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POSTEMPLOYMENT NONCOMPETE AGREEMENTS: WHY UTAH SHOULD DEPART FROM THE MAJORITY

Christopher Mack*

I. INTRODUCTION

A noncompete agreement is “[a] promise, usu[ally] in a sale-of-business, partnership, or employment contract, not to engage in the same type of business for a stated time in the same market as the buyer, partner, or employer.”¹ More specifically, postemployment noncompete agreements restrict employees from working within a particular field or industry for a specified period of time after leaving a company.² Employers most commonly negotiate noncompete agreements with their “technical, sales, and managerial personnel who have access to confidential business information or develop close relationships with customers.”³

Employers who use noncompete agreements claim they are “perhaps the only effective method of preventing unscrupulous competitors or employees from appropriating valuable trade information and customer relationships for their own benefit.”⁴ Employers further assert that “[w]ithout the protection afforded by such covenants, it is argued, businessmen could not afford to stimulate research and improvement of business methods to a desirably high level, nor could they achieve the degree of freedom of communication within a company that is necessary for efficient operation.”⁵

Forty-six states permit postemployment noncompete agreements.⁶ Utah is included in this majority, while California, representing the minority, bans postemployment agreements.⁷

This Note proposes that the Utah Legislature pass legislation mirroring California’s statutory law on postemployment noncompete agreements for the

* © 2015 Christopher Mack. J.D. Candidate 2016, S.J. Quinney College of Law, University of Utah. I’d like to thank Professor Hill and Professor Schwartz for their guidance and suggestions throughout this project, the executive board of the Utah Law Review for providing valuable insights, and the Utah Law Review staff for their hard work and attention to detail. Thanks also to my sweet wife Christina for her support and my two handsome boys Golden and Easton for always lightening the mood.

¹ BLACK’S LAW DICTIONARY 1215 (10th ed. 2014).

² Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 626 (1960).

³ *Id.*

⁴ *Id.* at 627.

⁵ *Id.*

⁶ See RUSSELL BECK, BECK REED RIDEN LLP, EMPLOYEE NONCOMPETES: A STATE BY STATE SURVEY 1–14 (2013), available at <http://www.beckreedriden.com/wp-content/uploads/2012/09/Noncompetes-50-State-Survey-Chart-20130814.pdf>, archived at <http://perma.cc/C265-5PZE>.

⁷ *Id.* at 2, 12.

following reasons: (1) a ban of postemployment noncompete agreements would strengthen Utah's economy and foster more ingenuity and innovation; (2) other legal mechanisms are more effective at achieving employers' purported reasons for requiring their employees to agree to postemployment noncompete agreements; (3) noncompete agreements, even if unenforceable, deter the less sophisticated party—the employee—from rightfully pursuing many employment opportunities; and (4) employees' rights and interests should come before the interests of business entities.⁸

This Note proceeds in four parts. Part II provides an overview of noncompetition law in both Utah and California. Part III discusses the policy arguments that underlie this Note's recommendation that the Utah Legislature enact noncompetition laws that mirror those of California. Finally, Part IV concludes.

II. BACKGROUND

A. *Noncompetition Law in Utah*

The Utah Supreme Court has held that postemployment noncompete agreements “are enforceable as long as they are supported by consideration, negotiated in good faith, necessary to protect a company's goodwill, and reasonably limited in time and geographic area.”⁹ This section will examine each of the four elements of an enforceable noncompete agreement: (1) consideration, (2) good faith negotiations, (3) goodwill and trade secrets, and (4) limits on time and geographic area.

1. *Consideration*

In Utah, noncompete agreements require consideration,¹⁰ as do all valid contracts; however, the amount of consideration needed to enforce the agreement is

⁸ This proposal should not be viewed as a lofty goal but rather a reasonable possibility, as several states have already banned noncompete agreements, which have been a source of controversy for some time now, and some states have already banned noncompete agreements for entire industries on public policy grounds. *See* MODEL RULES OF PROF'L CONDUCT R. 5.6(a) (2013) (“A lawyer shall not participate in offering or making: (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement”); Kenneth R. Swift, *Void Agreements, Knocked-Out Terms, and Blue Pencils: Judicial and Legislative Handling of Unreasonable Terms in Noncompete Agreements*, 24 HOFSTRA LAB. & EMP. L.J. 223, 244 (2007) (“Some statutes specifically preclude noncompete agreements for certain occupations, such as physician or broadcast industry employees.” (citation omitted)).

⁹ *TruGreen Cos. v. Mower Bros.*, 199 P.3d 929, 932 (Utah 2008) (citing *Allen v. Rose Park Pharmacy*, 237 P.2d 823, 828 (Utah 1951)).

¹⁰ “Consideration is an act or promise bargained for and given in exchange for a promise.” *Estate of Beesley v. Harris*, 883 P.2d 1343, 1351 (Utah 1994) (citing *Res. Mgmt. Co. v. Weston Ranch & Livestock Co.*, 706 P.2d 1028, 1036 (Utah 1985)).

minimal.¹¹ In other words, there must be a bargained-for exchange, however nominal it may be. For example, courts generally view an offer of continued employment as valid consideration in postemployment noncompete agreements.¹²

2. *Good-faith Negotiations*

As is true with all contract negotiations, courts require noncompete agreements to be negotiated in good faith.¹³ As such, Utah courts would likely deem ploys like “deception, intimidation, or any manner of coercion” as bad-faith negotiation tactics, and refuse to enforce contracts made in this manner.¹⁴ This might occur when an employer induces an employee to enter a noncompete agreement with the intent to promptly terminate the employee.¹⁵

3. *Goodwill and Trade Secrets*

Utah courts define “goodwill” as:

the advantage or benefit which is acquired by an establishment, beyond the mere value of the capital, stocks, funds or property employed therein, in consequence of the general patronage and encouragement which it receives from constant or habitual customers on account of its location, or local position or reputation for quality, skill, integrity or punctuality.¹⁶

Utah Courts hold that postemployment noncompete agreements are necessary to protect a company’s goodwill where it can be shown an employee would likely lure away her employer’s customers or clients if she were allowed to compete nearby.¹⁷ To be clear, to prevail on an injunction, the employer does not need to show the employee has taken, or will take, goodwill or trade secrets.¹⁸ Rather, the employer

¹¹ See William R. Knowlton, *Implementing Noncompete Agreements in Utah: Protecting Business Trade Secrets, Goodwill, and Investment in Employees*, UTAH B.J., May/June 2014, at 16, 16.

¹² See *Sys. Concepts, Inc. v. Dixon*, 669 P.2d 421, 426 (Utah 1983).

¹³ See *TruGreen Cos.*, 199 P.3d at 932.

¹⁴ See Knowlton, *supra* note 11, at 16.

¹⁵ See *Allen v. Rose Park Pharmacy*, 237 P.2d 823, 828 (Utah 1951) (Wade, J., dissenting).

¹⁶ *Jackson v. Caldwell*, 415 P.2d 667, 670 (Utah 1966). Black’s Law Dictionary provides an alternate definition for “goodwill”: “A business’s reputation, patronage, and other intangible assets that are considered when appraising the business, esp[ecially] for purchase; the ability to earn income in excess of the income that would be expected from the business viewed as a mere collection of assets.” BLACK’S LAW DICTIONARY, *supra* note 1, at 810.

¹⁷ See *Allen*, 237 P.2d at 827.

¹⁸ See *Sys. Concepts, Inc. v. Dixon*, 669 P.2d 421, 428 (Utah 1983).

must show there is a threat the former employee *may* take goodwill or trade secrets.¹⁹ When seeking injunctive relief, the employer must also show the employee's services were "special, unique, or extraordinary."²⁰ Similarly, the Utah Supreme Court has held that noncompete agreements will be upheld where they are necessary to protect trade secrets.²¹

4. *Limits on Time and Geographic Area*

Finally, the last prong of the test is whether the noncompete agreement is "reasonably limited in time and geographic area."²² "The reasonableness of the restraints in a restrictive covenant is determined on a case-by-case basis, taking into account the particular facts and circumstances surrounding the case and the subject covenant."²³

Regarding the time element, the reasonableness standard has been stretched to its limits.²⁴ As proof, Utah courts have upheld noncompete agreements with time restrictions ranging from one year all the way to twenty-five years.²⁵ In general, however, time restrictions ranging from six months to two years are most likely to be considered reasonable.²⁶

Determining whether a geographic limitation is reasonable is highly fact specific.²⁷ "Of primary importance . . . are the location and nature of the employer's clientele."²⁸ The more prevalent and scattered the client base, the more stringent the geographic limitation may be.²⁹

(a) *Noncompete Cases in Utah*

The Utah Supreme Court has decided several cases shaping the landscape of noncompete law in the state. A summary of Utah's seminal cases on postemployment noncompete agreements follows.

¹⁹ *Id.*

²⁰ *Robbins v. Finlay*, 645 P.2d 623, 628 (Utah 1982).

²¹ *Allen*, 237 P.2d at 827–28; *but see Robbins*, 645 P.2d at 628 (holding that an employee's general knowledge or expertise developed through the course of her employment cannot be treated as a trade secret).

²² *TruGreen Cos. v. Mower Bros.*, 199 P.3d 929, 932 (Utah 2008) (citing *Allen v. Rose Park Pharmacy*, 237 P.2d 823, 828 (Utah 1951)).

²³ *Sys. Concepts, Inc.*, 669 P.2d at 427.

²⁴ *See Knowlton*, *supra* note 11, at 18.

²⁵ *Id.* (citing *Robbins*, 645 P.2d at 624 (one-year restriction); *Valley Mortuary v. Fairbanks*, 225 P.2d 739, 741 (Utah 1950) (twenty-five-year restriction)).

²⁶ *Id.*

²⁷ *See Sys. Concepts, Inc.*, 669 P.2d at 427.

²⁸ *Id.*

²⁹ *See Blake*, *supra* note 2, at 662–63, 680.

(i) *Allen v. Rose Park Pharmacy*³⁰

Upon being hired by a new pharmacy, Mr. Allen agreed that if terminated, he would not compete within two miles of his employer for five years.³¹ After less than one year of employment, the pharmacy terminated Mr. Allen.³² Mr. Allen brought suit against the pharmacy seeking a declaration that the covenant was unenforceable.³³ The trial court agreed and found that the covenant not to compete was unenforceable because it lacked consideration and the two-mile restriction was unreasonable.³⁴

On appeal, the Utah Supreme Court reversed the trial court's determination, holding the covenant not to compete enforceable and necessary to protect the pharmacy's goodwill.³⁵ The court reasoned that the pharmacy's promise to employ and compensate Mr. Allen in exchange for Mr. Allen's promise not to compete with the pharmacy was sufficient consideration.³⁶ Next, the court found that the two-mile radius "seem[ed] reasonably calculated to protect the [pharmacy] from competition by [Mr. Allen] in view of the normal shopping habits of the public."³⁷ The court acknowledged that the term of five years was questionable, but in the end, it reasoned that because there was consideration and the restricted area was modest, the five-year term was not so overreaching as to cause the entire covenant to fail.³⁸

In his dissent, Justice Wade opined that the noncompete provision should have been deemed unenforceable because Mr. Allen was unfairly treated and the pharmacy took advantage of him.³⁹

(ii) *System Concepts, Inc. v. Dixon*⁴⁰

In May 1978, System Concepts, Inc. ("SCI"), a cable television equipment manufacturer, hired Ms. Dixon as a sales coordinator.⁴¹ In November of 1978, SCI asked Ms. Dixon to sign a noncompete agreement that restricted competition with any of SCI's competitors for two years after her employment ended without any specific spatial restriction.⁴² Just prior to Ms. Dixon's execution of the noncompete agreement, SCI promoted her as the national sales manager.⁴³ In March 1981, Ms.

³⁰ 237 P.2d 823 (Utah 1951)

³¹ *Allen v. Rose Park Pharmacy*, 237 P.2d 823, 824 (Utah 1951).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 828.

³⁶ *Id.* at 825–26.

³⁷ *Id.* at 828.

³⁸ *Id.*

³⁹ *Id.* at 828 (Wade, J., dissenting).

⁴⁰ 669 P.2d 421 (Utah 1983)

⁴¹ *Sys. Concepts, Inc. v. Dixon*, 669 P.2d 421, 424 (Utah 1983).

⁴² *See id.*

⁴³ *Id.*

Dixon left SCI to accept a position with MetroData, a competitor of SCI, as its national sales manager.⁴⁴ According to the court, at the time, the cable television equipment industry was in its infant stages, and as such, Ms. Dixon pursued the same customers as she had while at SCI.⁴⁵

After learning about Ms. Dixon's employment with MetroData, SCI brought suit seeking a preliminary injunction and damages.⁴⁶ The trial court denied the preliminary injunction, and SCI brought an interlocutory appeal.⁴⁷ Ultimately, the Utah Supreme Court disagreed with the trial court and reversed and remanded the case with instructions to enter a preliminary injunction.⁴⁸ The court held that injunctive relief was justified because SCI showed its goodwill was vulnerable to the taking and Ms. Dixon's services were "special, unique, or extraordinary."⁴⁹

In its analysis, the Utah Supreme Court first noted the trial court found that the consideration element had been met because an offer of continued employment qualifies as adequate consideration.⁵⁰ Second, the court noted there was no evidence, or even allegation, of bad-faith negotiations.⁵¹ Third, the court found that the two-year restriction was reasonable.⁵² Finally, the court found that the spatial restriction was reasonable, despite the agreement's failure to state a specific restrictive area.⁵³ While it appears that this particular point was an issue of first impression for Utah courts, the court cited and declined to follow persuasive precedent to the contrary, which holds that noncompete agreements are necessarily void where the employer fails to include a specific spatial restriction.⁵⁴

The court justified its position by noting that "[i]n those cases which have held a restrictive covenant void for failure to include a specific territorial restriction, generally the employer's business and the potential scope of its clientele have been of a 'local' nature."⁵⁵ However, "[t]he business being protected in this case (cable television) is not one which is sought locally by a localized clientele."⁵⁶

⁴⁴ *Id.*

⁴⁵ *Id.* According to the court, at that time, the cable television industry spanned the entire United States with an estimated 2,500 potential clients. *Id.* at 424 n.2.

⁴⁶ *Id.* at 424.

⁴⁷ *Id.* at 425.

⁴⁸ *Id.* at 429–30.

⁴⁹ *See id.* at 426.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 426–27.

⁵³ *Id.* at 427.

⁵⁴ *See id.* (citing *H & R Block, Inc. v. Lovelace*, 493 P.2d 205, 213 (Kan. 1972); *Armstrong v. Taco Time Int'l, Inc.*, 635 P.2d 1114, 1117–18 (Wash. Ct. App. 1981); *Pancake Realty Co. v. Harber*, 73 S.E.2d 438, 443 (W. Va. 1952)).

⁵⁵ *Id.*

⁵⁶ *Id.*

B. Noncompetition Law in California

For decades California laws have banned postemployment noncompete agreements. In 1941, the California Legislature adopted the Business and Professions Code Section 16600 (“Section 16600”), placing a ban on postemployment noncompete agreements.⁵⁷ The California Legislature enacted Section 16600 in part “to protect the interests in free competition and employee mobility of all Californians, including consumers, competitors, and employees.”⁵⁸ A second important purpose motivated the enactment of Section 16600—creating and maintaining a healthy economy.⁵⁹ Additionally, “[t]he Legislature’s statutory scheme was intended to eliminate post-employment restraints on competition and prevent litigation based on covenants not to compete.”⁶⁰

Section 16600 states, “[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.”⁶¹ The only exceptions to Section 16600’s ban on noncompete covenants are contracts dealing with the sale of a business and the dissolution of a partnership or limited liability company.⁶²

In responding to various challenges to Section 16600’s scope and validity, California state courts have consistently confirmed that “[t]he interests of the employee in his own mobility and betterment are deemed paramount to the competitive business interests of the employers”⁶³ Furthermore, Section 16600

⁵⁷ See Todd M. Malynn, *The End of Judicially Created Restraints on Competition*, COMPETITION, Spring 2009, at 35, 41. Section 16600’s predecessor was Civil Code Section 1673, which was enacted in 1872 and was substantially similar. *Id.* at 39.

⁵⁸ *Id.* at 38.

⁵⁹ See *id.* at 42 (“Like the Cartwright Act, Section 16600 rests ‘on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress’” (quoting *Cianci v. Superior Court*, 710 P.2d 375, 383 (Cal. 1985)).

⁶⁰ *Id.* at 38.

⁶¹ CAL. BUS. & PROF. CODE § 16600 (West 2008).

⁶² See Malynn, *supra* note 57, at 41.

⁶³ *Application Grp., Inc. v. Hunter Grp., Inc.*, 72 Cal. Rptr. 2d 73, 85 (Cal. Ct. App. 1998) (quoting *Diodes, Inc. v. Franzen*, 67 Cal. Rptr. 19, 26 (Cal. Ct. App. 1968)). Over the 1980s and 1990s, beginning with *Campbell v. Board of Trustees of the Leland Stanford Junior University*, 817 F.2d 499 (9th Cir. 1987), and concluding with *International Business Machines Corp. v. Bajorek*, 191 F.3d 1033 (9th Cir. 1999), the Ninth Circuit chipped away at Section 16600, creating a “narrow restraint” exception to the ban of noncompete agreements. See Malynn, *supra* note 57, at 45–46. The “narrow restraint” exception invalidated noncompete agreements only if the former employee could show that the covenant “‘completely restrained’ him from pursuing his profession.” *Int’l Bus. Machs. Corp.*, 191 F.3d at 1040 (citing *Gen. Commercial Packaging, Inc. v. TPS Package Eng’g, Inc.*, 126 F.3d 1131, 1133 (9th Cir. 1997) (per curiam)). In 2008, the California Supreme Court issued a landmark decision, in *Edwards v. Arthur Andersen LLP*, 189 P.3d 285 (Cal. 2008), eliminating the “narrow restraint” exception and “strongly reaffirm[ing] Section

“broadly protects ‘one of the most cherished commercial rights we possess’—‘the important legal right of persons to engage in businesses and occupations of their choosing.’”⁶⁴ The result is that Section 16600 benefits all Californians because it “promotes an efficient labor market,” thereby utilizing human resources in the most effective way possible.⁶⁵ This occurs because employers are on equal footing in competing for top talent.⁶⁶

Because the California Legislature has created a bright-line rule, it is easy to determine whether a contract is void due to a noncompete clause; “[a] contract is void if, by enforcing it, the employee ‘is not *as free* to [engage in a competing business] as he would have been if he were not bound by it.’”⁶⁷

III. ANALYSIS

The Utah Legislature should follow California’s Legislature and ban all postemployment noncompete agreements for four reasons. First, a ban on postemployment noncompete agreements would enhance Utah’s economy and business sector. Second, there are other legal mechanisms employers could use to guard trade secrets and customers that do not require former employees to sacrifice their ability to work in their desired fields and areas. Third, a ban on postemployment noncompete agreements will help prevent employers from taking advantage of unsophisticated employees through the threat of unenforceable noncompete agreements. Finally, the rights and interests of employees should come before those of business entities.

A. *A Ban on Postemployment Noncompete Agreements Would Strengthen Utah’s Economy and Business Sector*

Placing a ban on postemployment noncompete agreements would strengthen Utah’s economy and increase innovation and ingenuity. California’s ban on postemployment noncompete agreements validates this position. California has prohibited postemployment noncompete agreements dating back to 1872 when

16600’s sweeping prohibition against post-employment restraints on competition.” Malynn, *supra* note 57, at 54. Specifically, the court held that “[n]oncompetition agreements are invalid under Section 16600 in California even if narrowly drawn, unless they fall within the applicable statutory exceptions of sections 16601, 16602, or 16602.5.” *Edwards*, 189 P.3d at 297.

⁶⁴ Malynn, *supra* note 57, at 39 (quoting *Morlife, Inc. v. Perry*, 66 Cal. Rptr. 2d 731, 734 (Cal. Ct. App. 1997)). The California Legislature and state courts have made it a point to zealously guard and protect this right. See *New Method Laundry Co. v. MacCann*, 161 P. 990, 991 (Cal. 1916).

⁶⁵ Malynn, *supra* note 57, at 42.

⁶⁶ See *id.* (citing *Application Grp., Inc.*, 72 Cal. Rptr. 2d at 85).

⁶⁷ Malynn, *supra* note 57, at 44 (alteration in original) (quoting *Chamberlain v. Augustine*, 156 P. 479, 480 (Cal. 1916)).

Section 16600's predecessor, Civil Code Section 1673, was enacted.⁶⁸ Simply put, California's ban on postemployment noncompete agreements has stood the test of time for over 140 years.⁶⁹ Additionally, the ban has played an integral role in the growth of California's business sector, especially Silicon Valley, California's technology hub.⁷⁰ Supporting this position, Professor Ronald J. Gilson ("Professor Gilson"), Professor of Law and Business at both Stanford Law School and Columbia University School of Law has

attribute[d] the unparalleled success of California's economy, particularly its high-technology industries, to the legal infrastructure created by Section 16600's flat prohibition against post-employment restraints on competition, which enables labor resources to freely flow to their highest and best use, rewards innovation, and allows new businesses to grow, flourish, and mutually benefit from innovative ideas. He notes, however, that in the absence of a prohibition against post-employment restraints on competition, this extraordinary success would not be realized⁷¹

According to Professor Gilson, there should not be any exceptions to the ban of postemployment noncompete agreements—not even for trade secrets.⁷² Although a noncompete agreement is a great way to protect a business's trade secrets, it does more harm than good.⁷³ "[C]ovenants not to compete are effective in the same sense that burning down a house to eliminate termites is effective: the problem is eliminated but the collateral damage from the solution is worse than the problem itself."⁷⁴

Professor Gilson's position is further supported by a recent Harvard Business School study documenting the amount of technology innovation in Michigan before 1985, when there was a ban on postemployment noncompete agreements, and post-1985 when the legislature lifted the ban.⁷⁵ After the ban was lifted, there was a

⁶⁸ See Malynn, *supra* note 57, at 39.

⁶⁹ See *id.*

⁷⁰ *Id.* at 43. Silicon Valley was the birthing ground for many of the world's largest companies, including Google, Apple, Hewlett-Packard, Yahoo!, eBay, Cisco Systems, Intel, Adobe Systems, Oracle, Netflix, and many more. See Daniel J. Willis & Jack Davis, *SV 150: Searchable Database of Silicon Valley's Top 150 Companies for 2014*, SILICON VALLEY (Apr. 14, 2014, 6:00 AM), http://www.siliconvalley.com/sv150/ci_25548370, archived at <http://perma.cc/7FZ5-MHRT>.

⁷¹ Malynn, *supra* note 57, at 43 (citing 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, 603–09 (1999)).

⁷² *Id.*

⁷³ See *id.* at 43 (citation omitted).

⁷⁴ *Id.* (citation omitted).

⁷⁵ See Matt Marx et al., *Noncompetes and Inventor Mobility: Specialists, Stars, and the Michigan Experiment* 23 (Harvard Bus. Sch. Dep't of Research, Working Paper No. 07-042, 2007), available at <http://www.hbs.edu/faculty/Publication%20Files/07-042.pdf>, archived at <http://perma.cc/372U-M5T3>. The repealed Michigan statute's language bore a striking

drastic drop in inventions and innovation within the business sector, whereas before the ban was lifted Detroit, Michigan was one of the United States' most thriving business centers.⁷⁶ The study noted:

Constraining the flow of people and thus knowledge, enforcing regions may fail to develop entrepreneurial and technologically dynamic economies. Consistent with Gilson's arguments, industry growth may be attenuated as startups fail to condense in enforcing regions. The networks of small companies so crucial to Silicon Valley's growth would be less likely to develop in regions that enforce noncompetes.⁷⁷

California and Michigan are great examples of how the economy is bolstered by prohibiting postemployment noncompete agreements and likewise hindered by allowing them. California's Silicon Valley is perhaps the technology hub of the entire United States. It appears that California's ban on postemployment noncompete agreements has played a large role in Silicon Valley's development. This is likely because prohibiting employers from enforcing noncompete agreements largely prevents a company from establishing a monopoly, and thus, increases competition. An increase in competition breeds innovation because the companies that do not continue to advance will be left behind. Innovation then yields more efficient processes, creates more jobs, and decreases prices. Finally, prohibiting postemployment noncompete agreements increases the mobility of the most talented labor, ensuring the longevity and prosperity of the business sector.

B. Employers May Utilize Other Legal Mechanisms to Protect Company Trade Secrets and Goodwill Without Harming Their Former Employees' Future Job Prospects

There are several purported reasons why employers use noncompete agreements, and employers may require them for any combination of the following reasons. One reason is to protect the company's trade secrets from being divulged

resemblance to Section 16600, providing: "All agreements and contracts by which any person . . . agrees not to engage in any avocation [or] employment . . . are hereby declared to be against public policy and illegal and void." MICH. COMP. LAWS ANN. § 445.761 (West 1967) (repealed 1985). Oddly enough, the Michigan Legislature inadvertently lifted the ban on noncompete agreements. See Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements*, 52 WM. & MARY L. REV. 873, 896 (2010). This occurred with the passing of the Michigan Antitrust Reform Act, which repealed the section of the code where Section 445.761 was found. *Id.* at 896 n.80. Surprisingly, "more than twenty pages of legislative analysis of [the Michigan Antitrust Reform Act] by both House and Senate subcommittees do not mention noncompetes as a motivation for the bill." Marx et al., *supra*, at 7. Furthermore, it appears the Michigan Legislature did not even notice that it had abolished the noncompete provision. Moffat, *supra*, at 896 n.80.

⁷⁶ Marx et al., *supra* note 75, at 23.

⁷⁷ *Id.* (citations omitted).

by former employees.⁷⁸ Another reason is to guard against losing current customers when an employee leaves to work for a competitor.⁷⁹ There likely is a third reason, however, that motivates companies to require their employees to sign noncompete agreements—that reason is simply to ensure a company’s employees will not leave to work for a competitor.⁸⁰ This creates unfair situations for employees discussed, *infra*, in section D.⁸¹ Simply put, to allow employers to restrict and diminish a former employee’s right to work is both unnecessary and poor public policy.

Using confidentiality and nonsolicitation agreements, in lieu of noncompete agreements, would help companies achieve the two major goals that noncompete agreements purportedly set out to accomplish. In addition to achieving these goals, employing confidentiality and nonsolicitation agreements in the place of noncompete agreements eliminates the great potential harm to an employee who leaves his current employer for a better opportunity.

A confidentiality agreement is “[a] promise not to disclose trade secrets or other proprietary information learned in the course of the parties’ relationship.”⁸² Confidentiality agreements provide all the protection an employer needs to guard its trade secrets, confidential customer lists, processes, procedures, etc. On the other hand, a nonsolicitation agreement is “[a] promise, usually in a contract for the sales of a business, a partnership agreement, or an employment contract, to refrain, for a specified time, from either (1) enticing employees to leave the company, or (2) trying to lure customers away.”⁸³ Similar to confidentiality agreements, nonsolicitation agreements, like noncompete agreements, prevent a company’s former employee from stealing away its employees and customers.

The question remains then, if a nonsolicitation agreement combined with a confidentiality agreement achieves the two major purported purposes of a noncompete agreement, why do companies use noncompete agreements at all? The easy answer is that employers use noncompete agreements to restrict employee mobility. Once the employee signs the noncompete agreement, she cannot leave without incurring a massive penalty, namely being restricted from working in her chosen field, or being forced to move to a new state, or country; transitioning to a new career altogether; going on unemployment; or if she competes, the risk of being sued.

⁷⁸ See Blake, *supra* note 2, at 627.

⁷⁹ See *id.*

⁸⁰ See Moffat, *supra* note 75, at 894 (opining that noncompete agreements are “intended to restrict employee mobility”).

⁸¹ See *infra* Part III(D).

⁸² BLACK’S LAW DICTIONARY, *supra* note 1, at 361. Confidentiality agreements are also commonly referred to as nondisclosure agreements. *Id.* Black’s Law Dictionary defines “nondisclosure agreement” slightly differently: “A contract or contractual provision containing a person’s promise not to disclose any information shared by or discovered from a holder of confidential information, including all information about trade secrets, procedures, or other internal or proprietary matters.” *Id.* at 1215.

⁸³ *Id.* at 361.

It simply does not make sense to create vast amounts of collateral damage in the process of protecting one's trade secrets, employees, and customers, especially not when those exact purposes can be achieved without any collateral damage.

C. Employers' Noncompete Agreements, Even Where Unenforceable, Take Advantage of Employees' Lack of Sophistication

Although Utah courts have placed limitations on the enforceability of noncompete agreements, such as requiring reasonable territorial and duration restrictions, many employees who are bound by noncompete agreements will not be savvy enough or have the means to determine whether the noncompete agreement they signed is enforceable.

A lawsuit filed in 2014 against popular sandwich shop Jimmy John's⁸⁴ illustrates just how pervasive overly restrictive noncompete agreements are between employers and lower-level employees, who are often taken advantage of due to their lack of sophistication.⁸⁵ The noncompete provision in question attempted to restrict a terminated employee from working for any business that "derives . . . 10 percent of its revenue from sandwiches" and that is located within three miles of any Jimmy John's location.⁸⁶ Additionally, the duration of the noncompete agreement was two years.⁸⁷

⁸⁴ Dave Jamieson, *Jimmy John's Makes Low-Wage Workers Sign 'Oppressive' Noncompete Agreements*, HUFFINGTON POST (Oct. 13, 2014, 4:03 PM), http://www.huffingtonpost.com/2014/10/13/jimmy-johns-non-compete_n_5978180.html, archived at <http://perma.cc/JQ9Q-25D9>.

⁸⁵ Noncompete agreements are also harmful to sophisticated employees who have experience with them. See ORLY LOBEL, *TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING* 51 (2013). Noncompete agreements have become so prevalent that employees in many industries do not have a meaningful choice not to sign them. See *id.* (explaining that even sophisticated employees sign noncompete agreements because of the "leverage asymmetry" businesses possess). Many of these agreements are "presented as do or die at the beginning of the employment relationship." *Id.* This would not matter much if noncompete agreements were not so prevalent, but they are; studies show that "nearly 90 percent of managerial and technical employees have signed them." *Id.* Thus, people could not have a career in many industries without signing a noncompete agreement because they would be hard pressed to find a company that did not require it.

⁸⁶ Jamieson, *supra* note 84.

⁸⁷ *Id.* The exact language from the agreement provides:

Employee covenants and agrees that, during his or her employment with the Employer and for a period of two (2) years after . . . he or she will not have any direct or indirect interest in or perform services for . . . any business which derives more than ten percent (10%) of its revenue from selling submarine, hero-type, deli-style, pita and/or wrapped or rolled sandwiches and which is located with [sic] three (3) miles of either [the Jimmy John's location in question] or any such other Jimmy John's Sandwich Shop.

Kathleen Chavez (“Ms. Chavez”), the counsel of record, reported that Jimmy John’s required both her clients to sign the noncompete agreement or they would not be hired.⁸⁸ Stuningly, “the effective blackout area for a former Jimmy John’s worker would cover 6,000 square miles in 44 states and the District of Columbia.”⁸⁹ The restricted area under this noncompete agreement is so broad it would likely, if somehow found enforceable, prevent a former employee from working for nearly any sandwich shop in the country located within a metropolitan area or college town.

According to an anonymous Jimmy John’s franchise owner, “the noncompete clause is part of a standard-issue hiring packet provided by corporate.”⁹⁰ In a world where competitors copy one another on a frequent basis, Jimmy John’s is likely just one of a myriad of franchises that include similar noncompete provisions in its hiring packets.

It is a moot point that Jimmy John’s noncompete agreement is almost certainly unenforceable in most jurisdictions, including Utah, based on the overly broad spatial restriction. First, only two former Jimmy John’s employees, out of thousands, who have signed the same provision, have challenged the noncompete agreement.⁹¹ Hence, from an employer’s viewpoint, unenforceable noncompete agreements can be just as effective as enforceable agreements because former employees rarely challenge them in court.⁹² What’s more, the employer may not even care that the noncompete agreement is enforceable or perhaps intentionally designs it to be unreasonable.⁹³ Second, even if the noncompete agreement is found to be unenforceable due to the spatial restriction, most courts will trim the restriction down to what they determine to be a reasonable limitation and enforce the agreement under the new terms.⁹⁴ Thus, the employee will remain restrained by the noncompete agreement.

Id. (alteration in original).

⁸⁸ *Id.*

⁸⁹ *Id.* Jimmy John’s reportedly has more than two thousand locations. *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See Moffat, *supra* note 75, at 887–88; see also *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1286 (Ariz. 1999) (“For every agreement that makes its way to court, many more do not.”); *Richard P. Rita Pers. Servs. Int’l, Inc. v. Kot*, 191 S.E.2d 79, 81 (Ga. 1972) (“For every covenant that finds its way to court, there are thousands which exercise an in terrorem effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor, or who are anxious to maintain gentlemanly relations with their competitors.” (quoting Blake, *supra* note 2, at 682)).

⁹³ See Moffat, *supra* note 75, at 888 n.49 (“During my time in practice, I was asked by one client to draft a noncompete for all employees in a small company. I responded that the terms suggested by the client would be unenforceable. The client responded: ‘I don’t care. I just don’t want them to leave.’”). Moffat suggests that “employers have a tendency to overreach” when drafting their noncompete agreements, and this could be a widespread problem. See *id.* at 887–88.

⁹⁴ This process is known as reformation and also popularly referred to as the “blue pencil” doctrine. See, e.g., Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An*

If the Utah Legislature bans postemployment noncompete agreements altogether, over time it would become common knowledge that these provisions are prohibited by law. As such, the general public would largely be freed from being duped into such harmful and unenforceable contracts.

D. Employees' Rights and Interests Should Come First

The United States is a place where the most treasured rights and interests are those of the people. Indeed, these rights are enshrined in the Bill of Rights.⁹⁵ Yet Utah, by enforcing postemployment noncompete agreements, places the rights and interests of business entities before those of its employees. This is simply a case of the *invented* receiving more protection than the *inventor*.

By contrast, California courts have declared that the interests of employees are “paramount to the competitive business interests of the employers.”⁹⁶ In addition, California courts have shrewdly and repeatedly affirmed the right that people have to choose their own places of employment and that seeking any lawful employment is “one of the most cherished commercial rights we possess.”⁹⁷

There are many scenarios that demonstrate the unfairness that can occur when postemployment noncompete agreements are enforced or when the employee mistakenly complies with an unenforceable noncompete agreement. One common scenario occurs when an employee, who has chosen a particular career path, either becomes unhappy with her employer and wants to leave or is fired. The effect of the noncompete agreement is that when the employee is fired or otherwise leaves the company, she cannot immediately compete with her former employer. This person is often resigned to choose the lesser of three evils: (1) move or commute to another state or country that lies outside the geographic limit, potentially leaving the place where she laid down her roots, to pursue her selected occupation; (2) pursue a different occupation entirely, leaving behind her hard-earned experience and success;⁹⁸ or (3) simply seek unemployment, if possible, and wait for the

Argument for Specificity in Noncompete Agreements, 86 NEB. L. REV. 672, 673 (2008) (noting that the blue pencil doctrine allows courts “to either (1) strike unreasonable clauses from a noncompete agreement, leaving the rest to be enforced, or (2) actually modify the agreement to reflect the terms that the parties could have—and probably should have—agreed to.”). This reformation process actually “increases the use of overly broad clauses” and encourages employers to require employees to enter into unenforceable noncompete agreements. *Id.* at 690–91. It should be noted that Utah is undecided in terms of whether it is permissible for a court to reform a noncompete provision. *See* BECK, *supra* note 6, at 12.

⁹⁵ *See generally* U.S. CONST. amends. I–X (providing guaranteed rights that are reserved for the people).

⁹⁶ *Diodes, Inc. v. Franzen*, 67 Cal. Rptr. 19, 26 (Cal. Ct. App. 1968).

⁹⁷ *Morlife, Inc. v. Perry*, 66 Cal. Rptr. 2d 731, 734 (Cal. Ct. App. 1997).

⁹⁸ A good example of this was noted by Matt Marx, a professor at MIT. *See* Matt Marx, *Essays on Employee Non-compete Agreements* (unpublished dissertation, executive summary, Harvard Business School), available at <http://www.kauffman.org/~media/>

noncompete time period to expire before returning to her field of expertise.⁹⁹ All three of these options are unnecessary and pose an undue burden on the employee.

For example, Leah Benene, a former Subway employee, started working at the sandwich shop when she was a teenager and evidently signed a noncompete agreement upon being made manager.¹⁰⁰ After working for Subway for nearly five years, she was fired after asking for additional time off to recover from an illness and a resulting surgery.¹⁰¹ After being fired, Ms. Benene looked to put the skills she developed to good use and was hired at another sandwich shop nearby.¹⁰² When the Subway franchise found out about her new position, its attorney mailed a copy of the noncompete agreement she had signed.¹⁰³ The terms of the noncompete agreement stipulated that Ms. Benene could not work with a competing business located within one hundred miles of the Subway franchise for a full year following termination.¹⁰⁴ In addition to sending her a copy of the noncompete agreement she

kauffman_org/emerging_scholars/kdfp_dissertations/2008/marx_matt.pdf, *archived at* <http://perma.cc/AKZ4-PLH7> (last visited Sept. 10, 2015). Through a study he conducted, Marx learned that a scientist, who earned a Ph.D. in speech recognition from a prestigious school, was let go from a company he cofounded. *See id.* Instead of looking for another job within his industry, the scientist left his field altogether because he did not want to risk breaching his noncompete agreement. *Id.* The scientist implied that he may not have been the only person to do the same. He said that

employees were very much aware of these non-competition agreements. And many of them on a regular basis would . . . do a gut check and say, ‘Well, if I’m ever gonna leave and there’s gonna be two years when I’m not doing speech recognition, what would I do for two years?’

Id.

⁹⁹ David Neeleman, former executive at Southwest Airlines, former founder and CEO of JetBlue Airlines, and current CEO of Azul Brazilian Airlines, elected to wait out the five-year term on his noncompete agreement with Southwest Airlines after he was dismissed from the company and before he founded JetBlue Airlines. *See Marx et al., supra* note 75, at 23–24. Similarly, Vic Gundotra, former Microsoft executive and current Google executive, waited for his noncompete agreement to expire before taking his position at Google. *See id.* at 24. While taking the “unemployment” route worked for Mr. Neeleman and Mr. Gundotra, the average employee has nowhere near the amount of flexibility, resources, and future opportunities that is typical of corporate executives or other high-level employees. For most people, deciding to wait out the term of a noncompete agreement is impractical and likely the last resort.

¹⁰⁰ Amy Lange, *Woman Looking for Work After Subway Enforces Non-compete Contract*, FOX NEWS, (Oct. 29, 2013, 4:13 PM), (on file with the Utah Law Review). She was so young and inexperienced when she signed the noncompete agreement that she still does not remember ever having signed the document. *Id.*

¹⁰¹ *Id.*

¹⁰² *See id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

signed, the attorney included a letter instructing her to honor the contract.¹⁰⁵ The attorney also sent the same documents to Ms. Benene's current employer and no doubt threatened to file a lawsuit against them as well.¹⁰⁶ Consequently, Ms. Benene's current employer made the difficult decision to terminate her.¹⁰⁷

There was no need for Subway to require Ms. Benene to sign a noncompete agreement, much less threaten to enforce it. Subway was the party that ended the relationship. It is difficult to imagine a reasonable argument that would support an assertion that had Subway not enforced the noncompete agreement against Ms. Benene they would have been injured in some significant way. And while Subway has a legitimate interest in protecting its goodwill and trade secrets, it did not need a noncompete agreement to guard those interests; as discussed *supra*, in section B, Subway could have used a nonsolicitation and confidentiality agreement in place of the noncompete.

A similarly common scenario occurs when a top-performing employee, who has neither received a promotion nor an increase in wage, is recruited by a competitor that resides within the geographic limit and offered a position that is superior in some way to her current position. The employer could prevent the employee from accepting the position through an injunction, or if the employee accepts the position, her employer could sue for damages.¹⁰⁸ Consequently, like the person in the first scenario, the employee is resigned to choose the lesser of several evils. This is poor public policy; an employee should not be punished for excelling at her job.

Another example exists when a founder of a company falls victim to her own company's noncompete agreement. This may happen when the founder of a startup steps down as owner/CEO and hires a more experienced management team in an effort to take the company to the next level, all while remaining with the company in some lesser capacity. The new management would require the founder to sign a noncompete agreement in exchange for remaining with the company. The effect of the noncompete agreement is that, in the event the founder is let go, she cannot "compete" with the company she founded. This means she could not start another company or be hired by another company within the same industry or market for some six months to twenty-five years, unless that company competed outside of some judicially approved geographical area. Again, as in the previous two examples, the person is faced with a no-win situation. It is unjust to bar a founder of a company, who has been pushed out by new management, from competing with the very business she started.

¹⁰⁵ *Id.*

¹⁰⁶ *See id.*

¹⁰⁷ *Id.*

¹⁰⁸ *See TruGreen Cos. v. Mower Bros.*, 199 P.3d 929, 931–32 (Utah 2008).

IV. CONCLUSION

In sum, a decision by the Utah Legislature to follow California's statutory scheme on noncompetition law would have a positive impact on the economy. A ban on all postemployment noncompete agreements would strengthen the economy by increasing innovation and healthy competition. Additionally, it would create a more fair and efficient labor market, allowing individuals to reach their employment potential. Finally, abolishing postemployment noncompete agreements would significantly increase the protection to employee rights without harming businesses' rights to protect its goodwill and trade secrets.