

Regulating Noncompetes Beyond the Common Law: The New Uniform Restrictive Employment Agreements Act

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ABSTRACT

The common law has never treated a noncompete agreement between employer and employee like an ordinary contract. Rather, a court will enforce a noncompete only if it is reasonably tailored in time, geography, and scope of business to further a legitimate employer interest. Suppressing competition is an understandable but not legitimate interest.

While working well enough for some workers, the common law has challenges for workers who don't know about the noncompete until after starting work, for low-wage workers who are unlikely to have trade secrets or star power over customer relationships, and workers who are uncertain whether the noncompete is enforceable. The vagueness and variation between jurisdictions is especially challenging for employers trying to write an enforceable noncompete or trying to hire an experienced worker purportedly subject to a noncompete.

Adding to the complexity are related agreements such as nonsolicitation agreements, confidentiality agreements, payment-for-competition agreements, and training-reimbursement agreements. Some states subject the entire family of agreements to a similar framework, but many states use different standards or are silent about these siblings.

In recent years, more than a dozen states have enacted statutes regulating noncompetes more or less comprehensively. This is leading to a cacophony of statutory commands around the hum of the common law. The frustration, complaints, variety, and confusion inspired the Uniform Law Commission in July 2021 to promulgate a Uniform Restrictive Employment Agreements Act, to be pushed out to the states for adoption in the upcoming months and years.

The Uniform Restrictive Employment Agreements Act clarifies and codifies the common law by specifying four legitimate employer interests for a noncompete (sale of a business, trade secrets, customer relationships) and articulating a narrowly tailored standard. The Act adds precision by giving an outer time limit of one year for most agreements. The Act makes three key moves beyond the common law: it bans noncompetes for low-wage workers; it requires advance notice; and it sets penalties for prohibited agreements in addition to making them unenforceable.

This lecture explains the goals and key elements of the Uniform Restrictive Employment Agreements Act.