

March 11, 2020

The Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Re: Written Testimony of Practicing Attorneys for the Federal Trade Commission Workshop on “Non-Compete Clauses in the Workplace: Examining Antitrust and Consumer Protection Issues”

Dear Commissioners:

Thank you for the opportunity to submit written testimony for consideration in connection with the FTC’s workshop on “Non-Compete Clauses in the Workplace” (the “Workshop”). And, thank you for the hard work the Commission has already done and continues to do toward investigating the current use and impacts (both pro and con) of noncompetition agreements, as well as the need for, and appropriate scope of, any potential restrictions, beyond those imposed by the states.

The signatories below submit this testimony to provide what we believe is important background, as well as a perspective not articulated during the January 9, 2020 workshop, and to offer practical tools to balance the real-world interests and impacts for the employees, the former employers, and the new employers.

In sum, our testimony is submitted in two parts:

1. Our background in brief, offered for the purpose of enabling the Commission to evaluate the utility of our testimony.
2. Answers to six of the eight questions posed by the Commission, including specific recommendations for a fair, transparent approach, consistent with the outcomes in over 30 states across the country that have recently been reevaluating their noncompete laws.¹

¹ We do not address the threshold issues raised by the FTC concerning its statutory or constitutional authority to issue rulemaking or use other procedural mechanisms to restrict noncompetes in the employer-employee relationship.

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However, it bears mention that noncompetes² have been regulated by the states for over 200 years, and all 50 states have made policy decisions that make sense for their citizens and their economies. In more than 30 of those states, legislatures have recently reevaluated their law or are in the process of doing so now, with different outcomes that balance competing interests in a way that reflects the economic realities of the particular state. Nevertheless, in no state does the law permit unfettered use of noncompetes, nor has any state banned noncompetes wholesale since 1890. Rather, each of the 47 states permitting noncompetes allows them to be used, to a greater or lesser extent, only as necessary to protect companies from certain types of unfair competition.

1. OUR BACKGROUND

The signatories to this submission are lawyers and paralegals from around the country with extensive restrictive covenant and trade secrets experience, representing clients (from Fortune 50 companies to “mom and pop” shops to individuals) in countless trade secret and noncompete matters. We have all seen first hand (through helping thousands of clients) the benefits and detriments of the use of noncompetition agreements (and other restrictive covenants).

A brief biography of each of the signatories (with a link to the individual’s full on-line biography) is provided as *Attachment A*.

2. QUESTIONS POSED BY THE COMMISSION THAT WE HAVE ADDRESSED

The Commission has identified eight questions that it would like answered. Given the combined background of the signatories to this letter, we are able to provide substantive responses to the six topics answered below.

- **WHAT ARE THE BUSINESS JUSTIFICATIONS FOR NON-COMPETE CLAUSES?**

The business justifications for noncompete agreements are generally referred to as “legitimate business interests,” “protectable interests,” or something similar.

² Noncompetition agreements (colloquially referred to as “noncompetes,” among other things) are a type of restrictive covenant. While they can arise in many contexts, the focus of the FTC is on noncompetes used between employers and employees, and accordingly, our testimony is focused exclusively on those.

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Legitimate Business Interests Served by Noncompetes

While state laws vary to some degree,³ the protection of trade secrets is a fundamental protectable interest in all states that permit the use of employee noncompetes.⁴

Trade secrets are not, however, the only protectable interest. Other well-recognized interests include the protection of customer goodwill developed by the company (through the work it pays its employees to perform).⁵ Indeed, goodwill is frequently the primary concern for companies managing departing sales team members. But, other legitimate business interests exist, depending upon the particular state. For example, some states permit noncompetes to be used to ensure that investments in training, sharing of information, and innovation are protectable.⁶

Context for the Use of Noncompetes to Protect Trade Secrets

To fully understand the justification, some additional background is useful. First, it is important to note that noncompetition agreements are generally disfavored in the law, and, as a result, unlike most contracts, they are reviewed by courts for reasonableness. Specifically, in all states permitting noncompetes, courts balance the interests of the particular employee against the interests of the particular employer in the particular case. Accordingly, under most applicable state laws, noncompetes must be reasonable in time (typically one to two years, depending on the state), space (the territory in which the employee is restricted), and scope (the nature of the work that the employee is prohibited from engaging in during the restricted period).⁷

³ See Beck, *Employee Noncompetes, A State by State Survey* (“50 State Noncompete Survey,” March 12, 2020 version), available at <https://www.faircompetitionlaw.com/2020/03/12/50-state-noncompete-chart-updated-statutory-references-added/>. (For the Commission’s convenience, we have attached a copy of this chart as *Attachment B*.) Originally drafted in 2010, this chart is updated periodically and is current as of the date indicated (March 12, 2020).

⁴ Only three states ban employee noncompetes: California (since 1872; see *Edwards v. Arthur Andersen LLP*, 44 Cal.4th 937, 945 (2008)); North Dakota (since 1865 – before North Dakota was even a state; see *Werlinger v. Mutual Service Cas. Ins. Co.*, 496 N.W.2d 26 (N.D. 1993)); and Oklahoma (since 1890 – before Oklahoma was a state; see *Noncompetes in Oklahoma Mergers and Acquisitions*, 88 Oklahoma Bar Journal 128, at n.2 (Jan. 21, 2017)). Contrary to frequent confusion, Montana does *not* ban employee noncompete agreements. See *Wrigg v. Junkermier, Clark, Campanella, Stevens, P.C.*, 362 Mont. 496, 503-07 (Mt. Sup. Ct. 2011).

⁵ See *Attachment B (50 State Noncompete Survey)*.

⁶ *Id.*

⁷ *Id.*

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To understand how legitimate business interests are protected by noncompetes, it is important to understand the relationship among trade secrets (the universally protected interest) and the three primary tools to protect them: trade secret law, nondisclosure agreements, and noncompetes. Each is explained in turn.

Trade Secrets and Trade Secret Law: Trade secrets are information having economic value (actual or potential) derived from the fact that they are secret – and they must have been the subject of reasonable efforts to maintain secrecy. Trade secrets are protected by state trade secret laws and by federal law as well.⁸

Information failing to qualify as a trade secret is not protectable under trade secret laws – state or federal. However, just because the information may not qualify as a trade secret does not mean that it is unimportant to the business.

For example, a significant source of disagreement in trade secret lawsuits is customer information (often, complete or partial customer lists). Some states include customer information or customer lists in the definition of trade secrets.⁹ Others do not.¹⁰ In the states that do not, the threshold battle typically involves whether the customer information can even be a trade secret. And, even when it *can* be a trade secret, parties still argue over (among other things) whether the particular customer information qualifies. The ease or difficulty of compiling the information and the reasonableness of the efforts taken to maintain their secrecy are also frequent battlegrounds in these cases.

One of the most nuanced issues in trade secret law is how to handle the fact that trade secrets can often be retained in a person’s memory. As a general matter, the mere fact that information is lodged in someone’s head does not strip it of its trade secret qualities or the

⁸ On May 11, 2016, the Economic Espionage Act, 18 U.S.C. §§ 1831-1839, was amended by the Defend Trade Secrets Act of 2016 (DTSA) to create a private right of action for the protection of trade secrets under federal law.

⁹ See *Trade Secrets Acts Compared to the UTSA* (“50 State Trade Secrets Comparison Chart”), available at <https://www.beckreedriden.com/trade-secrets-laws-and-the-utsa-a-50-state-and-federal-law-survey-chart/>. (For the Commission’s convenience, we have attached a copy of this chart as Attachment C.) Originally prepared on August 14, 2016, this chart has been updated as laws have changed and is current as of the date indicated (August 8, 2018). See also Leach, *Anything but Uniform: A State-By-State Comparison of the Key Differences of the Uniform Trade Secrets Act*, available at <https://www.swlaw.com/assets/pdf/news/2015/11/06/How%20Uniform%20Is%20the%20Uniform%20Trade%20Secrets%20Act%20-%20by%20Sid%20Leach.pdf>.

¹⁰ *Id.*

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available protections. The secret formula to Coca-Cola is an example. There are reportedly only two people in the world who know it – each knows all of it, not just a portion.¹¹ And neither can lawfully disclose it to PepsiCo (or anyone else).

A mundane example of how this issue can present a significant threat to a company (in a context in which the company is unable to use a noncompete) is a Chief Marketing Officer (CMO) who worked on the company’s strategic plan and then leaves for a competitor to be its CMO, developing its strategic plan. The information the CMO knows about the former employer’s plans will necessarily inform decisions about the new employer’s strategic plan. How can the CMO avoid taking advantage of the weaknesses in the prior employer’s strategy as he or she sets the course for the new company? Similarly, how could he or she not use his or her knowledge to avoid getting tripped up by the strengths of the former employer’s plan as he or she maps out the new company’s plans?

Another type of information presenting the same problem is the so-called “blind alley” (or “negative information”), *i.e.*, information that was considered and rejected on the path to finding the right solution. The product WD-40 provides a good example. WD-40 is the lubricant that unsticks things that are stuck, but should not be, and fixes squeaks.¹²

Anyone setting out to create a similar product would benefit from knowing the rejected formulas.¹³ And someone who knows those failed efforts (such as a chemist who worked on their development) would not be expected to blindly recreate them (knowing they will fail) if they were attempting to make their own similar product. Instead, they would reject them at the outset, thereby saving substantial research and development efforts and cost.

Despite all of this, some states will allow the Coca-Cola executives who know the secret formula to work on Pepsi’s secret formula, the CMO to work on the new employer’s strategic plan, and the WD-40 chemist to work on the new competitive product. And sometimes the same

¹¹ *Coca-Cola’s Secret Formula Coca-Cola’s formula is not really so much of a secret that only two men each know half of it*, available at <https://www.snopes.com/fact-check/coca-cola-fomula/?collection-id=209643>.

¹² As they say on their website, “You need only two things in life: duct tape and WD-40; if it moves and shouldn’t, use duct tape, if it doesn’t move and should, use WD-40.”

¹³ WD-40 stands for “Water Displacement perfected on the 40th try.” Accordingly, there were 39 rejected formulas before finally perfecting the formula. Knowing those earlier attempts and therefore knowing to avoid them would necessarily save substantial time in the development of a competing product.

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result obtains even if the former employee demonstrably stole information on his or her way out the door.

Nondisclosure Agreements: Nondisclosure agreements (NDAs) (sometimes called “confidentiality agreements”) are agreements by which someone (frequently an employee or business partner) promises not to use or disclose the other party’s information. These agreements are a near-universal predicate to a company’s ability to protect its trade secrets and other confidential information.

NDAs serve multiple important purposes, including putting employees on notice that the company has information that may be confidential in general, and identifying for the employee particular types of information that the company considers confidential. Also, nondisclosure agreements are an important building block in the company’s overall efforts to take (and ability to demonstrate that it has taken) reasonable measures to protect its information. They also may provide a breach of contract remedy for the taking of company information (though only to the extent not preempted by trade secret laws).

Like trade secret laws, NDAs do not prevent an employee from working for a competitor, even in the situations described above (involving the CEO, CMO, and chemist). While courts will typically order the return of information, they will rarely prevent employees from working for the competitor, thereby leaving the former employer to police the former employee’s conduct (*i.e.*, use of its trade secrets) without the tools necessary to fully do so (*i.e.*, the former employer has no ability to know what the employee is doing until, in the worst case, it is too late, and the former employee has used the information).¹⁴

Noncompetes: Noncompetes can be an important tool in the protection of trade secrets, especially in scenarios like those described above (and others). Specifically, they serve as a prophylactic tool for companies to prevent the very circumstances in which trade secrets are likely to be put at risk and are thereby often critical to preventing the use or disclosure before it happens. Thus, they protect against the greatest potential threat to trade secrets: when employees move to a competitor.

¹⁴ Because “a secret once lost is . . . lost forever,” *FMC Corp. v. Taiwan Tainan Giant Indus. Co., Ltd.*, 730 F.2d 61, 63 (2nd Cir. 1984), and policing a former employee’s (and his or her new employer’s) conduct is generally quite difficult, noncompetes are often the only tool that can provide the necessary protection of a company’s trade secrets.

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When employees change jobs, up to 72 percent of them take – and are willing to use – their employer’s trade secrets.¹⁵ Similarly, as reported on CBS Money Watch, “The U.S. Chamber of Commerce estimates that 75% of employees steal from the workplace and that most do so repeatedly.”¹⁶

The economic consequences of this are enormous. The Center for Responsible Enterprise and Trade (CREATE.org) and PricewaterhouseCoopers estimate that the cost of trade secret misappropriation is between one and three percent of U.S. GDP, possibly costing U.S. companies as much as \$480 billion per year. Given that (according to a well-regarded study¹⁷) 85 percent of trade secret thefts are committed by either an employee or a party to a contract, the lion’s share of this loss is occasioned when an employee moves to a competitor.

The threat to the economy and the innovation reflected in our trade secrets is so great that it led to the passage of the Defend Trade Secrets Act of 2016¹⁸ (DTSA), establishing a federal private right of action for trade secret misappropriation.

But neither trade secret law (including even the DTSA) nor nondisclosure agreements provide the level of protection offered by noncompetes.¹⁹ The reason is that, as noted above, noncompetes operate to prevent an employee from taking a role with a competitor that would put the former employer’s trade secrets and other confidential business information squarely at risk of being used or disclosed.²⁰ Accordingly, with so much focus on the risks posed to companies’

¹⁵ *Dell End-User Security Survey 2017*, available at https://i.dell.com/sites/csdocuments/Learn_Docs/en/dell-end-user-security-survey-2017.pdf.

¹⁶ *Employee Theft: Are You Blind to It?*, available at <http://www.cbsnews.com/news/employee-theft-are-you-blind-to-it/>.

¹⁷ *A Statistical Analysis of Trade Secret Litigation in Federal Courts*,” by David Almeling, Darin Snyder, Michael Sapoznikow, Whitney McCollum, and Jill Weader (2010), available at <https://www.tradesecretsandemployeemobility.com/files/2014/05/Statistical-Analysis-of-Trade-Secret-Litigation-in.pdf>.

¹⁸ *See supra* n.8.

¹⁹ The various alternative agreements (for example, nonsolicitation, no-service, no-raid, and no-hire agreements) are rarely sufficient to protect the recognized interests sought to be protected. Indeed, this is precisely why the new Massachusetts noncompete law expressly authorizes courts to impose a “springing noncompete” (or “time out noncompete,” as John Marsh (a signatory to this letter) has called them) (described *infra* at 16-17) when an employee violates these other contractual obligations (or certain other obligations).

²⁰ As also noted above, states vary on the other interests that can be protected through noncompete agreements. *See Attachment B (50 State Noncompete Survey)*. In that vein, companies for whom

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trade secrets by the movement of employees, there is a bit of cognitive dissonance in the rush to ban noncompetes, which are oftentimes the most effective tool at preventing that very risk.

To be clear, contrary to much of the colloquial commentary, noncompete agreements cannot (lawfully) be used simply to prevent an employee from using his or her general skills and knowledge, or prevent any other *fair* competition.²¹ Employees are always free to use their general skill and knowledge. For example, Coca-Cola's CEO can be the CEO at any company that does not compete with The Coca-Cola Company. The CMO described above can be a CMO at any company that does not compete with his former employer. And, the chemist described above can be a chemist working on something other than a product competitive with WD-40. What they cannot do is use their former employer's trade secrets on behalf of a new employer. Yet that is what routinely happens – and it is one of the problems that noncompetes are necessary to prevent.

- **IS STATE LAW INSUFFICIENT TO ADDRESS HARMS ASSOCIATED WITH NON-COMPETE CLAUSES?**

State laws are sufficient to address any harms that may be associated with noncompete agreements. Federal intervention (whether at the statutory or regulatory level) is not necessary.

As a threshold matter, the question presumes the existence of harms in need of being addressed. The assumed harms typically identified are the theorized impacts on employee mobility, wages, and innovation. While noncompetes indisputably impact mobility, the latter two impacts cannot be presumed. Specifically, while some studies suggest that adverse effects (whether de minimis or not) may exist in certain contexts, other studies suggest that, in other contexts, the harms do not exist and, to the contrary, benefits may.²²

For example, a ban on noncompetes would harm a theorized positive effect on wages, given that employees “presented with a noncompete before accepting the associated job offer

customer contacts are the key to the business, noncompetes prevent the opportunity for even subtle customer solicitation that would otherwise exist without a noncompete.

²¹ Certainly, by preventing someone from working for a competitor in a role where they would likely use trade secrets or otherwise engage in unfair competition, there can be collateral effects on other activities that they employee could otherwise engage in for that competitor (depending on the nature of the planned role and extent of the noncompete restriction as applied).

²² In a 2017 research paper, Professor Matt Marx of Boston University's Questrom School of Business (one of the pioneering and foremost academics in this area of research) summarized the scope, deficiencies, and limitations of the available research on noncompetes in a paper available at <https://sih.berkeley.edu/wp-content/uploads/2018/06/Employee-Non-compete-Agreements.pdf>.

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earn 9.7% *higher* wages, receive 11% more training, and are 6.6% more satisfied in their job than those not bound by noncompetes.”²³ Similarly, a recent study that concluded, “[E]mployees [subject to noncompetes] . . . tended to be more productive, take fewer risks and align their behaviors with the goals of their employers” (at least in the mutual fund industry).²⁴ Further, in some contexts noncompetes appear to increase wages for certain categories of employees,²⁵ yield higher performing startups,²⁶ and increase investment in research and development.²⁷

Accordingly, given the state of research, the most significant conclusion that can be drawn is that the law surrounding noncompete agreements is not inherently in need of change, and certainly not wholesale changes. Rather, it is how noncompetes are sometimes abused that creates the problems. Specifically, while abuses exist and should be curbed, the extreme cases capture the headlines and drive an overreaction that would potentially undo nearly 200 years of developed law in the country.²⁸

²³ *Noncompetes in the U.S. Labor Force*, by Evan Starr, J.J. Prescott, and Norman Bishara (August 30, 2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714 (emphasis added).

²⁴ *Study Finds Noncompete Clauses Affect How Employees Behave, To Benefit Of Employers*, available at <https://news.ku.edu/2019/03/25/study-finds-non-compete-clauses-affect-how-employees-behave-benefit-employers>.

²⁵ See Workshop Tr., p. 144.

²⁶ *Enforcing Covenants Not to Compete: The Life-Cycle Impact on New Firms*, by Evan Starr, Natarajan Balasubramanian, and Mariko Sakakibara (June 15, 2014), available at https://www.faircompetitionlaw.com/wp-content/uploads/2015/02/more-noncompete-enforcement-equals-fewer-but-better-startups-starr_nv.pdf.

²⁷ See Workshop Tr., p. 131.

²⁸ Noncompetes have been around since at least the early 1400s and have been enforced in the United States since the early 1800’s. See *Hess v. Gebhard & Co.*, 808 A.2d 912, 918 n.2 (Pa. 2002) (“The earliest known American case involving a restrictive covenant is *Pierce v. Fuller*, 8 Mass. 223 (1811).”). Instructively, noncompetes were initially illegal. That was because the Plague ravaged the workforce, causing Europe to need every worker it could get. Accordingly, England made it illegal to not work (if you were able to work and under the age of 60). Noncompetes hampered that requirement and were therefore illegal. However, by 1621, a restriction limited to a specific geographic location was found to be an enforceable exception to the ban. See *Alger v. Thacher*, 36 Mass. 51, 53 (1837). Almost 100 years later, the exception became the rule with the 1711 watershed case of *Mitchel v. Reynolds*, 24 Eng. Rep. 347 (Q.B. 1711), which established the modern reasonableness framework for the analysis of the enforceability of noncompetition agreements. See Catherine L. Fisk, “[Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800–1920](#),” 52 *Hastings L.J.* 441, 453–54 (2001); *Alger v. Thacher*, 36 Mass. at 53.

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However, those abuses primarily involve the use of noncompetes with respect to low-wage workers, the lack of advance notice given to employees that they will be required to sign a noncompete, and the use (and overly aggressive enforcement) of overly restrictive agreements. Each can be reined in – and, in many states, legislators have looked, or currently are looking, at reform.

Indeed, over just the past several years, bills to modify noncompete laws have been introduced in over 30 states,²⁹ with 37 bills currently pending in 18 states (plus D.C.) this year alone.³⁰ Nineteen of those states have enacted legislation modifying their preexisting noncompete laws (seven last year alone), some strengthening noncompetes, others making it

The United States followed suit, and for the past 200 years, states have refined the framework based on the particular needs of their citizens and economy. And they continue to do so.

²⁹ The surge of states reviewing their noncompete laws is likely the result of a confluence of multiple factors, including the following: Oregon had changed its noncompete law in 2008, as the Great Recession was just beginning. Then, in 2009, Massachusetts began a nearly ten-year journey to update its noncompete laws, starting with the filing of two separate, unrelated bills by Representative Lori Ehrlich and now Senator (then Representative) Will Brownsberger in response to matters brought to their attention. One of those bills was a proposed ban on noncompetes; the other bill was a proposal to modify the existing law. The proposed ban, in particular, caught the attention of the media. Shortly thereafter, Georgia had a state-wide referendum to modify its noncompete laws – making noncompetes *more* enforceable in that state, which also caught the attention of the media. But, perhaps most influential, starting around 2014, noncompetes began receiving substantial media attention following the firestorm created when a fast-food chain was revealed to have been requiring its line workers to sign noncompetes. In addition, research into the potential impacts of noncompetes was accelerating around the same time and, in 2016, the U.S. Department of the Treasury issued a report titled, “Non-compete Contracts: Economic Effects and Policy Implications” (available at <https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf>), and the Obama Administration issued a Call to Action (available at <https://obamawhitehouse.archives.gov/sites/default/files/competition/noncompetes-calltoaction-final.pdf>) and an associated report (available at https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf).

³⁰ Bills are currently pending in Connecticut, D.C., Illinois, Indiana, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Virginia, and Vermont.

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harder to enforce them.³¹ Of those 19 states, seven have banned noncompetes for low-wage workers (with varying methods of determining who qualifies for the exemption).³²

While many of the states have considered noncompete bans similar to the Field Code³³ adopted in California, North Dakota, and Oklahoma, not a single state has done so.³⁴ Rather, each state has evaluated the diverse needs of its workforce and industries, and reached a balance of interests that it determined appropriate for its population. For example, in 2015, Hawaii banned the use of noncompetes for workers in the technology field. Yet, no other state followed its lead.

In short, each state – the laboratories of democracy – has its own unique economy. And each has tailored its noncompete law to serve the distinct needs of its citizens as it has determined appropriate. They continue to reevaluate and should be permitted to continue to refine the laws, define the tools, and find the balance of interests that they determine best fits their own economies. To interfere and impose a one-size-fits all model – particularly when the unintended consequences are entirely unknown and the research upon which any interference would be based is still nascent, inconclusive, and inconsistent – would be a significant mistake with potentially extraordinary adverse consequences (economic and otherwise³⁵).

³¹ The states are Alabama, Arkansas, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Maine, Maryland, Massachusetts, Nevada, New Hampshire, New Mexico, Oregon, Rhode Island, Utah, Washington, and West Virginia. See *The Changing Landscape of Trade Secrets Laws and Noncompete Laws Around the Country*, <https://www.faircompetitionlaw.com/changing-landscape-of-trade-secrets-laws-and-noncompete-laws/>.

³² Those states are Illinois, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, and Washington. See www.faircompetitionlaw.com. (Oregon had such a ban since 2008.)

³³ <https://www.britannica.com/topic/Field-Code>.

³⁴ The last time a complete ban on employee noncompetes was adopted was in 1890 (in Oklahoma).

³⁵ To that point, as one study found that “relaxing the enforceability of non-competes [meaning making noncompetes less enforceable] actually . . . leads to higher rates of misconduct among financial advisors. So this could actually be potentially harmful for consumers. Consumers are also charged higher fees.” See Final Transcript of the FTC January 9, 2020 Workshop (“Workshop Tr.”), p. 148.

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- **DO EMPLOYERS ENFORCE NON-COMPETE AGREEMENTS CONTAINED IN STANDARD EMPLOYMENT CONTRACTS? HOW ROUTINE IS SUCH ENFORCEMENT?**

While employers do in fact “enforce” noncompete agreements contained in employment contracts (whether “standard” or tailored), we are unaware of any studies revealing the frequency of such enforcement or any studies considering how enforcement may have changed over time.³⁶

However, over the past decade, the number of reported decisions (*i.e.*, published rulings by judges and collected in Westlaw’s database) involving noncompetes has largely remained the same³⁷ despite the growing workforce³⁸ and perhaps somewhat increased number of job changes per capita.³⁹ This leveling off of the number of decisions may suggest that fewer noncompetes are being used, are being enforced, or both.

In contrast, trade secret litigation appears to have increased substantially during that same period.⁴⁰ And, perhaps not surprisingly, the most trade secrets litigation occurs in California, perhaps suggesting that trade secrets litigation is being used as a substitute for the unavailable

³⁶ “Enforcement” can take many forms, ranging from merely reminding the employee about the existence of the noncompete to bringing a lawsuit and seeking injunctive relief from a court. Further, as observed by Professor Matt Marx in an early study, noncompetes can have an in terrorim effect through which employees simply comply with them, even if unenforceable, out of fear of being sued by their employer. That type of “self-enforcement” – and whether or how it has changed over time – is hard to meaningfully quantify, though Professor Starr has attempted to put some numbers to it. Workshop Tr., pp. 171-72.

³⁷ See *New Trade Secret and Noncompete Case Growth Graph* (“Case Growth Graph”) (Updated September 29, 2019), available at <https://www.faircompetitionlaw.com/2019/09/30/new-trade-secret-and-noncompete-case-growth-graph-updated-september-29-2019/>. (The chart is a “back-of-the-envelope” count intended to demonstrate relative numbers per year, not provide absolute numbers. Further, the counts in the most recent years tend to be significantly underreported as a consequence of the timing and manner in which Westlaw updates its database; accordingly, it is difficult to draw any meaningful conclusions from the counts in the last few years.)

³⁸ See Civilian Labor Force Level, January 1, 1948 through February 1, 2020, available at <https://fred.stlouisfed.org/series/CLF16OV>.

³⁹ *How Many Times Will People Change Jobs? The Myth of the Endlessly-Job-Hopping Millennial*, by Jeffrey R. Young (July 20, 2017), available at <https://www.edsurge.com/news/2017-07-20-how-many-times-will-people-change-jobs-the-myth-of-the-endlessly-job-hopping-millennial>.

⁴⁰ See *Case Growth Graph*.

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tool of a noncompete.⁴¹ To the extent that such a conclusion can be properly drawn, it stands to reason that a national ban on the use of noncompetes would have similar results nationally.⁴²

- ***SHOULD THE FTC CONSIDER USING ITS RULEMAKING AUTHORITY TO ADDRESS THE POTENTIAL HARMS OF NON-COMPETE CLAUSES, APPLYING EITHER UMC OR UDAP PRINCIPLES? WHAT “GAP” IN EXISTING STATE OR FEDERAL LAW OR REGULATION MIGHT SUCH A RULE FILL? WHAT SHOULD BE THE SCOPE AND TERMS OF SUCH A RULE? WHAT IS THE STATUTORY AUTHORITY FOR THE COMMISSION TO PROMULGATE A RULE?***

The FTC should not use its rulemaking authority to address noncompete clauses, as the states should be left to evaluate and regulate their own economies as they see fit – as they have done for over 200 years, and as they are continuing to do. There is no “gap” to fill; rather, all 50 states have made policy choices (whether through legislative action, judicial caselaw over many years, or both) – choices that, as indicated above, over 30 states have recently or are currently reevaluating, with different outcomes as make sense for their citizens and unique economies.

To the extent that the FTC has authority to promulgate a rule⁴³ and chooses to exercise it, the FTC should be judicious. As a threshold matter, before considering any regulatory action, it is important to understand the potential unintended consequences of significant changes in the law, including, for example, significantly increasing the likelihood that trade secrets will be unlawfully taken to a competitor and increasing the volume of more-costly trade secret litigation.⁴⁴

A ban would also harm other theorized positive aspects of noncompetes, including the following:

⁴¹ See *California Trade Secrets Litigation Supplants Noncompete Litigation*, available at <https://www.faircompetitionlaw.com/2017/06/25/california-trade-secrets-litigation-supplants-noncompete-litigation/>.

⁴² It bears noting that trade secret litigation is far more involved, more costly, longer lived, and less predictable than noncompete litigation.

⁴³ The signatories to this letter offer no opinion about whether the Commission has or does not have such power.

⁴⁴ See *California Trade Secrets Litigation Supplants Noncompete Litigation*, available at <https://www.faircompetitionlaw.com/2017/06/25/california-trade-secrets-litigation-supplants-noncompete-litigation/>.

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- Employees “presented with a noncompete before accepting the associated job offer earn 9.7% higher wages, receive 11% more training, and are 6.6% more satisfied in their job than those not bound by noncompetes.”⁴⁵
- “[E]mployees [subject to noncompetes] . . . tended to be more productive, take fewer risks and align their behaviors with the goals of their employers” (at least in the mutual fund industry).⁴⁶
- Noncompetes appear to systematically increase earnings for CEOs and physicians.⁴⁷
- Firm-sponsored training is more common in states with more-stringent (stronger) noncompete enforcement.⁴⁸
- States that permit stronger enforcement of noncompete agreements tend to have fewer – but better (higher-quality ideas and more likely to survive) – startups.⁴⁹

Accordingly, the response to the abuses should be proportional, and recognize that reliance on early stage empirical research, conflicting evidence, and faulty assumptions to change noncompete laws to match California, Oklahoma, and North Dakota is, in the end, not only unnecessary, but potentially counterproductive and contrary to the U.S. government’s policy of protecting trade secrets, as expressed through the Defend Trade Secrets Act.

Indeed, small companies are likely to suffer the most, as they often only have one trade secret that forms the basis of their value, but cannot afford costly trade secret litigation when their people leave to go to competitors or are lured away by larger companies that can easily take and quickly use the trade secrets. We heard many small companies raise that and similar

⁴⁵ *Noncompetes in the U.S. Labor Force*, by Evan Starr, J.J. Prescott, and Norman Bishara (August 30, 2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714.

⁴⁶ *Study Finds Noncompete Clauses Affect How Employees Behave, To Benefit Of Employers*, available at <https://news.ku.edu/2019/03/25/study-finds-non-compete-clauses-affect-how-employees-behave-benefit-employers>.

⁴⁷ See Workshop Tr. p 179.

⁴⁸ *Training the Enemy? Firm-Sponsored Training and the Enforcement of Covenants Not to Compete*, by Evan Starr (January 25, 2015), available at <https://www.faircompetitionlaw.com/wp-content/uploads/2015/02/training-the-enemy-firm-sponsored-training-and-the-enforcement-of-covenants-not-to-compete-starr.pdf>.

⁴⁹ *Enforcing Covenants Not to Compete: The Life-Cycle Impact on New Firms*, by Evan Starr, Natarajan Balasubramanian, and Mariko Sakakibara (June 15, 2014), available at https://www.faircompetitionlaw.com/wp-content/uploads/2015/02/more-noncompete-enforcement-equals-fewer-but-better-startups-starr_nv.pdf.

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concerns during the Massachusetts hearings and fact gathering. In particular, one concern that is often overlooked is that some small business owners have invested their entire life savings in the company and, if they cannot prevent a former employee who possesses an unfair competitive advantage from working (for a limited period) in a competitive role that threatens the existence of the company, their savings, their livelihood, and the remaining employees' jobs will all be lost.

Further, employers (who can afford it) will always find other means (potentially more detrimental) to try to protect themselves. For example, in addition to being able to obtain narrow post-employment restraints from the federal courts in California (at least until 2008, when the California Supreme Court held that that practice violated California's ban), some employers had entered into tacit agreements to not poach employees from each other. (This practice is on the decline following United States Department of Justice antitrust enforcement actions and the 2016 Antitrust Guidance for Human Resource Professionals,⁵⁰ issued jointly by the Department of Justice and Federal Trade Commission.)

Given all of the above, if the Committee determines that noncompete contracts are an appropriate subject of federal regulation, we recommend that any policy, guidance, or regulation be limited to the following two categories:

A. *Fairness and Transparency*

There are several changes that would balance the playing field and ensure fairness. They are as follows:

- A **ban** on noncompetes for **low-wage workers** (defined as employees who are not exempt under the Fair Labor Standards Act). There is rarely a need for such workers to be bound by noncompetes, and even when the need exists, the potential detriment to such workers will typically outweigh that risk (unless they have stolen trade secrets).
- A **requirement** that employers provide **advance notice** that a noncompete will be required. As Professor Marx has observed, "If it were the case that workers made fully informed decisions about signing a non-compete and could negotiate higher compensation in

⁵⁰ *Antitrust Guidance for Human Resource Professionals*, Department of Justice Antitrust Division and Federal Trade Commission (October 2016), available at <https://www.justice.gov/atr/file/903511/download>.

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exchange for doing so, *these agreements could be valuable for both workers and firms.*”⁵¹

- A **ban** on noncompetes where the overriding interests of third parties should be given priority.

B. *Limitation of Use to Only What Is Necessary*

Recognizing that noncompetes are an important tool in the protection of trade secrets (and other business interests recognized by many states), the following changes would allow the agreements to be used only where needed and only in a non-overreaching way.

- Mandate the so-called “**purple pencil**” rule to address overly broad noncompetes. States take one of three general approaches to overly broad noncompetes: *reformation* (sometimes called “*judicial modification*,” in which the court essentially rewrites the language to conform the agreement to a permissible scope); *blue pencil* (in which the court simply crosses out the offending language, leaving the remaining language enforceable or not); and *red pencil* (also referred to as the “all or nothing” approach, which, as its name implies, requires a court to void any restriction that is overly broad, leaving nothing to enforce). Although in its new law, Massachusetts retained the reformation approach (which the majority of states have historically used), an equitable, middle-ground approach (which one Massachusetts state senator named the “purple pencil”) is a hybrid of the reformation and red pencil approach, requiring courts to strike the noncompete in its entirety unless the language reflects a clear (good faith) intent to draft a narrow restriction, in which case the court may reform it.
- Provide for “**springing**” (or “**time-out**”) noncompetes. To encourage employers to limit their use of noncompetes, they must have a clear and viable remedy when employees violate other, less-restrictive obligations such as nondisclosure agreements and nonsolicitation agreements, misappropriate trade secrets, or breach their fiduciary duties to the company. In Massachusetts, the new noncompete law expressly allows a court to, in effect, create a noncompete for someone

⁵¹ *The Chilling Effect of Non-Compete Agreements*, by Matt Marx and Ryan Nunn (May 20, 2018), available at <https://econofact.org/the-chilling-effect-of-non-compete-agreements> (emphasis added).

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who has engaged in this unlawful conduct. We colloquially refer to these as “springing noncompetes” (or sometimes “time out” noncompetes) because they are not required of the employee in the first instance, but are only activated if the employee engages in otherwise unlawful behavior.

- **SHOULD THE FTC CONSIDER USING OTHER TOOLS BESIDES RULEMAKING TO ADDRESS THE POTENTIAL HARMS OF NON-COMPETE CLAUSES, SUCH AS LAW ENFORCEMENT, ADVOCACY, OR CONSUMER/INDUSTRY GUIDANCE?**

No; for all of the reasons stated above, the FTC should not engage in any efforts to alter the current state of noncompete law.

- **WHAT ADDITIONAL ECONOMIC RESEARCH SHOULD BE UNDERTAKEN TO EVALUATE THE NET EFFECT OF NON-COMPETE AGREEMENTS? SHOULD ADDITIONAL ECONOMIC RESEARCH ON THE EMPIRICAL EFFECTS OF NON-COMPETE AGREEMENTS FOCUS ON A SUBSET OF THE EMPLOYEE POPULATION? IF SO, WHICH SUBSET? CLARIFY THE PROBLEMS.**

This is a question best answered by the professors and other academics who perform and review the research. However, as most people at the Workshop who were involved in the research were the first to point out, the existing research suffers from certain inherent difficulties (including that it can be hard to isolate direct causal connections to noncompetes), reflects areas of (seeming) inconsistencies, and leaves open many areas in need of additional study. The following are just some examples:

- Although some research suggests that noncompetes appear to reduce wages for low-wage workers, as Professor Lavetti observed at the Workshop, this may be an over simplification.⁵² (Such over simplification includes, in addition to the issues identified by Professor Lavetti at the Workshop, unanswered questions of a causal connection between noncompetes and the purported effects suggested by some of the research.)
- Although people have routinely asserted that noncompetes (as well as no-poach agreements) are being used with more frequency than in the past, there is no actual proof of these claims, as there are no longitudinal studies looking for changes over

⁵² Workshop Tr., p. 152.

time.⁵³ But, because noncompetes certainly appear (anecdotally and as emphasized in the media) to be more widely used than in the past,⁵⁴ many have seized on the perception that employers are increasingly using noncompetes for lower level employees, and have correlated that with slow wage growth since the Great Recession, blaming the latter on the former. However, we do not actually know if either of those assertions is true.⁵⁵ Indeed, we do not know whether there is something about the way noncompetes have been used recently that has stifled wage growth or how to assess the fact that slow wage growth has been a persistent problem for at least the last 50 years – not just since the Great Recession or concomitant supposed increase in use and abuse of noncompetes.⁵⁶ And, reports last year indicate that wages have in fact picked up more recently.⁵⁷ In sum, we do not know how noncompete use has changed over years, and we cannot pronounce noncompetes to be the cause of slow wage growth.

- The research has yet to explain why – or the consequences (on the research or as a practical matter) of the (supposed) fact that – there are roughly as many noncompetes

⁵³ As noted above (pages 12-13) the opposite is quite possibly true for noncompetes, assuming one can draw such an inference from the fact that the number of Westlaw-reported judicial decisions concerning noncompetes (which can serve as a proxy for the use and enforcement of noncompetes) has remained roughly stagnant during the last decade.

⁵⁴ See Office of Economic Policy, U.S. Department of the Treasury, “Non-compete Contracts: Economic Effects and Policy Implications” (March 2016), available at <https://www.treasury.gov/resource-center/economic-policy/Documents/UST-Non-competes-Report.pdf>.

⁵⁵ But, we do know that the use of noncompetes dates back at least to medieval times when master craftsmen tried to restrain their apprentices from using the skills the masters taught them. See *Study Finds Many Companies Require Non-Compete Clauses For Low-Wage Workers*, available at <https://www.npr.org/2016/11/07/501053238/study-finds-many-companies-require-non-compete-clauses-for-low-wage-workers>. How the use has changed over the years has apparently not been studied.

⁵⁶ *America’s slow-motion wage crisis*, by John Schmitt, Elise Gould, and Josh Bivens (Sept. 13, 2018), available at <https://www.epi.org/publication/americas-slow-motion-wage-crisis-four-decades-of-slow-and-unequal-growth-2/>.

⁵⁷ See *Why Wages Are Finally Rising, 10 Years After the Recession*, by Ben Casselman, *The New York Times* (May 2, 2019), available at <https://www.nytimes.com/2019/05/02/business/economy/wage-growth-economy.html>; *U.S. labor costs rise in third quarter*, Reuters (October 31, 2019) <https://www.reuters.com/article/us-usa-economy-costs/u-s-labor-costs-rise-in-third-quarter-idUSKBN1XA1PC>.

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used (by percentages) in states that do not enforce noncompetes (for these purposes, California) as in states that do.⁵⁸

- Most of the studies that ask employees whether they are bound by a noncompete have no meaningful way to know whether the employee actually understands the difference between a noncompete, nonsolicitation agreement, or even a nondisclosure agreement.⁵⁹ (Many employees do not know the difference.⁶⁰ This type of confusion is a potential foundational problem in some of the data used to assess the effects of noncompetes.)

A more detailed discussion of many misplaced assumptions about the impact of noncompetes and a discussion of the limited research available to date is set forth in “*Misconceptions In The Debate About Noncompetes*,” Law360, July 8, 2019.⁶¹

Again, the signatories below thank the FTC for the opportunity to provide this testimony and for taking on such an important and fraught issue. We are all prepared to appear and testify live before the Commission, should the Commission so desire. We also offer any other assistance that the FTC may find helpful, including drafting language for a rule, policy, or guidance, should the FTC be so inclined.

Respectfully submitted,

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Boston, Massachusetts

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Boston, Massachusetts

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⁵⁸ Workshop Tr., pp. 129-30, 169-70.

⁵⁹ Professor Starr has indicated that in recent studies, he has focused on that very issue and has been making an effort to ensure that his research asks the right questions to ensure that the people surveyed understand the difference.

⁶⁰ This became abundantly clear during the lengthy legislative process in Massachusetts, where employers would talk about their use of noncompetes, only to learn that they were talking about nonsolicitation agreements.

⁶¹ Reprinted on *Fair Competition Law* as “*Correlation Does Not Imply Causation: The False Comparison of Silicon Valley and Boston’s Route 128*,” available without subscription here at <https://www.faircompetitionlaw.com/2019/07/09/correlation-does-not-imply-causation-the-false-comparison-of-silicon-valley-and-bostons-route-128/>.

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Attachments

The views and opinions expressed in this letter are those of the signatories in their individual capacity and do not necessarily reflect the views or opinions of their firms.

Attachment A

Russell Beck
Beck Reed Riden LLP
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Russell Beck is a litigation attorney with over 30 years of experience, nationally known for his work representing employees and employers (from Fortune 50 companies to “mom and pop” shops to individuals) in trade secrets and noncompete matters. For the past decade, he has also taught the course, *Trade Secrets and Restrictive Covenants*, at Boston University School of Law. He was the lead advisor and drafter of the new Massachusetts noncompete law, and assisted several legislators with, and revised some of the language in, the new Massachusetts trade secrets law. In 2016, he was invited to the White House to participate in the working group discussions that led to the development by the White House of a Call to Action on noncompetes. He authored the book, *Trade Secrets Law for the Massachusetts Practitioner* (1st ed. MCLE, Inc. 2019) (covering trade secrets nationally, with a focus on Massachusetts law), and the book, *Negotiating, Drafting, and Enforcing Noncompetition Agreements and Related Restrictive Covenants* (5th ed., MCLE, Inc. 2015) (covering Massachusetts noncompete law). In addition, he created the widely-used 50 State Noncompete Survey (*Employee Noncompetes, A State By State Survey*) and 50 State Trade Secrets Comparison Chart (*Trade Secrets Acts Compared to the UTSA*), the former of which was relied upon by the United States Department of the Treasury Office of Economic Policy’s report, “Non-compete Contracts: Economic Effects and Policy Implications”, and by the White House in connection with the Call to Action and related report. He also monitors changes to noncompete and trade secrets laws around the country, as detailed on the blog, *FairCompetitionLaw.com*.

Erika Hahn
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Erika Hahn is a paralegal at Beck Reed Riden LLP. She provides extensive support on trade secret and noncompete matters nationally, and has been a substantial contributor and editor on a book on Massachusetts noncompete law, a book on trade secrets law, and various other publications.

Hannah T. Joseph
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Hannah T. Joseph is Senior Counsel at Beck Reed Riden LLP, where she focuses her practice on complex commercial litigation. Specializing in the areas of trade secrets law, restrictive covenants, employee mobility, and unfair competition, she regularly litigates issues concerning the use and enforceability of noncompetition, nonsolicitation, and nondisclosure agreements, and counsels employers and employees regarding the same. Hannah has been named Super

Lawyers' Rising Star in Massachusetts consecutively since 2016 and, in 2015, pioneered the Boston Bar Association's Intellectual Property Basics Workshop Series (a program that continues today). Hannah regularly publishes and speaks on the topics of intellectual property law and restrictive covenants, including at the American Intellectual Property Law Association, Boston Bar Association, and Practising Law Institute. In addition, Hannah co-teaches the course, *Trade Secrets and Restrictive Covenants*, at Boston University School of Law alongside Russell Beck. Hannah graduated from Binghamton University in 2007 and Boston College Law School in 2013.

Dave Bohrer
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Dave is a Partner in Greenfield LLP, a Silicon Valley IP and business litigation firm. He is a trial lawyer with over 30 years' experience handling patent infringement, trade secret and numerous other technology-focused litigations. Before coming to Greenfield, Dave was an equity partner in the IP litigation departments at several AmLaw 100 firms. Dave is a Co-Lead of the team drafting the Sedona Conference commentary on monetary remedies in trade secret litigation, scheduled for publication fall 2020. Representative publications include his article "*Threatened Misappropriation of Trade Secrets: Making a Federal (DTSA) Case Out of It*," 33 Santa Clara High Tech. L. J. 506, 521 (2017). He received his undergraduate degree from Stanford and his law degree from Northwestern.

Benjamin I. Fink
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Ben is a shareholder at Berman Fink Van Horn P.C. in Atlanta, Georgia. His practice focuses on business and commercial litigation with an emphasis on competition-related disputes, including non-competes and trade secrets. A published author on restrictive covenants, he blogs regularly on non-compete and trade secret topics (www.bfvlaw.com/blogs). Ben's publications include co-authoring a chapter on Restrictive Covenant Litigation for *Georgia Business Litigation* and a Practice Note on Georgia Confidentiality, Nondisclosure and Non-Solicitation Agreements for Thomson Reuters' Practical Law. In 2010, he testified before a joint committee of the Georgia House and Senate for restrictive covenant agreements. He also served as a member of the State Bar of Georgia Special Legislative Study Committee for restrictive covenants. In recognition of his thought leadership in the trade secrets arena, he was invited to attend The Inaugural Sedona Conference on Developing Best Practices for Trade Secrets Issues that was held in December 2017 in Scottsdale, Arizona. He now serves on the Sedona Conference drafting team for Principles/Best Practices Commentary on Protecting Trade Secrets in Litigation as part of Working Group 12 on Trade Secrets. He is a frequent guest speaker at various seminars on non-compete, trade secrets and other related topics throughout Georgia and other parts of the country. A member of the Labor and Employment Law Section Board of Directors of the Atlanta Bar Association, he served as Chair (2014-2015). He currently serves as Programming Chair of the

Trade Secrets Committee of the American Intellectual Property Law Association, having previously served as Chair of the Cybersecurity Subcommittee (2015-2018) and Legislative Subcommittee (2013-2015). Since 2005, he has been named a Super Lawyer, as well as being designated as one of the Top 100 Super Lawyers in Georgia since 2013. He's been named one of Georgia's Legal Elite since 2012. Since 2015, he has been selected for inclusion in the Best Lawyers in America, and in 2015 he was elected as a member of the Litigation Counsel of America. He obtained his J.D. degree from Emory University School of Law, where he has served on the Alumni Board since 2016 and was recently appointed President-elect. He obtained his undergraduate degree from Duke University, where he serves on the Atlanta Regional Alumni Board.

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James P. Flynn is a Member of the Firm in the Litigation and Employment, Labor & Workforce Management practices. He currently serves as the Managing Director of Epstein Becker Green. His practice focuses on civil litigation and corporate counseling, including trial and appellate work in the area of intellectual property, complex commercial matters, and employment law. Mr. Flynn represents businesses in a broad spectrum of industries, including health care, pharmaceuticals, and financial services. His experience is similarly diverse and includes representing clients in restrictive covenant and non-competition matters.

Chambers USA: America's Leading Lawyers for Business has ranked Mr. Flynn among the "Leaders in Their Field" in New Jersey for Labor & Employment (2016 to 2019). He was selected by his peers for inclusion in *The Best Lawyers in America*® (2015 to 2020), in the field of Commercial Litigation, and has been named to the *New Jersey Super Lawyers* list (2006, 2007, 2009, 2011 to 2019), in the areas of Employment & Labor and Employment Litigation: Defense. Mr. Flynn was also recommended by *The Legal 500 United States*, in the areas of Labor and Employment Disputes (Including Collective Actions): Defense (2018, 2019) and Workplace and Employment Counseling (2019).

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James A. "Jim" Gale is the national Co-Chair of IP Litigation for Cozen O'Connor, LLP. Jim is a registered patent attorney that has been enforcing and defending restrictive covenant and theft of trade secret cases around the nation for over 36 years. He has directly handled hundreds of injunctions in over 35 different states in both state and federal courts. As Vice President and General Counsel of an international medical device company he also oversaw the implementation, enforcement and defense of restrictive covenant and trade secret cases around the world. Jim is AV Martindale rated, listed in Best Lawyers of America®, SuperLawyers, Legal Elite and many other peer review organizations.

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Nicole D. Galli is the founder and Managing Partner of the Law Offices of N.D. Galli LLC, a boutique law firm located in Philadelphia and New York that focuses on business litigation and advice, especially with regard to intellectual property protection. Nicole’s practice focuses on commercial and IP litigation, IP counseling and trade secrets. In addition to her client work, Nicole is involved in several national initiatives around effective trade secrets management, including serving as a Vice Chair of IP Protection in the Supply Chain Committee for the LES Standards Setting Project, focused on developing ANSI “best practices” standards for managing IP (especially trade secrets) in a supply chain and as co-chair of the Sedona Working Group (12) Trade Secrets drafting team focused on Governance and Management of Trade Secrets (team 5).

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Seth Hudson is a partner with Clements Bernard Walker, PLLC in Charlotte, NC. He is an intellectual property attorney with extensive experience in all areas of intellectual property law, including the procurement, enforcement, and maintenance of patent, trademark, and copyright portfolios. He regularly counsels clients and litigates disputes regarding restrictive covenants, trade secrets, false advertising, and non-competition issues. He conducts trade secret audits and advises clients on which strategies to employ to protect their trade secrets and drafts appropriate nondisclosure and nonuse agreements. Seth received undergraduate degrees in chemistry and mechanical engineering from North Carolina State University and his law degree from the University of Richmond.

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Jacqueline C. Johnson devotes her practice to employment litigation and counseling, with particular experience in trade secret and wrongful competition litigation on a national basis and drafting and enforcement of restrictive covenant agreements for multi-state employers. Co-chair of the Littler Mendelson, P.C.’s Unfair Competition and Trade Secrets Practice Group, Jackie regularly authors client updates on developments in unfair competition and trade secret law. She also co-authored *Unfair Competition and Intellectual Property Protection in Employment Law* - a comprehensive treatise on noncompete agreements and unfair competition litigation for Bloomberg BNA

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Jennifer Kenedy is a Vice Chair of the Executive Committee and former Managing Partner of the Chicago Office of Locke Lord LLP, a full-service AmLaw 100 law firm. Since 2003 Jennifer has acted as national counsel on restrictive covenant and trade secret issues for a large American multinational financial services and mutual fund corporation. She obtains injunctions in federal and state courts nationwide against former brokers who leave, join competitors in violation of their restrictive covenants and misappropriate the Company's proprietary trade secret customer data. She handles arbitrations before the Financial Industry Regulatory Authority (FINRA) enforcing restrictive covenants. She also acts as national restrictive covenant and trade secret counsel for several other insurance and financial services clients, acting as lead trial counsel in litigation pending around the country and counseling companies in several industries on utilizing appropriate restrictive covenants to protect their confidential proprietary information. Jennifer frequently speaks and publishes on restrictive covenant and related trade secret issues, including for the Practising Law Institute and American Intellectual Property Law Association.

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Thomas F. Lebens is a patent attorney and partner based in the San Luis Obispo office of Fitch, Even, Tabin & Flannery LLP, a national leader in the field of intellectual property law. Tom has served clients in preparing and prosecuting patent and trademark applications, including appeals, post-grant review, and interferences, since 1991. He also counsels clients in IP and business strategy, licensing issues, infringement and validity analysis and opinions, and trade secret and copyright matters.

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John advises and represents a wide range of clients in many industries, from Fortune 500 companies to individuals, in trade secret and restrictive disputes throughout the United States. As Chair of the American Intellectual Property Law Association's Trade Secret Law Committee, John was actively involved in providing comments and supporting the enactment of the Defend Trade Secrets Act, the federal statute that *The Wall Street Journal* called the "most significant expansion" of federal IP law in 70 years.

John has written and presented on trade secret and restrictive covenant issues and he has been quoted on those issues by *The Wall Street Journal*, *Wired*, *Inside Counsel*, *Law360*, *The National Law Journal*, *Managing IP* and *Wired*; and his blog, "The Trade Secret Litigator" (www.tradesecretlitigator.com), has been cited by publications including *The Wall Street*

Journal. John is listed in the 2016-2020 editions of *The Best Lawyers of America* for Litigation – Intellectual Property and in the 2009-2020 editions of *Ohio Super Lawyers*. John graduated in 1986 from John Carroll University and is a 1989 graduate of Vanderbilt Law School.

Scott McDonald
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Mr. McDonald is a Shareholder in Littler Mendelson PC. He graduated from the University of Texas School of Law in 1987 and has spent the vast majority of the past 30 years of his legal career focused on labor and employment law issues with a concentration in unfair competition and trade secret disputes. He is the author and editor of numerous books and scores of articles related to the subject, including *Unfair Competition and Intellectual Property Protection in Employment Law*, Bloomberg BNA, McDonald & Johnson (2014), and *Drafting and Enforcing Covenants Not to Compete*, Bloomberg BNA, McDonald & Lichty (2009). He is a Co-Founder of Littler’s Unfair Competition and Trade Secret Practice Group, a group that was recognized in Lex Machina’s July 18, 2018, Trade Secret Litigation Report as having handled more trade secret cases (for plaintiffs and defendants) between 2009 and 2018 than any other firm in the nation.

Mr. McDonald has served on committees authoring revisions to the Texas noncompete statute, and served as an Advisor in the drafting of *Restatement of the Law – Employment Law* (ALI 2014). He has also participated in many precedent setting cases such as *Alex Sheshunoff Management Services, L.P. v. Johnson*, 209 S.W.3d 644, 648 (Tex. 2006) (as amicus curia for the Texas Assoc. of Businesses, helping correct a 10+ year misinterpretation of the Texas noncompete statute), *In Re Hewlett Packard*, 212 S.W.3d 356 (Tex. App. 2006) (establishing a new defense to pre-suit depositions in trade secret cases), and *Quantlab Technologies Ltd. v. Godlevsky*, 317 F.Supp.3d 943 (S.D. TX 2018) (establishing the standard for a large award of attorneys’ fees in a trade secret case, and ultimately securing in excess of \$40 million in total judgments for Quantlab after jury trial and appeal).

Mr. McDonald has been consistently recognized by clients, press and his peers for exceptional service to the law and his clients. His recognition includes: BTI’s Client Service All-Star Team; Best Lawyers in America (2006 - 2020) (Lawyer of the Year - Employment Law DFW (2013), Lawyer of the Year - Labor Law DFW (2015, 2017)); Law.com and Texas Lawyer (“*Dallas Lawyer Preserves \$12.2M Trade Secrets Verdict at the 5th Circuit*,” June 28, 2017); and Chamber’s USA’s America’s Leading Lawyers for Business (2012 – 2019) which describes him as having “made a name for himself in the noncompete arena”.

Mr. McDonald has a national practice that involves handling cases all across the nation and regularly advising clients on national unfair competition prevention and trade secret programs related to every state in the United States. He is past Chair of the Dallas Bar Association’s Labor & Employment Law Section, and is Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization.

Paul Mersino
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Paul M. Mersino is a Director and Shareholder in the Detroit office of Butzel Long, one of the oldest law firms in Detroit, Michigan, and serves as the Chair of the Litigation Practice Department. Mr. Mersino represents public and private companies, both as plaintiff's attorney and defendant's attorney, in non-competition and trade secret disputes across the country. He has been recognized as a *Michigan Super Lawyer* and as a Top Lawyer in Detroit by *dBusiness Magazine* in the area of Trade Secrets.

Robert B. Milligan
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Robert B. Milligan is a partner at Seyfarth Shaw LLP and is co-chair of the firm's Trade Secrets, Computer Fraud & Non-Competes Practice Group. Robert's practice encompasses a wide variety of commercial litigation and employment matters, including general business and contract disputes, unfair competition, trade secret misappropriation, and other intellectual property theft. His practice focuses on trade secret, non-compete, and data protection litigation and transactional work on a state, national, and international platform. His experience includes trials, binding arbitrations and administrative hearings, mediations, as well as appellate proceedings. Robert also provides advice to clients concerning a variety of business and employment matters, including nondisclosure, non-compete, and invention assignment agreements, corporate investigations, trade secret and intellectual property audits, commercial landlord/tenant disputes, ADA and OSHA compliance, and an assortment of franchise and bankruptcy issues. He is active in the leadership for the Sedona Conference Trade Secret Working Group, ABA IP Section, ITech Law, and the State Bar of California IP Section.

Eric Ostroff
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Eric Ostroff is a shareholder at Meland Russin & Budwick in Miami, Florida. He is a Chambers-ranked lawyer who focuses his practice on trade-secret and restrictive covenant litigation. He has extensive experience representing both companies and individuals in these matters, across a variety of industries. Eric is the author of the Protecting Trade Secrets blog, which can be found at www.protectingtradesecrets.com. Eric earned his JD, summa cum laude, from the University of Miami School of Law, where he was a member of the law review.

Katherine Perrelli
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Kate Perrelli is the co-chair of Seyfarth Shaw LLP's national Trade Secrets, Computer Fraud & Non-Competes group and she is the Chair of the ABA Committee on Trade Secrets and Interference with Contracts. Kate is also the immediate past national chair of Seyfarth's Litigation department.

Clients turn to Kate when they are most concerned about losing their confidential proprietary information and trade secrets or when other companies have hit them with a shot across the bow alleging violations of common and statutory laws for hiring a new employee or group of employees. Kate is a nationally recognized authority in trade secret and unfair competition law and companies rely on her experience to counsel them in protecting their business assets both before and after a dispute arises.

In addition to representing her clients across the country on such matters in federal and state courts, arbitrations and mediations, she is also frequently retained to conduct complex investigations concerning executives, internal workplace misconduct and other internal complaints. Her services also include preparation of individual and multistate employer noncompete, nonsolicit, nondisclosure and other restrictive covenant agreements; advice regarding onboarding of employees or groups of employees from a competitor, or departing employees joining a competitor; and preparation and implementation of trade secret protection programs, including trade secret audits.

Linda K. Stevens
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Linda K. Stevens is an experienced litigator and counselor who helps clients protect their intellectual property and resolve their commercial disputes. Much of Ms. Stevens' work relates to employee departures, non-competition and confidentiality covenants, trade secrets, and allegations of employee raiding and other unfair competition. Ms. Stevens is frequently asked to speak, write, and teach regarding her areas of concentration. She has held leadership positions in the trade secret and non-competes area. For more than a decade, Ms. Stevens chaired her former firm's Trade Secrets and Restrictive Covenants Client Service Team, and she chaired an American Bar Association Trade Secrets subcommittee for many years, as well. After thirty years of large law firm practice, Ms. Stevens is now Of Counsel with Smith O'Callaghan & White in Chicago and an adjunct professor at Illinois Institute of Technology's Chicago-Kent School of Law. (linda.stevens@socw.com / 312.258.5667)

Peter J. Toren
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Peter J. Toren was a federal prosecutor with the Computer Crime & Intellectual Property Section with the Criminal Division of the United States Department of Justice from 1990 to 1998. While at Justice, he was the lead prosecutor on one of the first cases that was indicted and went to trial under the Economic Espionage Act of 1996. Since leaving Justice, he was a partner with Sidley Austin in New York and has represented civil clients on both sides of the aisle in trade secret litigation and has represented defendants in criminal matters, including conducting several internal investigations involving the misappropriation of trade secrets. He is also the author of *Intellectual Property & Computer Crime* (Law Journal Press) that contains a chapter on the EEA and the DTSA and has been updated 30 times since it was first published in 2003. He is also the co-author of a *Handbook to the Defend Trade Secrets Act of 2016* (Wolters Kluwer) and has published dozens of articles on trade secret. His complete biography is available at www.Petertoren.com.

Erik Weibust
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Erik is co-chair of the Litigation Department at Seyfarth Shaw's Boston office and a member of the firm's Trade Secrets, Computer Fraud & Non-Competes practice group. He has a national litigation practice, representing companies of all sizes and in various industries throughout the United States in high-stakes commercial litigation involving theft of trade secrets, breach of restrictive covenant agreements, employee raiding, breach of fiduciary duty and the duty of loyalty, and unfair competition. He also advises clients with respect to the protection of trade secrets and proprietary information; the drafting, implementation, and enforcement of post-employment restrictive covenants and commercial NDAs; and the hiring of executives, key employees, and strategic groups from competitors.

Erik is a nationally-recognized trade secrets attorney, regularly publishing articles and speaking on related topics locally and nationally. He has been quoted in the *Washington Post* and *Law360* among other national publications. Erik currently serves as Vice Chair of the American Intellectual Property Law Association (AIPLA) Trade Secrets Law Committee, Co-Lead of the Monetary Remedies in Trade Secrets Disputes Drafting Committee for The Sedona Conference Working Group on Trade Secrets, and Co-Chair of the American Bar Association's Restrictive Covenants/Tortious Interference Sub-Committee of the Business Torts and Unfair Competition Committee.

Legal500 recommended Erik in its 2017, 2018, and 2019 editorials naming Seyfarth's Trade Secrets group as one of the top four in the country. Prior to joining Seyfarth, Erik clerked for the Honorable Peter W. Hall of the United States Court of Appeals for the Second Circuit.

Neal Weinrich
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Neal Weinrich is a shareholder at Berman Fink Van Horn P.C. in Atlanta, Georgia. He concentrates his practice on commercial litigation involving restrictive covenants, trade secrets, computer fraud and other competition-related issues. He represents employers and employees from a wide variety of industries in unfair competition disputes in courts in Georgia and other jurisdictions, as well as in arbitral forums. Recognized by Super Lawyers as a Rising Star in Georgia since 2012, he writes and speaks frequently on various issues that arise in competition-related cases. He is also the co-founder of and a regular contributor to *Georgia Non-Compete and Trade Secret News* (www.georgia-noncompete.com). Neal served as the Vice-Chair of the Digital Forensics Subcommittee of the Trade Secret Law Committee of the American Intellectual Property Law Association. He also recently served as a co-chair of the Ethics and Professionalism Committee of the Young Lawyers Division of the State Bar of Georgia. He currently serves on the Board of the Labor & Employment Committee of the Atlanta Bar Association. Neal graduated from Tulane University in 2003 and from Emory University School of Law in 2006.

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James M. Witz is a litigator specializing in non-competition and trade secret disputes, and cases involving emergency and injunctive relief. He is the co-chair of Littler Mendelson's national Unfair Competition and Trade Secret Practice Group. Mr. Witz represents both plaintiffs and defendants in restrictive covenant matters, and has obtained multiple seven figure trial verdicts in high-profile trade secret and restrictive covenant cases in courts around the United States and has successfully argued such matters in the higher courts as well. Mr. Witz counsels clients throughout the country regarding employee hiring, termination and related matters, including the drafting and implementation of effective employment agreements, confidentiality policies and restrictive covenants. Mr. Witz is a frequent speaker on restrictive covenant and trade secret matters, and has authored or contributed commentary on such matters for leading legal publications.