Is Strict Enforcement of Non-Competes Good Policy? Substantial Evidence Suggests it is Not

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Introduction

The use of non-competes in the employment context has long been the subject of controversy in the United States. On the one hand, there are many states in which non-competes are liberally enforced against employees. On the other, there are some states that have historically been hostile to non-competes in the employment context. Of course, there are also a fair number of states that fall somewhere in the middle. In most states, except the ones most hostile to non-competes, the law typically allows for the enforcement of non-competes as long as they are reasonable, requiring courts to balance the interests of employers, employees, and society as a whole in making a reasonableness determination.

This approach typically provides the courts with wide discretion in determining on a case-by-case basis whether a non-compete should be enforced, allowing increased flexibility in the law. However, some scholars have argued that this reasonableness test for enforceability, which has been adopted in the majority of states, leads to inconsistency in enforcement as a consequence of such wide discretion[2], as well as the misallocation of scarce human resources, reduced economic growth, innovation, and even employee performance.[3]

Further, some scholars have argued that a legal regime in which non-competes are strictly enforced is inconsistent with the current state of the economy and the new realities of the employment model in the United States, including the shift from employers promising long-term job stability in exchange for employee loyalty to an industrial model comprised of job instability and increased employee mobility.[4]

The purpose of this article is to examine non-competes from a historical perspective, providing insight as to why non-compete law has developed in the United States in the way it has. The article will also examine the uses of non-competes in the employment context and whether they are effective in achieving their purported goals.

Historical Perspective

The laws relating to the use of non-competes in the employment context are rooted heavily in English common law beginning in the seventeenth century guild system.[5] An oft-cited hornbook, Clark on Contracts, states that a contract in unreasonable restraint of trade is contrary to public policy and void.[6] The rationale for the historical hostility toward non-competes in the employment context is explicitly set forth in this treatise:

> The unreasonableness of contracts in restraint of trade and business is very apparent from several obvious considerations: (1) Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families[;] (2) They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as to themselves[;] (3) They discourage industry and enterprise, and diminish the products of ingenuity and skill[;] (4) They prevent competition and enhance prices[; and] (5) They expose the public to all the evils of monopoly.[7]

Courts have also been suspicious of non-competes in the employment context because they are often considered to be the result of unequal bargaining power and constitute contracts of adhesion.[8]

Despite this historical hostility to non-competes, many states enforce them where they are deemed to be reasonable.[9] In making a reasonableness determination, courts typically consider the nature and extent of the trade or business and the situation of the parties.[10] Specifically, the courts will normally consider

> whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either. It can only be oppressive, and, if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy.[11]

This type of determination requires the courts to balance the interests of employers, employees, and the public in enforcing a non-compete in the employment context, while acknowledging that such agreements are generally heavily scrutinized.[12]

Current State of Non-Compete Laws in the United States

As Norman D. Bishara illustrates in his work, "Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants Not To Compete, Trends, and Implications for Employee Mobility Policy," non-compete laws across the nation fall on a spectrum and there are numerous subtleties in the laws of each jurisdiction.[13] Nevertheless, the states generally align into two different camps: (1) those laws which provide that non-competes are *per se* invalid[14]; and (2) those laws which provide that non-competes may be enforced if they are reasonable.

California is probably the most well-known state that outlaws non-competes in the employment context. Under California Business and Professions Code Section 16600, with certain exceptions[15], "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."[16] Conversely, Massachusetts is considered to be a more typical example of non-compete laws seen throughout the country. Under Massachusetts law, "[a] covenant not to compete is enforceable only if it is necessary to protect a legitimate business interest, reasonably limited in time and space, and consonant with the public interest." While non-compete laws are varied, the use of non-competes by employers also varies

depending on the non-compete laws of the particular jurisdictions in which the employer conducts business, e.g., whether non-competes are generally enforceable in those jurisdictions.[17]

The Use of Non-Competes from the Perspective of Employees and Employers

The primary argument for the use of non-competes in the employment context by employers is that they are necessary to prevent unfair competition through an employee's misappropriation of "business assets," including confidential information, trade secrets, or other key competitive knowledge as a result of employee training or merely being learned through employment.[18] This may have had a great deal of persuasive force decades ago, when it was more common for an employee to spend his entire career with one employer. However, some scholars have noted that employers now want employees to take an "entrepreneurial approach to their jobs… [seeking] employees to exercise creativity on behalf of the [employer]… and [to] behave like owners" in order to allow the employer remain competitive in this increasingly fast-paced, knowledge-centered industrial economy, all without making promises of job security or loyalty that were prevalent in the United States in the mid-twentieth century.[19]

As a result of this shift toward entrepreneurial innovation by employees in the workplace, the question should be posed as to who actually owns the employee's human capital. One could conclude that "the goal of today's management is to engender commitment without loyalty," which may be an unfair result for employees.[20] In addition to this issue, there may be other countervailing arguments against the use of non-competes by employers including that the restrictions non-competes may place on

employee mobility and job marketability are overbroad and unreasonable, particularly if, as some scholars argue, job security is a thing of the past.[21]

Do Non-Competes Negatively Impact Economic Development?

Proponents of non-competes argue that businesses are less likely to open offices or locate in jurisdictions where courts frequently strike down non-competes and that this stems from concerns about their ability to restrict their employees from leaving and joining competitors. While this theory may be supported by anecdotal evidence, there does not appear to be any empirical evidence supporting it. On the other hand, some studies suggest that strict enforcement of non-competes may not be in the best interest of all businesses or overall economic development.[22]

One researcher at New York University in 1999 suggested that California's ban on non-competes is a "causal antecedent" for Silicon Valley's rise and thriving high-tech industry.[23] Since that time, researchers at MIT and Harvard Business School have also concluded that states that enforce non-competes tend to experience lower venture capital investment than states that proscribe enforcement[24], and that the strict enforcement of non-competes drives away some of the "best and brightest."[25]

For example, researchers at the Harvard Business School studying Michigan's inadvertent shift toward strict enforcement of non-competes in the 1980's have concluded that there is a much greater risk of emigration by highly cited inventors, i.e., those with more than the median number of citations per patent prior to the policy reversal, than similarly situated inventors in states that do not enforce non-competes.[26] The researchers concluded that given the higher opportunity costs of highly cited and specialized inventors, such inventors may be more likely to be motivated to emigrate

and seek employment in less restrictive regions. They may also be more attractive to out-of-state employers than lower-value workers and would be more likely to be recruited.[27] As a result, the researchers concluded that "workers with higher levels of human capital may be at once more eager and more able to emigrate while lower-value workers are kept at their jobs – and thus in the region – by non-compete agreements."[28]

Similarly, another study found that while tougher enforcement of non-competes promotes executive stability, increased enforceability also results in reduced executive compensation.[29] Thus, one could argue that highly accomplished executives may be more likely to locate in states with that do not favor enforcement of non-competes as they may believe they can maximize their compensation in those states. This same study found that stricter enforcement of non-competes reduces research and development spending and capital expenditures per employee.[30] At a minimum, these studies make it important to reexamine this historical rationale for non-compete enforcement.

What Impact Do Non-Competes Have on Innovation?

Proponents of non-competes have also traditionally argued that they give businesses an incentive to engage in expensive research and development activities, which lead to innovations in products and services, thereby making businesses more competitive.[31] Without such protections, they say, employers will be less likely to spend money on research and development because employees could more easily walk away from the business and take their knowledge to a competing business.

Nevertheless, researchers studying the rise of Silicon Valley in the high-tech industry during the 1980's and the lower growth of the high-tech industry in

Massachusetts have concluded that the enforcement of employee non-competes may actually reduce technological advancement, innovation, and economic growth for businesses due to the lack of the information spillover created by employee mobility.[32] Further, one scholar from the University of Denver has concluded that the use of non-competes as protection for intellectual property rights such as trade secrets may inhibit downstream innovation because former employees may be sufficiently afraid of becoming "enmeshed in litigation" as a result of using such information to engage in competitive activities, such as creating a competing enterprise.[33] These studies appear then to show that enforcement of non-competes has the potential to stifle the innovation of former employees.

What Impact Do Non-Competes Have on Employee Performance?

A newer argument against the strict enforcement of non-competes in the employment context is that such enforcement stifles employee performance. In a recent joint study, researchers from the University of California at San Diego and the University of San Diego found that subjects in simulated non-compete conditions showed significantly less motivation in their jobs and got worse results on effort-based tests. They conclude that restrictions on an employee's future employment not only dim the employee's later employment prospects, but also "decrease their perceived ownership of their jobs, sapping their desire to exert themselves and develop their skills."[34] The researchers noted that "although information leakage and job-hopping by talented employees may provide competitors with undue know-how, expertise, and technologies, constraining mobility may negatively affect employee performance [, because an] employee who knows their market opportunities are significantly reduced

due to an enforceable non[-]compete restriction will be less driven to perform well and to invest in his own human capital."[35]

While it is unclear whether all employees are less motivated to perform when subject to an enforceable non-compete, when the vast majority of employment contracts are at-will and a decline in performance may lead to termination, one could conclude that the strict enforcement of non-competes may have a negative impact on employee performance.

Are Non-Competes Necessary to Protect Trade Secrets?

As indicated above, non-competes may be used to protect against employees exiting a company and taking and using or disclosing trade secrets learned during their employment in their future employment or in creating a competing business. In fact, "[w]here courts have enforced covenants not to compete against 'common' employees, it has typically been to protect an employer's investment in training, development of customer goodwill, or to protect trade secrets or confidential information."[36] Typically, protecting trade secrets against future disclosure by a former employee has been one of the more common rationales for enforcing covenants not to compete. But, courts are typically reluctant to enforce a covenant not to compete where the employee does not have access to trade secrets or other confidential or proprietary information, as the covenant may constitute an unlawful restraint of trade.[37]

When former employees will be or have been exposed to trade secrets in the course of their employment, employers may seek to protect against the disclosure of such trade secrets in subsequent employment by requiring the employees to sign a non-compete agreement which restricts the employees' ability to work for a competing

company or start a competing business. While the Uniform Trade Secrets Act and similar state trade secrets statutes provide injunctive relief for actual or threatened misappropriation of trade secrets, as well as potential damages for actual misappropriation, some scholars believe this type of protection is insufficient for employers as the damage may already be done by the time they are able to obtain an injunction and damages may not be enough to compensate the employer for the unauthorized disclosure of its trade secrets.[38] As a result, some employers use non-competes as additional protection against the disclosure of their trade secrets by former employees as a prophylactic measure to avoid the potential for misappropriation from happening in the first instance and from the employer having to respond to the misappropriation after the harm has already been done.[39]

Researchers from the University of St. Thomas reject such arguments, arguing that there are a number of other legal mechanisms by which employers can achieve the same results, i.e., avoid misappropriation of trade secrets by former employees, which would also allow former employees to have greater job mobility.[40] Further, these scholars argue that non-competes used for the purpose of prohibiting the misappropriation of trade secrets or to prevent unfair competition are ineffective for their intended purpose for the following reasons:

(1) Non-competes when used as a prophylactic measure to protect against *potential* trade secret misappropriation are necessarily overbroad with a near impossibility of being able to tailor a trade secret non-compete to only prohibit employees from using or disclosing trade secrets;

(2) Non-competes used in this manner also come with the serious risk of over-deterrence, which is compounded by the *in terrorem* effect of simply having a non-compete, as employees may not understand the nuances of the non-compete and its enforceability and as a result may decide against engaging in competitive activity solely to avoid potential litigation;

(3) Relatedly, with the mere existence of a non-compete, prospective employers may be unwilling to hire employees subject to such non-competes to avoid litigation based on alleged tortious interference with contracts or unfair competition; and

(4) Employers have an incentive to draft overbroad non-competes because they are drafting for potential future disclosure of trade secrets and it is difficult to guess what types of harmful competitive activity in which an employee may engage, as well as because many states will allow the modification and reform of an overbroad non-compete and will not invalidate the entire agreement.[41]

Based on the arguments among scholars, one could conclude that non-competes, while seemingly a useful tool for employers, are unnecessary to prevent the misappropriation of trade secrets by former employees as such agreements are more restrictive on employees' job mobility than is reasonably necessary, particularly given the existence of legal alternatives to non-competes. Similarly, one scholar from the University of Denver concluded that non-competes do not work well to protect intellectual property assets such as trade secrets because they are simultaneously too narrow and too blunt an instrument: too narrow because they fail to protect the trade secrets (and other intellectual property) from the world, just from the employee and a competing business; too blunt because they are directed at people rather than the

intangible intellectual property itself, unlike other forms of intellectual property.[42] This scholar similarly asserts that non-competes may be used to protect information that could not ordinarily be protected by trade secret law, copyright law, or patent law, which would interfere with "the effort in the [intellectual property] regimes to work toward a balance [between protection and the public domain.]"[43]

In sum, based on the studies suggesting the availability of other legal mechanisms such as nondisclosure agreements, confidentiality agreements, and the Uniform Trade Secrets Act, as well as the purported inability of non-competes to adequately protect trade secrets without overreaching to cover non-protectable information and without overly restricting job mobility, one could reasonably conclude that non-competes may not be the most appropriate way in which to protect an employer's trade secrets from former employees' improper use or disclosure.

Conclusion

The question of whether non-competes should be enforceable in the employment context, particularly to protect the improper use and disclosure of trade secrets by former employees, appears to have no clear answer: employers have a legitimate interest in protecting their business assets from unfair competition by former employees and their new employers, employees have a legitimate interest in having the ability to change jobs and not be chained to a specific job as a result of knowing information they may potentially use in a new position, particularly where employer-employee contracts have fundamentally changed and job stability is no longer a guarantee; and the public has a legitimate interest in a competitive marketplace. In comparing these competing interests and attempting to balance them, researchers have begun to conclude that

despite the reasons for justifying the strict enforcement of non-competes, there may be many reasons why such enforcement may not be beneficial for employees, employers, businesses, and the economy as a whole, e.g., strict enforcement may reduce regional economic growth, innovation, and perhaps even employee performance and motivation.

When considering the use of non-competes to protect against the improper use and disclosure of trade secrets by former employees engaging in competitive activities, a number of researchers have determined that while it is understandable for employers to use non-competes as a preventative measure to avoid potential misappropriation, the non-compete is actually an ineffective tool for achieving such goals in comparison to the alternative legal mechanisms that may be used to achieve the same results. Nondisclosure agreements and confidentiality agreements which may be closely tailored to identify the specific information that is to be prohibited from use or disclosure, rather than identifying the individual who cannot use or disclose "trade secrets" to a competitor may be a better option.

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[2] Daniel P. O'Gorman, *Contract Theory and Some Realism About Employee Covenant Not to Compete Cases*, 65 SMU L. REV. 145, 185 (2012).

[3] *See* Michael J. Garrison and John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 168-69 (2008); Norman D. Bishara, "Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants Not to Compete, Trends, and Implications for Employee Mobility Policy," 13 U. PA. J. BUS. L. 751, 761 (2011); Katherine V.W. Stone, *Knowledge at Work Disputes Over the Ownership of Human Capital in the Changing*

Workplace, 34 CONN. L. REV. 721, 723 (2002); Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 578 (June 1999); On Amir and OrlyLobel, *Driving Performance: A Growth Theory of Noncompete Law*, 16 STAN. TECH. L. REV. 833, 836 (2013).

[4]*See* Garrison &Wendt,*supra* note 2, at 166-167.

[5]*See* O'Gorman, *supra* note 1. As noted in Mr. O'Gorman's work, the move toward enforcement of non-competes in the employment context was seen in nineteenth century English courts when the courts began to cite *Mitchel v. Reynolds*, aseventeenth century case which upheld a non-compete included in a contract ancillary to the sale of a business because it was "reasonable." Specifically, while there is a presumption that any restraint of trade is invalid because such agreements may cause hardship on the seller of the business resulting from an inability to earn a livelihood, cause harm to society from losing the seller's services, and enable a business to develop a monopoly, in *Mitchel*, the non-compete was reasonable because the agreement was ancillary to the sale of a business, not employment, and would result in hardship to a businessperson who wanted to retire but could not obtain an acceptable price because the buyer could not be assured the seller would not compete against him. The Court in *Mitchel* stated there may have been a difference had the non-compete been ancillary to an employment agreement, but also noted there is a distinction between "general" and "partial" restraint, the former being invalid as a matter of law. This reasonableness approach to determining the validity of a non-compete influenced much of the law in the United States as it relates to non-competes in the employment context.

[6]WILLIAM LAWRENCE CLARK, HANDBOOK OF THE LAW OF CONTRACTS 304 (2d ed. 1914).

[7] These justifications for invalidating contracts in unreasonable restraint of trade are cited in a number of cases since the late 1800s and early 1900s, including: Rakestraw v. Lanier, 104 Ga. 188, 194 (1898); Freudenthal v. Espey, 45 Colo. 488 (1909); Arthur Murray Dance Studios of Cleveland v. Witter, 105 N.E.2d 685, 62 Ohio Law Abs. 17 (Ohio Ct. Common Pleas 1952).

[8]*See* Buffkin v. Glacier Grp., 997 N.E.2d 1, 10 (Ind. Ct. App. 2013) (citing RESTATEMENT (SECOND) OF CONTRACTS § 188, cmt. g (1981) ("Post-employment restraints are scrutinized with particular care because they are often the product of unequal bargaining power and because the employee is likely to give scant attention to to the hardship he may later suffer through loss of his livelihood);Ultra Lube, Inc. v. Dave Peterson Monticello Ford-Mercury, Inc., 2002 WL 31302981, at *6 (Minn. Ct. App. Oct. 15, 2002) (The Supreme Court expressed concern about unequal bargaining power between employee and employer because "it may well be surmised that such a covenant finds its way into an employment contract not so much to protect the business as to needlessly fetter the employee, and prevent him from seeking to better his condition by securing employment with competing concerns. One who has nothing but his labor to sell, and is in urgent need of selling that, cannot well afford to raise any objection to any

of the terms in the contract of employment offered to him, so long as the wages are acceptable."); Johnstone v. Tom's Amusement Co., Inc., 228 Ga. App. 296, 299 (1997) ("The rationale behind the distinction in analyzing covenants not to compete is that a contract of employment inherently involves parties of unequal bargaining power to the textent that the result is often a contract of adhesion…");Sentry Ins. Co. v. Firnstein, 14 Mass. App. Ct. 706, 707 (1982) ("[Non-competes in the employment context] are scrutinized with particular care because they are often the product of unequal bargaining power and because the employee is likely to give scant attention to the hardship he may later suffer through the loss of his livelihood.").

[9] This is arguably consistent with Clark on Contracts, where Mr. Clark states that "[p]ublic policy requires… that the freedom of persons to enter into contracts shall not be lightly interfered with. Some restraint of trade, therefore, must be permitted, [but the agreement] must not be unreasonable." CLARK, *supra* note 5, at 305.

[10]*Id.*

[11]*Id.* (citing Horner v. Graves, 7 Bing. 735, 131 Eng. Rep. 284 (1831)).

[12]*See* Garrison & Wendt, *supra* note 2. (noting the expansion of enforcing non-competes where the alleged employer's interests related to generalized training rather than solely unique or specialized skills in certain jurisdictions, as well as the move to reformation and modification of non-competes in certain jurisdictions which allow the courts to modify non-competes in order to make them reasonable, rather than striking the non-compete as invalid as a whole.).

[13]Bishara, *supra* note 2. Bishara notes that on a spectrum of weak to strong enforcement of non-competes, 96% of states (forty-nine states and the District of Columbia) allow some type of non-compete enforcement, with 12 states (20%) strongly enforcing non-competes, such as Florida and New Mexico, nine states (18%) weakly enforcing non-competes, such as Arkansas and Alaska, and thirty states (60%) moderately enforcing non-competes.

[14] There are also states which will typically not enforce non-competes except under limited circumstances, such as the exception in Colorado where a non-compete will only be enforced if it applies to executive and management personnel and employees who constitute professional staff to executive and management personnel, as well as to any contractual provision providing for recovery of the expense of educating and training an employee who has served an employer for a period of less than two years. C.R.S. § 8-2-113(2)(c)-(d), (2013).

[15] These exceptions generally include restrictions on employment choice related to the sale of the goodwill of a business and partnership dissolution.

[16]While California will not ordinarily enforce non-competes in the employment context, if a non-compete is necessary to protect the employer's trade secrets, Section 16600 will

not invalidate such non-compete.*See* Loral Corp. v. Moyes, 174 Cal. App. 3d 268, 276 (1985); D'sa v. Playhut, Inc., 85 Cal. App. 4th 927, 934 (2000);Muggill v. Reuben H. Donnelley Corp., 62 Cal. 2d 239, 242 (1965).

[17] In California, for example, where non-competes are banned from use in the employment context, employers are forced to work collaboratively with employees in order to avoid the spread of business information upon termination, such as by providing equity compensation to ensure employee loyalty. In the event that an employee leaves a firm for a competitor, the former employer may seek injunctive relief or damages for the disclosure of trade secrets that may arise as a result of the employment. *See* Richard A. Booth, *Hurd on the Street?*THE NATIONAL LAW JOURNAL (Oct. 25, 2010), available at http://www.nationallawjournal.com/id=1202473700488?slreturn=20140116104553#.

[18] Garrison & Wendt, *supra* note 2, at 166-167.

[19] Katherine V.W. Stone, *Knowledge at Work Disputes Over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721, 733 (2002).

[20]*Id.*

[21] Garrison & Wendt, *supra* note 2, at 115.

[22]*See* April Franco and Matthew Mitchell, *Covenants Not to Compete, Labor Mobility and Industry Dynamics*, 44 – 46 (Mar. 21, 2005), available at http://www.lse.ac.uk/fmg/research/RICAFE/pdf/Franco_April.pdf); *see also*Booth, *supra* note 16 (California law against non-competes is good for business, particularly the technology business, as it seemed to have led to the rise of Silicon Valley and increased innovation by allowing information sharing that would otherwise not have been possible; further, without the restrictions of non-competes, employees are free to leave less productive companies whenever they so choose, which helps to create a more efficient marketplace and allows the best employees to be hired by the best businesses.); Matt Marx and Lee Fleming, *Non-compete Agreements: Barriers to Entry… and Exit?*, 12 INNOVATION POLICY AND THE ECONOMY 39 – 64 (2011), available at http://funginstitute.berkeley.edu/sites/default/files/Non-compete%20agreements%20barriers%20to%20exit.pdf.

[23] Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 578 (June 1999).

[24] According to a study completed by researchers Sampsa Samila and Olav Sorensen, the findings relating to venture capital within a region is an early indicator regarding regional productivity. The researchers acknowledged however that the impact of venture capital on an industry is only one component of research and development investments, and that venture capital may be more concerned with creating wealth in a

small number of firms rather than creating more jobs and firms. Even with these caveats in mind, the researchers still concluded that such indicators do not appear to support the enforcement of non-competes. Sampsa Samila and Olav Sorensen, *Non-compete Covenants: Incentives to Innovate or Impediments to Growth*, Danish Research Unit for Industrial Dynamics Working Paper No. 10-02, (2011), available at http://www3.druid.dk/wp/20100002.pdf.

[25]*See* Marx &Fleming,*supra* note 21, at 20.

[26] Matt Marx, Jasjit Singh, and Lee Fleming, *Regional Disadvantage? Non-compete Agreements and Brain Drain*, p. 19 (2012), available at http://www.iga.ucdavis.edu/Research/All-UC/conferences/berkeley-2012/fleming-paper-1. *See also* Matt Marx, Deborah Strumsky, and Lee Fleming, *Mobility, Skills, and the Michigan Non-Compete Experiment*, 55MGMT. SCI. 875(2009) (finding that "[t]he job mobility of inventors in Michigan fell 8.1% following the policy reversal compared to inventors in other states that continued to proscribe non-competes, and these effects were amplified for those with particular characteristics"), available at http://funginstitute.berkeley.edu/sites/default/files/Mobility,%20Skills,%20and%20the%20Michigan%20Non-compete%20Experiment.pdf; Matt Marx, Deborah Strumsky, and Lee Fleming, *Noncompetes and Inventor Mobility: Specialists, Stars, and the Michigan Experiment*, Working Paper No. 07-042 (2007), available at http://www.hbs.edu/faculty/Publication%20Files/07-042.pdf.

[27]*Id.* As a further example, without the restrictions of non-competes, employees are free to leave less productive companies whenever they choose to do so, which helps create a more efficient marketplace and allows the best employees to be hired by the best businesses. *See* Booth,*supra* note 16.

[28]*Id.*

[29]Mark J. Germaise,*Ties that Truly Bind: Non-Competition Agreements, Executive Compensation and Firm Investment* (2009), available at http://personal.anderson.ucla.edu/mark.garmaise/noncomp7.pdf.

[30]*Id.*

[31]Garrison & Wendt, *surpa*note 2, at 168.

[32]*Id.* at 169-70.*See also* Viva R. Moffat, *Making Non-Competes Unenforceable*, 54 ARIZ. L. REV. 939, 979 (2012);AnnaLeeSaxenian, *Regional Advantage: Culture and Competition in Silicon Valley and Route 128*, Cambridge, Massachusetts: Harvard University Press (1994).

[33] Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Non-Competition Agreements*, 52 WM. & MARY L. REV. 873, 911 and n. 150 (2011).

[34] On Amir and OrlyLobel, *How Noncompetes Stifle Performance*, HARVARD BUS. REV., Jan.–Feb. 2014, at 26, available at http://hbr.org/2014/01/how-noncompetes-stifle-performance/ar/1,

[35]*See* Amir &Lobel, *supra* note 2.

[36] Edward T. Ellis, *Non-Competition Agreements and Protection of Trade Secrets*, American Law Institute – American Bar Association Continuing Legal Education, Current Developments in Employment Law, CV001 ALI-ABA 1097, 1101 (2013).

[37]*Id.*

[38]*See* Randy Burton, Esq., Sam Johnson, Esq., and Cara Burton, Esq., *The Sound of Inevitability: The Doctrine of Inevitable Disclosure of Trade Secrets Comes to Texas*, 44 SPG TEX. J. BUS. L. 103, 123 (2012) (Arguing that once trade secrets have been disclosed, the secrecy may be lost and the damage irreversible, thus it is better off to have preventative measures such as non-competes to help protect against the misappropriation of trade secrets, rather than resorting to litigation).

[39] Garrison & Wendt, *supra* note 2, at 117.

[40]*Id.*at 116. The authors point out that former employees are still under a continuing fiduciary duty not to disclose or use trade secrets of their prior employer, though it is unclear how much this fiduciary duty actually deters employees from disclosing or using trade secrets. The authors also suggest the use of nondisclosure and confidentiality agreements specifying the proprietary business information that is required to remain confidential in lieu of non-competes. Further, injunctive relief may be sought to prevent the misappropriation of trade secrets or threat thereof under the Uniform Trade Secrets Act or similar state law. The authors also raised the controversial topic of "inevitable disclosure," which has been recognized in certain jurisdictions and rejected in others, under which a court could prevent an employee from working for a competitor if the disclosure of trade secrets will be virtually certain based on the knowledge base of the former employee and the position the employee secured with the competitor. *See also* Moffat,*supra* note 33, at 980.

[41]*Id.* at 178.

[42] Moffat, *supra* note 33at 980.

[43]*Id.*