Franchise Noncompetes: Their Legal Effect, Practical Impact, and Superior Alternatives

Robert W. Emerson*

Post-term noncompete covenants are pervasive for employment and franchise agreements in the United States. While franchisors have legitimate business interests to be protected by restraints on the post-term competition of former franchisees, these covenants are unduly burdensome on those bound by them and thus are sometimes declared void, left unenforced, or reduced in scope. In some cases, even noncompetes that courts would not enforce nevertheless burden franchisees because of their in terrorem *effect.*

This Article outlines the arguments for and against including post-term noncompete covenants in franchise agreements. It addresses different state-law approaches to regulating the enforcement of noncompete covenants, as well as how noncompetes could be impacted by a nationwide per se ban of these covenants in the employment context. Finally, the Article evaluates potential solutions to the noncompete problem that would result in greater equity for franchisees. It looks to the treatment of franchise noncompetes in other countries, and it considers alternatives such as nondisclosure agreements, intellectual property rights, training repayment agreements, rights to repurchase assets, and other incentivization techniques. Given the numerous, focused, effective, and lawful alternatives to post-term noncompete covenants and the great burden that these covenants impose on franchisees, the post-term franchise noncompete should be considered against the public interest and thus declared unenforceable.

* Huber Hurst Prof. of Business Law, Univ. of Florida. J.D., Harvard Law School. Special thanks for comments from participants at the Annual Hurst Research Seminar in Legal Studies (U. Florida, Jan. 2024) and at the International Society of Franchising's Annual Conference (Babson College, in Boston, June 2024).

INTRODUCTION

A. Noncompete Covenants

The right to work in one's chosen field is deeply rooted in the American legal tradition.[1] Despite the immense value society has historically placed on this freedom, many workers today agree to contractual limitations on this freedom in exchange for certain work or business opportunities. In particular, they often agree to noncompete agreements, and the common law has long recognized and often upheld these covenants against competition.[2]

Noncompete covenants are restrictive covenants that franchisors and employers frequently include in franchise and employment agreements. In the franchise context, these covenants restrict a franchisee's ability to start or join a competing business at the same time they are operating their franchised unit or within a certain amount of time after the termination of the franchise relationship. Franchisors include these provisions in franchise agreements to protect their investment in training a franchisee, as the restrictive covenant

1. *See* J. A. Leo Lemay, *Causes of the American Discontents Before 1768*, *in* BENJAMIN FRANKLIN: WRITINGS 607, 613 (J. A. Leo Lemay ed., 1987) ("There cannot be a stronger natural right than that of a man's making the best profit he can of the natural produce of his lands."); *see also* CONG. GLOBE, 42d Cong., 1st Sess. App. 86 (1871) (statement of Rep. Bingham) ("[O]ur own American constitutional liberty . . . is the liberty . . . to work an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellowmen, and to be secure in the enjoyment of the fruits of your toil."); Truax v. Raich, 239 U.S. 33, 41 (1915) ("[T]he right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.").

2. Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 629–37 (1960).

prevents franchisees from obtaining a franchisor's "know-how" and then using this information to start a competing enterprise. There are two recognized types of noncompete covenants: in-agreement and post-agreement, or—perhaps more precisely—post-term.[3] In-agreement covenants apply during the franchisor and franchisee's relationship.[4] Post-term covenants operate after the parties' relationship has terminated or expired.[5] Both in-agreement and post-agreement covenants must be reasonable and necessary to be enforceable, but courts generally have applied less scrutiny in evaluating the reasonableness of in-agreement covenants. Courts have held that in-agreement covenants in franchise agreements are generally reasonable and valid because they have a "just and honest purpose" and are "not injurious to the public."[6] This Article will focus on post-term noncompete covenants due to the ongoing debate over their use in employment and franchising agreements.

B. The Scope of the Article

This Article examines the current usage of noncompete covenants within U.S. franchise systems and how these covenants can increase the potential for abuse and inequality in the franchisee-franchisor relationship. It begins by addressing the conflict between the franchisor's need to use noncompete covenants to protect its business interests and these covenants' infringement on the franchisee's freedom to pursue a career and earn a living. It will also address the *in terrorem* effect, which induces franchisees to comply with noncompete agreements even if the noncompete would not be upheld if challenged in court. This effect mainly works on franchisees with fewer resources because the threat of litigation is a daunting burden to their viability. The Article will then survey how current state law attempts to balance these competing interests. Finally, this Article will discuss proposed regulations and alternatives to noncompete covenants that can be utilized by franchisors in hopes that a more equitable solution may be achieved. Given the burdens noncompete covenants impose on franchisees and the abundance of less restrictive alternatives available to franchisors, the best solution may be to render these covenants completely unenforceable.

---

3. W. MICHAEL GARNER, FRANCHISE AND DISTRIBUTION LAW AND PRACTICE § 3:40 (2024). Throughout this Article, I use the word, "post-term," when speaking of the application of franchise covenants against competition (noncompetes) with respect to former franchisees. In effect, these noncompetes are intended to reach a franchisee after that person's franchise has ended. Insofar as the franchise agreement may still operate in some ways, post-termination of the franchise (e.g., concerning the return of properties from one party to another, and the right to payments or an adjustment of payments, such as fees or royalties still due under the franchise agreement). *See* Adrian K. Felix & Andra Terrell, *Navigating the Post-Term Franchisor-Franchisee Relationship*, 25 FRANCHISE LAW., no. 1, 2022, at 11, 13–14 (discussing post-term contractual rights). "Post-term" may be more precise, although "post-agreement" or similar terms are often used when discussing noncompetes. For the purpose of analysis, the terms are treated as interchangeable.

4. GARNER, *supra* note 3, § 3:40.

5. *Id.*

6. *See* Peter J. Klarfeld & Mark S. VanderBroek, *Law on Covenants Against Competition Shifts Towards Greater Enforceability by Franchisors*, 31 FRANCHISE L.J. 76 (2011); Adcome Express, Inc. v. EPK, Inc., No. C6-95-2128, 1996 WL 266412, at *10 (Minn. App. May 21, 1996) ("A noncompete covenant that 'is for a just and honest purpose, for the protection of a legitimate interest of the party is whose favor it is imposed, reasonable as between the parties, and not injurious to the public,' is generally held valid despite the public policy disfavoring restraints on trade." (quoting Bennet v. Storz Broad. Co., 134 N.W.2d 892, 898–99 (Minn. 1965))).

I. THE IMPACT OF NONCOMPETE CLAUSES

National surveys have found that nearly 20% of the American workforce is bound to noncompete covenants for their current occupations.[7] Certainly, a much larger percentage of employers must have noncompetes, even if they may only apply them to some of their workforce.[8] Also, some employees fail to recognize the presence of a noncompete. These persons are unsure whether their employer uses noncompetes and whether they (the individual employee) agreed to a noncompete.[9] In fact, many workers have admitted that it was only sometime after they had signed a noncompete that they realized they had done so.[10]

Indeed, an estimated 38% of U.S. workers have been covered by a noncompete at some point in their careers.[11] Four states, California, Minnesota, North Dakota, and Oklahoma have outright banned noncompete covenants in employment,[12] and most other states (35 of them) have enacted statutory restrictions. These restrictions include limits on their length of time or their coverage in some industries (e.g., health care), and nine of these states (Colorado, Illinois, Maine, Maryland, New Hampshire, Oregon, Rhode Island, Vir-

7. U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-103785, NONCOMPETE AGREEMENTS: USE IS WIDESPREAD TO PROTECT BUSINESS' STATED INTERESTS, RESTRICTS JOB MOBILITY, AND MAY AFFECT WAGES 4–5 (2023) (citing Donna Rothstein and Evan Starr, *Noncompete Agreements, Bargaining, and Wages: Evidence from the National Longitudinal Survey of Youth 1997*, U.S. BUREAU OF LAB. STAT.: MONTHLY LAB. REV. (June 2022), https://www.bls.gov/opub/mlr/2022/article/noncompete-agreements-bargaining-and-wages-evidence-from-the-national-longitudinal-survey-of-youth-1997.htm [https://perma.cc/6PFL-ZDQV], and thus reporting statistics for a final sample of 3090 respondents aged 32 to 38 when surveyed in 2017–18). The GAO report also cited Evan P. Starr, J.J. Prescott & Norman D. Bishara, *Noncompete Agreements in the U.S. Labor Force*, 64 J.L. & ECON. 53 (2021) (analyzing a 2014 survey of 11,505 respondents). The Starr, Prescott, and Bishara study calculated that 19.9% of the respondents were operating under a current noncompete and noted that this figure is similar to the findings in more recent studies involving two 2017 surveys of 795 respondents and 2000 respondents published in 2018 and 2017, respectively. *Id.*

8. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 7, at 6 (noting that 55.4% of 446 private sector employers responding to the GAO's survey reported that at least some of their workers had NCAs [noncompete agreements]; further finding that this percentage remained above 52% for all surveyed employer groups with 20 or more workers, and it was still 40.7% of the smaller employers (those with under 20 employees) who used NCAs for at least some workers). GAO's employer survey also found that different types of workers are required to sign NCAs, including executives and hourly workers. For example, over half (55.3%) of surveyed employers stated that they required all hourly workers to sign NCAs, while another 17.1% required some of their hourly workers to sign NCAs. *Id.* at 8.

9. Starr, Prescott & Bishara, *supra* note 7, at 60 (noting that, of the 11,505 respondents answering whether they had ever agreed to a noncompete, "29.7% [reported] maybe, where the maybe category includes those who have never heard of a noncompete (24.8%), do not know if they have one (2.2%), do not want to say (0.23%), and cannot remember (2.5%)").

10. Starr, Prescott & Bishara, *supra* note 7, at 60 (reporting that among those surveyed workers who answered that they had entered into a noncompete agreement, 8.8% also acknowledged that they had "unknowingly signed at least one such provision that they discovered only at some later date").

11. *Id.* at 55, 58, 60 (drawing on their 2014 survey of 11,505 respondents "from all states, industries, occupations, and other demographic categories," the authors' weighted estimates indicated that "38.1 percent of US labor force participants have agreed to a noncompete at some point in their lives").

12. CAL. BUS. & PROF. CODE § 16600 (West 2024); MINN. STAT. § 181.988 (2024); N.D. CENT. CODE § 9-08-06 (2024); OKLA. STAT. tit. 15, § 217 (2024).

ginia, and Washington) bar noncompetes on employees earning below a set level of compensation.[13] Only eight states—Alaska, Kansas, Mississippi, Nebraska, Ohio, South Carolina, West Virginia, and Wyoming—have no statute restricting noncompetes, while two other states simply have statutes allowing covenants to protect "reasonable competitive business interests" (Michigan) or calling for the covenants to be "reasonably necessary" to protect a legitimate business interest (Wisconsin), and one state's statute (North Carolina's) simply provides that a noncompete agreement must be in writing.[14] There is less precise data available for the prevalence of noncompete covenants in franchising, though surveys suggest franchise agreements have commonly included such a provision as well.[15] On the one hand, the extraordinary prevalence of noncompete covenants suggests that franchisors have good reason to include them in their agreements with prospective franchisees.[16] On the other hand, abuse of these provisions has the potential to harm the large percentage of industry participants bound by them. Recent studies suggest that employees experience lower career mobility and wages over the long term in states that allow the enforcement of noncompete clauses in employment contracts.[17]

A. The Franchisor Perspective

In exchange for franchise fees and royalties, franchisors provide numerous benefits to their franchisees, including access to a recognized brand name, marketing and promotional

13. *State Noncompete Law Tracker Analysis*, ECON. INNOVATION GRP. (Oct. 11, 2024), https://eig.org/state-noncompete-map/ [https://perma.cc/9YAV-XFGE]; Press Release, FTC, FTC Announces Rule Banning Noncompetes (Apr. 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes [https://perma.cc/44CA-PLM4]. Statutory limits on noncompetes are further discussed *infra* notes 102-107 and accompanying text.

14. *State Noncompete Law Tracker Analysis*, *supra* note 13.

15. Andrew Elmore & Kati L. Griffith, *Franchisor Power as Employment Control*, 109 CALIF. L. REV. 1317, 1343 (2021) (examining 44 franchise contracts and finding that 38 of them had post-term restrictions on franchisee competition); Robert W. Emerson, *Franchising Covenants Against Competition*, 80 IOWA L. REV. 1049, 1051 n.5 (1995) (citing a 1971 study indicating that about two-thirds of all franchise agreements contained a noncompete clause; and referring to the author's own 1993 study of 100 franchise agreements, with 98 having post-term noncompetes).

16. Indeed, other recent studies besides those already discussed indicate that post-term noncompetes in franchising are close to universal. The author's survey of 200 franchise agreements in 2023 found that 98.5% restricted the franchisee's post-term competition; moreover, 89% of the agreements barred post-term competition not just against the franchisor but specifically against any other franchisee in the system (and sometimes even against planned franchises not yet operating). This survey is on file with author. *See also* Robert W. Emerson, *Franchise Contract Interpretation: A Two-Standard Approach*, 2013 MICH. ST. L. REV. 641, 699 (stating that 98 of 100 franchise agreements reviewed in 2013 had post-term noncompete clauses restricting the franchisee).

17. *See* Starr, Prescott & Bishara, *supra* note 7; *see also* Natarajan Balasubramanian et al., *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers*, 57 J. HUM. RES. (SPECIAL ISSUE) S349, S369–70 (2022). *See also* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 7 (discussing, *inter alia*, the type of workers, the factors influencing employers' and employees' decisions to enter into noncompetes, the effects of those noncompetes, and the states' attempts to regulate noncompetes, this wide-ranging report issued in May 2023 looked at 31 studies on the prevalence and economic effects of noncompetes; besides reviewing federal laws and interviewing stakeholders such as worker advocates, employer groups, and researchers, the GAO conducted its own surveys of private sector employers on why they use and enforce noncompetes (446 employers responded), and of state attorney general offices about their state statutes on noncompetes (25 states and the District of Columbia responded)).

materials, development assistance, and general support.[18] Essentially, buying a franchise provides an entrepreneur with the opportunity to take over a proven business backed by the support of the franchisor and the franchise system.[19]

Part of the value of this system is the training the franchisor provides to the franchisee. This training may vary with respect to intensity and content across franchise brands, but it generally involves the franchisor revealing their "know-how" to franchisees and teaching them how to successfully operate within the franchisor's brand system. For example, McDonald's requires prospective franchisees to complete roughly two weeks' worth of training, including attending classes at "Hamburger University," before they can purchase a franchise location.[20] McDonald's also provides another 12–18 months of part-time training in a restaurant to new franchisees.[21] This intensive training is necessary to ensure that franchisors equip franchisees to deliver the iconic McDonald's experience that diners around the world expect.

Given that many large franchise brands have carefully developed business models that appeal to customers around the United States or internationally, the skills conveyed to the franchisee through this training can be highly valuable. After receiving this training and operating a franchised unit under the supervision of the franchisor, franchisees likely have the baseline skills necessary to operate their own similar business.[22] Accordingly, franchisors use noncompete agreements to keep franchisees from quickly turning around and applying their acquired skills to a competing enterprise. These provisions allow franchisors to protect their investment in a franchisee's growth and development.

Further, employers and franchisors own trade secrets—valuable intellectual property such as a "formula, pattern, device, or compilation of information which one uses for one's business and which allows that person to obtain an advantage over competitors who do not know or use it."[23] Some direct examples of trade secrets in the franchise context include

18. *What is a Franchise?*, INT'L FRANCHISE ASS'N, https://www.franchise.org/faqs/basics/what-is-a-franchise [https://perma.cc/K3GX-8H86].

19. *Id.*

20. MCDONALD'S USA LLC, FRANCHISE DISCLOSURE DOCUMENT 26–29 (2024), https://www.restfinance.com/app/pdf/fdd/Mcdonalds-2023.pdf [https://perma.cc/QZN8-65X4] (dealing with training, in Franchise Disclosure Document (FDD) Item 11 "Franchisor's Assistance, Advertising, Computer Systems, and Training").

21. *World Class Franchise Training Program*, MCDONALD'S, https://www.mcdonalds.com/us/en-us/about-us/franchising/training-services.html [https://perma.cc/V8TU-VK4L].

22. Franchisors ordinarily provide training of their franchisees, require that franchisees pay for the training, and may continue to train, and collect the related fees, from the start of the franchise to the end thereof. *See* Emerson, *supra* note 16, at 691–92 (indicating that, in 2013, 100% of a reviewed 100 franchise agreements provided that there would be franchisor training of the franchisee, with 67% of the agreements expressly stating that the training would be at the franchisee's expense, and 94% of the agreements declaring that the franchisor would perform consulting services for the franchisee after the initial training). Note that the 2013 figures represented a significant increase in clauses explicitly asserting that the training expenses were to be borne by the franchisee (up from 43% in 1993) and the continuing training consultations declaration (up from 59% in 1993). *Id.* This deep, contractually secured franchisor involvement in training, often at the franchisee's expense and throughout the duration of the franchise, remains a key term in franchise agreements, per the author's survey of 200 franchise agreements in 2023 (98.5%, 35%, and 85%, respectively, expressly providing for training, at the franchisee's expense, with continuing consultations).

23. RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (AM. L. INST. 1939).

customer lists, business plans, pricing techniques, and recipes.[24] Essentially, this information gives a business its competitive advantage in the marketplace, which necessitates its secrecy. Since franchisees are typically granted access to these secrets during their franchise agreement, the franchisor understandably has a strong interest in ensuring the franchisee does not later reveal these secrets to a competitor. While nondisclosure agreements and other legal mechanisms exist and are commonly used to protect trade secrets, one weakness of those arrangements is that they often cannot be enforced until a franchisee has committed a violation.[25] Franchisors use post-term noncompete agreements as an additional defense, preemptively guarding against a competitor gaining access to this information.[26] By preventing a competing enterprise from hiring a former franchisee immediately following the termination of the franchise agreement, franchisors prevent a competitor from bringing in a franchisee to gain access to their knowledge of franchisor trade secrets.

Additionally, there is goodwill associated with a franchise location, generated by repeat customers who had positive experiences at that business.[27] When the franchise term ends, the franchisor is interested in preserving the goodwill associated with that location. This interest is generally why noncompetes define geographic regions.[28]

Some courts have analogized the issuance of a franchise to the sale of a business, where the franchisor conveys the benefit of the system's goodwill to the franchisee during the franchise's existence.[29] *Sylvan Learning, Inc. v. Gulf Coast Education Inc.* provides an example of a former franchisee benefiting from a franchisor's goodwill.[30] In this case, the

---

24. PRACTICE GUIDES: FRANCHISE 72–73 (Philip F. Zeidman ed., 2019).

25. For example, an employer may obtain an injunction against a former employer using the employer's trade secrets, but this relief is not available until the former employee has misappropriated the trade secret in some way. *See* R. Mark Halligan, *Remedies for Trade Secret Misappropriation*, REUTERS (May 8, 2023), https://www.reuters.com/legal/legalindustry/remedies-trade-secret-misappropriation-2023-05-08/ (on file with the *Journal of Corporation Law*).

26. PRACTICE GUIDES: FRANCHISE, *supra* note 24, at 76–78.

27. *See* Jeffrey H. Wolf & Amy Heiserman, *Goodwill Hunting: The Challenges in Proving Harm to Franchisor Goodwill in Termination-Related Disputes*, 41 FRANCHISE L.J. 231, 232–33 (2021) (noting that commentators and courts have defined goodwill, in the franchising context, as going beyond simply the generation of repeat business but also including brand (trademark) recognition; concluding, "[a]lthough the precise legal definition somewhat varies by source, the consensus is that goodwill reflects the intangibles of a business that make customers want to come back").

28. Since noncompete agreements' geographical restrictions are meant to protect the legitimate business interests of the company but may not be any greater than necessary to provide that protection, the reasonableness zone will depend on what region the franchisor's business is in. *Non-Compete Geographic Boundaries*, HENDERSHOT COWART P.C., https://www.hchlawyers.com/business-law/contract-law/non-compete-agreements/non-compete-geographic-boundaries/ [https://perma.cc/S4Q2-SY7U]. Thus, a court may find that a noncompete agreement may reasonably be larger in a geographic region like Gainesville, Florida, because of the smaller number of businesses and further reach, than in a densely populated area like Manhattan, where a franchisor's business would only attract people in a much closer proximity. *See, e.g.*, Soft Pretzel Franchise Sys. v. Taralli, Inc., No. 13-3790, 2013 WL 5525015, at *8 (E.D. Pa. Oct. 4, 2013) (holding that a ten-mile geographic restriction in a noncompete agreement in Philadelphia that kept the franchisee from selling soft pretzels similar to the franchisor's was reasonable because ten miles was the approximate distance a franchisor was willing to travel for the pretzels).

29. Jess A. Dance & William W. Sentell, *Turning an (Occasional) Blind Eye: Selective Enforcement of Franchisee Post-Term Non-Compete Covenants*, 37 FRANCHISE L.J. 245, 248 (2017).

30. Sylvan Learning, Inc. v. Gulf Coast Educ., Inc., No. 10-CV-450, 2010 WL 3943643, at *6 (M.D. Ala. Oct. 6, 2010).

defendant ex-franchisee, Gulf Coast Education, opened a new learning center, which violated Sylvan's noncompete covenant because the business used the same operating methods, location, and clients.[31] The court found that Gulf Coast's new learning center would injure Sylvan's franchise.[32] Specifically, the former Sylvan franchise was synonymous with the new business, and the goodwill of the Sylvan franchise allowed Gulf Coast's new business to succeed.[33] Thus, it would be improper to let the former franchisee profit from the franchisor's conveyed goodwill that was meant specifically for the franchise agreement.

This case likely represents a situation when enforcing a noncompete agreement was reasonable because the franchisee had intimate knowledge of the Sylvan methods and student lesson plans, had continued contact with the former students, and continued to operate the new store in the same location, using the same sign, logos, telephone number, and materials as the franchisee had with Sylvan.[34]

As seen here, courts view unfavorably a former franchisee who improperly benefits from a franchisor's goodwill. This disfavor might arise because courts consider goodwill an asset earned through customer loyalty.[35] Along the same lines, this goodwill should transfer back to the franchisor when a franchise terminates.[36] Because a franchisee is the face of the franchise system in the relevant market, customers can become confused when a former franchisee suddenly offers similar products or services under a different name.[37] Another example of this concept is in *Quizno's Corp. v. Kampendahl*, in which a former Quizno's franchisee, Robert Kampendahl, opened Bob's Deli in the same building as his previous Quizno's restaurant.[38] Bob's Deli was similar to Quizno's and used the same or similar menus, signs, and ingredients.[39] The court held that there was a breach of a valid noncompete agreement.[40] The court found that Quizno's suffered irreparable harm because Bob's Deli became associated with Quizno's.[41] This association could cause a loss of goodwill and market presence if the new business continued to operate.[42]

Similar concerns exist when a franchisor decides to sell a franchised unit to a new franchisee after the conclusion of an agreement with a former franchisee. A former franchisee who opens a competing business may deter a prospective franchisee from entering

---

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 15.

35. Robert W. Emerson, *Franchise Goodwill: Take a Sad Song and Make It Better*, 46 U. MICH. J.L. REFORM 349, 353 (2013).

36. *See* Jiffy Lube Int'l, Inc. v. Weiss Bros., Inc., 834 F. Supp. 683, 691 (D.N.J. 1993).

37. *See id.* (quoting Quizno's Corp. v. Kampendahl, No. 01 C 6433, 2002 WL 1012997, at *7 (N.D. Ill. May 20, 2002) (granting a franchisor an injunction against a former franchisee and finding "enforcement of the non-compete covenant is essential to allow time for the public to stop associating [the competing business] with Quizno's")); *but see* 7-Eleven v. Grewal, 60 F. Supp. 3d 272, 283 (D. Mass. 2014) (declining to award injunction enforcing noncompete covenant when "[c]ustomers would have no reason to associate Defendants' convenience store with the 7-Eleven brand after 7-Eleven's marks are removed from the premises").

38. *Quizno's Corp.*, 2002 WL 1012997, at *2.

39. *Id.* In this case, franchisee Robert Kampendahl clearly acted in bad faith. Presumably, most franchisees proceed in good faith.

40. *Id.*

41. *Id.* at *7.

42. *Id.*

the existing market. In *NaturaLawn of America., Inc. v. West Group., LLC*, the court held that if a former franchisee operated a competing business, it would permanently shut the franchisor out of the market.[43] One can argue that a franchisor, already having built goodwill in an area, has a right to keep benefiting from such goodwill.[44]

Finally, and perhaps most critically, noncompete clauses protect the franchise system itself. When a current or former franchisee enters into a competing venture, that party competes not only with the franchisor's business but with the other franchisees in the system as well.[45] As stated by the Supreme Judicial Court of Massachusetts, part of the consideration granted to a franchisee under a franchise agreement is "protection from competition from former . . . franchisees under the terms of the very covenant not to compete he now challenges."[46] A post-term noncompete provision may present a roadblock to a former franchisee's pursuit of subsequent business ventures. However, all ex-franchisees of that franchise system are in a similar posture, facing post-term limitations; and, in the meantime, while still a franchisee (i.e., as long as they continue to own and operate their franchises), each franchisee has ownership interests that are protected. Through the use of noncompete provisions, the goodwill of new and existing franchises is preserved, and the value of each franchisee's investment is protected.[47]

Because of these strong business interests, some insist that noncompete clauses in employment and franchise agreements are necessary to encourage business investment, thereby creating more opportunities for workers and entrepreneurs alike. While the data

43. NaturaLawn of Am., Inc. v. West Grp., LLC, 484 F. Supp. 2d 392, 402 (D. Md. 2007).

44. Dance & Sentell, *supra* note 29, at 248. Although some see the franchisor as having the right to this goodwill, the franchisor already has a leg up on the franchisee because the franchisor appears to have the advantage "both coming and going," as persons buy a franchise and, as said persons exit franchising. *Id.* With that, basic fairness issues arise. The franchisor controls so much of what the prospective franchisee can learn or do while pursuing a franchisee. Michael Seid, *The Relationship Between Franchisor and Franchisee*, MSA WORLDWIDE, https://www.msaworldwide.com/blog/the_relationship_between_franchisor_and_franchisee/ [https://perma.cc/CZJ4-F2ZN] (explaining how franchisors control the franchisee upon entrance into the business by teaching the franchisee how to operate and setting the bounds for the business). The franchisor likewise has much power to terminate or at least threaten to terminate franchisees for failure to comply with all material terms of the franchise agreement. Kevin Kilcommons, *Franchise Termination: When and How to End a Franchise Relationship*, KILCOMMONS LAW, P.C. (May 15, 2023), https://kilcommonslaw.com/business/franchise-termination-when-and-how-to-end-a-franchise-relationship/ [https://perma.cc/TQ6B-FB8S] (explaining how a franchisor has control over the tail end of a franchise relationship because the franchisor can choose when to terminate the agreement based on things like material breach or change in industry. Thus, there is an argument that the franchisee should be entitled to some of this goodwill).

45. This inter-franchisee competition can extend to all franchisees in the system, such as a location proximate to the franchisor's or other franchisees' business, not just those franchisees who are nearby. Thomas J. Kent, Jr., *How Abolishment of Non-Compete Agreements Would Impact the Franchise Model*, SAXTON & STUMP (Mar. 29, 2023), https://www.saxtonstump.com/news-and-insights/how-abolishment-of-non-compete-agreements-would-impact-the-franchise-model/ [https://perma.cc/K48T-85AM] (describing how noncompete agreements protect each individual franchisee in the system).

46. Boulanger v. Dunkin' Donuts, Inc., 815 N.E.2d 572, 578 (Mass. 2004).

47. *See* Rita's Water Ice Franchise Corp. v. DBI Inv. Corp., No. 96-306, 1996 WL 165518, at *3 (E.D. Pa. Apr. 8, 1996) (describing how the franchisor has a protectible interest in a franchise sale).

are limited, studies suggest that enforcing noncompete clauses may encourage start-up development in those states.[48] A 2021 study examining data from Michigan found that enforcing noncompete clauses corresponded with a six percent to eight percent increase in start-up job creation.[49] More research is required to draw a more definite conclusion that noncompete clause enforcement supports job creation. However, it is at least intuitively reasonable that franchisors would prefer to invest in franchisees and employees under conditions where they have more control over how their trade secrets and "know-how" are used.[50]

Given the business concerns at stake, franchisors point to the foregoing several justifications for using post-term noncompete clauses in franchise agreements. Noncompetes have been justified as a way to protect customer contacts and goodwill,[51] trade secrets or other confidential information,[52] and training.[53] Legitimate interests that can serve as the basis for an enforceable noncompete tend to involve one or more of the following interests:

(1) the hiree's (franchisee's) contacts with the hirer's (franchisor's) customers. This is protection from the hiree's appropriation of the hirer's customer contacts and "particularized knowledge" of the customers.[54]

(2) The hiree (franchisee) has accessed the hirer's (franchisor's) trade secrets or other confidential information.[55]

(3) The hiree (franchisee) has acquired experience or skills, typically through training from or arranged by the hirer.[56]

In the meantime, many states have enacted statutes, some general, but most covering a specific industry; these laws try to curtail the effect of noncompete agreements "driving skilled workers to other jurisdictions."[57] And, in all the states, a court may evaluate the reasonableness *vel non* of a noncompete's terms, the degree of fairness in each party's

48. Gerald A. Carlino, *Do Non-Compete Covenants Influence State Startup Activity? Evidence from the Michigan Experiment* (Fed. Rsrv. Bank of Phila., Working Paper No. 21-26, 2021), https://www.philadelphiafed.org/-/media/frbp/assets/working-papers/2021/wp21-26.pdf.

49. *Id.* at 28.

50. Robert W. Emerson, *Franchising Lessons in the Age of Incivility: Operations Manuals and Trade Secrets*, 29 TEX. INTELL. PROP. L.J. 305, 330 (2021) ("[F]ranchisors are interested and heavily invested in protecting the information given to prospective franchisees [] product mix reports, marketing plans, . . . customer lists, financial information, marketing and sales information, distribution techniques, recipes, and business plans. [If] a franchisee fails to protect these secrets, the franchisor will have a misappropriation claim.").

51. *See supra* notes 27–47 and accompanying text.

52. *See supra* notes 23–25, 50 and accompanying text.

53. *See supra* notes 20–22 and accompanying text.

54. Richard E. Kaye, *Cause of Action to Enforce Noncompetition Covenant in Employment Contract*, *in* 36 CAUSES OF ACTION 103, § 19 (2d ed. 2008). This basis for noncompetes—the influence upon or contacts with customers—appears to be the most litigated of the interests. Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 586 (2001).

55. Kaye, *supra* note 54, § 15.

56. C.T. Drechsler, Annotation, *Enforceability of Restrictive Covenant, Ancillary to Employment Contract, as Affected by Duration of Restriction*, 41 A.L.R.2d 15, § 13[a] (1955). When a covenant against competition is disputed, courts determine whether the hirer's purported needs "outweigh the undue oppression which would befall" the hiree. SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 13:4 (4th ed. 2022).

57. Prudential Locations, LLC v. Gagnon, 509 P.3d 1099, 1107 n.8 (Haw. 2022) (quoting 2015 Haw. Sess. Laws 158, § 1).

exercise of its powers, and—especially important given the discussion immediately above—the noncompete's *bona fides*.[58]

B. The Problem for Those Bound by Noncompetes

While franchisors have strong and legitimate reasons to incentivize franchisees to stay within the franchise system, using noncompete covenants burdens franchisees in several ways. Namely, these provisions restrict a franchisee's ability to pursue opportunities to advance their career, either by purchasing a franchise from another system or by founding their own business. If a franchisee decides not to renew their franchise agreement or to terminate early for any reason,[59] they do so with the knowledge that the noncompete may bar them from earning an income in the franchisor's industry for a year or more.[60]

One reason for concern is the broad language commonly used in these noncompete provisions. For example, consider this language that appeared in a Hardee's Franchise Disclosure document from 2022:

> Franchisee covenants and agrees that during the term of this Agreement, and for a period of 1 year following its expiration or earlier termination, Franchisee shall not, either directly or indirectly, for itself, or through, on behalf of, or in conjunction with, any person, firm, partnership, corporation, or other entity . . . . [o]wn, maintain, operate, engage in, advise, help, make loans to, or have any interest in, either directly or indirectly, any restaurant business: (i) that sells hamburgers or any menu item that comprises at least 10% of sales at System Restaurants operated by [Hardee's] or [Hardee's] Affiliates; or (ii) whose method of operation or trade dress is similar to that employed in the System. . . . Following the expiration or earlier termination of the term of this Agreement, this restriction shall apply within 2 miles of the Franchised Location and within 2 miles of any then-existing System Restaurant, except as otherwise approved in writing by [Hardee's].[61]

If a Hardee's franchisee determines to "move on" from its franchise, under the terms of the franchise agreement, the now ex-franchisee will not be allowed to engage in any sort of related work within two miles of one of Hardee's 1815 U.S. restaurants for the following year.[62]

---

58. *Id.* at 1108 (concluding that a noncompete was unenforceable against a real estate broker because it lacked "legitimate purpose").

59. As a matter of fact, a franchisee may not be the one to decide to not renew or to terminate. Even when the franchisor terminates or elects to not renew, the now ex-franchisee still is subject to the noncompete. The former franchisee, whether in that state voluntarily or absent any choice of its own, is then barred from competition. Filip De Ly, *Non-Compete Clauses in International Contracts*, 2006 INT'L BUS. L.J. 441, 445.

60. Many states will enforce a noncompete covenant with a duration of 1–3 years against a franchisee. *See infra* notes 96–102 and accompanying text.

61. HARDEE'S RESTAURANTS LLC, FRANCHISE DISCLOSURE DOCUMENT 32 (2022), https://franchisepanda.com/download-franchise-disclosure-document/5513/CB6pFWuegeSrza2jEOOjCrhUeBxMGQ5wPzv11IaSL9QX7D9aODufTZXwqFL8Q5PE (on file with the *Journal Corporation Law*).

62. *See id.*; *see also Hardee's Fact Sheet*, HARDEE'S, https://www.hardees.com/fact-sheet [https://perma.cc/4QC3-DLUT] (counting 1815 active restaurants as of 2025).

To further complicate the issue, the noncompete provision also directs former franchisees not to operate a restaurant business "that sells . . . any menu item that comprises at least 10% of sales at System Restaurants operated by [Hardee's] or [Hardee's] Affiliates."[63] Hardee's parent company is controlled by a private equity firm, and as a result, they list brands including Dunkin' Donuts, Jimmy Johns, Moe's, and Baskin' Robbins as affiliates.[64] Not only is a Hardee's franchisee barred from operating a different hamburger restaurant after the termination of their franchise agreement, but per the terms of the noncompete clause, they would also not be allowed to sell coffee, sandwiches, burritos, or ice cream. These franchisees are essentially locked out of the restaurant industry for one year following the end of their franchise agreement with Hardee's, which understandably creates a hardship for individuals who derive their livelihood from operating restaurants.

Even if state law prohibits this type of noncompete agreement from being enforced, the *in terrorem* effect—discussed below—may keep a less established franchisee from fighting the noncompete in court. Because of the prospect of costly litigation, the franchisee may decide it is easier to comply than to question the noncompete's validity.

This inequality is worsened by the fact that the franchisor is often free to compete with the franchisee during the term of the franchise agreement. In many cases, franchisors will expressly provide in the franchise agreement that that franchisee will not receive an exclusive territory.[65] This means the franchisor has the right to encroach on the franchisee's customer base by opening new franchised or franchisor-owned units nearby.[66] This allows the franchisor to increase its system revenues at the direct expense of the sales of the franchisee.[67] Further, the recent expansion of e-commerce and food delivery networks has increased this encroachment effect.[68] Franchisors and their sister brands can now sell directly to customers in the franchisee's territory, potentially taking sales from the franchisee.[69]

---

63. *See* HARDEE'S RESTAURANTS LLC, *supra* note 61, at 15.

64. *See id.*; *see also Portfolio Companies*, ROARK CAP., https://www.roarkcapital.com/portfolio [https://perma.cc/B2C8-BC4W]. This combination—barring sales of any larger (more than 10% of sales) menu item, plus a list of brands whose menu items are protected from competition—is so broad that it appears to be, perhaps, unenforceable.

65. Robert W. Emerson, *Franchise Territories: A Community Standard*, 45 WAKE FOREST L. REV. 779, 792–94 (2010). Even when there is an exclusive territory, franchisees typically experience difficulty collecting damages. Struggles include calculating reverse royalties and collecting damages even when there *are* contractual provisions to protect against encroachment. Indeed, issues with collecting damages represent yet another barrier for franchisees and reflects the inequality in franchisor-franchisee relationships. *See generally* Suh v. Pak, No. B320737, 2024 WL 768839 (Cal. Ct. App. Feb. 26, 2024).

66. *See* Emerson, *supra* note 65.

67. *Id.*

68. *See generally* James B. Egle & Isaac S. Brodkey, *Encroachment in the Era of Digital Delivery Platforms: Impact of Delivery Apps on Brick and Mortar Exclusive Territories*, 41 FRANCHISE L.J. 195 (2021). Brittany Magelssen presents a counterargument that in some instances, franchise encroachment can boost sales for the original franchisee. Brittany Magelssen, *Study Finds Roomy Benefit for Some Same-Brand Hotels in Same Area*, U. TEXAS DALLAS (July 14, 2021), https://news.utdallas.edu/business-management/hotel-brand-encroachment-2021/ [https://perma.cc/8KL9-F4F9]. Dr. Kim and Dr. Sandy Jap created a model using hotel sales data from one of the largest hotel chains from between 2007 and 2012. The authors examined "customer responses to franchise encroachment and subsequent outcomes, such as whether existing franchisee business increased or was cannibalized." *Id.*

69. *See id.*

While franchisees may have some legal remedy against this encroachment,[70] the fact remains that a franchisee's contractual obligation not to compete is often not reciprocated by the franchisor.

Noncompete covenants have become especially onerous for some franchisees in the wake of increased private equity participation in the franchising space.[71] Typically, a franchisee will buy into a given franchise with certain expectations about income potential and the general workplace experience, often based on information disclosed to them by the franchisor. However, with franchise businesses becoming a popular takeover target for large private equity firms, the franchisee may find themselves months or years into their franchise agreement and forced to deal with a new franchisor.[72] The new owner may implement vast shifts in operations to increase system-wide profits.[73] Even if these new policies end up hurting the franchisee's business or making it less enjoyable to operate, the franchisee may be forced to continue operating its franchise due to the restrictions imposed by their post-term covenant not to compete.[74]

Despite the glaring challenges that noncompetes present to franchisees, the covenants are still overwhelmingly present in franchise agreements entered into by new franchisees.[75] This is because franchisors practically force franchisees to accept a post-term noncompetition covenant due to the overwhelming disparity in bargaining power between franchisor and prospective franchisee.[76] While the franchisee-franchisor relationship is often likened to a relationship between two businesses, this is misleading.[77] Despite the rise of multi-unit franchising in recent years, single-unit operators still own nearly half of all franchised

70. *See* Emerson, *supra* note 65, at 794.

71. Lydia DePillis & Michael Corkery, *When Private Equity Came for the Toddler Gyms*, N.Y. TIMES (Jan. 28, 2023), https://www.nytimes.com/2023/01/28/business/economy/little-gym-private-equity.html (on file with the *Journal of Corporation Law*).

72. *See id.* In effect, franchisors almost always can transfer their position as franchisor to another entity while the franchisee has no ability to assign (e.g., sell) its franchise unless the franchisor approves. As usual, the franchisor holds the power in an arrangement massively favoring the franchisor over the franchisee. *See* Emerson, *supra* note 16, at 700–01 (indicating that, in 2013, 83% of a studied 100 franchise agreements gave the franchisor the right to assign the franchise agreement to another party, but 100% of these same agreements mandated that the franchisee must get the franchisor's approval before the franchisee can assign, sell, or otherwise transfer the franchise to another party). Note that the author's survey of 200 franchise agreements in 2023 found that 97% gave the franchisor the right to assign the franchise agreement to another party, up from the 83% figure in 2013, while the requirement that the franchisee obtain the franchisor's approval before selling, assigning, or otherwise transferring the franchise remained at nearly 100%, simply down from 100% in 2013 to 98% in 2023.

73. DePillis & Corkery, *supra* note 71.

74. *Id.*

75. *See* sources cited *supra* note 7.

76. David Gurnick, *Some Maxims of Franchise Law*, 42 FRANCHISE L.J. 271, 275–77 (2023); *see also*, Robert W. Emerson, *Franchising and the Parol Evidence Rule*, 50 AM. BUS. L.J. 659, 713 (2013) ("Thus likened to an adhesion contract, with the power disparity very much weighted toward the franchisor, the franchise agreement 'carries within itself the seeds of abuse.'").

77. *See* FTC Non-Compete Clause Rule, 16 C.F.R. § 910.1(f) (2023) ("[T]he relationship between a franchisor and franchisee may be more analogous to the relationship between two businesses than the relationship between an employer and a worker.").

units[78] and number well over 80% of the franchisees altogether.[79] The typical large franchisor is much more sophisticated and possesses far more resources than the average single-unit franchisee.[80] Presumably, while not as great, the disparity in power favoring the franchisor generally remains strong even when the franchisor is dealing with multi-unit franchisees.

The franchisor offers access to its proven brand system and valuable intellectual property, an exciting proposition to many prospective franchisees. Studies suggest that new franchisees are commonly biased toward optimism about the prospective success of their franchise ventures.[81] If prospective franchisees want to join that system, they are presented with a standard agreement with very little room to negotiate its terms.[82] Based on the overwhelming optimism of franchisees, many fail to even read and consider these terms and their potential impacts.[83] This "take-it-or-leave-it" offering leads franchisees interested in joining the franchisor's system to agree to noncompetition compacts and other provisions that might have undesirable consequences in the future.[84] Certainly, surveys suggest that

78. The 2022 figures indicate that multi-unit franchise owners own 53.9% of all franchised units in the United States. Steve Beagelman, *Franchising Through Multi-Unit Expansion*, FORBES (Oct. 17, 2022), https://www.forbes.com/sites/stevenbeagelman/2022/10/17/franchising-through-multi-unit-expansion/ (on file with the *Journal of Corporation Law*); *see* Darrell Johnson, *Multi-Unit Ownership Shows No Signs of Slowing Down*, *in* MULTI-UNIT FRANCHISEE 2022 BUYER'S GUIDE 3 (2022) (stating that "nearly 44,000 multi-unit operators (MUOs) in the [United States] today control more than half (53.9%) of all franchised units in the country, amounting to approximately 224,000 total units.") [hereinafter Johnson, *Multi-Unit Ownership Shows No Signs of Slowing Down*]; Darrell Johnson, *Multi-Unit Ownership Rules*, FRANDATA (May 6, 2019), https://www.frandata.com/multi-unit-ownership-rules/ [https://perma.cc/ZV8G-BBVB] (discussing the rise of multi-unit franchising); Ritwik Donde, *Multi-Unit, Multi-Brand Franchisees Are on the Rise*, FRANDATA (June 14, 2019), https://www.frandata.com/multi-franchisees-are-on-the-rise/ [https://perma.cc/8ABN-TYC7] (finding that more than 50% of all U.S. franchised units were owned by multi-unit franchisees and that the average number of units owned by a multi-unit owner had risen from under 4.8 to nearly 5.2).

79. With multi-unit franchisees numbering perhaps 50,000 and owning on average about five franchises, that means the single-unit franchisees, owning in total about 46% of the franchises, must number nearly 213,000 altogether (assuming total franchises of over 460,000).

80. *See* Emerson, *supra* note 16, at 698–701.

81. *See* Robert W. Emerson & Uri Benoliel, *Are Franchisees Well-Informed? Revisiting the Debate over Franchise Relationship Laws*, 76 ALB. L. REV. 193, 209–13 (2013) (considering the cognitive biases and informational and reasoning deficits common among franchisees); Uri Benoliel & Jenny Buchan, *Franchisees' Optimism Bias and the Inefficiency of the FTC Franchise Rule*, 13 DEPAUL BUS. & COM. L.J. 411, 414, 428, 430 (2015) (discussing potential and current franchisees often are optimistically biased towards future success; they avoid reading disclosure documents and fail to obtain informative data about future risks).

82. Rochelle B. Spandorf & Beata Krakus, *Observations on Negotiating Franchise Agreements in Today's Legal Environment*, LAW.COM (Dec. 29, 2006), https://www.lawjournalnewsletters.com/2006/12/29/observations-on-negotiating-franchise-agreements-in-todays-legal-environment/ [https://perma.cc/228P-CHRP] (noting that franchisors have little incentive to negotiate terms with prospective franchisees, and generally resist franchisee attempts to secure better terms).

83. *See* Robert W. Emerson & Steven A. Hollis, *Bound by Bias? Franchisees' Cognitive Biases*, 13 OHIO ST. BUS. L.J. 1, 16–21, 35 (2019) (explaining how franchisees, with little or no bargaining power and susceptible to deception by franchisors or their agents, often make mistakes when seeking information, undertaking negotiations, or otherwise reaching a contract: these errors often stem from anchoring, reactance, confirmation, and information biases); Benoliel & Buchan, *supra* note 81.

84. *See* Robert W. Emerson, *Transparency in Franchising*, 2021 COLUM. BUS. L. REV. 172, 197 ("Franchisees with no business experience are unlikely to be able to understand the twenty-three disclosure items that a franchisor provides in the FDD. It seems even less likely that franchisees will understand the legality of the disclosure document and whether it satisfies the Franchise Rule's requirements.").

many new franchisees fail to hire lawyers to assist them in negotiating their franchise agreements, further reducing the likelihood that a prospective franchisee will be able to opt out of such undesirable provisions.[85]

While a variety of state and federal laws exist to govern the use of noncompete agreements, one lingering cause for concern is the *in terrorem* effect these covenants can have on franchisees. This effect is observed when franchisees forgo an otherwise legal course of action out of concern for complying with the terms of their contract with the franchisor.[86] In other words, a franchisor does not need to initiate litigation against a franchisee for a noncompete agreement to be effective; the threat of litigation itself is often enough to dissuade a franchisee from taking actions that may violate the agreement. While some large, sophisticated entities own dozens of franchised units, the average franchisee is often a fairly unsophisticated entrepreneur who may own one or two units.[87] These franchisees generally lack the resources to fight litigation to enforce a noncompete agreement or pay any resulting damages. Accordingly, they adhere to the terms of the agreement.

This *in terrorem* effect opens the door for abuse of noncompetition provisions. Since the vast majority of noncompete covenants are not litigated in court, franchisors may get away with imposing mobility restrictions on their franchisees, which would otherwise be unenforceable.[88] Indeed, there is limited data that suggests employers tend to draft such unenforceable restrictions.[89] Franchisees who cannot bear the potential costs of breaking the agreement may find themselves trapped in their situation, even in cases where the terms of the agreement are too restrictive to be enforced by a court. This effect is reflected in recent data, which suggests that an employee in a state where noncompete clauses are unenforceable is just as likely to have such a clause in their employment contract as an employee in a state where they are enforceable.[90] If an employer is confident that its employees lack the sophistication to contest the imposition of a noncompete, these provisions do not even need the force of law behind them to achieve the desired effect. Merely including post-term noncompetition language in the franchise agreement is itself enough to restrict potential competition by franchisees. This adds to the difficulty in regulating the use of noncompetes and other restrictive covenants, further tipping the scales in favor of the franchisor. Any proposed solution for the noncompete covenant situation must address the *in*

85. Robert W. Emerson, *Fortune Favors the Franchisor: Survey and Analysis of the Franchisee's Decision Whether to Hire Counsel*, 51 SAN DIEGO L. REV. 709, 717 (2014) (describing a survey of franchise attorneys found that only 26.07% of franchisees were represented by counsel at the closing of a franchise agreement).

86. Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements*, 52 WM. & MARY L. REV. 873, 887–88 (2010).

87. *See* Johnson, *Multi-Unit Ownership Shows No Signs of Slowing Down, supra* note 78.

88. *Id.*; *see also* Richard P. Rita Pers. Servs. Int'l, Inc. v. Kot, 191 S.E.2d 79 (Ga. 1972) ("For every covenant that finds its way to court, there are thousands which exercise an *in terrorem* effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor, or who are anxious to maintain gentlemanly relations with their competitors.").

89. *See* Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127, 1137 (2009) (discussing a 2006 study which reviewed federal District Court rulings on requested injunctions to enforce various restrictive covenants. The study found that only 25% of covenants were enforced as written, suggesting the other 75% that came before the District Courts that year were overly broad or otherwise unreasonable).

90. *See* Starr, Prescott & Bishara, *supra* note 7, at 81.

terrorem phenomenon to be effective. Beyond making overbroad noncompetes unenforceable, the courts, legislators, and regulators could, for example, consider imposing additional disincentives on franchisors, such as by freeing ex-franchisees from other restrictions. To name just a few possibilities, disincentives might include freeing terminated franchisees to transfer business assets, to line up a buyer of their business, or to grant "stay-over rights" with respect to franchise trademarks or other network properties. Furthermore, some states have long had special compensation provisions with respect to noncompetes, terminations,[91] and goodwill.[92] The state of Washington, for example, provides in its franchise relationship statute that a franchisor cannot refuse to renew a franchise without repurchasing the franchisee's inventory,[93] and only can avoid the payment of compensation to the franchisee for goodwill if the franchisee has been given a year's notice of nonrenewal and the franchisor agrees not to enforce any covenant that restrains competition.[94] Other states similarly provide, in effect, that noncompetes cannot be enforced if the franchisor gives insufficient notice of nonrenewal or does not pay for the franchisee's loss of goodwill, and Iowa's franchise relationship statute specifies that a franchisor's right to enforce a contractual covenant barring its present or former franchisee from ever exploiting the franchisor's trade secrets does not give the franchisor a more general right—to enforce against an ex-franchisee a post-term noncompete.[95]

C. The Current Legality of Noncompetes

A fundamental principle of black-letter law is that one must not deny the right of another person to earn a living. To do so would represent an unjustified restraint of trade that violates Section 1 of the Sherman Act.[96] However, "antitrust laws only reach covenants with the clear purpose or effect of destroying competition rather than of upholding a

91. State franchise relationship statutes may require that a franchisor, upon the franchise's termination or nonrenewal, repurchase some assets held by the franchisee. ARK. CODE ANN. § 4-72-209 (2023); CAL. BUS. & PROF. CODE § 20022 (2023); CONN. GEN. STAT. § 42-133f(c); HAW. REV. STAT. § 482E-6(3) (2022); MICH. COMP. LAWS § 445.1527(d) (2023); R.I. GEN. LAWS § 6-50-5 (2023); WASH. REV. CODE § 19.100.180(2*)*(i) (2022); WIS. STAT. § 135.045 (2022). Hawaii and Washington may compensate ex-franchisees at the fair market value of the items repurchased HAW. REV. STAT. § 482E-6(3) (2022); WASH. REV. CODE § 19.100.180(2)(i) (2022). Rhode Island finds the repurchase price based on a fair *wholesale* market value. R.I. GEN. LAWS § 6-50-5 (2023).

92. Some franchise relationship statutes also mandate that a franchisor must pay for the goodwill lost by franchisees whose franchises have ceased, generally through termination, nonrenewal, or the underlying business' failure or impending transfer (e.g., by sale to another party). In Hawaii and Washington, the franchise statutes state that franchisors must compensate their franchisees for the loss of goodwill. HAW. REV. STAT. § 482E-6(3) (2022); WASH. REV. CODE § 19.100.180(2)(i) (2022). In California and Illinois, the statutes mandate franchisor compensation of franchisees for the value or diminished value of the franchisees' business. CAL. BUS. & PROF. CODE § 20035(a) (2023); ILL. COMP. STAT. 815, § 705/20 (2022).

93. WASH. REV. CODE § 19.100.180(2)(i) (2022).

94. *Id.* Quantifying goodwill, such as the capitalization of excess earnings, depends upon a formula whereby goodwill is calculated according to what Buyer B pays Seller S, minus the value of net assets. Robert W. Emerson & Charlie C Carrington, *Devising a Royalty Structure that Fairly Compensates a Franchisee for its Contribution to Franchise Goodwill*, 14 VA. L. & BUS. REV. 279, 297–302 (2020).

95. IOWA CODE §§ 523H.5, 537A.10(5) (2021).

96. Emerson, *supra* note 15, at 1053; *see* 15 U.S.C. § 1 (2023) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

franchisor's legitimate interests."[97] Aside from general antitrust law principles, there has been no specific federal regulation of noncompete covenants in the employment or franchising contexts.[98] Instead, the enforceability of a noncompete covenant is typically determined under the law of the state in which enforcement is sought.

1. State Legislation Banning Noncompetes

In 2023, Minnesota became the fourth state to make noncompete clauses in employment agreements unenforceable *per se*, joining California, Oklahoma, and North Dakota.[99] The New York state legislature also passed a bill that would completely ban noncompete covenants, though it is unclear whether this ban would also apply to noncompetes in franchise agreements.[100] However, the New York ban was vetoed by Governor Kathy Hochul, who believed the scope of the ban should have been narrowed to protect only low-income workers.[101]

While the remaining 46 states have not enacted a complete ban, all 50 states currently have some degree of regulation on the use of noncompete covenants in employment and franchise agreements.[102] For example, in addition to the four states with near-complete bans of all noncompetes,[103] nine states (Colorado, Illinois, Maine, Maryland, New Hampshire, Oregon, Rhode Island, Virginia, and Washington) and the District of Columbia (D.C.) have statutes that prohibit noncompete agreements for employees earning below a specified threshold, ranging from just $30,160 annually in New Hampshire all the way to much larger thresholds about four times higher in the three Western states and over five times higher in D.C.[104] Also, most states have limited the use of noncompetes in particular

97. *See* Emerson, *supra* note 15, at 1095.

98. Indeed, so long as this absence of federal regulation remains in place, and if "enforcement of an employee noncompetition covenant can have no measurable market impact, [then] 'antitrust law is a nullity for employment noncompetes.'" Thomas J. Collin, *No-Hire Clauses—Ancillary Restraints for Protection of Brand Goodwill*, 41 FRANCHISE L.J. 143, 146 n.8 (2021) (quoting Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 ANTITRUST L.J. 165, 175 (2020)).

99. Winter Keefer, *Minnesota Becomes Fourth State to Ban Noncompetes*, MINNPOST (May 31, 2023), https://www.minnpost.com/twin-cities-business/2023/05/minnesota-becomes-fourth-state-to-ban-noncompetes/ [https://perma.cc/NU57-QCWS]. Minnesota's ban applies only to employment contracts entered into following July 1, 2023. Noncompete agreements executed before this date remain enforceable.

100. *See* Assembly Bill 1278, 2023–2024 Leg. (N.Y. 2023).

101. Luis Ferré-Sadurní, *Hochul Vetoes Ban on Noncompete Agreements in New York*, N.Y. TIMES (Dec. 22, 2023), https://www.nytimes.com/2023/12/22/nyregion/kathy-hochul-veto-noncompete.html (on file with the *Journal of Corporation Law*).

102. For further exploration of the legality of noncompete clauses in employment agreements, see BECK REED RIDEN LLP, 50 STATE NONCOMPETE SURVEY CHART (2025), https://beckreedriden.com/wp-content/uploads/2025/02/BRR-Noncompetes-20250213-50-State-Noncompete-Survey-Chart-Beck-Reed-Riden-LLP.pdf [https://perma.cc/29V3-9VQL] (survey dated Feb. 13, 2025).

103. *Supra* note 99 and accompanying text.

104. *Non-Compete Agreements in 2025 – Federal Ban on Hold, State Laws Continue to Expand*, SCHNEIDER, WALLACE, COTTRELL, KONECKY LLP (March 1, 2025), https://www.schneiderwallace.com/media/non-compete-agreements-in-2025-federal-ban-on-hold-state-laws-continue-to-expand/ [https://perma.cc/NYS3-58YX]; *The Non-Compete Agreement Landscape in 2025,* FROST BROWN TODD (2025), https://frostbrowntodd.com/the-non-compete-agreement-landscape-in-2025/ [https://perma.cc/3ADA-CKAZ]. Two states, Massachusetts and Nevada, provide as follows: (1) in Massachusetts, workers whose wages are low enough that they are eligible for overtime pay or the minimum wage (i.e., they are "nonexempt employees under the Fair Labor Standards Act

industries.[105] The most prominent and widespread usage of such laws is likely found in medical fields, with 20 states having imposed limits on noncompetes for healthcare professionals, including doctors and nurses.[106] Altogether, as of March 2025, only eight states have no statute directly banning or at least restricting noncompetes: Alaska, Kansas, Mississippi, Nebraska, Ohio, South Carolina, West Virginia, and Wyoming.[107] A much larger majority of states have pushed for, and sometimes received, relief.[108]

2. Noncompetes Under the Rule of Reason

In the context of franchise agreements, courts will often review the validity of a noncompete agreement under a 'reasonableness' standard. In California, for example, noncompetition agreements between businesses are subject to review under the rule of reason.[109] Despite banning noncompete provisions in the employment context, California and its courts are much more willing to enforce these provisions against franchisees and businesses. However, California is not uncommon in this approach. Because franchise agreements are often viewed as being closer to business-to-business agreements, states tend to apply the less stringent reasonableness standard to noncompete provisions included in franchise agreements.

This reasonableness analysis takes slightly different forms in different states. In some states, courts place a heavy emphasis on how long a noncompete provision remains in ef-

---

(FLSA), 29 U.S.C. §§ 201-219 (2025)), cannot be subject to a noncompete covenant; and (2) in Nevada, employees paid solely on an hourly wage basis, exclusive of tips or gratuities, cannot be bound to a noncompete. BECK REED RIDEN LLP, RESTRICTIVE COVENANT WAGE THRESHOLDS & SIMILAR CRITERIA (2025), https://faircompetitionlaw.com/wp-content/uploads/2025/02/BRR-20250213-State-Low-Wage-Worker-Thresholds-and-Criteria.pdf [https://perma.cc/U3D5-P5X4]. Other states' thresholds, below which noncompetes cannot apply to employees, are as follows: Colorado ($127,091), Illinois $75,000), Maine (400% of the federal poverty level ("wages" of $62,600)), Maryland ($46,800), New Hampshire ($14.50 per hour (two times the federal minimum wage) or tipped minimum wage, whichever applies); Oregon ($116,427); Rhode Island 250% of the federal poverty level for individuals (wages of $39,125 for the first 40 hours); Virginia ($76,081.20); Washington ($123,394.17) (total "earnings" in box one of W-2) ($308,485.43 for independent contractors (1099-Misc payments). *Id.*; *see also* Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, 68 MGMT. SCI. 143, 144 (2022) (finding that wage gains of as much as 14% to 21% after Oregon's adoption of a retroactive wage threshold legislation).

105. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3494 (proposed Jan. 19, 2023) (codified at 16 C.F.R. pt. 910) (noting that of the then 47 (now 46) states that do not outright ban noncompetes "the majority of these 47 states have statutory provisions that ban or limit the enforceability of non-compete clauses for workers in certain specified occupations."); *Non-Compete Agreements in 2025*, supra note 104; *The Non-Compete Agreement Landscape in 2025*, supra note 104.

106. Non-Compete Clause Rule, *supra* note 105; *Non-Compete Agreements in 2025*, *supra* note 104; *The Non-Compete Agreement Landscape in 2025*, *supra* note 104.

107. Economic Innovation Group, *State Noncompete Law Tracker* (Oct. 11, 2024), https://eig.org/state-non-compete-map/#Existing%20Noncompete%20Laws%20by%20State [https://perma.cc/6W9L-QKQC]; *see* BECK REED RIDEN LLP, *supra* note 102 (showing that almost all the states have laws directly concerning noncompetes or at least have provisions exempting specified persons or activities from noncompetes).

108. *See* Chris Marr, *Red State Lawmakers Look at Noncompete Bans for Low-Wage Workers*, BLOOMBERG L. (Feb. 9, 2022), https://news.bloomberglaw.com/daily-labor-report/red-state-lawmakers-look-at-noncompete-bans-for-low-wage-workers [https://perma.cc/KK58-YLTY].

109. *See* Ixchel Pharma, LLC v. Biogen, Inc., 470 P.3d 571, 580–82 (Cal. 2020) (identifying the proper standard as "whether the rule of reason applies").

fect following the termination of the franchise agreement. For example, in Florida, an individual seeking to enforce a restrictive covenant must "plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant."[110] If this showing is made, a post-term restrictive covenant against a franchisee is presumed to be reasonable if its duration is one year or less and unreasonable if three years or more.[111] In evaluating the reasonableness of a restrictive covenant, Florida courts will not "consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought."[112] As a result, franchisors enjoy a strong presumption in favor of enforcement, provided the noncompete covenant in question has a duration of less than three years. Similarly, a noncompete provision included in a franchise agreement is enforceable in Louisiana if the duration of the restraint does not exceed two years following the conclusion of the franchise agreement.[113]

Georgia also relies on statutory presumptions for the reasonableness of post-term restrictions. First, the statute presumes time restraints of two years or less after termination for employees and three years or less after termination for franchise and distribution agreements are reasonable.[114] Georgia's strict legislative time restraints do not apply to buyer-seller relationships. Under the statute, if a noncompete agreement is between the owner and seller of a business, the court will presume the time that the seller makes under the sale to be reasonable.[115] Next, the statute presumes that a geographic restriction is reasonable if it covers "the areas in which the employer does business at any time during the parties' relationship, even if not known at the time of entry into the restrictive covenant," as long as the total distance encompassed by the covenant also is reasonable, or the agreement lists particular competitors as prohibited employers for a limited period after termination, or both.[116] Lastly, Georgia presumes restrictions over the scope of prohibited activities valid if "[t]he scope of competition restricted is measured by the business of the employer or other person or entity in whose favor the restrictive covenant is given."[117] Any description of prohibited activities that "provides fair notice of the maximum reasonable scope of the

110. FLA. STAT. § 542.335(1)(b) (1996).

111. *Id.* § (1)(d)(2) (1996).

112. *Id.* § (1)(g)(1) (1996).

113. LA. STAT. § 23:921(F)(1)(b) (2015).

114. GA. CODE ANN. §§ 13-8-57(b)–(c) (2011). A post-termination noncompete period of up to five years is presumed reasonable in connection with the sale of a business. *Id.* § 13-8-57(d). As Georgia's new statute applies somewhat different standards for franchisor-franchisee contracts, Georgia has acknowledged that a franchise relationship differs from both an employment relationship and a sale of business transaction.

115. Bearoff v. Craton, 830 S.E.2d 362, 370–72 (Ga. App. 2019).

116. GA. CODE ANN. § 13-8-56(2) (2023); *see* Eleanor Vaida Gerhards, *Georgia Court Finds Hooter's Franchise Non-Compete Unreasonable in Geographic Scope*, FOX ROTHSCHILD (Mar. 25, 2024), https://franchiselaw.foxrothschild.com/2024/03/articles/legal-decisions/georgia-court-finds-hooters-franchise-non-compete-unreasonable-in-geographic-scope/ [https://perma.cc/G6VH-WJJ3] (discussing the case, HOA Franchising, LLC v. MS Foods, LLC, No. 23-cv-04096, 2023 WL 9692401, at *13 (N.D. Ga. Dec. 30, 2023), in which District Judge Eleanor L. Ross blue-penciled a noncompete agreement because the agreement included a provision that was not geographically reasonable in terms of the total distance encompassed and that may have included some areas where the franchisor was not in operation until after the end of the parties' franchisor-franchisee relationship). *Id.*

117. GA. CODE ANN. § 13-8-56(3) (2019).

restraint" is sufficient, "even if the description could possibly be stated more narrowly to exclude extraneous matters."[118]

Nebraska follows a slightly different approach, albeit one that also leans in favor of franchisors. If a court or arbitrator finds that a post-term noncompete to be enforced against a franchisee is unreasonable, the court "shall reform the terms of the noncompete . . . to [make it] reasonable and enforceable."[119] A Nebraska court's application of the reasonableness standard will be less rigid than the time-based analysis of a state like Florida or Louisiana. However, the "shall reform" language directs judges to rewrite the terms of the agreement and essentially ensures that courts will find a way to enforce a noncompete against a franchisee.[120] This mandate bails out a franchisor whose drafting of a noncompete provision may have been overly broad or otherwise unreasonable. Indeed, from a resource-limited franchisee's perspective, this appears to be the worst legal standard of all, telling franchisees that are even considering a challenge of the noncompete that they will be sued and cannot win; even an "unlawful" covenant will simply be adjusted.

3. Alternative Approaches to Noncompete Enforcement

While most states apply some variation of a reasonableness analysis to the enforceability of noncompete clauses in the franchise context, it is worth mentioning a few states with different approaches. In Colorado, "any covenant not to compete that restricts the right of any person to receive compensation for performance of labor for any employer is void."[121] However, this broad proscription against noncompetes is qualified in that it does not apply to covenants governing "highly paid workers," so long as the covenant "is no broader than is reasonably necessary to protect the employer's legitimate interest in protecting trade secrets."[122] In cases applying this statute, courts have held that franchisees may fall into the class of "highly paid workers" excluded from protection against noncompetes.[123] This then leads a court to analyze how reasonable the noncompete provision is in light of how necessary it is to protect the trade secrets of the franchisor. In theory, tying the reasonableness of a noncompete provision to how well it advances a franchisor's legitimate interest should limit the amount of arbitrary or unfair provisions that are enforced.

In North Dakota, noncompete covenants are unenforceable, with two exceptions: agreements by the seller of a business not to compete with the new owner and agreements

---

118. *Id.* § 13-8-53(c)(1) (2012). Furthermore, "activities, products, or services shall be considered sufficiently described if a reference to the activities, products, or services is provided and qualified by the phrase 'of the type conducted, authorized, offered, or provided within two years prior to termination' or similar language containing the same or a lesser time period." *Id.* § 13-8-53(c)(2).

119. *See* NEB. REV. STAT. § 87-404(2) (2018).

120. *See id.* § 49-802(1) ("When the word *shall* appears, mandatory or ministerial action is presumed." (emphasis added)).

121. COLO. REV. STAT. ANN. § 8-2-113(2)(a) (2024).

122. *Id.* § 8-2-113(2)(b) (2024).

123. *See, e.g.*, Postnet Int'l Franchise Corp. v. Wu, 521 F. Supp. 3d 1087 (D. Colo. 2021). In this case, the court notes that although Colorado Revised Statute § 8-2-113 "generally prohibits enforcement of noncompete agreements," the statute exempts numerous agreements, including what was at issue in *Postnet*: a noncompete "protect[ing] trade secrets and applying to professional staff. *Id.* at 1102; *see also* COLO. REV. STAT. ANN. § 8-2-113(2) (2024) (specifying application to "executive and management personnel"); *id.* § 8-2-113(2)(d) (2024) (specifying application to independent contractors, and owners of a franchised business). Perhaps "highly paid workers" could be determined by franchisee stakes, shares, or income.

by partners/shareholders of a partnership/corporation not to compete upon dissolution of the organization.[124] Under North Dakota law, a noncompete clause in a franchise agreement does not appear to fall under either of the statutory exceptions and would likely be unenforceable. Even if a court found a noncompete agreement to fall under one of the statutory exceptions, it would be enforceable only to the extent that it is not overly broad. Case law on this issue suggests the scope of a noncompete must be limited to the county in which the two parties would be competing.[125] North Dakota offers some of the most restrictive laws against the use of noncompete provisions in both employment and franchise agreements.

II. THE FTC'S NONCOMPETE CLAUSE RULE

On January 5, 2023, the Federal Trade Commission (FTC) published a notice of proposed rulemaking (NPRM) for new federal regulations, which would effectively ban the use of noncompete clauses for all U.S. workers, with limited exceptions.[126] Following the proposed FTC rule, NLRB General Counsel Jennifer Abruzzo concluded in a memorandum that the use of noncompete clauses in employment contracts generally violates the National Labor Relations Act.[127] Any contractual provision that restricts an employee's ability to leave and seek new employment potentially chills that employee's right to organize with other employees and take protected actions in pursuit of better conditions.[128]

The FTC proposal was part of a push by the Biden administration to protect workers and increase competition in the U.S. labor market.[129] The proposed rule would have prohibited any contract clause that "has the effect of prohibiting the worker from seeking or

124. N.D. CENT. CODE § 9-08-06 (2019); *see also* Osborne v. Brown & Saenger, Inc., 904 N.W.2d 34, 38 (N.D. 2017) ("Thus, we conclude that North Dakota has a strong public policy against non-compete agreements.").

125. Pruco Sec. Corp. v. Montgomery, 264 F. Supp. 2d 862, n.2 (D.N.D. 2003) (citing Earthworks, Inc. v. Sehn, 553 N.W.2d 490, 493 (N.D. 1996); Lire, Inc. v. Bob's Pizza Inn Rests., Inc., 541 N.W.2d 432, 433 n.1 (N.D. 1995); Herman v. Newman Signs, Inc., 417 N.W.2d 179, 181 (N.D. 1987)).

126. *Non-Compete Clause Rulemaking*, FTC (Jan. 5, 2023), https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking [https://perma.cc/D85B-8HDA].

127. Memorandum from Jennifer Abruzzo, NLRB Gen. Couns., to All Regional Directors, Officers-in-Charge, and Resident Officers (May 30, 2023) (on file with the *Journal of Corporation Law*).

128. *Id.* However, on January 27, 2025, President Donald Trump fired Abruzzo and a week later named William B. Cowen as NLRB Acting General Counsel. Danielle Kaye & Rebecca Davis O'Brien, *Trump Firings at Labor Board Paralyze the Agency*, N.Y. TIMES (Jan. 28, 2025), https://www.nytimes.com/2025/01/28/us/politics/trump-nlrb-jennifer-abruzzo.html (on file with the *Journal of Corporation Law*); Office of Public Affairs, *President Trump Appoints William B. Cowen Acting General Counsel of the National Labor Relations Board*, NAT'L LABOR RELATIONS BD. (Feb. 3, 2025), https://www.nlrb.gov/news-outreach/news-story/president-trump-appoints-william-b-cowen-acting-general-counsel-of-the [https://perma.cc/MG8P-F2DE]. As usual, the stark shift in policy orientation was almost immediate. *See* Memorandum from Willim B. Cowen, NLRB Acting Gen. Couns., to All Regional Directors, Officers-In-Charge, and Resident Officers (Feb. 14, 2025) (on file with the *Journal of Corporation Law*). The memorandum, with a subject heading, "Rescission of Certain General Counsel Memoranda," indicated that Cowen had rescinded "pending further guidance" 12 Abruzzo memoranda and had outright rescinded 17 memoranda by the Biden administration's NLRB General Counsel, including the two memoranda about noncompetes (GC 23-08 and GC 25-01). *Id.*

129. *Fact Sheet: Executive Order on Promoting Competition in the American Economy*, WHITE HOUSE (July 9, 2021), https://web.archive.org/web/20250103084929/https://www.whitehouse.gov/briefing-room/statements-

accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer."[130] This is intended to bar the use of not only explicit noncompete provisions but also any *de facto* noncompetes, such as an overly broad nondisclosure agreement, which would prevent the worker from gaining employment in the same field after the termination of their employment with the employer.[131] Given the widespread usage of noncompete covenants in employment contracts, the FTC boasted that this proposed rule would increase the earnings of U.S. workers by a combined $300 billion annually, due to removing artificial restraints on competition in the labor market.[132]

The protections of this proposed rule were intended to apply to "any natural person who works, whether paid or unpaid, for an employer."[133] When it comes to noncompete covenants, it does not matter whether a worker is classified as an employee or an independent contractor under the Fair Labor Standards Act, as both groups would be protected under the proposed rule.[134] However, the proposed rule explicitly provided that franchisees are not included within the definition of a "worker."[135] The FTC's reasoning for this exclusion is that "the relationship between a franchisor and franchisee may be more analogous to the relationship between two businesses than the relationship between an employer and a worker."[136] Should the proposed rule be adopted with its current language, post-term noncompete covenants in franchise agreements would remain enforceable subject to federal antitrust law and state contract law.

Following the FTC's publication of this NPRM, the FTC accepted public comments on the proposed rule until May 11, 2023.[137] In all, the FTC received over 20,000 comments from individuals of all different professional backgrounds, representing a wide array of industries.[138] The majority of these comments were in favor of adopting the proposed

releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/. The FTC and the NLRB entered a memorandum of understanding in which the two entities agreed to collaborate in addressing several labor issues, including noncompete covenants. *See Federal Trade Commission, National Labor Relations Board Forge New Partnership to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices*, FTC (July 19, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/07/federal-trade-commission-national-labor-relations-board-forge-new-partnership-protect-workers [https://perma.cc/G49A-47XJ]; Press Release, *supra* note 13 (noting how noncompetes discourage competition and inhibit new business formation, and nondisclosure agreements are a good alternative to noncompetes).

130. Non-compete Clause Rule, 88 Fed. Reg. 3509 (Jan. 19, 2023) (codified at 16 C.F.R. pt. 910.1).

131. *See id.* (including "no poach" agreements, meaning that employers agree not to hire or compete for each other's employees).

132. *FTC Proposes Rule to Ban Noncompete Clauses*, *Which Hurt Workers and Harm Competition*, FTC (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition [https://perma.cc/J754-ZBL3].

133. Non-compete Clause Rule, *supra* note 130, at 3511.

134. *Id.*

135. *Id.*

136. *Id.*

137. *See Rulemaking Docket: Non-Compete Clause Rule (NPRM)*, REGULATIONS.GOV, https://www.regulations.gov/docket/FTC-2023-0007/comments?sortBy=postedDate&sortDirection=desc [https://perma.cc/FHS3-W927].

138. *Id.*

rule.[139] Additionally, there were many comments from current and former franchisees advocating for the rule's application to franchise agreements. These commenters questioned the notion that the franchisee-franchisor relationship is analogous to a relationship between two businesses, citing the great disparity in bargaining power between the franchisee and the franchisor.[140] Because of this power imbalance when negotiating a franchise agreement, commenters argued that franchisees should be afforded the same protections as workers under the proposed rule. The FTC was expected to (and did) vote on the finalized version of this proposed rule in 2024, and certainly no change in the politics, nor guidance from public comments persuaded the Commission to extend the rule's protections to franchisees.[141]

Employers who rely on these provisions to keep employees in place did challenge this sweeping ban on noncompete clauses. To this effect, the nonprofit U.S. Chamber of Commerce was particularly vocal in its opposition to the proposed rule, going so far as threatening to sue to prevent its implementation.[142] The Chamber of Commerce and other opponents of the proposed rule decried the rulemaking as a massive overreach by the FTC.[143] Indeed, it was unclear whether the FTC possesses the rulemaking authority to promulgate such a broad and impactful rule. In a statement published alongside the NPRM, former FTC Chair Lina Khan cited sections 5 and 6(g) of the FTC Act, reading them together to provide the source of the FTC's authority to ban noncompetes.[144] Section 5 provides: "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."[145] Section 6(g) provides: "The Commission shall have power . . . to make rules and regulations for the purpose of carrying out the provisions of this subchapter."[146] The FTC's position was that employers' use of noncompete clauses is an unfair method of competition affecting commerce, specifically the U.S. labor market.[147] As such, Lina Khan believed it was within the FTC's authority

139. *See generally id.* Many commenters referenced their own experiences with post-agreement noncompete covenants and the challenges these restrictions imposed on their ability to pursue other career opportunities. Both employees and franchisees submitted comments against the use of noncompetes. *Id.*

140. *See Comment on Non-Compete Clause Rule from Franchisee, Anonymous*, REGULATIONS.GOV (Apr. 23, 2023), https://www.regulations.gov/comment/FTC-2023-0007-19335 [https://perma.cc/5757-MYR7]; *see also Comment Submitted on Non-Compete Clause Rule by Dady & Gardner, P.A.*, REGULATIONS.GOV (Jan. 29, 2023), https://www.regulations.gov/comment/FTC-2023-0007-5214 [https://perma.cc/V2QN-ZNQM].

141. Dan Papscun, *FTC Expected to Vote in 2024 on Rule to Ban Noncompete Clauses*, BLOOMBERG L. (May 10, 2023), https://news.bloomberglaw.com/antitrust/ftc-expected-to-vote-in-2024-on-rule-to-ban-noncompete-clauses (on file with the *Journal of Corporation Law*).

142. Suzanne P. Clark, *The Chamber of Commerce Will Fight the FTC*, WALL ST. J. (Jan. 22, 2023), https://www.wsj.com/articles/chamber-of-commerce-will-fight-ftc-lina-khan-noncompete-agreements-free-markets-overregulation-authority-11674410656 (on file with the *Journal of Corporation Law*).

143. *See id.*; *see also* Letter from Sean Heather, Senior Vice President Int'l Regul. Affs. & Antitrust, to April Tabor, Sec'y of the Comm'n, FTC (Apr. 17, 2023), https://www.uschamber.com/assets/documents/FTC-Noncompete-Comment-Letter_FINAL_04.17.23.pdf [https://perma.cc/FXQ7-LLCX].

144. Statement, FTC, Statement of Chair Lina M. Khan, Comm'r Rebecca Kelly Slaughter & Comm'r Alvaro M. Bedoya Regarding the Notice of Proposed Rulemaking to Restrict Employers' Use of Noncompete Clauses, (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/statement-of-chair-lina-m-khan-joined-by-commrs-slaughter-and-bedoya-on-noncompete-nprm.pdf [https://perma.cc/3P2D-DVSP].

145. 15 U.S.C. § 45.

146. 15 U.S.C. § 46.

147. *See* WHITE HOUSE, *supra* note 129.

to implement a rule banning the use of these provisions.[148] However, an outright ban on a specific type of contract provision that is legal (subject to limitations) in a majority of states certainly brushes up against the outer limits of the FTC's rulemaking capabilities. Because of the wide ambit and controversial nature of the rule, it could be, and has been, challenged under the "major questions doctrine" which has seen newfound prominence after the Supreme Court's analysis in *West Virginia v. Environmental Protection Agency*.[149] Under this doctrine, absent clear statutory support for an administrative agency's actions, a reviewing court should hesitate to uphold a federal agency's regulatory actions (its rulemaking) unless the agency had clear congressional authority to regulate in that manner.[150] For the FTC's rule on noncompetes, the gathering storm—recent Supreme Court precedent and, in the end, a Presidential election, spelled doom for a nationwide, administratively developed, rule prohibiting noncompetes for most employer-employee relationships. However, the rule can stand as a model, or at least a guidepost, for others to learn from if not emulate.[151] All the factfinding and theorizing over the FTC proposal, its development and, at least for now, its demise, can be studied and learned from.

The "final rule" from the FTC was challenged and stopped during the summer of 2024, shortly before the rule was to come into force in early September 2024. Three federal trial courts quickly ruled.

The first judge held in favor of the FTC. On July 23, 2024, the U.S. District Court for the Eastern District of Pennsylvania decided that the FTC did have authority to issue its rule banning most employment based noncompete agreements.[152] By early October 2024, the plaintiff withdrew its challenge to the FTC Rule.[153]

But the other two decisions that same summer put the Rule on hold. And the election in early November effectively sealed the Rule's fate.

On August 13, 2024, in a ruling from the bench, followed by a written order two days later, the U.S. District Court for the Middle District of Florida entered a limited injunction

148. *See id.* (explaining how past Presidents took bold action when faced with similar threats).

149. *See* West Virginia v. EPA, 597 U.S. 697, 732 (2022) (requiring clear congressional authorization for an agency to claim authority from a statute); *see also* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1060–65 (2023) (demonstrating how a minority party can invoke the major questions doctrine to effectively amend statutes by withholding consent).

150. Two years after *West Virginia v. EPA*, and just 66 days after the FTC issued its final rule against noncompetes (*FTC Announces Rule Banning Noncompetes*, FED. TRADE COMM'N (Apr. 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes [https://perma.cc/JK5W-3VSE]), the U.S. Supreme Court, on June 28, 2024, further weakened the authority of federal agencies' rulemaking and adjudicatory processes by expressly overturning Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024). This is further discussed *infra* notes 244-247 and accompanying text.

151. For example, states or private parties. *See infra* note 247 for discussion of the federal and state correlation.

152. ATS Tree Services, LLC. v. Fed. Trade Comm'n, CA No. 24-1743, 2024 WL 3511630 (E.D. Pa. Jul. 23, 2024). The court held that the FTC has broad authority to regulate "unfair methods of competition" under the FTC Act. 15 U.S.C. §§ 41-58 (2024). *Id.*

153. Nalee Xiong & Brian D. Pedrow, *ATS Withdraws Challenges to the FTC's Final Non-Compete Rule After the Eastern District of Pennsylvania Denies its Motion to Stay Proceedings*, BALLARD SPAHR (Oct. 8, 2024), https://www.hrlawwatch.com/2024/10/08/ats-withdraws-challenges-to-the-ftcs-final-non-compete-rule-after-the-eastern-district-of-pennsylvania-denies-its-motion-to-stay-proceedings/ [https://perma.cc/66WV-DJKJ].

prohibiting the FTC from enforcing its rule on noncompetes.[154] Judge Timothy J. Corrigan invoked the "major questions doctrine" to find that the FTC did not have a valid grant of congressional authority to enact the rule.[155] Judge Corrigan expressly limited his holding to just the parties, as he blocked the FTC from enforcing its rule barring most noncompetition agreements, including the noncompetes to which the plaintiff, a real estate firm, was a party.[156]

The most significant case, at least in scope, was decided a week after the *Properties of the Villages* case. In *Ryan, LLC v. Federal Trade Commission*,[157] U.S. District Judge Ada Brown of the Northern District of Texas issued a final judgment vacating the FTC noncompete rule nationwide.[158] In granting such relief, Judge Brown concluded that the FTC lacks statutory authority to promulgate the rule (a substantive rule concerning unfair competition) and also concluded that the rule is arbitrary and capricious.[159]

Still, for the federal approach to noncompetes, the transition from the Biden administration to the Trump administration does not necessarily foretell a significant break in policy. While the Trump administration has turned away from a categorical, nationwide prohibition of noncompetes in employment, and has thus moved to pause the government appeals of the two U.S. District Court holdings (*Properties of the Villages* and *Ryan, LLC*) striking down the FTC rule prohibiting noncompetes,[160] the FTC may not pursue any further formal rulemaking on the issue, and FTC Chairperson Andrew N. Ferguson keeps emphasizing his view that noncompetes can harm competition in labor markets.[161]

In late February 2025, Ferguson issued a memorandum directing the key FTC officials to form a Joint Labor Task Force.[162] Under the second Trump administration, Fergu-

154. Properties of the Villages, Inc. v. Fed. Trade Comm'n, 2024 WL 3870380 (M.D. Fla. Aug. 15, 2024).

155. *Id.* The "major questions doctrine" requires administrative agencies issuing rules of extraordinary economic and political significance to point to clear and unambiguous congressional intent to confer such power on the agency.

156. *Id.* While the court acknowledged that the FTC has rulemaking authority over some subjects, but whether such authority extends to the promulgation of the rule banning some noncompetes is a "major question" that must be answered using the test that the Supreme Court articulated in West Virginia v. EPA, 597 U.S. 697 (2022). Applying that test, the court concluded that there was no statutory authority.

157. Ryan, LLC v. Fed. Trade Comm'n, 746 F. Supp. 3d 369 (N.D. Tex. 2024).

158. *Id.*

159. *Id.* at 376. The reasons for this lawsuit and the halt on implementation include the lack of rulemaking capabilities of the FTC. *Id.* The attorney for the plaintiffs celebrated the victory and proffered that noncompetes "play a vital role in safeguarding intellectual property and innovation, building trust within businesses, and investing in training their people." *Ryan Lawsuit Succeeds in Striking Down Federal Trade Commission (FTC) Ban on Non-Compete Agreements*, YAHOO! FIN. (Aug. 20, 2024), https://finance.yahoo.com/news/ryan-lawsuit-succeeds-striking-down-230900358.html [https://perma.cc/WG4L-EYCY].

160. Tobias E. Schlueter & Zachary V. Zagger*, Trump Administration Halts Appeals of Rulings Blocking FTC Noncompete Ban*, OGLETREE DEAKINS (Mar. 12, 2025), https://ogletree.com/insights-resources/blog-posts/trump-administration-halts-appeals-of-rulings-blocking-ftc-noncompete-ban/ [https://perma.cc/N8FH-K96H].

161. *Id.*

162. *See generally* Andrew N. Ferguson, *Directive Regarding Labor Markets Task Force*, WHITE & CASE (Feb. 26, 2025), https://www.whitecase.com/sites/default/files/2025-03/memorandum-chairman-ferguson-re-labor-task-force-2025-02-26.pdf [https://perma.cc/B5GF-F3DR] (Memorandum of Federal Trade Commission

son assumed an "extra" role as chairman of the FTC besides his continuing role as a commissioner. He outlined many broad subjects and specific topics for investigation and prosecution of deceptive, unfair, or anticompetitive conduct in labor markets.[163] Ferguson's memorandum specifically assures the public that the FTC "prioritizes rooting out and prosecuting unfair labor-market practices."[164] Among the many deleterious business practices that the FTC will pursue are:

(1) Noncompetes that, as Ferguson notes, "impose unnecessary, onerous, and often lengthy restrictions on former employers' ability to take new jobs in the same industry after they leave their employment."
(2) Unfair or deceptive trade practices harmful to gig economy workers; and
(3) "[m]isleading franchise offerings, which can lead workers or potential employers to invest savings in ways that never ultimately bring benefits anticipated to the American worker."[165]

The Joint Labor Task "signals a shift from broad rulemaking to targeted enforcement."[166] Still, this is much closer to the "pro-worker" label one may expect of progressive Democrats, but not conservative, "pro-business" Republicans. While not banning noncompetes outright, the agency will, it seems, continue to investigate the use of noncompetes or similar practices in specific cases, especially when the business "restrict[s] worker mobility without a clear business justification."[167] With both the Republican and any Democratic commissioners thus proclaiming their worker party "credentials,"[168] noncompetes could be limited to "essential roles" (e.g., a principal researcher, but not an administrative assistant, at a biotech firm), and the classifications would be subject to possible administrative

---

Chairman Ferguson to (1) Daniel Guarnera, Director, Bureau of Competition, (2) Christopher Mufarrige, Director, Bureau of Consumer Protection, (3) Ted Rosenbaum, Acting Director, Bureau of Economics, NS (4) Clarke Edwards, Acting Director, Office of Policy Planning).

163. Jesse M. Coleman & Eron Reid, *FTC Requests Stay of Appeals to Challenges to FTC Non-Compete Rule Citing New Administration*, SEYFARTH (Mar. 11, 2025), https://www.tradesecretslaw.com/2025/03/articles/ftcs-crackdown-on-non-competes/ftc-requests-stay-of-appeals-to-challenges-to-ftc-non-compete-rule-citing-new-administration/ [https://perma.cc/YZP5-J3G6] ("Chairman Ferguson's recent remarks suggest that the current administration will prioritize individual prosecutions, rather than broad rulemaking, to police abusive and overreaching use of non-compete agreements.").

164. Ferguson, *supra* note 162, at 3.

165. *Id.* at 2; *see White & Case Glob. Non-Compete Res. Ctr.*, WHITE & CASE (2025), https://www.whitecase.com/insight-tool/white-case-global-non-compete-resource-center-ncrc [https://perma.cc/ESH6-7QF6] (discussing noncompetes and the FTC's new Joint Labor Task Force).

166. Cara Cannella, *Noncompete Agreements Are Sticking Around—But Be Careful How You Use Them*, INC. (Mar. 13, 2025), https://www.inc.com/cara-cannella/noncompete-agreements-trump-ftc-task-force/91160277 (on file with the *Journal of Corporate Law*).

167. *Id.* ("Employers should audit existing agreements and tailor restrictive covenants to actual business needs," says Tobias Schlueter, an employment attorney with Ogletree Deakins who advises businesses on restrictive covenants and trade secrets. "The more limited and specific, the more defensible.").

168. *See* Jesse M. Coleman, Michael Wexler & Gio Perez, *FTC Launches Joint Task Force to Investigate and Prosecute Non-Compete Agreements, as FTC Chairman declares the GOP a 'Workers' Party'*, Seyfarth (March 7, 2025), https://www.tradesecretslaw.com/2025/03/articles/ftcs-crackdown-on-non-competes/ftc-launches-joint-task-force-to-investigate-and-prosecute-non-compete-agreements-as-ftc-chairman-declares-the-gop-a-workers-party/#more-13176 [https://perma.cc/2N3E-R9TU] ("Chairman Ferguson has had a recent change of focus, signaling that, while a blanket ban under the rule may have been unlawful, the FTC will nevertheless prosecute individual abusive uses of non-compete agreements under his leadership and support additional policies aimed at protecting workers.").

or court reviews,.[169] Furthermore, noncompetes—typically outright employment bans—could cover most concerns simply with non-solicitation clauses.[170] Rather than a rapid replacement of departing or fired workers, or other substitutes for their skills, more direct measures have been urged – incentives, not restrictions: Encouraging employees to remain, not just quit and then compete, with bonuses, commission agreements, profit sharing, and some patent or other intellectual property agreements.[171]

A deeper discussion of FTC rulemaking authority is beyond the scope of this Article. However, the development of this proposed rule over the coming years carries potentially huge consequences for both franchise and employment law. Perhaps most importantly, this attempt by the FTC to make such a sweeping nationwide change to contract law is yet another indication that post-term noncompetes have fallen out of favor with the broader legislative and regulatory communities. As noted earlier in this Article, the legislatures of both Minnesota and New York passed *per se* bans on the use of post-term noncompete covenants in employment contracts during 2023.[172] Additionally, California amended its already restrictive anti-noncompete statute to prohibit the enforcement of noncompetes regardless of where the employment agreement was entered into.[173] Under the updated statute, a Nevada-based employer and employee could enter into a valid noncompete covenant, but if the employee later took a job with a California employer in violation of the covenant, California courts would not enforce the covenant against the former employee.[174] This new legislation serves as a strong condemnation of noncompetes by the nation's most populous state. Regardless of whether this iteration of the FTC's proposed noncompete ban passes or whether it ends up applying to franchisees, it will likely not represent the last attempt to restrict their use further. Post-term noncompete covenants are as unpopular as ever with lawmakers and the public,[175] and that does not bode well for those covenants' continued enforceability. In the face of ongoing efforts by the federal government and state legislatures to curtail or entirely eliminate the use of noncompete covenants, franchisors and other businesses should at least prepare for the potential of life without noncompetes. As explored in the remainder of this Article, franchisors can end their reliance on restrictive noncompete covenants by contracting with their franchisees to protect their specific business interests.

169. Cannella, *supra* note 166.

170. *Id.*

171. *Id.*

172. *See supra* notes 99-101 and accompanying text (discussing Minnesota's and New York's noncompete bans).

173. Joy Rosenquist et al., *California Reaches Across State Lines to Invalidate Employee Non-Compete Agreements*, LITTLER (Sept. 6, 2023), https://www.littler.com/publication-press/publication/california-reaches-across-state-lines-invalidate-employee-non-compete [https://perma.cc/KY5M-SF9B].

174. *See id.* (discussing how SB 699 nullifies the noncompete agreements of employees moving to California from another state).

175. *Most Americans Support Banning Noncompete Agreements for Workers*, IPSOS (Jan. 6, 2023), https://www.ipsos.com/en-us/news-polls/most-americans-support-banning-noncompete-agreements [https://perma.cc/BQ4G-3HQ2].

III. INCLUDING THE FRANCHISE AGREEMENT CONTEXT IN THE FTC'S PER SE NONCOMPETE BAN

As mentioned, the FTC has stated that a significant reason for the *per se* ban on enforcement of noncompete clauses in labor agreements includes removing artificial constraints on commerce to increase competition in the labor market.[176] Reportedly, noncompete clauses could account for lost wages up to $300 billion annually.[177] Once workers encumbered by a post-term noncompete clause leave their place of employment, they must either enter a new industry, relocate to a different geographical location, or wait for the duration of the noncompete for it to expire before they can begin earning again. This process not only removes workers from the job market but also blocks access to the full, most efficient labor pool from other employers.

The same logic applies to post-term noncompete clauses in the franchise agreement context. Noncompete agreements reduce competition among franchisors and franchisees as well. When a franchisee is unable to reenter an industry after termination, it keeps the franchisee from earning and restricts the options that a franchisor searching for a franchisee in the area may have. Thus, the same unfavorable anti-competitive effect that the FTC is attempting to rectify with the employment agreement noncompetes is an issue in the franchising space as well.

Additionally, the FTC has stated that the *per se* ban on enforcement of noncompetes is necessary to protect employees.[178] The idea is that because of the stature of the employer during employment negotiations, their bargaining power is typically much greater than that of the employee.[179] Therefore, the employer can incorporate provisions into the agreement that are unfavorable to the employee, which may lead to noncompete agreements that unfairly burden the employee.[180]

The situation for franchisees is parallel. For most franchisees who own just a single franchise,[181] their size and power pale in comparison to the large conglomerate franchisors. Similar to how large employers have unfair bargaining power over employees, franchisors have bargaining power over many smaller franchisees. This disparity leads to noncompete agreements that franchisees may find unfavorable but have no choice but to accept.

The FTC contended that the discrepancy in bargaining power between employers and employees is not the same as between franchisors and franchisees because the franchise

176. Non-Compete Clause Rule, 16 C.F.R. § 910 (2023).

177. *Non-Compete Clause Rulemaking*, *supra* note 126 (noting that the FTC proposed rule preventing employers from entering into noncompete clauses with workers and requiring employers to rescind existing noncompete clauses would, the FTC estimated, "increase American workers' earnings between $250 billion and $296 billion per year").

178. Alexander Raskovich et al., *Breaking Barriers or Breaking Bad? The FTC's Proposed Ban on Noncompete Agreements in Employment Contracts*, 35 HARV. J.L. & POL'Y PER CURIAM 1, 2, 7 (2023).

179. *Id.*

180. *Id.*

181. Johnson, *supra* note 78 (reporting that in 2018 the United States had 43,212 owners of multiple franchise units accounting for control of about 54% of the 450,000 or more total franchised units; the vast majority of these multi-unit owners, 35,407, held just two to five units, and a much larger number, at least 207,000 single-unit franchisees, necessarily constituted the owners of the remaining 46% of the franchised units).

agreement relationship is more analogous to a business-to-business agreement.[182] However, in business-to-business agreements, two things are typically being exchanged that are deemed to have equal value. Contrarily, in franchise agreements, the parties are partially bargaining for the right to use something that will bring value. Unlike in a merger and acquisition, where a party could walk away from the deal retaining half of the imagined deal's value if the franchise deal does not move forward, one party is left in an unfavorable position. Thus, that party feels more pressure to move the deal forward, letting franchisors add negative components to the deal that it may not have if it took place in a business-to-business transaction. Accordingly, franchisees need the same protection as employees when negotiating relationship agreements.

Not only is the franchisee in a similar position to the employee, but noncompete agreements can be found to be illegal per se in both contexts as well. In *Broadcast Music*, the Supreme Court stated that the test to determine whether anti-competitive practices are per se illegal is if the purpose of the practice threatens the proper operation of the free market such that it does or appears to restrict competition or diminish output.[183] Since noncompetes in the franchise agreement and employment agreement context both curb competition and similarly decrease output, they both should be considered in a parallel way.

IV. OTHER PROPOSED REFORMS AND ALTERNATIVES TO NONCOMPETE AGREEMENTS

Given the moral hazards and opportunities for abuse that noncompete clauses currently present, there is a strong argument against their continued use in franchise and employment contracts. At the very least, it is worth considering additional regulatory measures limiting the scope of these provisions or encouraging franchisors to use alternatives that may be less restrictive. With the implementation of the FTC's proposed ban on noncompetes being strongly challenged for its broadness, perhaps a less sweeping measure could more effectively address the concerns of both franchisors and franchisees.

A. International Treatment of Noncompetes

Noncompete clauses are common in many business and employment contracts, and countries around the world have taken different measures to ensure that these and other restrictive covenants are used fairly. A brief survey of relevant measures from other jurisdictions will be helpful for comparison to the status of noncompetes domestically and as a potential source of new ideas for addressing restrictive covenants in the United States.

At the outset, it is important to note that few countries have specific rules against using noncompete clauses in franchise agreements. Instead, disputes arising over the enforceability of such a covenant are generally handled under the contract or antitrust laws of that country. For example, the European Union regulates franchise agreements under the antitrust framework of the Treaty on the Functioning of the European Union (TFEU) Article

182. Non-Compete Clause Rule, 16 C.F.R. § 910 (2023).

183. Broad. Music, Inc. v. Colum. Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979).

101, subsections (1) and (3), which outlaw agreements between companies that put restraints on trade.[184] In 2022, the EU Commission implemented an updated Vertical Agreement Block Exemption Regulation (VBER), which exempts certain vertical distribution agreements, including franchises, from TFEU 101 anti-competition scrutiny.[185] The 2022 VBER provides safe harbor for post-term noncompete clauses in franchise agreements, provided the duration of the restriction is limited to one-year post-agreement, is limited to the premises from which the franchisee operated, and is indispensable to protect the franchisor's know-how.[186] A noncompete clause that does not meet these limitations is not automatically unenforceable, but is not entitled to the VBER safe harbor and can be subjected to antitrust scrutiny pursuant to the TFEU.[187]

1. Safe Harbor Limitations for Noncompetes

Short of a *per se* prohibition against noncompete clauses, a similar safe harbor approach could provide for more balanced enforcement of noncompete covenants than under the existing framework. Under such a system, franchisors would be incentivized to tailor their use of noncompete clauses in their franchise agreements to only what is necessary to protect their legitimate business interests. Otherwise, they risk uncertain and costly litigation over the provision. With overly broad noncompete provisions ineligible for the safe harbor, franchisees bound by such a provision would retain their ability to challenge its enforcement in court. The United States or an individual state need not copy the exact language of the VBER safe harbor. However, similarly clear standards could help encourage more equitable drafting of restrictive covenants and greater predictability for both franchisors and franchisees.

2. Indispensable to Protect Know-How

Within Europe, a few countries have their own specific rules to address restrictive covenants in franchise agreements. The Netherlands recently passed the Franchise Act, which includes regulations on enforcing post-term noncompetes against franchisees.[188] In addition to being restricted to a one-year duration and a limited geographic area, post-term noncompetes must be "indispensable to protect the know-how transferred by the Franchisor to the Franchisee, and there must be a direct link between the transferred know-how and the need for the post-term restriction."[189] France also allows post-term noncompetes

184. Consolidated Version of the Treaty on the Functioning of the European Union art. 101(1), (3), May 9, 2008, 2008 O.J. (C115), https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX%3A12008E101%3AEN%3AHTML [https://perma.cc/T6PU-JQB6].

185. Saskia King & Ariane Le Strat, *The Impact of the New VBER and VABEO Rules for Franchises*, BIRD & BIRD (Nov. 17, 2022), https://www.twobirds.com/en/insights/2022/uk/the-impact-of-the-new-vber-and-vabeo-rules-for-franchises [https://perma.cc/4LBD-YKAB].

186. *Id.*

187. *Id.*

188. Martine De Koning, *Dutch Franchise Act Into Force!*, INTL. BAR ASS'N (June 7, 2021), https://www.ibanet.org/ifc-dutch-franchising-act-summary-article-june-21 [https://perma.cc/2HKX-V8HP].

189. *Id.* (internal quotations omitted).

in franchise agreements, subject to a similar set of limitations as those in the Netherlands.[190]

The requirement that the noncompete clause be "indispensable to protect the know-how transferred by the Franchisor" offers a useful qualitative factor for courts to consider when determining if a given clause is reasonable.[191] Currently, the statutes and case law in many U.S. states focus on the geographic scope and the duration of the noncompete clause in question. While these factors are certainly important to consider, they do not address the full picture, and a focus on such quantitative aspects runs the risk of arbitrary enforcement decisions. For example, even a one-year noncompete could be unreasonable if there is no real justification for restricting the former franchisee in such a manner. Holding franchisors to this higher standard would push them to limit their use of noncompetes and other restrictive covenants only to the extent that such a provision is necessary to protect their specialized know-how.[192]

B. Updating the Current Framework

As discussed in this Article, franchisors have legitimate business interests that need to be protected upon the conclusion of their relationship with a franchisee. In many cases, franchisees turn to noncompete covenants to address these concerns. Instead of pushing to eliminate these covenants, as in the case of the FTC's proposed rule, it may be possible to modify the framework for enforcing noncompete covenants to make their effect more equitable for franchisees.

Generally, state regulations on the use of noncompete covenants in both employment and franchising contracts have restricted these covenants based on time and geographic limitations.[193] However, the reasonableness (and, in turn, enforceability) of a noncompete covenant should be determined under a more complete analysis. Specifically, a four-step approach to determining reasonableness would help courts to better balance the rights of both franchisors and franchisees.[194]

1. Determining if the Noncompete is Enforceable

First, courts should evaluate the legitimate economic interests of the franchisor and whether these are the interests that necessitate protection by a noncompete covenant.[195] The noncompete should directly relate to the franchisor's legally protected intellectual property, specialized training provided to the franchisee, goodwill in the area developed by the franchisor, or any monetary investment in the franchisee's training or development.

190. *See Franchise Laws and Regulations France 2025*, ICLG (Oct. 31, 2023), https://iclg.com/practice-areas/franchise-laws-and-regulations/france [https://perma.cc/SPF2-2QN5].

191. *Id.*

192. Of course, this new, stricter, anti-noncompete standard may not succeed–that is, it may not keep franchisors from drafting and seeking to impose harsh noncompetes–if that new anti-noncompete standard could somehow be avoided by court decisions that effectively accept noncompetes by reforming them. *See supra* notes 119–20 and accompanying text (discussing Nebraska's reformation of franchise noncompetes).

193. *See supra* notes 111–17 and accompanying text.

194. *See* Emerson, *supra* note 15, at 1103.

195. *Id.*

Second, if enforcement of the noncompete can protect the franchisor's interests, the analysis should turn to the level of support provided to the franchisee by the franchisor.[196]

Third, if the franchisor provided adequate benefits to the franchisee in exchange for the noncompete covenant, then the franchisee's activities should be reviewed to determine whether the alleged competitive activities wrongfully violated the franchisor's legitimate interests.[197]

Finally, if the noncompete is enforced against the franchisee, it should be subject to reasonable time and geographic limitations, as are already enforced in many states.[198]

Regarding the second step, enforcing a post-term noncompete covenant against a franchisee represents a significant restraint on the franchisee's right to earn a living. In exchange for the franchisee's agreement to this restraint, the franchisor should provide equivalent benefits to the franchisee. For a franchise business, these benefits would typically take the form of franchisor support, such as training, access to the use of the trademarks and secrets of the franchisor, and contracts with suppliers. In the analysis outlined above, the franchisor would carry the burden to show the support provided to the franchisee met or exceeded industry standards.

2. Safeguards the Franchisor Must Abide by to Have an Enforceable Noncompete

Additionally, the franchise relationship should demonstrate reciprocity of obligations between the franchisor and the franchisee.[199] In other words, the franchise agreement should not impose obligations on the franchisee with respect to a certain item when the franchisor is not similarly obligated. For example, a franchisor's right to assert a post-term interest in the franchisee's business location should correlate with the extent to which the franchisor assisted the franchisee in selecting or developing that location.[200] In the context of noncompete covenants, the franchisor should not be able to enforce strong post-term restraints against the franchisee if the franchisor competed either directly or indirectly with the franchisee's sales during the term of the franchise agreement. In the age of e-commerce and food delivery apps, franchisors and their sister brands can now easily sell to customers who otherwise would buy from the franchisee's physical location.[201] Franchisors should not be able to siphon revenue away from their franchisees and then ask a court to protect them from competition after the conclusion of the franchise agreement.

3. The Franchisee's Affirmative Defenses Against Noncompete Enforcement

Further, when a franchisor sues to enforce a noncompete covenant, the franchisee should have the ability to raise a variety of affirmative defenses excusing their breach of the covenant. Possible defenses could include:

---

196. *Id.*

197. *Id.*

198. *Id.*; *see also supra* notes 106–20 and accompanying text.

199. *See* Emerson, *supra* note 15, at 1100–03 (proposing systematic reform through federal legislation or uniform state statutes to ensure noncompetition covenants in franchise agreements are fair, reciprocal, and limited in scope; and arguing that reasonable restrictions should align with the rights and benefits conferred upon franchisees).

200. *Id.*

201. See *supra* notes 65–69 and accompanying text.

> (1) there was gross inequality of bargaining power between the franchisor and the franchisee; (2) at the time the franchise contract was executed, the franchisee paid for all of the rights acquired thereunder, including goodwill and training; (3) the franchisor violated an implied covenant of exclusivity; (4) the franchisor breached its duty of good faith and fair dealing, particularly if it unfairly terminated the franchise; (5) the franchisor had "unclean hands"; and (6) the original goodwill that the covenant was intended to protect has dissipated.[202]

These defenses help to protect the franchisee from abusive or arbitrary enforcement of noncompete covenants. In many cases, franchise agreements are essentially contracts of adhesion due to the great disparity in resources and bargaining power between franchisor and franchisee.[203] A franchisee should not be bound by a post-term noncompete covenant a franchisor forced the franchisee to accept. Similarly, if the goodwill of the franchisor's brand is damaged to the point that customers no longer frequent the franchised units, the franchisor no longer has any justification for preventing the former franchisee from operating a new business in that territory.[204]

The proposed affirmative defenses also reinforce the notion that the franchisor should not be able to restrict the post-term activities of former franchisees without having fulfilled corresponding obligations of its own. It is generally accepted that both parties to a franchise agreement have a duty to use good faith in their dealings with each other and to abstain from doing anything which would "have the effect of . . . impairing or injuring the right of the other party to receive and enjoy the reasonable expected benefits of the contract."[205] In the context of a franchise agreement, the franchisor should act in good faith to ensure the franchisee has the necessary resources to succeed pursuant to the terms of the agreement.[206] If the franchisor withholds or fails to provide this support in bad faith, the franchisee should not be prevented from pursuing a new and potentially better endeavor.[207] This duty of good faith is especially important when it comes to the termination of a franchise agreement.[208] If a franchisor terminates the agreement in bad faith, it should not be able to prevent the franchisee from competing following this termination. It is critical for the franchisee to

202. Emerson, *supra* note 15, at 1104. Arguments 1 and 2 (gross inequality of bargaining power and the "I paid for that right or service" defense) are based on the typical circumstances—the negotiations and the contract terms themselves—strongly favoring the franchisor. Emerson, *supra* note 16, at 690–93, 696, 700–01 (showing that the vast majority of franchise contracts provide franchisor control over a franchised business' initial, current, and future layout, the business' operating and quality standards, inspections, its intellectual property, its advertising, and the possible sale or other assignment of the franchise); these pro-franchisor contract terms continue, per the author's 2023 examination of 200 franchise contracts.

203. Emerson, *supra* note 16, at 713.

204. Goodwill has been defined as "'a company's positive reputation in the eyes of its customers or potential customers' and 'is generated by repeat business with existing customers or by referrals to potential customers.'" Get In Shape Franchise, Inc. v. TFL Fishers, LLC, 167 F. Supp. 3d 173, 199 (D. Mass. 2016) (quoting N. Am. Expositions Co. v. Corcoran, 898 N.E.2d 831, 846 (2009)). If a franchisor's reputation with customers is tarnished, potentially reducing sales for franchisees, there is no goodwill interest to be protected with a post-term noncompete.

205. Frank J. Cavico, *The Covenant of Good Faith and Fair Dealing in the Franchise Business Relationship*, 6 BARRY L. REV. 61, 75–76 (2006); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. L. INST. 1981).

206. *Id.* at 84–86.

207. *See id.*

208. *Id.* at 95–97.

have defenses available to protect against the enforcement of noncompetes in these situations. Otherwise, franchisors may gain immense power over the franchisee without giving up consideration of corresponding value. This stage of the analysis enforces that if there was not a true exchange of benefits and obligations between the franchisor and franchisee in agreeing to a noncompete covenant, then the covenant should not be enforced.

Even if a given noncompete covenant passes the first two steps of the analysis, it should only be enforced against the franchisee to the extent that the franchisee's competitive actions directly infringe on the legitimate interests of the franchisor. For example, the noncompete covenant could be enforced to prevent the franchisee from misappropriating the franchisor's trademarks or using the franchisor's built-up goodwill to compete with the franchisor. On the other hand, simply opening a competing business in the franchisor's industry would not allow for enforcement of the noncompete, provided the franchisee was not misappropriating anything received from the franchisor.[209]

The widespread implementation of a more holistic analysis such as this one would help to make the enforcement of post-term noncompetes against franchisees fairer. By requiring that the franchisee receive support from the franchisor in exchange for the noncompete, the parties will be more likely to strike a true bargain in negotiating a franchise agreement. Furthermore, requiring that the noncompete and any competitive activity by the franchisee be tied to the franchisor's legitimate interests will help to prevent arbitrary enforcement against former franchisees.

C. The In Terrorem *Effect*

While additional regulation of post-term noncompete covenants could make their conditions fairer to those bound by them, the vast majority of these covenants in both franchising and employment contracts are not challenged in court.[210] This means that franchisors can continue to impose restrictions on their franchisees' mobility, which would otherwise be unenforceable under the regulations. Because the franchisor can generally rely on the franchisee complying with the terms of their noncompete covenant without having to litigate for its enforcement, the franchisor is incentivized to overreach and greatly impede the franchisee's ability to compete. Any proposed legislative reform of noncompete covenants is accordingly limited by the franchisor's ability to simply disregard the requirements for enforceability when drafting the franchise agreement.

As such, there is an argument to be made that the moral hazard of post-term noncompete covenants should be removed altogether by rendering these covenants unenforceable *per se*. Indeed, perhaps we also could have a penalty for overreaching covenants; as a further deterrent, and to signal other franchisors, there might be a civil penalty, perhaps comparable to what may be awarded in antitrust suits or other civil actions serving a public purpose, not simply a private interest. As acknowledged earlier in this Article, franchisors have legitimate interests, which they protect using post-term noncompetes.[211] However, the inability to account for the risk to franchisees posed by the *in terrorem* effects of these

209. According to the current framework, this competition would violate most franchise noncompetes, but my suggested newer standard would look to what is at stake and often protect the ex-franchisee's right to compete, including in this scenario.

210. *See* Moffat, *supra* note 86, at 887–88.

211. *See supra* Part I.A (The Franchisor Perspective).

covenants makes it difficult to reconcile their continued use in franchise agreements with the need to protect franchisees from abuse.

At the very least, more should be done to educate franchisees about post-term noncompete covenants and their rights under any applicable state law. One possible solution would be to add a required item to the Franchise Disclosure Document (FDD), where a franchisor must include materials explaining any restrictive covenants the franchisor intends to hold the franchisee to. Currently, the Franchise Act only requires franchisors to disclose whether the agreement includes any post-term restrictive covenants and what the basic terms of the covenants are.[212] Under the Franchise Act, these items are to be included in a chart as part of items 9 and 17 of the FDD.[213] A detailed description of the parties' obligations with respect to these covenants or the legal context surrounding their enforcement is not required.[214]

The current level of required disclosure does not go far enough to protect franchisees from unlawful noncompetition covenants. Merely disclosing the existence of a post-term noncompete in the franchise agreement is of little benefit if the franchisee is unaware of whether such a provision can be enforced in the state where the agreement is executed. In addition to what must currently be included in the FDD under the Franchise Act, franchisors should be required to include a statement of the current law on noncompete covenants in the relevant jurisdiction. Because many prospective franchisees do not have a lawyer review the franchise agreement before they sign, this additional disclosure would at least make the franchisee aware of their rights so they can truly give their informed consent to being bound by the provision.[215] Further, this required disclosure would incentivize franchisors to comply with state law restrictions on noncompete covenants, as franchisees would be much less likely to enter into an agreement knowing that it contains unlawful provisions. Increasing franchisees' understanding of noncompete covenants at the outset of the franchise relationship could be an effective means of lessening the *in terrorem* effect these provisions often carry.[216]

D. Alternatives

Post-term noncompete covenants are just one of many contractual tools that franchisors have at their disposal to protect their interests following the termination of an agreement with a franchisee. The main benefit conferred onto the franchisee by the franchisor is the right to use the franchisor's valuable trademarks and associated goodwill, trade secrets, and know-how obtained through training. Aside from noncompete covenants, several other legal mechanisms directly cover these interests while placing less restriction on a franchisee's post-term mobility.

---

212. 16 C.F.R. §§ 436.5(i), 436.5(q)(3).

213. *Id.*

214. *Id.*; *see also* Disclosure Requirements and Prohibitions Concerning Franchising, 72 Fed. Reg. 15444 (Mar. 30, 2007) ("[T]he contract disclosures are required to be presented in easy-to-read tables, with references to the franchise agreement, rather than in the form of more detailed descriptions.").

215. *See generally* Emerson, *supra* note 65.

216. Unfortunately, prospective franchisees often do not read the information (in the FDD, franchise agreements, and other materials) available to them. *See supra* Part IV.B. Therefore, more must be done to encourage the due diligence of franchisees and prospective franchisees.

1. Intellectual Property Rights

Federal and state registration statutes extend protection for a franchisor's intellectual property (IP). Under both the Lanham Act[217] and the Defend Trade Secrets Act[218] at the federal level, and also with the Uniform Trade Secrets Act,[219] which has been adopted by every state except New York and North Carolina,[220] franchisors can obtain injunctive relief against the misappropriation of their trademarks or trade secrets.[221] These statutes provide greater uniformity and predictability in their enforcement than the variety of state and common law frameworks that regulate noncompete covenants.[222] There is a strong argument to be made that the relief offered pursuant to these statutes offers even greater security to franchisors than attempting to enforce a noncompete covenant against a former franchisee who may be misappropriating intellectual property.[223] Further, franchisors may strengthen their claim for injunctive relief by defining their trade secrets and the scope of the franchisee's right to use these secrets in the franchise agreement.[224] Injunctive relief against misappropriation protects not only the franchisor's exclusive ownership of IP but also any goodwill these trademarks hold with the brand's customers.[225] A former franchisee that continues to use the franchisor's marks to pass their business off as part of the system can cause great confusion and damage to the franchisor's brand in the eyes of customers, especially if the former franchisee's business operates at a lower standard of service.[226] If such misappropriation takes place, the franchisor has a right of action to stop this damaging behavior. Some jurisdictions even presume that a franchisor has suffered "irreparable harm" to their brand goodwill in a trademark misappropriation action, though not all courts go this far.[227] Should franchisors lose the ability to bind franchisees with post-term noncompete covenants, this injunctive relief offers a more than adequate means of protecting their brand goodwill. Further, this is a more equitable means of protection since it hinders only those former franchisees who break the rules and cause harm to the franchisee.

2. Nondisclosure Agreements

Franchisors also protect their trade secrets using nondisclosure agreements. For example, a sample franchise agreement used to award a typical Baskin' Robbins franchise includes a clause prohibiting the franchisee from contesting the validity of the franchisor's

217. 15 U.S.C. § 1051.

218. 18 U.S.C. § 1836.

219. UNIF. TRADE SECRETS ACT, § 2 (UNIF. L. COMM'N 1985).

220. *Id.*

221. *See* 15 U.S.C. § 1116 (on injunctive relief).

222. *See* Emerson, *supra* note 15, at 1098.

223. *Id.*

224. MICHAEL J. LOCKERBY, JAMES P. MITTENTHAL & HEATHER CARSON PERKINS, PROTECTION OF FRANCHISE SYSTEM TRADE SECRETS AND CONFIDENTIAL INFORMATION, AND ENFORCEMENT OF NON-DISCLOSURE AGREEMENTS, IN THE DIGITAL AGE (2012), https://www.americanbar.org/content/dam/aba/publications/franchising_past_meeting_materials/2012/w3.pdf [https://perma.cc/Z5TA-BBRR].

225. See Wolf & Heiserman, *supra* note 27, at 240 (citing numerous court opinions for the conclusion that, at the preliminary injunction stage, many judges have presumed, and *should* presume, "a likelihood of confusion [arising] from the infringement of a party's trademark amounts to irreparable harm. In the context of franchise law, the irreparable harm element of injunctive relief typically equates to harm to goodwill").

226. *Id.* at 239.

227. *Id.* at 235–39.

"Proprietary Marks," or using these marks outside the scope of the franchisee's obligations under the agreement.[228] Further, it forbids the franchisee to "communicate or share any Confidential Information with anyone, or use for the benefit of anyone, except in carrying out [their] obligations under this Agreement."[229] These restrictions apply both during and after the course of the franchise agreement and allow Baskin-Robbins to pursue injunctive relief against this prohibited behavior. Given that franchisors already commonly design and use nondisclosure agreements to protect against misuse of the franchisor's intellectual property by a competitor, it could be argued that noncompete clauses are redundant in the franchise context. These provisions address a key concern of franchisors just as well as a noncompete would and are generally enforceable.[230] Given the largely negative sentiment against the use of noncompete covenants, it may be advantageous for franchisors to rely more heavily on nondisclosure provisions targeted at keeping their trade secrets and know-how within the franchise system.[231]

While nondisclosure agreements have their positives compared to noncompetes, some negatives that come with the noncompetes also come with nondisclosures. For example, franchisees may be dissuaded from signing an agreement with the franchisor if they know that a nondisclosure will be included.[232] Presumably, just like noncompete agreements, the franchisee knows its options will be restricted post-term, and the franchisees' employment prospects will decline. Thus, nondisclosure agreements would replace noncompete agreements best if they were considered with other techniques.[233] For example, the 2014 Noncompete Survey Project and 2020 Cornell National Social Survey suggest that training repayment agreements are more prevalent among younger workers, nearly 10–15% of ages 25–40, compared to 3.6–4.3% of those aged 41–65.[234] Additionally, the figures indicate that workers with graduate degrees are more likely to have forms of training repayment agreements with rates of 7.4% in 2014 and 11.9% in 2020, compared to those only possessing a high school diploma.[235] Other data proposes that training repayment agreements are most common in occupations that require advanced training and technical skills (e.g., engineering, architecture, computing, and mathematics).[236] These distributions can help

228. BASKIN ROBBINS FRANCHISING LLC, FORM OF BASKIN-ROBBINS FRANCHISE AGREEMENT (2011), https://www.sec.gov/Archives/edgar/data/1357204/000119312511172042/dex1030.htm [https://perma.cc/P7VQ-BKVH].

229. *Id.* at 10.

230. Overly broad NDAs would also qualify as an illegal de facto noncompete under the proposed FTC rule. *See supra* notes 129–31 and accompanying text.

231. The FTC supports this strategy, saying that "[t]rade secret laws and non-disclosure agreements (NDAs) both provide employers with well-established means to protect proprietary and other sensitive information. Researchers estimate that over 95% of workers with a noncompete already have an NDA." Press Release, *supra* note 13.

232. Alexandra Twin, *Non-Disclosure Agreement (NDA) Explained, With Pros and Cons*, INVESTOPEDIA (July 12, 2024), https://www.investopedia.com/terms/n/nda.asp [https://perma.cc/W4SH-NYEK].

233. *Exploring Alternatives to Non-Compete Agreements*, AM. SPEECH-LANGUAGE-HEARING ASS'N, https://www.asha.org/practice/exploring-alternatives-to-non-compete-agreements/ [https://perma.cc/FXE6-7K8J] (providing pros and cons on nondisclosure agreements as an alternative for noncompetes).

234. J.J. Prescott, Stewart Schwab & Evan Starr, *First Evidence on the Use of Training Repayment Agreements in the U.S. Labor Force*, PROMARKET (Mar. 27, 2024), https://www.promarket.org/2024/03/27/first-evidence-on-the-use-of-training-repayment-agreements-in-the-us-labor-force/ [https://perma.cc/EJN6-B7UD].

235. *Id.*

236. *Id.*

explain how certain noncompete practices further limit career mobility as workers in these fields already face limited lateral opportunities due to their age and niche technical skills. Over time, this system may entrench workers in unusual, vulnerable positions that may not align with their career goals or market value, resulting in lower cumulative wages.[237]

3. Training Repayment Agreements

Beyond the typical contractual means for ensuring know-how is kept a secret (noncompete agreements, nondisclosure agreements, and IP rights), which attempt to keep ideas secret through contractual tools that impose damages for the violation of the clauses, franchisors could also use methods that proactively stipulate punishment for revealing the franchisor's secrets. In practice, these tools would be more legally sound than noncompetes because they would not come with a noncompete agreement's typical pitfalls[238] and would be more effective than nondisclosure agreements or IP law rights remedies because they would present a more concrete penalty to the franchisee.

An example of this type of tool is known as a training repayment agreement. These are contract provisions that require a worker to pay back their employer for the cost of their training if they leave the job before a specified time period has elapsed. In the franchise context, these provisions are useful in that they protect the training provided by franchisors, another key part of their investment in a franchisee's success.

However, there are additional concerns surrounding the use of training repayment provisions in employment contracts. The cost of triggering one of these provisions can be steep, even in relatively 'low-skilled' work. For example, PetSmart recently sought to enforce a $5000 training repayment provision against a pet groomer who decided to leave her position roughly halfway through the two-year minimum tenure provided for in her employment contract.[239] The position in question paid about $15 per hour, and there was little evidence to show how PetSmart arrived at the $5000 value for the training provided.[240] Because of situations like this, there are growing concerns that these training repayment provisions are little more than a means for employers to lock in workers and suppress their bargaining power, similar to the function of a noncompete.

Given that training repayment provisions may be enforced whenever an employee leaves their employment, regardless of whether they go to work for a competitor, there is an argument to be made that these provisions are even more dangerous than noncompetes. Further, they carry the same *in terrorem* effect as a noncompete clause, with the added threat that the balance due to be repaid becomes a debt affecting the employee's credit. Because of this concern, the FTC was seeking to rein in the use of these provisions by classifying them as *de facto* noncompete clauses in certain situations.[241] Under the proposed rule, an illegal training repayment provision would be one which "requires the

237. *Id.*

238. *Non-Compete Clause Rulemaking*, *supra* note 126 (explaining that part of the reason noncompete agreements are legally problematic is because they restrict mobility, suppress wages, and hinder innovation).

239. Dave Jamieson, *A PetSmart Dog Groomer Quit Her Job. They Billed Her Thousands of Dollars for Training*, HUFFPOST (Aug. 5, 2024), https://www.huffpost.com/entry/petsmart-dog-groomer-billed-training_n_62ebe32ae4b0c55016181768 [https://perma.cc/3YLB-RK3Y].

240. *Id.*

241. Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (codified at 16 C.F.R. pt. 910).

worker to pay the employer or a third-party entity for training costs if the worker's employment terminates within a specified time period, where the required payment is not reasonably related to the costs the employer incurred for training the worker."[242] These provisions could still be enforced under the rule if the repayment is reasonably related to the actual costs of the employee's training and would not be unenforceable *per se* as with traditional noncompete provisions.[243]

As discussed previously, for now–with two federal court holdings opposed to the FTC's 2024 Rule,[244] with the last vestiges of *Chevron* now dead,[245] and with a Republican administration having assuming control in January 2025, the FTC's 2024 noncompete rule is now defunct; this rule, and all of its underpinnings (the hearings, the comments, the Commission's findings), has become the administrative equivalent of a lengthy "dissenting" judicial opinion. But it does, like such an opinion, remain present for when the political winds—the Congressional control, court composition, incumbent President, and regulatory agencies[246]—may reverse course, again. Certainly, the 2024 rule did not directly apply to franchisees. However, by extension, that broader coverage remains possible for a future when a noncompete ban could be broader—reaching franchisees and others who may not constitute employees but who are also unfairly impacted.[247]

---

242. *Id.* at 3535.

243. *Id.*

244. *See supra* notes 152–61 and accompanying text; *see, e.g.*, Nina T. Martinez et al., *District Court Ruling Bars Federal Trade Commission Non-Compete Rule for the Near Term*, PILLSBURY (Sept. 10, 2024), https://www.pillsburylaw.com/en/news-and-insights/us-district-court-federal-trade-commission-noncompete-rule.html [https://perma.cc/G7Z9-9Z39] (discussing litigation regarding the proposed noncompete rule).

245. On June 28, 2024, the U.S. Supreme Court issued a landmark decision in Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024). The *Loper Bright* decision overturned Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

246. David McCabe & Cecilia Kang, *Trump Fires Democrats on Federal Trade Commission*, N.Y. TIMES (Mar. 19, 2025), https://www.nytimes.com/2025/03/18/technology/trump-ftc-fires-democrats.html (on file with the *Journal of Corporation Law*) (on March 18, 2025, President Trump fired the two Democrats, Rebecca Kelly Slaughter and Alvaro Bedoya, from the Federal Trade Commission, bringing the number of commissioners down to two Republicans). The two fired commissioners are appealing their termination as an illegal overreach of executive power upending the usual practice that independent regulatory boards should be filled with three members from the President's party and two from the opposing party. David McCabe, *The Two Democrats Trump Fired From the F.T.C. Sue Over Their Dismissals*, N.Y. TIMES (Mar. 27, 2025), https://www.nytimes.com/2025/03/27/technology/ftc-fired-democrats-trump-lawsuit.html (on file with the *Journal of Corporation Law*). In Humphrey's Ex'r v. United States, 295 U.S. 602 (1935), the Supreme Court upheld the law providing that the FTC's commissioners (and, in effect, the commissioners of other independent federal commissions) could only be removed before the completion of their terms if done "for cause." *Id.* at 629.

247. Of course, such a future may seem only a mirage, given how the FTC Noncompete Rule went from a proposal to promulgation in the 16 months from January 2023 onward, only to fall quickly, first in two district court decisions but, much more significantly, with the 2024 Presidential election. In 2025, with *Chevron* dead, with the FTC's orientation changed dramatically from what it had been in 2024, the FTC Noncompete Rule is, at most, dormant. However, the newer, conservative FTC may actually be receptive to some of the same arguments against noncompetes as have increasingly been adopted in a number of states, both those under Democratic party control and sometimes those ruled by Republicans. And the FTC's dalliance with a ban, perhaps especially the underlying rulemaking architecture—the voluminous commentary and factfinding—will remain a record for the future.

So, as the issue stays primarily within state purview (except perhaps for occasional "extreme" cases, such as ones alleging antitrust issues), the FTC may, for now, in fact have little role to play with respect to

The regulated use of training repayment provisions could be a valuable alternative to noncompete provisions in franchise agreements. The cost of training a new franchisee to successfully operate a system unit can legitimately be an expensive undertaking for the franchisor. It may also provide real value to the franchisee as an entrepreneur. Accordingly, this is one of the justifications cited for the use of noncompete provisions. However, a well-tailored training repayment provision that allows a franchisor to collect only the costs expended in training the franchisee may be more desirable because it directly protects the specific interest of the franchisor.[248] However, numerous concerns about training repayment often lead to grouping those requirements with noncompetes and finding both to be unduly restrictive on employees' rights and harmful to an efficient, thriving, market-sensitive economy.[249]

---

noncompetes. This prediction is based on, among other factors, (1) the presumption that a Republican FTC's default position will be great skepticism when assessing the efficacy of regulatory intervention, and (2) the shift in ultimate power to interpret the law—enabling acts and other guidance—is now, under a series of decisions (most recently *West Virginia v. EPA* and *Loper Bright Enterprises v. Raimondo*), clearly the province of federal courts over the particular agencies, absent clear Congressional directives to the contrary. Perhaps ironically, this does mean that a commission which overturns or redirects the rules and rulings of previous commissioners from the other party is simply owed less deference, and may be seen as having less sway, regardless of which party is now in charge of that regulatory agency. In other words, unless Congress could act, or federal courts could reasonably expect a broad view of existing federal statutes (e.g., antitrust laws), a federal agency's role may be seen as diminished, with the states continuing their statutory and adjudicatory role overseeing noncompetes. With that responsibility, the state courts, the litigants in both common law and statutory-based actions, the state regulators, and the legislators may all, of course, still use the FTC's present or past work—its record —while pushing for individual or systemic justice with respect to noncompetes, whether involving employees, independent contractors, or some possibly overlapping class, the most significant likely being purchasers of businesses and licensees who quite often are franchisees. *White & Case Glob. Non-Compete Res. Ctr.*, *supra* note 165 (noting that the FTC cannot enforce the 2024 Noncompete Rule because of a U.S. District Court nationwide injunction issued in August 2024; declaring nonetheless, "the FTC's noncompete rule has put non-competes in the spotlight and private plaintiffs are already attempting to use antitrust law to challenge non-competes and seek damages.").

248. For data on training, *see supra* note 22. As a legal matter, the fundamental importance of training generally and of, specifically, the franchisor's imparting to the franchisee the requisite know-how is, or at least should be, a core requirement for state recognition and protection of the franchise relationship and the parties' rights thereunder. *See* Robert W. Emerson, *Franchise Savoir Faire*, 90 TUL. L. REV. 589, 643–46 (2016) (discussing how, in the United States, the concept of *savoir-faire*—know-how—is an implicit if not express basis for franchising, that franchisor-to-franchisee transfer of know-how is the parties' usual expectation, and that this aspect of franchising, know-how, so basic in other nations' franchise law jurisprudence, should be recognized as a required element of U.S. franchise law).

249. Prescott, Schwab & Starr, *supra* note 234 (providing analysis of training repayment provisions and their potentially problematic nature; the graphs pull information from 2014 to 2020, offering valuable insights into future trends, the demographic that training repayment programs impact the most, and how the FTC Rule on Noncompetes would treat training repayment programs); *see* Jonathan F. Harris, *History Absolves the FTC: A Defense of the Rule on Non-Competes and Functional Non-Competes*, HARV. L. REV. BLOG (Jan. 5, 2025), https://harvardlawreview.org/blog/2025/01/history-absolves-the-ftc-a-defense-of-the-rule-on-non-competes-and-functional-non-competes/ [https://perma.cc/EV42-6VKC] (noting that "a TRAP [Training Repayment Agreement Provision] is a functional non-compete if it burdens employees with 'significant out-of-pocket costs' for leaving a job and effectively prevents them from switching jobs'"; also stating, "Many employers [acknowledge] they use TRAPs primarily to keep workers from leaving their jobs rather than to recover costs for providing useful general skills training[, and some] trade groups have openly recommended TRAPs as workarounds to traditional non-competes that face [much more] scrutiny"; examples of TRAPs for "low and low-middle wage workers [include] pet groomers earning close to the minimum wage, foreign-recruited healthcare workers claiming underpayment and exploitation, cosmetologists claiming to have received no training, and truckers enduring grueling conditions").

A concept that is related to training repayment agreements and that could dissuade franchisees from revealing protected know-how without the use of a noncompete is including a clause that requires the franchisee to pay back whatever it may have earned during its equitable recoupment claim period. The equitable recoupment doctrine refers to the idea that a franchisee may recoup its investment in the relationship if the franchisee made required investments that it did not recoup in the franchise period which was at will and terminated without just cause.[250]

To help ensure franchisees do not disseminate know-how to competitors, franchisors could include provisions in the franchise agreement that stipulate that franchisees are only entitled to keep compensation earned during an equitable recoupment period if they comply with a nondisclosure agreement. Thus, if the franchisee subsequently violates the nondisclosure agreement, it will have to pay damages for harm caused by the disclosure as well as a repayment of any compensation it had earned from the equitable recoupment period it was entitled to. Since this would only protect the franchisor in the circumstance that it terminates the franchise agreement without just cause, franchisors would need to pair this method with others, such as the training repayment agreement and a nondisclosure agreement to account for the instance where the franchisee terminated the agreement, or the franchisor terminated the agreement with just cause.

Similar to the training repayment agreement method, this method requires the franchisor to pay an additional payment on top of potential damages incurred from a violation of a nondisclosure or violation of IP rights. This extra layer of protection would ideally act as an extra deterrent from revealing franchisor secrets.

In theory, this sort of measure would keep franchisees from disclosing the franchisor's secrets to other franchisors because of the franchisee's interest in keeping the investment it has made in previous franchises. Since investment costs can be very sizeable,[251] franchisees would presumably have a strong incentive not to reveal any secrets of the previous franchisor.

These measures present a proactive deterrent that would wane franchisees away from revealing secrets more effectively than a contract clause that leaves damages up to the court and may or may not be enforced. Rather than relying on a noncompete that could be based on legally shaky grounds, pairing this method with other tools (e.g., training repayment agreements and nondisclosure agreements) would create a legal lockbox on the franchisor's know-how that would make it very difficult to open without extensive repercussions. These proactive tools can be stacked with others to guarantee that franchisees would not reveal franchisor secrets.

4. Rights to Repurchase Assets

Another more focused alternative to noncompete covenants is for franchisors to include a right to repurchase the franchisee's assets upon termination or expiration of the

250. James J. Long & Jevon C. Bindman, *Equitable Recoupment: A Limited Remedy for Dealer or Franchise Terminations when Statutory Protection is Absent*, 41 FRANCHISE L.J. 367, 367–70 (2022).

251. *Id.* Note that "[t]he closer that [a franchisee's] expenditure is to a capital investment, the more likely that it will qualify for recoupment, while the more that [the expenditure] resembles ordinary business expenses, the less likely that it is to qualify." *Id.* at 374.

franchise agreement.[252] By exercising such a right, the franchisor would prevent their former franchisee from immediately transitioning their location into a competing business to continue selling to the same customers. A contractual right to repurchase would not offer complete protection against competition from a former franchisee. Still, it would at least slow down the franchisee in setting up their competing outfit and allow the franchisor to resell the assets to a new franchisee.[253] Buying back the assets of the franchisee may be especially valuable if the subject business requires the use of proprietary tools or fixtures, such as specially developed cooking instruments.[254] While this right to repurchase is not as restrictive as a noncompete covenant, the added benefit to the franchisor is that these provisions are generally enforceable. In fact, the use of a repurchase provision is the approach encouraged by Iowa's franchising statute.[255] Repurchasing the assets of a former franchisee certainly presents additional financial considerations and concerns for a franchisor.[256] Still, in certain situations, it can be another useful means for protecting the franchisor's interests.[257]

5. Incentivizing Franchisees to Keep the Secret Sauce, Secret

Thus far, we have mainly considered how to protect the know-how that the franchisor shares with the franchisee after the event of the franchisee leaving.[258] Instruments such as rights to repurchase agreements or nondisclosure agreements are only relevant after the

252. Ignazio J. Ruvolo & Ingrid von Kaschnitz, *The Dreaded 'Scott' Decision—The Status of Enforcing Post-Termination Non-Competition Covenants in California*, 11 FRANCHISE L.J. 45, 47–48 (1992).

253. *Id.*

254. *Id.*

255. IOWA CODE § 523H.11 (2016) ("A franchisor shall not prohibit a franchisee from, or enforce a prohibition against a franchisee, engaging in any lawful business at any location after a termination or refusal to renew by a franchisor, unless it is one which relies on a substantially similar marketing program as the terminated or nonrenewed franchise or unless the franchisor offers in writing no later than ten business days before expiration of the franchise to purchase the assets of the franchised business for its fair market value as a going concern.").

256. To make it more affordable and in line with the true costs, the repurchase should be at a depreciated cost—to make the burden lower on the franchisor and more in line with the actual economics. Indeed, that is the usual approach when a state enacts a law to require a repurchase. For example, in 2015, California amended its Franchise Relations Act to delineate a right of repurchase, subject to some exceptions (e.g., the franchisee has declined the franchisor's bona fide offer of renewal (20022(c)), the franchisor has publicly announced a complete, nondiscriminatory withdrawal from the franchisee's geographic market area (20022(e)), or the franchisor "does not prevent the franchisee from retaining control of the [franchisee's] principal place of . . . business") (20022(d)). As bound by those or other statutory conditions or exceptions, the statute proclaimed:

> Except as provided in this section, upon a lawful termination or nonrenewal of a franchisee, the franchisor shall purchase from the franchisee, at the value of price paid, *minus depreciation*, all inventory, supplies, equipment, fixtures, and furnishings purchased or paid for under the terms of the franchise agreement or any ancillary or collateral agreement by the franchisee to the franchisor or its approved suppliers and sources, that are, at the time of the notice of termination or nonrenewal, in the possession of the franchisee or used by the franchisee in the franchise business.

CAL. BUS. & PROF. CODE § 20022(a) (2023) (emphasis added).

257. *See* sources cited *supra* note 91 and accompanying text (discussing state franchise relationship statutes that, upon the franchise's termination or nonrenewal, require franchisors to repurchase some assets held by the franchisee); *see also* sources cited *supra* note 94 and accompanying text (discussing the state of Washington's statute, which requires either proper notice of nonrenewal or repurchasing assets).

258. *See supra* Part IV.D (discussing alternatives to noncompetes focused on nondisclosure agreements and other alternative means of retaining intellectual and tangible property).

franchisee has made up its mind to disassociate from the franchisor. However, the most effective and least restrictive method for ensuring know-how stays within the organization is to incentivize the franchisee to stay within the organization, and if the franchisee does leave, incentivize the franchisee to keep the secrets—a carrot rather than a stick.[259]

There are many forms an incentive can take. For example, a franchisor could offer the franchisee benefits, such as stock options, for every renewal of the franchise agreement the franchisee signs. Creating a system that fosters long-lasting relationships can help keep know-how close to the core without ever having to get wrapped up in noncompete, or even nondisclosure, messiness. Stock options are not the only thing franchisors could use. It could be as simple as creating a monetary bonus schedule that franchisees have access to the longer, they stay with the franchisor. Instead of focusing on an inevitable disassociation, franchisors could use preventative tools that keep the headache of dispersed secrets from ever coming to fruition.

In some cases, however, franchisees will decide to move on. In these instances, franchisors could again use incentives to keep the franchisee from disclosing anything to which the franchisor wants to maintain exclusive access. A termination package could be worked out that puts forth as consideration the franchisee's promise to never use know-how or goodwill that the franchisee acquired through the franchisor's facilitation. Options like these are completely viable and can be very effective if executed correctly. They would eliminate the hassle created by tools that only consider the issue as an after-disassociation problem.

One of the main arguments in favor of noncompete agreements is that they increase employers' incentives to make productive investments in, for example, trade secrets, customer lists, worker training, and capital investment.[260] The reasoning is that companies are more willing to make these investments if they know that the employee or franchisor will not run off with the know-how shortly thereafter, thus rendering the investment counterproductive.[261] Without noncompete agreements, if employers and franchisors are hesitant to share their know-how, and this hesitancy manifests itself into inadequate training and less information being shared with the employees operating the business, the business will become less efficient and costlier. The business' reservations shall lead to a more expensive operation and a lower quality product or service.

Even if this effect is true (the FTC has not found any evidence in support of it),[262] it does not mean that there are no other less restrictive alternatives that achieve the same solution. As mentioned above, nondisclosure agreements are a viable tool to keep a franchisee from revealing trade secrets to a competitor. In fact, nondisclosure agreements may even work better than a noncompete since they directly address the subject information

259. *See supra* Part I (disusing the uncertainty that covenants not to compete often create for both the franchisor and franchisee in terms of protecting their future interests); *see also supra* Part IV.D (discussing intellectual property rights and instruments focused on reacquiring physical property).

260. *See* Non-Compete Clause Rule, 89 Fed. Reg. 38433 (May 7, 2024) (codified at 16 C.F.R. § 910) (providing guidance for enforceable noncompetes), *invalidated by* Ryan, LLC v. Fed. Trade Comm'n, 746 F. Supp. 3d 369 (N.D. Tex. 2024). For more on the franchisor's justification for a noncompete clause controlling its franchisees and even ex-franchisees, see *supra* Part I.A.

261. *See* Sarah O. Lam, Thomas Lenard & Scott Wallsten, *Is a Ban on Noncompetes Supported by Empirical Evidence?*, 29 FORDHAM J. CORP. & FIN. L. 1, 18–19 (2023) (displaying the economic benefits of noncompetes).

262. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3487, 3505, 3527, 3529–30 (proposed Jan. 19, 2023) (codified at 16 C.F.R. pt. 910).

that the franchisor is worried about protecting, and they can have a larger chronological scope than a noncompete.[263]

Further, if a nondisclosure agreement is not as useful because the franchisor is worried about sharing training and techniques that the franchisee may use, rather than the franchisee revealing more concrete information gathered, the franchisor can rely on the IP rights it has in the trade secrets. As mentioned, IP law will protect the franchisor from the dissemination of practices, processes, designs, patterns, and compilations of information that are unique and that bring the franchisor economic value.[264] These rights are also enforced statutorily,[265] so the franchisor does not need to worry about the possibility of a poorly drafted noncompete being struck down by a court.

While all restrictive covenants necessarily come with some drawbacks to those bound by their terms, the use of covenants that specifically address the interests of the franchisor provides a more balanced outcome for all parties. Rather than exerting broad control over the career direction of a franchisee following the conclusion of their agreement using a noncompete covenant, franchisors could instead rely on other commonly used contract provisions to protect only the value they confer to franchisees through the agreement. Should noncompete provisions be further restricted or banned outright, the increased use of these other provisions could help continue to meet the needs of the unique franchise business model.

In essence, two of the main things franchisors seek to protect with noncompetes can be protected more directly with other tools. Not only will the secrets be more directly protected, but there will also be a greater chance of a court upholding the protections conferred by those tools.

V. CONCLUSION

The inclusion of post-term noncompetition covenants is pervasive in both employment and franchise agreements. Given the considerable amount of training, goodwill, and access to trade secrets that franchisors confer to franchisees, many argue that noncompete covenants are necessary to ensure the continued success of the franchise business model. On the other hand, these restrictive covenants do impose real hardships on franchisees, who are often small entrepreneurs who lack the bargaining power to secure more favorable terms for themselves. In evaluating these competing interests, a more balanced solution is necessary.

At the very least, state lawmakers should reevaluate the standards for enforcing post-term noncompete covenants. Many state statutes currently direct courts to evaluate the reasonableness of a covenant primarily based on the time and distance restraints imposed by the covenant. Instead, this analysis should take a more holistic approach, considering factors such as the relation of the noncompete to a legitimate need of the franchisor, the reciprocity of obligations between the franchisor and franchisee, and the benefits conferred to the franchisee in exchange for their agreement to the noncompete. In this analysis, the

263. *See, e.g.*, FLA. STAT. § 542.335(1)(d)(1)(e) (1996) (stating that any noncompete clause that is lingering in duration of more than two years shall be presumed unreasonable and thus held to be unenforceable).

264. *See, e.g.*, 18 U.S.C. § 1832(a) (stating that any person who knowingly steals a trade secret from its owner, used in interstate commerce, may be fined or imprisoned).

265. *Id.*

franchisor seeking to enforce the covenant against the franchisee should bear the burden of showing the existence of these factors. If post-term noncompete covenants are to be enforced against franchisees at all, the facts surrounding the desired enforcement should make it clear that the covenant was fairly bargained for and is not an arbitrary restriction on the franchisee's ability to earn a living.

However, noncompete covenants bring with them additional challenges that are difficult for the law to address, such as *in terrorem* effects, which discourage franchisees from taking otherwise legal courses of action. Even when lawmakers impose restrictions on noncompete covenants, franchisors who draft these covenants are often free to circumvent the restrictions because franchisees typically lack the sophistication to challenge these restrictions, even when they are unlawful. To better protect franchisees, it may be necessary for legislators to completely ban the use of noncompete covenants in franchise agreements. A nationwide, per se ban on using post-term noncompete covenants in franchise agreements would ensure franchisees' rights to career mobility are protected. With other contractual methods available for franchisors to protect their business interests, franchisors can still craft agreements that serve their needs without broadly preventing their former franchisees from pursuing other opportunities.

Recently, there has been a great deal of political pushback against using noncompete provisions in the employment context. Sweeping bans on these provisions have been proposed at the federal and state levels, with several states already enacting such legislation. While post-term noncompete covenants are still largely enforceable in the United States, the winds of public opinion seem to have shifted against their continued legality, as evidenced by the thousands of comments the FTC received in support of its proposed ban of the covenants. Given this backdrop, it is likely wise for franchisors to be proactive in reducing their dependency on noncompete provisions for the protection of their business model.

Whatever the mechanism for bringing about such a change, the continued equity of the relationship at the heart of the franchise business model requires that post-term noncompete covenants be phased out of use in franchise agreements.