.J. 101, 107 (2008) (stating that many courts use a reasonable expectation test when considering employee handbooks and that “virtually all courts that have considered the question” have concluded that employee handbooks can give rise to enforceable promises).

⁷⁴ See *Am. Mortg. Network v. LoanCity.com*, No. D044550, 2006 WL 3199291, at *11 (Cal. Ct. App. Nov. 7, 2006) (holding that a non-solicitation provision in an employee handbook that “expressly states it is not a contract” cannot be considered a contract); *Elite Cleaning Co. v. Capel*, No. Civ.A. 690-N, 2006 WL 1565161, at *5 (Del. Ch. June 2, 2006).

⁷⁵ Starr et al., *supra* note 11, at 16-17 (stating that of the respondents who had heard of non-compete agreements, 2.6% could not remember if they had signed a non-compete for their current job and 3.2% did not know if they had ever signed a non-compete).

terms, and the factors that need to be known may be largely unknowable at the beginning of the relationship.

III. NOTICE AND THE LITIGATION/ADJUDICATION STAGES

Misinformation about the law of non-competes is rampant. For example, when asked whether non-compete contracts are subject to federal, state, local, or city laws, only twenty percent of Evan Starr's study participants knew that the answer was state law.⁷⁶ More importantly, most people did not know whether non-competes are enforceable.⁷⁷ Partly due to this lack of knowledge, nearly half of engineers and scientists participating in a recent study have been asked to sign them, even in states where non-competes would be unenforceable.⁷⁸ Even CEOs, who are likely the most informed and empowered group of employees, are often required to sign non-competes. The Bishara study found that sixty percent of CEOs in California were required to sign a non-compete.⁷⁹

In the Starr study of the general labor force population, the actual signing of non-competes was not more likely to occur in enforcing states than in non-enforcing states.⁸⁰ In fact, even in California where non-competes are unenforceable, participants had signed non-competes as frequently as employees in other states.⁸¹

Even if an employee knows that generally some non-competes are enforceable, there are two major unknowns pertaining to her departure. First, employers vary considerably in their choice as to whether they will pursue the enforcement of human capital contracts.⁸² Second, courts vary considerably on

⁷⁶ See Evan Starr, Assistant Professor, Univ. of Md. Smith Sch. of Bus., Lewis and Clark Law School Business Law Fall Forum: Contractual Restrictions on Post-Employment Activity (Sept. 11, 2015).

⁷⁷ *Id.*

⁷⁸ *HB 1090 HD1 Relating to Employment Agreements: Hearing on H.B. 1090 Before H. Comm. on Consumer Prot. & Commerce*, 28th Legis. (Haw. 2015) (testimony of Matt Marx before Comm.), http://www.capitol.hawaii.gov/Session2015/Testimony/HB1090_HD1_TESTIMONY_CPC_02-25-15_.pdf [<https://perma.cc/7ESU-NLX8>] (concluding that the "brain drains" in Hawaii are directly related to non-compete agreements).

⁷⁹ Bishara, *supra* note 32, at 34.

⁸⁰ Starr et al., *supra* note 11, at 48-49 (explaining that "enforcement policy explains very little of the choice to use noncompetes").

⁸¹ *Id.* at 47 ("California, despite its ban on noncompetes, still has a higher than average incidence of noncompetes: 13.93%").

⁸² Some regions and industries seem to have a culture of pervasive non-enforcement to leaky enforcement. See Robert Gomulkiewicz, *Leaky Covenants-Not-to-Compete as the Legal Infrastructure for Innovation*, 49 U.C. DAVIS L. REV. 251, 285 (2015) (describing the small number of cases filed in between "large, well-resourced technology firms" in Washington state, and suggesting that one reason for this is a fear by these firms of a kind of "mutually assured destruction" in the form of constant lawsuits).

whether to enforce human capital contracts and how to interpret the agreements.⁸³

Litigation against former employees has a strategic element and may not necessarily involve intellectual property that had been previously recorded as such before the employee's departure.⁸⁴ The inherent uncertainty creates tilted risk management equilibriums.⁸⁵ The asymmetries in both information and resources that were characteristic of the contractual relationship continue post-employment, and are especially prevalent when an employee chooses an entrepreneurial route rather than joining an established competitor.⁸⁶ Thus, start-ups are at a disadvantage in such litigation.⁸⁷

Indeed, actual lawsuits fail to reveal the whole picture of how human capital contracts shape the flow of knowledge. Employers regularly conduct exit interviews, issue demand letters, and convey a general sense of what the employee is prohibited from doing.⁸⁸

Relatedly, those aware of having signed a non-compete had a raised compensation bar to entice them to move. Compared to those not bound by a

⁸³ See *infra* notes 92-96.

⁸⁴ See Charles Tait Graves & James A. DiBoise, *Do Strict Trade Secret and Non-Competition Laws Obstruct Innovation?*, 1 ENTREPRENEURIAL BUS. L.J. 323, 339 (2006) (arguing that problems with intellectual property litigation occur because courts do not recognize that claims are often created by attorneys after the employee has left).

⁸⁵ See James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 882 (2007) ("Intellectual property's road to hell is paved with good intentions. Because liability is difficult to predict and the consequences of infringement are dire, risk-averse intellectual property users often seek a license when none is needed.").

⁸⁶ See generally Albert Choi & George Triantis, *The Effect of Bargaining Power on Contract Design*, 98 VA. L. REV. 1665, 1681 (2012) (explaining that the "impact of bargaining power extends beyond price terms"); Choi & Triantis, *supra* note 66, at 57 (stating that information problems explain the existence of covenants and collateral); Albert Choi & George Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions*, 119 YALE L.J. 848, 923 (2010) (concluding that "litigation costs can act as information screens, and in turn enhance the effectiveness of contract provisions").

⁸⁷ ORLY LOBEL, *supra* note 26, at 199-217 ("The start-up company is often unable to defend itself or endure the costs of lengthy litigation, even if the claims against it are unsubstantiated."); Rajshree Agarwal, Martin Ganco & Rosemarie H. Ziedonis, *Reputations for Toughness in Patent Enforcement: Implications for Knowledge Spillovers Via Inventor Mobility*, 30 STRATEGIC MGMT. J. 1349, 1370 (2009) (concluding that "the high costs associated with IP litigation can differentially affect the behavior of entrepreneurial and established firms"); see also Erik Larson, *Modem Operandi: In High-Tech Industry, New Firms Often Get Fast Trip to Courtroom*, WALL STREET J. Aug. 28, 1984 at 1, 14 (finding that founders of start-ups are the most costly victims of intellectual property lawsuits).

⁸⁸ William Lynch Schaller, *Trade Secret Inevitable Disclosure: Substantive, Procedural & Practical Implications of an Evolving Doctrine (Part II)*, 86 J. PAT. & TRADEMARK OFF. SOC'Y 411, 422 (2004) (discussing pre-litigation tactics that parties can use to protect their intellectual property rights).

non-compete, participants in the Starr study who had signed a non-compete reported that they would need a much higher wage raise before considering a new job offer.⁸⁹ In a different study, MIT economist Matt Marx found that thirty percent of engineers who signed non-competes actually took a professional detour to avoid the industry.⁹⁰

Misinformation about enforceability is unsurprising given that even scholars who specialize in the area often debate the ways in which enforceability should be measured. This is an area “fraught with ambiguity stemming not from the absence of authority, but the excess of it, much of which is facially inconsistent. The abundance of law and lack of clarity have affected the practices of employees and employers, who are often ill-informed about the ramifications of these agreements.”⁹¹

Generally, courts will uphold a non-compete agreement if it is reasonable from a temporal, geographic, and substantive perspective.⁹² Reasonableness of these contractual terms is determined by an ad hoc analysis weighing “legitimate business interests” against “employee hardships” and peppered with a nod to the “public interest.”⁹³ Courts approach the question of reasonableness with a case-by-case analysis, making advance predictions very difficult.⁹⁴ Courts have acknowledged “there is no inflexible formula for

⁸⁹ Starr, *supra* note 11, at 40 (“Noncompete signers are 7.1 percentage points more likely to require at least a 55% increase in annual compensation in order to leave for a competitor.”).

⁹⁰ Matt Marx, *The Firm Strikes Back: Non-compete Agreements and the Mobility of Technical Professionals*, 76 AM. SOC. REV. 695, 705 (2011) (“Of the 276 respondents who signed non-competes and then changed jobs . . . [thirty two percent] reported taking a job in a different industry.”).

⁹¹ 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, 1180-81 (2001) (footnote omitted).

⁹² Swift, *supra* note 43, at 232 (“[M]ost courts will uphold a noncompete agreement if it protects an employer’s legitimate business interest and is reasonable as to temporal and geographic limitations, and as to the scope of the preclusions.”); *see also* *Omniplex World Servs. Corp. v. U.S. Investigations Servs., Inc.*, 618 S.E.2d 340, 342 (Va. 2005) (“Each non-competition agreement must be evaluated on its own merits, balancing the provisions of the contract with the circumstances of the businesses and employees involved.”).

⁹³ Orly Lobel, *Intellectual Property and Restrictive Covenants*, in *LABOR AND EMPLOYMENT LAW AND ECONOMICS* 517, 519-20 (Kenneth G. Dau-Schmidt, Seth D. Harris & Orly Lobel eds., 2d ed. 2009) (explaining that courts generally look at reasonableness when deciding whether to enforce a non-compete agreement).

⁹⁴ *Pierson v. Med. Health Ctrs, P.A.*, 869 A.2d 901, 904 (2005) (“We continue to adhere to the case-by-case approach for determining whether a restrictive covenant in a post-employment contract is unreasonable and unenforceable.”); Michael Edwards et al., *The Enforceability of Covenants Not to Compete in Alabama*, 65 ALA. L. 41, 48 (2004) (“[I]t is often difficult to predict where a trial or appellate court may draw the fine line between reasonable protection of an employer’s . . . business interests and an unreasonable restraint

deciding the ubiquitous question of reasonableness.⁹⁵ Even when a court determines a restrictive covenant to be unreasonable, uncertainty continues to permeate throughout such a finding; courts must decide whether to invalidate the entire contract, blue-pencil it, or modify it to what they perceive as reasonable.⁹⁶

Human capital contracts are difficult to interpret in large part because of relational opportunism. Employment contracts are traditionally vague and open-ended because the parties prefer the flexibility inherent in the evolving relationship.⁹⁷ The agreement resides in a few policy statements but the actual terms unfold over time, and the concrete terms are not present at the point of entry.⁹⁸ The questions about what knowledge is secret, what has been developed by the employee, what the competition looks like, and what investment has been made in the employee's human capital are all aspects that cannot be known until the end of the relationship.⁹⁹

When courts attempt to determine reasonableness, they consider more than what was reasonable at the time the contract was drafted. They consider everything that has happened since then, including: (1) what the employee received in terms of training, skills, and trade secrets; (2) the value and

on trade.”); *see also* *Sheffield v. Stoudenmire*, 553 So.2d 125, 126 (Ala. 1989) (“[E]ach particular contract must be tested by determining on the facts of the particular case whether the restriction upon one party is greater than is reasonably necessary for the protection of the other party.” (quoting *Robinson v. Comput. Servicers, Inc.*, 346 So.2d 940, 943 (Ala. 1977))).

⁹⁵ *Columbus Med. Servs., LLC v. Thomas*, 308 S.W.3d 368, 384 (Tenn. Ct. App. 2009) (quoting *Allright Auto Parks, Inc. v. Berry*, 409 S.W.2d 361, 363 (Tenn. 1966)).

⁹⁶ *See* Kurt H. Decker, *Refining Pennsylvania's Standard for Invalidating a Non-Competition Restrictive Covenant When an Employee's Termination Is Unrelated to the Employer's Protectable Business Interest*, 104 DICK. L. REV. 619, 631-32 (2000) (explaining the approaches that courts use to determine a restrictive covenant's enforceability); Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 112 (2008) (“The emerging trend in the law of employee noncompete agreements suggests that courts are generally more inclined to invalidate employee noncompete agreements than under the modern approach”); Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 681 (2008) (defining the “blue-pencil test” as a standard where judges decided to either invalidate an entire contract or invalidate only offending words).

⁹⁷ Lobel, *supra* note 93, at 518 (stating that employment contracts are “commonly characterized as informal, unwritten, implicitly, relational contracts that evolve over the period of time”).

⁹⁸ Arnov-Richman, *supra* note 91, at 1215-16 (“The nature of employment, or any contract for ongoing personal services, is that the arrangement evolves over time to reflect changes in the needs and expectations of the parties.”).

⁹⁹ Lobel, *supra* note 93, at 518 (discussing competing notions of innovation and the uncertainties of contractual agreements with respect to innovation).

contribution efforts of the employee; (3) how long the employee actually worked for the employer; and (4) the employee's possible career plans and options at the point of departure.¹⁰⁰ Generic all-inclusive contractual restrictions may simply be unsuitable for a relationship that is constantly evolving. At the same time, the spread of these contracts creates psychological or expressive effects that go beyond what is actually enforceable when challenged in court. These effects are problematic not only from an employee protection perspective, but also from a broader innovation policy perspective. Job mobility is a fundamental element of economic growth and innovation.¹⁰¹ Current research shows that aggressive talent wars in which employees move frequently among competitors fuels high tech clusters and is key to entrepreneurship.¹⁰² Mobility is linked to higher density of professional networks, positive knowledge spillovers, and higher patenting rates.¹⁰³ Moreover, in recent behavioral studies, On Amir and I find that participants bound by post-employment restrictions did not perform as well and were less motivated to stay on task than those unbound by such restrictions.¹⁰⁴

IV. NOTICE, INNOVATION POLICY & DIRECTIONS FOR REFORM

“[I]t was like one furniture maker trying to sue someone for designing a new kind of chair. There were thousands of different types of chairs, and making one didn't give you the right to own them all.”

– Ben Mezrich, *Accidental Billionaires*¹⁰⁵

A minority of jurisdictions, most notably California, do not enforce non-competes as a bright-line rule.¹⁰⁶ At the legislative level, beyond California,

¹⁰⁰ Arnov-Richman, *supra* note 91, at 1180-82 (considering “courts’ use of protectable interests as a proxy for determining when a noncompete agreement is appropriate from a policy perspective”).

¹⁰¹ Matt Marx et al., *Mobility, Skills and the Michigan Non-Compete Experiment*, 55 MGMT. SCI. 875, 875-76 (2009).

¹⁰² Lobel, *supra* note 26, at 846.

¹⁰³ *Id.* at 847 (“High employee turnover, regional human capital concentration, and density of professional networks all contribute to economic growth.”).

¹⁰⁴ On Amir & Orly Lobel, *How Noncompetes Stifle Performance*, HARV. BUS. REV. (Jan. 2014), <https://hbr.org/2014/01/how-noncompetes-stifle-performance> [<https://perma.cc/ZL7S-UCRF>] (explaining that “noncompetes can be a double-edged sword” which can both support productivity but also stifle performance); Orly Lobel, *Aggressive Talent Wars Are Good for Cities*, HARV. BUS. REV. (Oct. 4, 2013), <https://hbr.org/2013/10/aggressive-talent-wars-are-good-for-cities> [<https://perma.cc/F5MP-3JMT>].

¹⁰⁵ BEN MEZRICH, *THE ACCIDENTAL BILLIONAIRES: THE FOUNDING OF FACEBOOK: A TALE OF SEX, MONEY, GENIUS, AND BETRAYAL* 117 (2009); *see also* Facebook, Inc. v. Pac. Nw. Software, Inc., 640 F.3d 1034, 1037 (9th Cir. 2011) (discussing a settlement agreement between founders of Facebook and the founders of rival website ConnectU).

there have been recent attempts to curtail the spread of human capital contracts by limiting their reach. Building on recent innovation scholarship, the issue of the desirability of expansion through contract has been taken up by various state legislatures. Policymakers hope to find the best legal infrastructure to facilitate innovation, as well as to establish fairness and equity rules about human capital enclosure.

Most recently, in late June 2015, Hawaii passed a law banning non-compete and non-solicitation clauses from employment contracts in the high-tech industry.¹⁰⁷ The Act was motivated by a finding that:

most non-compete agreements effectively prevent an individual from working in any technology capacity at an organization which their employer competes or does business with. For employees of large consumer oriented companies which do business with nearly everyone, a non-compete agreement tends to effectively eliminate nearly all viable options for employment within the state.¹⁰⁸

The legislature was concerned that, as a result of non-compete clauses, technology workers were encouraged to move to a different state to find new employment and that the pool of high-tech talent had been dwindling as a result.¹⁰⁹ The reform was based on empirical findings that technology companies in Hawaii are finding it exceedingly difficult to find experienced talent that is unbound by a non-compete.¹¹⁰ In contrast to the MOVE Act

¹⁰⁶ CAL. BUS. & PROF. CODE § 16600 (West 2015) (“Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.”); *see also* *Fillpoint, LLC v. Maas*, 146 Cal. Rptr. 3d 194, 199 (Cal. Ct. App. 2012) (“Covenants not to compete are generally unenforceable . . .”).

¹⁰⁷ HAW. REV. STAT. ANN. § 480-4(d) (West 2015); *see also* Orly Lobel, *High Tech Hubs & Post-Employment Restrictions: Hawaii Joins California in Its Ban of Non-Competes*, CASETEXT (Aug. 17, 2015), <https://casetext.com/posts/high-tech-hubs-post-employment-restrictions> [<https://perma.cc/3GQE-DU8G>] (discussing Hawaii and California’s decision to eliminate noncompetition clauses).

¹⁰⁸ *HB 1090 HD1 Relating to Employment Agreements: Hearing on H.B. 1090 Before H. Comm. on Consumer Prot. & Commerce*, 28th Legis. (Haw. 2015) (testimony of Kathryn S. Matayoshi, Superintendent of Educ., Haw. Dep’t of Educ.), http://www.capitol.hawaii.gov/Session2015/Testimony/HB1090_TESTIMONY_EDB_02-13-15_.pdf [<https://perma.cc/ST6G-JNJJ>].

¹⁰⁹ STATE OF HAW. COMM. ON ECON. DEV. & BUS., STAND. COMM. REP. NO. 1112 RE HB NO. 1090, 28th Legis. (Haw. 2015), http://www.capitol.hawaii.gov/session2015/CommReports/HB1090_SD1_SSCR1112_.htm [<https://perma.cc/H2M8-9FFN>] (stating that qualified candidates were unable to work in Hawaii because of non-compete agreements).

¹¹⁰ *Id.* (“[T]echnology companies in Hawaii are increasingly finding it difficult to accommodate noncompete and nonsolicit agreements . . .”).

currently before Congress, the Hawaii Act was adopted as an economic policy for the tech sector rather than as a protective labor legislation.¹¹¹

Other jurisdictions have differentiated between high salary earners and all others. In 2007, Oregon passed a non-compete law which limited the use of non-competes and capped them to two years when the agreements were allowed.¹¹² In 2015, the Oregon legislature shortened the cap from two years to eighteen months.¹¹³ An interesting feature of the Oregon law is the requirement of either two weeks advanced notice or an adequate salary raise when the employer introduces a non-compete.¹¹⁴

Notice is significant because it may force parties to consider the employment agreement prior to signing and encourage information-gathering on both sides. The MOVE Act would require employers to disclose non-compete restrictions at the beginning of the hiring process.¹¹⁵ Section 4 of the MOVE ACT provides that:

In order for an employer to require an employee, who in any workweek is engaged in commerce or in the production of goods for commerce (or is employed in an enterprise engaged in commerce or in the production of goods for commerce) and is not a low-wage employee, to enter into a covenant not to compete, the employer shall, prior to the employment of such employee and at the beginning of the process for hiring such employee, have disclosed to such employee the requirement for entering into such covenant.¹¹⁶

¹¹¹ STATE OF HAW. COMM. ON ECON. DEV. & BUS., Stand. Comm. Rep. No. 393 re HB No. 1090, 28th Legis. (Haw. 2015), http://www.capitol.hawaii.gov/session2015/CommReports/HB1090_HD1_HSCR393_.htm [<https://perma.cc/PF9T-RST5>] (explaining that restrictive covenants are often contained in employment contracts in the technology sector).

¹¹² OR. REV. STAT. § 653.295(1) (2015).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ MOVE Act, S. 1504, 114th Cong. § 4 (2015), <https://www.congress.gov/bill/114th-congress/senate-bill/1504/text> [<https://perma.cc/4GDQ-VBV3>] (stating that employers who meet the requirements under the Act must disclose any covenants not to compete at the beginning of the hiring process); Eric Goldman, *Why Congress Should Restrict Employee Non-Compete Clauses*, FORBES (June 30, 2015, 12:43 PM), <http://www.forbes.com/sites/ericgoldman/2015/06/30/congress-should-move-to-restrict-employee-non-compete-clauses/#751e636d28e3> (explaining how this statutory language could present problems for employees due to the vague timing of the required disclosure of these restrictions and could prove ineffective).

¹¹⁶ S. 1504 § 4.

The statutory language of the MOVE Act requiring notice “at the beginning of the process for hiring such employee” is a bit vague.¹¹⁷ Eric Goldman questioned the bill’s language:

What does this mean? One way of reading it is that employers could satisfy the requirement by putting a cryptic notice (such as “non-compete required”) in the job posting. Or employers might interpret the language to permit disclosure well after the job offer, because everything before that is preparatory steps towards “the process for hiring.” Unless the statute clarifies the requirement, it’s not clear the language will actually lead to useful early disclosure for employees.¹¹⁸

Still, such a requirement would be an improvement relative to the practices currently pervasive in the job market.

Other states are currently considering their non-compete policies. In January 2015, Massachusetts legislators introduced a bill that would adopt California’s policy to void non-competes.¹¹⁹ The bill states the following:

Any written or oral contract or agreement arising out of an employment or independent contractor relationship that prohibits, impairs, restrains, restricts, or places any condition on, a person’s ability to seek, engage in or accept any type of employment or independent contractor work, for any period of time after an employment or independent contractor relationship has ended, shall be void and unenforceable with respect to that restriction.¹²⁰

The bill has received the support of the state’s former Governor, Deval Patrick, who has stated the ban on non-competes supports job mobility and reinforces the state’s industries, especially in technology and science industries.¹²¹ Currently, Rhode Island and Washington also have bills pending

¹¹⁷ *Id.*

¹¹⁸ Goldman, *supra* note 115.

¹¹⁹ Russell Beck, *Massachusetts Bills to Ban Noncompetes and Adopt UTSA in the New Legislative Session (2015-2016)*, FAIR COMPETITION L. (Jan. 18, 2015), <http://faircompetitionlaw.com/category/massachusetts-noncompete-bill/> [<https://perma.cc/HT4D-QP7M>]; Michael Rosen, *About*, MASS. NONCOMPETE L., <http://www.massachusettsnoncompetelaw.com/about/> [<https://perma.cc/6WR9-ZVF3>] (stating that several industries in the Massachusetts economy routinely require employees to sign restricting covenants).

¹²⁰ S. 169, 189th Gen. Ct. Reg. Sess. § 11 (Mass. 2015), <https://legiscan.com/MA/text/S169/2015> [<https://perma.cc/ZYR4-KKA5>].

¹²¹ Callum Borchers & Michael B. Farrell, *Patrick Looks to Eliminate Tech Noncompete Agreements*, BOS. GLOBE, Apr. 10 2014, at A1, <https://www.bostonglobe.com/business/2014/04/09/gov-patrick-pushes-ban-noncompete-agreements-employment-contracts/kgOq3rkbtQkhYooVlicfOO/story.html>.

that would ban non-competes.¹²² These efforts are worthwhile because, as we have seen above, the patchwork under-the-radar expansion of human capital law has become inimical to the balance underlying intellectual property law.¹²³ However, the focus of many non-compete reforms is above all the non-compete contract. Simultaneously, other contractual restrictions function to restrict mobility and enclose information and knowledge that otherwise, under intellectual property policy, would be free to flow in the market.

In 1813 Thomas Jefferson wrote, “He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.”¹²⁴ However, in the employment context, instruction and ideas are now regularly listed as proprietary. When ideas fall short from patentability and copyrightability, can they still be owned and controlled? This is a question that has perplexed courts and legal scholars. With a shift from status to contract, restrictions over ideas and innovation through private ordering have expanded. The Copyright Act of 1976 expressly preempts state “common law” copyright.¹²⁵ This has meant that ideas may not be deemed property under federal or state law, yet ideas are regularly deemed employment-related under contractual obligations. One court explained the difficulty of tracing the source of ideas, because ideas “are the most intangible of property rights, and their lineage is uniquely difficult to trace. Paternity can be claimed in the most casual of ways, and once such a claim is lodged, definitive blood tests are notoriously lacking.”¹²⁶ Historically, the courts have deemed contracts as beyond the scope of intellectual preemption.¹²⁷ But the

¹²² H.B. 5708, 2015 Gen. Assemb., Jan. Sess. (R.I. 2015) (“Non-competition agreements are declared to be contrary to the public policy of the state, and shall not be enforced”); H.B. 1926, 64th Leg., Reg. Sess. (Wash. 2015) (“Except as provided in [sections of this act] every contract by which a person is restrained from engaging in a lawful profession, trade, or business of any kind is to extent void.”).

¹²³ See *supra* Part III.

¹²⁴ Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in 13 THE WRITINGS OF THOMAS JEFFERSON 326, 334 (Albert Ellery Bergh ed., 1907).

¹²⁵ 17 U.S.C. § 301 (2012).

¹²⁶ *Burten v. Milton Bradley Co.*, 592 F. Supp. 1021, 1031 (D.R.I. 1984), *rev'd*, 763 F.2d 461 (1st Cir. 1985).

¹²⁷ See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1455 (7th Cir. 1996) (explaining Judge Easterbrook’s finding that the cause of action for breach of contract lies outside of copyright preemption); James W. Falk, *Originality or Novelty in Cases of Misappropriation of Ideas*, 33 J. PAT. OFF. SOC’Y 888, 888 (1951) (describing the common law protection afforded to ideas as a “guise” that has many difficulties); Harold C. Havighurst, *The Right to Compensation for an Idea*, 49 NW. U. L. REV. 295, 298 (1954) (“[U]nless some independent grounds exist for giving [ideas] standing as property, there appears to be no basis of liability for their unauthorized use apart from contract”); Benjamin Kaplan, *Implied Contract and the Law of Literary Property*, 42 CALIF. L. REV. 28, 29-32 (1954) (describing cases that apply a breach of contract approach as a theory of recovery for protecting of ideas); Lionel

rise of the standard human capital contract may present a renewed opportunity to consider this dynamic.¹²⁸

A number of both federal and state employment protections require that employees are provided with specific notice of their rights in the workplace in the form of a notice poster.¹²⁹ Federal employment protections that require notice include: standards of workplace safety,¹³⁰ wage and hour limits,¹³¹ family and medical leave requirements,¹³² and antidiscrimination laws.¹³³ These multiple notice requirements are provided in the form of approved posters, and usually must be placed in a conspicuous area of the workplace.¹³⁴ Courts recognize the importance of the educational function of these notice posters in the workplace, which inform employees of their statutory rights in

S. Sobel, *The Law of Ideas, Revisited*, 1 UCLA ENT. L. REV. 9, 14 (1994) (describing the importance of finding a theory or legal protection for ideas); Harry P. Warner, *Legal Protection of Program Ideas*, 36 VA. L. REV. 289, 291 (1950) (explaining that courts are reluctant to protect ideas because of their “evanescent character and intangibility”); Joseph D. Pannone, Note, *Property Rights in an Idea and the Requirement of Concreteness*, 33 B.U. L. REV. 396, 398 (1953) (explaining that courts “have never been willing to extend protection to the author of abstract ideas in absence of an existing confidential relationship between the parties”).

¹²⁸ See also Rochelle Dreyfuss & Orly Lobel, *Economic Espionage as Reality or Rhetoric: Equating Trade Secrecy with National Security*, 20 LEWIS & CLARK L. REV. (forthcoming 2016) (explaining that the use of standard form contract seemingly makes any kind of information confidential).

¹²⁹ Daniel B. Amodeo, *Fair Notice: Reassessing NLRB Authority to Inform Employees of Their Rights to Unionize*, 63 AM. U. L. REV. 789, 799-800 (2014) (explaining that Congress has “expressly legislated notice-posting requirements” that require posters serving to alert workers of their right).

¹³⁰ See 29 U.S.C. § 657(c)(1) (2012) (granting the Secretary power to make “regulations requiring that employers, through posting of notices or other appropriate means, keep their employees informed of their protections and obligations under this Act”).

¹³¹ See 29 C.F.R. § 516.4 (2015) (requiring employers to “post and keep posted a notice explaining the [Fair Labor Standards] Act”).

¹³² See 29 U.S.C. § 2619 (“Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted, a notice . . .”).

¹³³ See 42 U.S.C. § 2000e-10 (2012) (requiring employers “post and keep posted in conspicuous places upon its premises” notice of antidiscrimination law under Title VII); *id.* § 12115 (requiring employers to “post notices in an accessible format” under the Americans with Disabilities Act).

¹³⁴ Peter D. DeChiara, *The Right to Know: An Argument for Informing Employees of Their Rights Under the National Labor Relations Act*, 32 HARV. J. LEGIS. 431, 440-43 (1995) (explaining that a number of federal employment statutes require notice posters containing clear and conspicuous statements).

the employment context.¹³⁵ When workers are unaware of their rights and protections, those rights and protections are substantially diminished.¹³⁶ Employers who do not meet the posting requirements can face punitive or remedial damages.¹³⁷

Though the purpose of the notice requirements and the standards governing the notice posters themselves are intended to inform employees of their rights under the law, there are still gaps in the worker-education process. For example, the approved notice poster explaining the wage and hour regulations of tipped employees does not include information clarifying rules around tip pools, who is considered a tipped employee, and whether back-of-house employees have the same rights to the tip pool as front-of-house employees.¹³⁸ Thus, the poster approved by the Department of Labor, despite the specific notice requirements and penalties for noncompliance, does not include the information tipped employees require.¹³⁹

Similarly, employment relationships have evolved significantly from the time notice posters were first introduced into the workplace.¹⁴⁰ Increases in classification of workers as independent contractors, franchising agreements, and temporary work arrangements, as well as advancements in communication technology, have all substantially changed the nature of the workplace by severing the traditional connection between the employee and the physical worksite.¹⁴¹ This modern disconnect renders the age-old notice poster

¹³⁵ Amodeo, *supra* note 129, at 800 (“Recognizing the important educational function these posters bring to the workplace, courts have placed a high premium on their presence.”).

¹³⁶ Kimberly S. Webster, *Fissured Employment Relationships and Employee Rights Disclosures: Is the Writing on the Wall for Workers’ Right to Know Their Rights?*, 6 NE. U. L.J. 435, 435-37 (2014).

¹³⁷ See *supra* notes 130-33 (providing for various fines and remedies for employers who fail to meet posting requirements).

¹³⁸ Neil Patrick McConnell, Comment, *Mr. Pink Never Leaves a Tip: How Current Tip Credit and Tip Pool Guidelines Leave Employees at the Mercy of Employers*, 114 PENN ST. L. REV. 621, 628-38 (2009).

¹³⁹ Susan N. Eisenberg & Jennifer T. Williams, *Evolution of Wage Issues in the Restaurant Industry*, 30 ABA J. LAB. & EMP. L. 389, 396 (2015) (“Despite specific notification requirements and the risk of significant penalties, the DOL-approved FLSA poster that employers are required to post in the work place does not contain all of the information the regulations require employers to provide to tipped employees.”).

¹⁴⁰ Webster, *supra* note 136, at 437-38 (explaining that with an increase of workers not setting foot on an employer’s worksite, a physical poster does not help provide workers with notice of their rights).

¹⁴¹ *Id.* (explaining that since the government first required posters, “trends such as the misclassification of employees as independent contractors, the increase in franchising arrangements, communications technology, and the rise of temporary employment

insufficient in many cases, as the worker never has occasion to view the conspicuously placed poster.¹⁴² As these trends continue to advance, further departing from the traditional employer-employee relationship, it is likely this insufficiency will only become more pronounced.

Despite the limitations of these varied notice requirements, the core idea of notifying employees of their legal rights and requiring employers to provide information regarding these rights during employment should serve as an important model for the area of human capital law. For example, a poster hung in the locker room of a large workplace such as an Amazon warehouse which informs employees that non-competes are not enforceable in California could be a game-changer in the decision of at least some employees to accept a competing job. A notice to workers about their rights to retain some of their human capital, the types of information that cannot be deemed confidential, or the types of ideas that cannot be assigned to an employer could further spur productive conversations with employers about IP ownership and could foster entrepreneurship.

CONCLUSION

As more and more employees, whether fast-food workers or CEOs, are required to sign employment contracts containing restrictive agreements, questions about notice, distributive justice, and innovation policy become pertinent. Human capital contracts are often introduced later in the employment process, leaving employees either unaware of the implications of these agreements or unable to fairly negotiate their terms. This unfairness due to lack of advance notice is compounded with misinformation about the enforceability of these contracts, as well as the difficulty of interpreting such agreements even when they are deemed enforceable. New reform efforts such as the MOVE Act attempt to introduce more transparency and limits on the enforcement of human capital agreements. Such reforms, along with the dissemination of clearer information pertaining to these policies, would not only better protect the livelihood of workers, but would also support competitive talent markets, which are essential for the innovation age.

relationships have increasingly disconnected workers from their employer's physical worksite").

¹⁴² *Id.* at 438 (explaining that posters do not help the workers who "do not work at the employer's place of business" because "the workers never see these 'conspicuous' posters").