DISCUSSING WHETHER CONGRESS SHOULD IMPLEMENT A NATIONAL UNIFORM NON-COMPETITION AGREEMENT AND WHY NON-COMPETITION AGREEMENTS DISCOURAGE DYNAMISM PARTICULARLY IN FLORIDA

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I. INTRODUCTION

Florida's non-competition statute is the most restrictive covenant in the United States.[1] Florida's non-competition agreement, otherwise known as a restrictive covenant, has failed to implement its purpose of protecting employers and employees.[2] Ameliorating Florida's unethical abuse of non-compete contracts should require the implementation of a Uniform Non-Compete Act on the federal level.[3] Part II of this Comment provides a broader context of the evolution of Florida's non-compete statute.[4] Florida's statute has transitioned from a moderate non-compete statute to an overly general and pro-employer statute because of the 1996 legislation, which changed the statute's language.[5] The implementation is reflected in the Florida Supreme Court's ruling in the case of *White v. Mederi Caretenders Visiting Services of Southeast Florida, L.L.C.*[6] This Comment also analyzes the impact of the blue pencil doctrine on employees and how different states have highly criticized Florida's statute.[7] Part III reviews a non-compete agreement's impact on low-income workers and its effect on labor market participation and employee mobility.[8] It also describes current federal regulatory attempts by the White House and legislatures to implement and rid the enforcement of non-compete statutes in the United States.[9] Although there have been recent efforts to advocate for more regulations for non-compete agreements, this Comment shows the problems that accompany different non-compete statutes in other states.[10] Part IV concludes with a discussion of the issues with economic and business dynamism through a Florida case study while also

1. Hank Jackson, *Florida's Noncompete Statute: "Reasonable" or "Truly Obnoxious?,"* FLA. BAR J., Mar. 2018, at 11, 12; *see also* Norman D. Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants Not to Compete, Trends, and Implications for Employee Mobility Policy*, 13 U. PA. J. BUS. L. 751, 778 (2011).
2. *See* Jackson, *supra* note 1, at 12; Bishara, *supra* note 1, at 778.
3. *See* discussion *infra* Parts I–V.
4. *See* discussion *infra* Part II.
5. *See* discussion *infra* Part II.
6. *See* discussion *infra* Part II; 226 So. 3d 774 (Fla. 2017).
7. *See* discussion *infra* Part II.
8. *See* discussion *infra* Part III.
9. *See* discussion *infra* Part III.
10. *See* discussion *infra* Part III.

reviewing competing theories on a non-compete agreement's effect on free market labor mobility between firms and industries.[11]

II. THE EVOLUTION OF FLORIDA'S EXCESSIVELY RESTRICTIVE NON-COMPETE STATUTE AND THE HISTORY OF NON-COMPETE AGREEMENTS

The primary focus of this Comment is to gauge the strength of non-compete agreements in fostering dynamism through its broad and restrictive terms throughout different jurisdictions.[12] A non-compete agreement encourages innovation by preventing workers from transferring one company's protected intellectual property and confidential legitimate business information to a rival company.[13] State law governs the enforceability of restrictive covenants that restrict competition between employers and employees.[14] Thus, on the one hand, Florida utilizes an overly broad covenant, while states such as California and North Dakota have contractually banned the implementation of contractual restrictions on employee mobility.[15] Non-competition agreements seek not to punish former employees but to protect the employer from unfair competition.[16] However, Florida's provisions mainly aim to benefit an employer's interest in protecting confidential business information regardless of the hardship an employee may endure resulting from the termination.[17] Despite Florida's excessive restraint on trade, some states—like New York—take a similar approach.[18] Non-competition statutes in similar states must be reasonable in time, scope, and geographical location and tied to a legitimate business purpose.[19] Florida was one of the few states that considered non-competition agreements contrary to public policy.[20] Nevertheless, the subject of enforceability of a

11. *See* discussion *infra* Part IV.

12. *See* discussion *infra* Parts I–V.

13. THE WHITE HOUSE, NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGES, POTENTIAL ISSUES, AND STATE RESPONSES 2 (2016), http://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf.

14. *See id.* at 11.

15. Bishara, *supra* note 1, at 757, 778.

16. Griffin Toronjo Pivateau, *An Argument for Restricting the Blue Pencil Doctrine*, 7 BELMONT L. REV. 1, 4 (2019).

17. *See* FLA STAT. § 542.335(1)(g)(1) (2022).

18. Jackson, *supra* note 1, at 14.

19. *Id.*

20. *See* Love v. Miami Laundry Co., 160 So. 32, 42 (Fla. 1934) (Brown, J., dissenting in part) (concluding that contracts should be carefully scrutinized by the courts when the covenant is unreasonable and should not be enforced "unless there is a clear showing that the loss to the employer is irreparable and [the] remedy at law [would be] inadequate.").

restrictive covenant has undergone a substantial evolution through Florida's enactment of statutes and amendments.[21]

Non-compete agreements are contractual agreements that limit an employee's ability to start or work for a competing firm after a job separation.[22] While these agreements protect a company's legitimate business interest and its investment in workers, it also limits an employee's ability to earn a living by eroding the worker's future bargaining position for finding employers.[23] Employers have utilized non-competition agreements to protect trade secrets and the company's individualized and unique information, reduce labor turnover, and improve employer leverage in future negotiations with workers.[24] However, the benefits of a restrictive covenant have often come at the expense of a worker's ability to earn a living and the economy as a whole.[25] Although non-compete statutes vary throughout jurisdictions, Florida's statute governing non-competition agreements has faced criticism for its pro-employer nature.[26]

For many years in the twentieth century, Florida had considered the importance of contract construction and voided non-competition agreements on the ground that it was against public policy to impose an undue hardship on the employee.[27] Florida courts determined that these restrictive covenants be scrutinized by not allowing a court of equity to lend its aid to the covenant's enforcement of unreasonable terms.[28] The Florida Supreme Court followed the common law in England, which determined that prohibiting a man's right to pursue his calling was void as against public policy.[29] Common law paved the way for considering an employee's pursuit of trade in the field where the employee had developed an imperative skillset.[30] Nevertheless, restrictive

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21. *See* Jackson, *supra* note 1, at 12.

22. John M. McAdams, *Non-Compete Agreements: A Review of the Literature* 2 (Federal Trade Commission, Working Paper, 2019), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3513639.

23. *Id.* at 5, 6–7.

24. OFF. OF ECON. POL'Y, U.S. DEP'T OF TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 3 (2016), http://home.treasury.gov/system/files/226/Non_Compete_Contracts_Econimic_Effects_and_Policy_Implications_MAR2016.pdf.

25. *Id.*

26. Jackson, *supra* note 1, at 12.

27. Kendall B. Coffey & Thomas F. Nealon, III, *Noncompete Agreements Under Florida Law: A Retrospective and a Requiem?*, 19 FLA. ST. U. L. REV. 1105, 1106 (1992).

28. Love v. Miami Laundry Co., 160 So. 32, 42 (Fla. 1934).

29. Standard Newspapers, Inc. v. Woods, 110 So. 2d 397, 399–400 (Fla. 1959).

30. *Id.* at 399.

covenants not to compete have presented centuries-old problems.[31] The earliest cases surrounding non-compete agreements in England considered the chronic shortage of skilled workers and the epidemics of the Black Death during the fourteenth century.[32] For this reason, restraints on trade were void against public policy.[33] By the eighteenth century, after England expanded commercialization, courts upheld restraints on trade provided it was reasonably limited both in geographical locations and duration of time.[34]

The common law framework quickly became criticized by employers who discovered no legal way to limit the competitive advantage learned by former employees.[35] Although Florida followed common law, the importance of an employee's ability to earn a living slowly eroded with the adoption of section 542.12 of the Florida Statutes in 1953.[36] Before the statute's enactment, Florida courts held discretionary power to strike down laws that prevented an individual from supporting himself and his or her family.[37] The Florida Supreme Court in *Arond v. Grossman*[38] stated that no Florida decisions had enforced non-competition agreements against former employees absent some particular equity and on the grounds of lack of mutuality.[39] Florida Statute section 542.12 was the first statute to authorize contractual restrictions for competition in the state by prohibiting employees from learning about a company's confidential business information and subsequently leaving for a competing business.[40] This statute also created a presumption of irreparable injury, which did not require an employer to allege or prove the existence of harm.[41]

In 1980, section 542.12 was recodified as section 542.33, and in 1990, the section was amended after several conflicting rulings led to unpredictable outcomes for employers.[42] The amendment was imperative in providing a backdrop for considering Florida's statute as the most restrictive covenant in the

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31. Socko v. Mid-Atlantic Sys. of CPA, Inc., 99 A.3d 928, 931 (Pa. Super. Ct. 2014).

32. *Id.*

33. *Id.*

34. *Id.*

35. Kendall B. Coffey, *Noncompete Agreements by the Former Employee: A Florida Law Survey and Analysis*, 8 FLA. ST. U. L. REV. 727, 728 (1980).

36. *See* Coffey & Nealon, III, *supra* note 27, at 1107; FLA. STAT. § 542.33 (1989). On October 1, 1980, § 542.12 was renumbered as § 542.33. Coffey & Nealon, III, *supra* note 27, at 1107 n.8.

37. *See* Coffey & Nealon, III, *supra* note 27, at 1106–07.

38. 75 So. 2d 593 (Fla. 1954).

39. *Id.* at 595.

40. *See* Coffey & Nealon, III, *supra* note 27, at 1133; FLA. STAT. § 542.33.

41. *See* FLA. STAT. § 542.33(2)(a).

42. Coffey & Nealon, III, *supra* note 27, at 1133; FLA. STAT. § 542.33.

United States.[43] The amended statute provides that courts could not enforce a non-compete agreement against employees, independent contractors, or agents when the agreement is contrary to public health, safety, or welfare, when the agreement is unreasonable, and when a showing of irreparable injury does not support the agreement.[44] This statute restricted the presumption that the employer would be irreparably injured when a past employee joins the employer's competitor.[45] A presumption would only arise in specific circumstances, limited to the use of trade secrets, customer lists, direct solicitation of existing customers, or where the seller of a goodwill of a business or a shareholder is selling or disposing of all of his or her shares in a corporation breaches an agreement to refrain from engaging in a similar business.[46] Thus, in any other circumstance, the party seeking to enforce the covenant must allege and prove the existence of irreparable injury to the company before seeking injunctive relief.[47] The issue with the amended statute arose because courts could not identify how to measure the unreasonableness of a restrictive covenant.[48]

The application of a legitimate business interest test, which determines whether an employer seeking to enforce a non-compete agreement has a legitimate business interest rather than just a restraint against the employee leaving to work for a competitor, is detailed in Florida's Second District Court decision in *Hapney v. Central Garage, Inc*.[49] In this case, the plaintiff had over seven years of experience installing and repairing auto and truck air-conditioning systems before he began to work for Central Garage for nine-and-a-half months.[50] He signed a non-compete agreement at the start of his previous employment before working for the company's direct competitor.[51] The plaintiff had not received additional training, did not have access to the company's confidential business information or trade secrets, and he did not develop significant relationships with the company's customers.[52] The court concluded that reasonableness extended beyond the time and geographical scope of the statute to the protection of a legitimate business interest.[53] Despite implementing

43. *See* Coffey & Nealon, III, *supra* note 27, at 1112–13.
44. *Id.* at 1133–34; FLA. STAT. § 542.33(2)(a).
45. Coffey & Nealon, III, *supra* note 27, at 1135–36.
46. *Id.* at 1133–34; FLA. STAT. § 542.33(2)(a).
47. *See* Coffey & Nealon, III, *supra* note 27, at 1135.
48. *See id.* at 1112.
49. 579 So. 2d 127, 129–31 (Fla. 2d DCA 1991), *disapproved on other grounds by* Gupton v. Vill. Key & Saw Shop, Inc., 656 So. 2d 475 (Fla. 1995).
50. *Id.* at 128.
51. *Id.*
52. *Id.* at 129.
53. *See id.* at 133.

the legitimate business interest test, different circuits disagreed with the test and applied a balancing test.[54] The rules governing restrictive covenants became blurred with the inconsistent use of a legitimate business interest test and the possibility of different court rulings on the same case.[55] In 1996, the Florida legislature enacted Florida Statute section 542.335, which governs all restrictive covenants, effective on and after July 1, 1996.[56] The statute's implementation contains a detailed framework for enforcing a covenant in Florida.[57]

Florida's non-compete law, section 542.335, is the most pro-employer statute in the country.[58] The statute states that "[i]n determining the enforceability of a restrictive covenant, a court: [s]hall not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought."[59] Second, the statute also asserts that "[a] court shall not employ any rule of contract construction that requires the court to construe a restrictive covenant narrowly, against the restraint, or against the drafter of the contract."[60] Although these two provisions face high scrutiny among different states, Florida's blue pencil rule poses a greater issue when analyzing how employers can utilize this doctrine to the detriment of the person against whom the enforcement is sought in court.*

A. *Out-of-State Criticism*

Although Florida enacted a statute that provides a more detailed framework than section 542.33, different jurisdictions have disagreed with Florida's overly restrictive guidance in construing covenants.[61] For example, the New York Court of Appeals in *Brown & Brown, Inc. v. Johnson*,[62] found that Florida's non-compete statute was unenforceable because it was contrary to public policy and, thus, violated a fundamental principle of justice.[63] In this case, the defendant worked for the plaintiff, Brown & Brown, Inc., and signed a non-solicitation agreement whereby she was prohibited from soliciting, accepting, or

54. *See* Jewett Orthopaedic Clinic, P.A. v. White, 629 So. 2d 922, 926 (Fla. 5th DCA 1993).
55. *See id.*
56. FLA. STAT. § 542.335(3) (2022).
57. *See id.* § 542.335(1)(h).
58. Jackson, *supra* note 1, at 12; Bishara, *supra* note 1, at 778, 787.
59. FLA. STAT. § 542.335(1)(g)(1).
60. *Id.* § 542.335(1)(h).
61. *See* discussion *supra* Part II; Jackson, *supra* note 1, at 11.
62. 34 N.E.3d 357 (N.Y. 2015).
63. *Id.* at 360; *see also* Jackson, *supra* note 1, at 11.

servicing any customer or entity of the New York offices.[64] Brown & Brown, Inc. is a Florida corporation with a subsidiary in New York.[65] The defendant was terminated and began working for the plaintiff's competitor.[66] The appellate court held that Florida's choice-of-law provision was unenforceable against public policy and that the provision was overbroad.[67] Additionally, in *Bremen v. Zapata Off-Shore Co.*,[68] the United States Supreme Court held that a contractual choice-of-forum clause should be unenforceable if enforcement defies the forum's public policy declared by statute or by judicial decision.[69] Similarly, in *Unisource Worldwide, Inc. v. South Central Alabama Supply, L.L.C.*,[70] the Alabama court held that utilizing Florida's non-compete agreement under the choice-of-forum clause would be contrary to Alabama's position in disfavoring contracts that restrain employment.[71]

Similarly, in 2008, the Illinois Appellate Court in *Brown & Brown, Inc. v. Mudron*,[72] denied enforcing the choice-of-law provision that required Florida law application.[73] Illinois law requires that, in determining whether a restrictive covenant is reasonable, a court must consider the hardship the covenant imposes on an individual employee.[74] In this case, the court considers Illinois' law, which provides its workers with greater protection from the adverse effects of restrictive covenants.[75]

B. *Rethinking* White v. Mederi Caretenders Visiting Services of Southeast Florida, L.L.C.

To further illustrate how Florida's statute has been under attack by different jurisdictions, the Florida Supreme Court in *White* explores whether Florida's non-compete statute unreasonably restricts employees.[76] In this case, Caretenders, a home healthcare company, hired the defendant, White, as a

64. *Johnson*, 34 N.E.3d at 359.
65. *Id.*
66. *Id.*
67. *Id.* at 360.
68. 407 U.S. 1 (1972).
69. *Id.* at 15.
70. 199 F. Supp. 2d 1194 (M.D. Ala. 2001).
71. *Id.* at 1201.
72. 887 N.E.2d 437 (Ill. App. Ct. 2008).
73. *Id.* at 440.
74. *Id.*
75. *Id.*
76. *See* White v. Mederi Caretenders Visiting Servs. of Se. Fla., L.L.C., 226 So. 3d 774, 779 (Fla. 2017).

marketing representative to solicit medical facilities and physicians for home health service referrals.[77] White signed a non-compete agreement with Caretenders, which prohibited her from working for a competitor one year after her termination.[78] Subsequently, White left Caretenders and sought employment with a direct competitor, where she solicited customers from her previous employer.[79] On appeal, the Court found that Caretenders had a legitimate business interest in its referral sources.[80] The Florida Supreme Court reversed the trial court's ruling that Caretenders did not have a legitimate business interest in referral sources because section 542.335 of the Florida Statutes does not identify referral sources as a legitimate business interest.[81]

The case of *White* is imperative in analyzing how the Florida Supreme Court reads section 542.335 because the case overbroadly expands on legitimate business interest considerations separate from that of the statute.[82] In doing so, Florida courts have mistakenly circumvented the bounds of the statutory directive that a legitimate business interest regarding customers must be substantial and identifiable.[83] A referral list of customers—with which a company has no specific, identifiable, or substantial relationship with the individuals listed—cannot become a legitimate business interest simply because a physician refers to it.[84]

C. *The Blue Pencil Rule*

When a court addresses an unreasonable restrictive covenant, a court can either refuse to enforce the covenant or apply a legal doctrine termed the blue pencil rule.[85] The blue pencil rule is a doctrine that allows courts to strike out unreasonable and overbroad provisions in a non-compete agreement but may not add or change the language of the agreement.[86] Courts have three options when

77. *Id*. at 778.
78. *Id.*
79. *Id.*
80. *Id.* at 786.
81. *White*, 226 So. 3d at 781–82; *see also* FLA. STAT. § 542.335(1)(b) (2022).
82. *Compare White*, 226 So. 3d at 785, *with* Hiles v. Americare Home Therapy, Inc., 183 So. 3d 449, 454 (Fla. 5th DCA 2015), *aff'd in part, quashed in part sub nom.* White v. Mederi Caretenders Visiting Servs. of Se. Fla., L.L.C., 226 So. 3d 774 (Fla. 2017) (holding that "unidentified prospective patients, and correspondingly referral physicians, do not qualify as legitimate business interests for the purpose of enforcing [employment] restrictive covenants").
83. *See White*, 226 So. 3d at 780; FLA. STAT. § 542.335(1)(b)(3).
84. *See White*, 226 So. 3d at 780; FLA. STAT. § 542.335(1)(b)(3).
85. *See* Pivateau, *supra* note 16, at 2.
86. *Id.* at 23.

addressing an unreasonable non-compete agreement.[87] First, the court can void the entire contract, including reasonable terms and provisions, otherwise known as the red pencil rule.[88] Second, the court can strike out only the unreasonable provisions and maintain the rest of the contract, or third, the court may reform the contract to make the terms reasonable.[89] "More than [thirty] states have adopted the practice of contract reformation, including Massachusetts, New York, New Jersey, and Tennessee."[90] Essentially, courts have the authority to either strike unreasonable clauses, leaving the rest to be enforced, or modify the agreement to make it enforceable.[91] The blue pencil rule has faced extreme criticism because it allows employers to rely on the court system when there is a mistake in the contracting process or errors that need correction.[92] The issue with the blue pencil rule is that it allows courts to disregard the express language of a non-compete agreement to make the agreement reasonable.[93] In striking out clauses the court finds unreasonable, the original contracting parties choose to agree to a new contract.[94]

Because the blue pencil doctrine creates uncertainty in employment contracts, an employee's rights may become uncertain because the employee will not know what sort of conduct is prohibited.[95] In addition, an employee may have no choice but to accept a low-salary job from a new employer because of the fear of litigation.[96] Despite the confusion of the blue pencil doctrine to employees, employers are also affected by the inconsistencies of the doctrine.[97] The doctrine leaves employers guessing how far an agreement can be drafted before the court implements the blue pencil rule.[98] Therefore, companies are forced to weigh the benefits of the agreement against the burden of having to enforce the agreement.[99] However, employers continue to lack guidance

87. Jacqueline A. Carosa, *Employee Mobility and the Low Wage Worker: The Illegitimate Use of Non-Compete Agreements*, 67 BUFF. L. REV. DOCKET D1, D18 (2019).
88. *Id.*
89. *Id.*
90. *Id.* at D19.
91. *See id.* at D18.
92. *See* Pivateau, *supra* note 16, at 2.
93. *Id.*
94. *See* Carosa, *supra* note 87, at D7; Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 674 (2008).
95. Pivateau, *supra* note 94, at 691.
96. *Id.* at 692.
97. *Id.*
98. *Id.*
99. *Id.*

regarding the enforceability of the non-compete agreement because courts have consistently interpreted similar cases in different ways.[100]

The Florida statute enforcing the blue pencil doctrine states that "if a contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interest or interests, a court shall modify the restraint and grant only the relief reasonably necessary to protect such interest or interests."[101] The issue with the Florida statute is the use of the word "shall" instead of "may" since "shall" forces the court system to modify an agreement to protect a legitimate business interest while "may" provides discretion to the court system in deciding whether to keep part of the agreement that was agreed upon by the contracting parties, the narrow language used in the word "shall" encourages litigation.* Litigation in the court system around non-compete agreements has been before the courts for more than five hundred years.[102] Through these cases, the court system has handled the evolution of business methods, including the ebb and flow of contract construction, business ethics, and personal economic freedom.[103]

1. *In Terrorem* Effect

The blue pencil rule places a significant burden on employees.[104] "The problem is commonly referred to as the *in terrorem* effect."[105] The blue-penciling of a contract permits an *in terrorem* effect on an employee who must attempt to interpret an ambiguous provision in a restrictive covenant to decide whether it is the right decision to accept employment.[106] Many courts have addressed the blue pencil doctrine's effect on the overuse of broad provisions.[107] For example, the court in *Richard P. Rita Personnel Services, International, Inc. v. Kot*[108] found that many covenants exercise the *in terrorem* effect on employees who respect their contractual obligations and on competitors who fear

100. *See* Pivateau, *supra* note 94, at 692.
101. FLA. STAT. § 542.335(1)(c) (2022).
102. Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 626 (1960).
103. *Id.* at 626–27.
104. Pivateau, *supra* note 94, at 689.
105. *Id.* at 690.
106. Lanmark Tech., Inc. v. Canales, 454 F. Supp. 2d 524, 529 (E.D. Va. 2006) (noting that an employer may try to limit the *in terrorem* effect of an ambiguous provision in a non-compete agreement by interpreting it narrowly but a request for limited relief could not cure a defective non-competition agreement).
107. Pivateau, *supra* note 94, at 690.
108. 191 S.E.2d 79 (Ga. 1972).

complications if they employ a covenantor or are anxious to maintain relations with their competitors.[109] The court stated, "[i]f severance is generally applied, employers can fashion truly ominous covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable."[110] Thus, a non-compete agreement harms employees unaware of the nature of the agreement.[111]

2. Liberal Blue Pencil States

In strict blue pencil states, the courts will find the agreement unenforceable if the agreement fails to meet the standard of reasonableness in scope, duration, or geographical location.[112] "The strict blue pencil rule holds that a court may not, under the guise of interpretation, redraft a non-competition agreement to make it more reasonable or narrow."[113] In contrast, liberal blue pencil states provide courts with greater deference in redrafting a non-compete agreement.[114] A court may utilize the liberal blue pencil rule only to the extent that it is reasonably necessary to protect the employer; however, courts may enforce an unreasonable contract partially rather than completely voiding it.[115] For example, New Jersey applies the blue pencil rule liberally.[116] New Jersey's law on partially enforcing a non-compete agreement depends on whether the enforcement is possible without causing injury to the public and without any injustice to the parties involved.[117] In contrast, although Maine utilizes the blue pencil rule liberally, the Supreme Judicial Court in Maine held that the reasonableness of a covenant depends upon the case's specific facts.[118] The scope of the covenant would be interpreted how the employer intended to enforce it.[119] Thus, the court will not consider the parties' bargained-for-exchange or its enforcement by its plain terms.[120]

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109. *Id.* at 81.
110. *Id.*
111. *See id.*; Pivateau, *supra* note 16, at 44.
112. Pivateau, *supra* note 16, at 25.
113. *Id.*
114. *See id.* at 27.
115. *Id.*
116. *Id.*
117. Pivateau, *supra* note 16, at 27.
118. Chapman & Drake v. Harrington, 545 A.2d 645, 647 (Me. 1988); Pivateau, *supra* note 16, at 28.
119. Pivateau, *supra* note 16, at 28 (citing Everett J. Prescott, Inc. v. Ross, 383 F. Supp. 2d 180, 190 (D. Me. 2005)).
120. *See id.*

III. NON-COMPETITION AGREEMENTS EFFECT ON LOW-INCOME WORKERS

The Florida statute governing non-competition agreements unduly burdens an employee by prohibiting the consideration of an employee's individualized or economic hardship resulting from an employer's termination and construing the contract against the employee.[121] Thus, many low-income workers are disproportionately affected.[122] Utilizing national survey data for about 11,000 labor force participants, approximately thirty-eight percent of workers have agreed to a non-compete agreement in the past, and nearly one in five workers in the United States is employed under a non-compete agreement.[123] Although the purpose of a non-compete agreement is more likely to be found in highly skilled sectors, non-compete agreements are also found in low-skill, low-paying jobs and in some states where these agreements are unenforceable.[124] In 2014, 34.7% of employees without a bachelor's degree entered a non-compete agreement at least once, while 14.3% are currently working under one.[125] Of those individuals who earn less than $40,000 a year, 13.3% are currently subject to a non-compete agreement.[126] Many technologically-driven companies, such as Amazon, have been criticized for making workers sign non-compete agreements.[127] Amazon prohibited workers from engaging in or supporting "the development, manufacture, marketing, or sale of any product or service" that competes with the company.[128] Amazon's low-wage workers, including seasonal, hourly workers, were not likely to object to a non-compete clause.[129] Because Amazon's services and products could range worldwide, its restrictive covenant threatened its employees' livelihood.[130] Subsequently, Amazon removed the non-compete clause for hourly workers in the United States.[131] A

121. *See* FLA. STAT. § 542.335 (2022); Evan P. Starr et al., *Noncompete Agreements in the U.S. Labor Force*, 64 J.L. & ECON. 53, 53–54 (2021).
122. Starr et al., *supra* note 121, at 64.
123. *Id.* at 60.
124. *Id.* at 53, 55, 61.
125. *Id.* at 55, 64.
126. *Id.* at 64.
127. Jana Kasperkevic, *Amazon Removes Crazy Non-Compete Clause from Hourly Workers' Contracts*, BUS. INSIDER (Mar. 29, 2015, 10:42 AM), http://www.businessinsider.com/amazon-removes-non-compete-clause-for-hourly-workers-2015-3.
128. *Id.*
129. *Id.*
130. *See id.*
131. *See id.*

company's inclusion of non-compete clauses in contracts has yielded limited wage growth by "restraining labor market competition from product market competit[ion] . . . and preempting future competition from departing employees."[132] Further, the fields of architecture and engineering executed thirty-six percent of non-compete agreements, and computer and mathematical vocations executed thirty-five percent of non-compete agreements.[133] Nevertheless, the farm, fishing, and forestry vocations executed six percent of non-compete agreements.[134] However, big corporations and small businesses that seek to limit labor market participation continue to utilize these restrictive covenants.[135] Because of non-compete agreements' effect on low-income workers, many states have recently banned these restrictive covenants for low-wage or hourly workers.[136] States such as Virginia, Maryland, and Nevada have banned most restrictive covenants for low-wage employees.[137] Non-compete agreements may also reduce the availability of jobs for an employee.[138] An employee may not find opportunities for employment that would foster or advance skills the employee has experienced.[139] The inability to find an employer that will help the employee contribute to the tax base or collect a paycheck can lead to unemployment or reliance on other public support programs.[140]

A. *Employee Mobility*

"The importance of employee mobility cannot be understated."[141] Employee mobility is a valuable commodity because it allows workers to find better opportunities, boosts employee morale, and helps employers find more workers to fill positions.[142] At-will-employment principles also favor employee

132. Starr et al., *supra* note 121, at 55.
133. *Id.* at 64, 67 fig.5.
134. *Id.*
135. *See id.* at 55, 73–77; Bishara, *supra* note 1, at 758; THE WHITE HOUSE, *supra* note 13, at 4.
136. Teresa Lewi et al., *Recent Federal and State Laws Restrict Use of Employee Non-Competition Agreements by Government Contractors and Other Employers*, COVINGTON (Aug. 19, 2021), http://www.insidegovernmentcontracts.com/2021/08/recent-federal-and-state-laws-restrict-use-of-employee-non-competition-agreements-by-government-contractors-and-other-employers/.
137. *Id.*
138. Carosa, *supra* note 87, at D32.
139. *See id.* at D32–33.
140. *Id.* at D33.
141. *Id.*
142. *Id.*

mobility because it permits employers to terminate employment at any time, for any reason.[143] The issue with non-compete agreements, particularly that of Florida's, is that employment mobility remains more imperative to low-wage workers than to high-wage counterparts because a low-wage worker will change jobs for a small increase in compensation while a high-wage worker would be less likely to begin working for a new employer.[144] Consequently, Florida's overly restrictive covenant harshly impacts low-wage workers.[145] In the low-wage sector, where non-compete agreements are often utilized to control costs rather than safeguard legitimate business interests, non-compete agreements can benefit the employer at the employee's expense.[146] The employer benefits at the employee's expense because the employee is still bound to the non-compete agreement even after the employer has safely recouped its investment.[147]

B. *Non-Uniform Regulation*

Because of the many issues accompanying the implementation of a non-compete clause into a contract, there is currently no federal law governing the restrictions of non-compete agreements.[148] "Traditionally, the enforceability of these agreements has largely been a matter of common law and subject to state contract principles."[149] However, over the past few years, many states have implemented regulations that limit the enforcement of restrictive covenants.[150] To illustrate, in May 2021, Oregon amended its non-compete statute to state that overbroad non-compete agreements are "void" instead of "voidable."[151] Similarly, Nevada also amended its laws, penalizing employers who attempted to enforce non-compete agreements prohibited by law.[152] The only federal action addressing non-compete agreements has been in the form of presidential

143. Carosa, *supra* note 87, at D34.
144. *See id.*
145. *See id.*; Bishara, *supra* note 1, at 778.
146. Carosa, *supra* note 87, at D37, D38.
147. *Id.* at D38.
148. *See id.* at D12.
149. Lewi et al., *supra* note 136.
150. *See id.*
151. *Id.*; OR. REV. STAT. § 653.295(1) (2022).
152. Lewi et al., *supra* note 136; Assemb. B. 47, 2021 Leg., 81st Sess. (Nev. 2021) (prohibiting a "noncompetition covenant from applying to an employee who is paid solely on an hourly wage basis, exclusive of any tips or gratuities" and requiring courts to award attorney's fees and costs where an employer restricts a former employee from providing services to a former customer or client under certain circumstances).

recommendations and recommendations by the legislature.[153] The problem with non-compete agreements arising at the federal level comes from the foundation of restrictive covenants as a matter of contract law.[154] Restrictive covenants in restraint of trade are enforceable if the employer satisfies the following three requirements.[155] First, "the covenant must relate . . . to either a contract for the sale of goodwill or other subject property or to a contract of employment."[156] Second, "the covenant must be supported by adequate consideration," and third, "the application of the covenant must be reasonably limited in both time and territory."[157] "All three requirements must coalesce before a restrictive covenant is enforceable."[158] Because contract law is a matter reserved to the states, government action towards non-compete agreements has been minimal.[159] While contract law is up to the states, it does not immunize the state employment laws from preemption if Congress decides to preempt such laws.[160]

C. *Current Federal Regulatory Attempts to Control Non-Compete Agreements*

In 2015, Congress introduced the Mobility and Opportunity for Vulnerable Employees Act to prohibit employers from requiring low-wage employees to enter into covenants not to compete.[161] However, the bill failed to be enacted.[162] Additionally, in 2015, Senator Marco Rubio introduced the Freedom to Compete Act, legislation protecting entry-level, low-wage workers from non-compete agreements that limit employment opportunities and the ability to negotiate for higher wages.[163] Federal legislative action is needed because many states implement different laws on handling non-compete agreement cases, and many courts often apply various rulings on the same or similar cases.[164] Because many states have different statutes governing

153. Carosa, *supra* note 87, at D46–47.

154. *But see id.* at D12, D47.

155. Socko v. Mid-Atlantic Sys. of CPA, Inc., 99 A.3d 928, 932–33 (Pa. Super. Ct. 2014) (citing Maint. Specialties, Inc. v. Gottus, 314 A.2d 279, 282 (Pa. 1974) (Jones, C.J., concurring)).

156. *Id.*

157. *Id.*

158. *Id.*

159. *See* Carosa, *supra* note 87, at D47.

160. *Id.*

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

162. Carosa, *supra* note 87, at D47.

163. Freedom to Compete Act, S. 124, 116th Cong. (2019); *see also* Carosa, *supra* note 87, at D48–49.

164. *See* Carosa, *supra* note 87, at D48.

restrictive covenants, it is essential to address each state's diversification and unique necessities.[165] Although the proposal of a uniform act would fail to take this into account, the impact of these covenants on low-income workers will remain the same.[166] The Mobility and Opportunity for Vulnerable Employees Act effectively advocated for the deregulation of non-compete agreements for low-wage employees who are often left unemployed resulting from the terms of the covenant.[167] Thus, a uniform federal act restricting the implementation of non-compete agreements and low-income workers would effectively stimulate employee mobility, job diversification, and employment opportunities.[168] A uniform non-compete act would provide stakeholders and legislatures with predictability and clarity on issues that states often do not know how to address, especially for states like New York, which would find Florida's statute contrary to public policy.[169] Despite the benefits of a uniform federal act for non-compete agreements, it would be more beneficial to create a bill in which general rules would regulate non-compete agreements nationwide.[170] Therefore, because of the socio-economic landscapes of the states, state legislators should define low-wage workers and design legislation that would reflect the unique needs of each state.[171]

IV. DYNAMISM AND THE EFFECT OF A NON-COMPETE BAN FOR LOW-INCOME WORKERS

Banning non-compete agreements for low-wage workers would likely lead to increased hourly wages.[172] When non-compete agreements are enforced on low-wage workers, any additional compensation received by workers due to firm investments has been associated with the threat of within-industry mobility.[173] For example, a 2008 study on the Oregon ban on non-compete agreements for hourly-paid workers showed positive wage effects.[174] The increase in positive wage effects results from findings that low-wage workers

165. *See id.* at D49.
166. *See id.*
167. *See id.*; Kasperkevic, *supra* note 127.
168. *See* Carosa, *supra* note 87, at D58.
169. *See* Jackson, *supra* note 1, at 12.
170. *See* Carosa, *supra* note 87, at D49.
171. *See id.*
172. *See* Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Non-Compete Agreements*, 68 MGMT. SCI. 143, 143 (2022).
173. *Id.* at 144.
174. *Id.* at 143.

have less bargaining power in contracting around non-compete agreements.[175] The Current Population Survey found that Oregon's ban on non-compete agreements for low-wage workers increased hourly wages by 2.2%–3.1% on average, with effects of six percent over seven years.[176] Consequently, after the non-compete agreement ban, monthly job-to-job mobility among hourly workers increased by twelve to eighteen percent.[177]

While studies have shown that advanced high-wage markets implement many non-compete agreements, low-wage workers are more likely than high-wage workers to transition across industries.[178] The issue arises with a low-wage worker's ability to transfer industry-specific human capital.[179] Thus, these restrictive covenants strip workers of the opportunity to take high-paying jobs within the industry and bind workers to firms with no incentive to increase wages.[180] Historically, it is rare for states to ban non-compete agreements entirely.[181] If there was a federal ban on non-compete agreements for low-wage workers, employers might choose to avoid the effects by switching from hourly to salary compensation; for instance, the 2008 Oregon ban reflected how companies manipulated job characteristics to avoid the non-compete ban.[182] The study proved that if salaried jobs are more desirable with the elimination of non-compete agreements, the ban's effect improved job quality.[183]

Further, significant efforts over the past decades to ban non-compete agreements are reflected in presidential action.[184] The White House's Chief Economic Advisor under the Obama administration stated that when there is less of an ability to threaten to leave one job for another, there is less of an ability to earn.[185] The administration believed that the advantages of banning a non-compete were individual freedom, personal fulfillment, and the opportunity to

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175. *Id.*
176. *Id.*
177. Lipsitz & Starr, *supra* note 172, at 144.
178. *Id.*
179. *Id.* at 146.
180. *Id.*
181. *Id.* at 147 (citing Russell Beck, *The Changing Landscape of Trade Secrets Laws and Noncompete Laws Around the Country*, FAIR COMPETITION L., http://faircompetitionlaw.com/changing-landscape-of-trade-secrets-laws-and-noncompete-laws/ (July 12, 2022)).
182. *See* Lipsitz & Starr, *supra* note 172, at 159.
183. *Id.*
184. *See* Carosa, *supra* note 87, at D46–47.
185. Omri Ben-Shahar, *California Got It Right: Ban the Non-Compete Agreements*, FORBES (Oct. 27, 2016, 3:02 PM), http://www.forbes.com/sites/omribenshahar/2016/10/27/california-got-it-right-ban-the-non-compete-agreements/?sh=7d02bb2a3538.

change employment, thus guaranteeing that individuals would be paid wages that reflected their value to the firm.[186] The White House's position on non-compete agreements under the Obama administration was like that of California, where non-compete agreements are banned.[187] In California, employers are prohibited from enforcing restrictive covenants on trade.[188] In 2019, California's Attorney General, Xavier Becerra, called for a nationwide ban on non-compete agreements.[189] The attorney general urged the Federal Trade Commission to take a stand against non-compete agreements in response to competition and consumer protection hearings.[190] Additionally, an alliance of labor unions, public interest groups, and legal advocates submitted a letter requesting the Federal Trade Commission to "initiate a rulemaking effort to classify worker non-compete provisions as . . . illegal under the Federal Trade Commission Act."[191] Labor market concentration has also been excluded from review by the Department of Justice and the Federal Trade Commission.[192]

Similarly, in July 2021, President Biden signed an executive order that directed the Federal Trade Commission to reduce the use of non-competes nationwide to help stimulate competition and regulate the economy.[193] Nearly one dozen states have applied restrictions on the enforcement of non-compete agreements.[194] Biden's executive order asked the Federal Trade Commission to adopt rules that would enhance competition nationwide to promote job fluidity.[195] Typically, "the [Federal Trade Commission] enforces federal statutes passed by Congress and signed into law by the Chief Executive."[196] Therefore, because common law or statutory law governs non-compete agreements, it is questionable

186. *See id.*
187. *Id.*
188. Press Release, Rob Bonta, Att'y Gen., Off. of Att'y Gen., Attorney General Becerra Calls for Nationwide Ban on Non-Compete Agreements, Reminds Businesses of Existing Prohibition in California (Nov. 15, 2019), http://oag.ca.gov/news/pressreleases/attorny-general-becerra-calls-nationwide-ban-non-compete-agreements-reminds.
189. *Id.*
190. *Id.*
191. *Id.*
192. Kenneth Dau-Schmidt et al., *The American Experience with Employee Noncompete Clauses: Constraints on Employees Flourish and Do Real Damage in the Land of Economic Liberty*, 42 COMPAR. LAB. L. & POL'Y J. 585, 589 (2022).
193. Andrew P. Botti, *Non-Competes May Become a Thing of the Past Across the Nation*, MCLANE MIDDLETON (July 12, 2021), http://www.employmentlawbusinessguide.com/2021/07/non-competes-may-become-a-thing-of-the-past-across-the-nation/.
194. *Id.*
195. *See id.*
196. *Id.*

whether the Federal Trade Commission has the power to implement such recommendations.[197]

A. *The Problem with Economic and Business Dynamism*

Silicon Valley remains the most vital and global center of the technological industry in the United States.[198] An explanation for the apparent success of California's culture is the free flow of workers between companies absent the enforcement of non-compete agreements in the state; thus, the re-distribution of workers in various ways has spurred innovation because workers are switching to different employers rather than staying with one.[199] The most common way for communication to effectively reach different individuals in different corporations is by switching employers.[200] Thus, employee mobility is restrained when workers are required to sign non-compete agreements.[201] The "legal rules governing employee mobility influence the dynamics of high technology industrial districts by [either] encouraging rapid employee movement between employers and startups."[202] Because California does not enforce non-competes throughout the state, knowledge spillovers between firms have aided in the success of Silicon Valley.[203] "The success of Silicon Valley suggests that per capita firm value will be greater where intellectual property protection is [weak]."[204]

The effectiveness of non-compete agreements illustrates the limited life of information in advanced technological industries.[205] Enforcing non-compete agreements slows down high-velocity employment to the extent that knowledge spillovers are too low to support a districtwide innovation cycle.[206] Consequently, an employee's unique information learned from a former employer is likely to be inapplicable during the covenant's term.[207] Silicon

197. *Id.*

198. Noah Smith, *Non-Compete Agreements Take a Toll on the Economy*, BLOOMBERG (Mar. 22, 2018, 8:00 AM), http://www.bloomberg.com/opinion/articles/2018-03-22/noncompete-agreements-take-a-toll-on-the-economy.

199. *See id.*

200. *Id.*

201. *See id.*

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

203. *Id.* at 575.

204. *Id.*

205. *Id.* at 603.

206. *Id.*

207. *See* Gilson, *supra* note 202, at 603–04.

Valley's employers' efforts to prevent employees from leaving and spilling over tacit knowledge failed because employees knew they could leave at any time.[208] Employers learned that high-velocity employment and knowledge spillovers were inevitable.[209] This legal infrastructure helped employers cooperate and compete, leading to a unique dynamic process that infected Silicon Valley's characteristics.[210]

Non-compete agreements hurt economic dynamism.[211] However, the main benefit of these agreements is increased business investments.[212] Non-compete agreements cause existing companies in knowledge-intensive industries to invest more because companies are more willing to commit to new projects.[213] Because there are higher investments in projects, there is an increase in economic activity; however, investments spur economic growth when there are more new companies.[214] Many states, such as Hawaii and New Mexico, ban non-compete agreements for specific jobs related to technology and health care.[215] Massachusetts, which lost to Silicon Valley in its strive to become the country's prominent technological center, is also considering reform for restrictive covenants that affect high and low-wage workers.[216]

1. Florida

Florida's non-compete statute favors the establishment of large firms over small firms.[217] A 2020 Florida case study illustrates how Florida's 1996 legislative change to non-competes has led to larger firms, higher business concentration, and greater employment by larger firms.[218] Although most studies focus on how non-compete agreements affect employees, Florida's 1996 legislative change to non-compete agreements has impacted firm location choice,

208. *Id.* at 608.
209. *Id.*
210. *Id.*
211. Smith, *supra* note 198.
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. Smith, *supra* note 198.
217. Jessica Jeffers, *The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship* 6 (The Kauffman Found., Working Paper, 2019), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3040393.
218. Hyo Kang & Lee Fleming, *Non-competes, Business Dynamism, and Concentration: Evidence from a Florida Case Study*, 29 J. ECON. MGMT. STRATEGY 663, 664 (2020).

growth, and regional concentration.[219] In turn, this has highly impacted business and economic dynamism throughout Florida.[220]

Florida is an attractive state to study non-compete business dynamism for three reasons.[221] First, Florida's 1996 legislation focused on implementing an enforceable non-compete agreement.[222] Second, the legislation sought to enforce the restrictive covenant in the state.[223] Lastly, employers and employees in Florida are accustomed to non-competes because of the four-decade-long history governing non-compete agreements.[224]

Startup companies prefer locations with weak non-compete agreement enforcement because companies want to hire experienced employees.[225] Startups are less likely to value the legal strategies that come with non-compete agreements because startups often lack the resources to pursue legal action and will most likely place a lower value on a location with strong non-compete enforcement.[226] On the other hand, big firms find that retaining existing employees is necessary because big companies have systematic processes in place through which employees have access to strategic assets and information.[227] Big firms want to retain these employees because they fear that employees will leave to work for a competitor or unwillingly share confidential information.[228] Big firms also might favor states with strong enforcement of non-compete agreements because big firms are often diversified and may run different businesses in different fields.[229] Thus, big companies can relocate employees without breaching the non-compete agreement.[230] In contrast, small firms are likely to lack diversity and are more likely to grow in a specific area.[231] Because of the new non-compete legislation in 1996, large firms have built establishments in Florida.[232] Large firms will likely be attracted to hiring new employees in Florida because of Florida's strong non-compete enforcement.[233] Therefore,

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219. *Id.*
220. *See id.*
221. *Id.* at 666.
222. *Id.*
223. Kang & Fleming, *supra* note 218, at 666.
224. *Id.*
225. *Id.* at 667.
226. *Id.*
227. *Id.*
228. Kang & Fleming, *supra* note 218, at 667.
229. *Id.* at 668.
230. *Id.* at 667–68.
231. *Id.* at 668.
232. *Id.* at 664, 681.
233. *See* Kang & Fleming, *supra* note 218, at 668.

large firms can recoup their investment and retain employees because an employee's alternatives to his current employment are limited.[234]

a. *Statistical Analysis*

A study utilizing the Business Dynamics Statistics provided by the United States Census Bureau on the effect of Florida's 1996 non-competition statute consistently revealed that Florida went from a moderately enforcing state to the most extreme non-compete enforcing regime in the country.[235] This study could not run industry-specific analyses; however, the Quarterly Census of Employment and Wages provided industry-specific information.[236] This census was constructed from the unemployment insurance accounting system for each state in the United States and was provided by the Bureau of Labor Statistics.[237] Florida's stark change after the 1996 non-compete legislation altered business dynamism and the regional size distribution of firms.[238] States that strongly enforce non-compete agreements showed a positive correlation between large firm establishments and employment and tended to have a smaller proportion of small firm establishments.[239] In 1997, the entry of business units of small firms decreased by 5.6%, while that of large firms increased.[240] In addition, small firms decreased job creation by 1.8%, whereas large firms increased job creation by 7.6%.[241] After the implementation of the 1996 statute, establishment concentration increased by 0.0036 points or about 2.82%.[242] On average, the establishment concentration in Florida was 0.1278 before the 1996 law change.[243]

Moreover, after the enforcement of Florida's non-compete statute in 1996, large firms were more likely to move their businesses to Florida.[244] Small firms appeared less likely or less able to create new jobs.[245] Across all U.S. states, this study observed a negative cross-sectional correlation between non-compete enforcement and small firm establishment and employment.[246] This study

234. *Id.*
235. *See id.* at 680.
236. *Id.* at 669.
237. *Id.*
238. Kang & Fleming, *supra* note 218, at 664.
239. *Id.*
240. *Id.* at 673.
241. *Id.* at 675.
242. *Id.* at 676.
243. Kang & Fleming, *supra* note 218, at 676.
244. *Id.* at 681.
245. *Id.*
246. *Id.*

strengthens the finding that low-wage workers, typically those in small business entities, are disproportionately affected compared to high-wage workers.[247]

2. A Free-Market Perspective

Free market advocates have argued for the enforcement of non-compete agreements.[248] This economic argument assumes that labor markets are competitive and employees freely choose to enter such covenants.[249] Economic theory also opposes the view that employers utilize non-compete agreements to limit labor market competition.[250] While both opposing views have truths, the two free-market perspectives predicted lower worker mobility and longer job tenure.[251] Moving from a non-compete unenforceability regime to the highest level of enforceability, like in Florida, would reduce a worker's probability of changing employers by 26.1%.[252]

Generally, "courts will not protect employer customer contacts absent express contractual . . ." provisions.[253] Although employers utilize non-compete agreements to protect investments in training an employee, this is unsupported by common law.[254] For example, in the Alabama Supreme Court of *Chavers v. Copy Products Company*,[255] the defendant, Chavers, signed a non-compete agreement with the plaintiff company.[256] The agreement prohibited the defendant from competing against his former employer in the business of selling office copiers and providing office copier supplies and maintenance.[257] The court reasoned that a simple skill is insufficient to give an employer a substantial protectable right unique to his business.[258] The accepted solution indicates that the employee should reimburse the employer for demonstrable costs if the employee leaves within a specified period.[259] Although the Florida statute does not reflect such a solution, it is crucial to recognize that non-competes are often

247. *See id.* at 664, 667–68.
248. Dau-Schmidt et al., *supra* note 192, at 586.
249. *Id.*
250. *Id.*
251. *Id.* at 615.
252. *Id.*
253. Dau-Schmidt et al., *supra* note 192, at 594.
254. *Id.* at 595 (citing Restatement (Third) of Employment Law § 8.07 (Am. L. Inst. 2015)).
255. 519 So. 2d 942 (Ala. 1988).
256. *Id.* at 942–43.
257. *Id.* at 943.
258. *Id.* at 944 (citing Greenlee v. Tuscaloosa Off. Prod. & Supply, Inc., 474 So. 2d 669, 672 (Ala. 1985)).
259. Dau-Schmidt et al., *supra* note 192, at 595.

invalidated because they frustrate the public good.[260] Cases involving the public interest often consider a small number of individuals that provide an imperative good or service to a distinct or uncommon market.[261]

V. CONCLUSION

The abuse of restrictive covenants in the U.S. labor market, particularly for low-wage workers, is a piercing issue requiring federal action.[262] Because states commonly address contract law,[263] federal enforcement of a uniform and coherent non-compete act is not likely without significant efforts for reform.* However, recent efforts by President Joe Biden and different state court rulings have indicated the pressing issues of forum selection clauses.[264] The issues with forum selection clauses in each state regarding non-compete agreements arise because every state governs its statute differently.[265] Implementing a uniform non-compete act would solve uncertainties surrounding employer-employee relationships and boost economic and business dynamism in the United States by providing clear procedural rules governing enforceability.* Although this Comment sheds a negative light on non-compete agreements and their impact on labor mobility and the American labor market, legitimate business interests still require some form of protection.[266] A uniform non-compete act would provide legislatures and congressional districts with guidance in the court system and relief for low-wage employees disproportionately affected by non-compete agreements.[267] Promoting uniformity in state law over restrictive covenants is likely to affect transparency and bargains for exchange for workers who do not receive notice of the restrictive covenant before accepting employment, specifically for low-wage workers.[268] Even though non-competes can benefit employers and employees, it is difficult to say that continuing to enforce these covenants at the state level, especially in Florida, will positively impact dynamism.*

260. *Id.* at 600.
261. *Id.*
262. *But see* Carosa, *supra* note 87, at D12.
263. *Id.* at D47.
264. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972); Botti, *supra* note 193; *see also* Exec. Order No. 14,036, 3 C.F.R. 615 (2022).
265. *Bremen*, 407 U.S. at 15; *see also* discussion *infra* Section II.A.
266. *See* Carosa, *supra* note 87, at D28; discussion *infra* Part II.
267. *See* Carosa, *supra* note 87, at D49.
268. *See id.* at D50.