A MORE REASONABLE APPROACH TO NONCOMPETE EMPLOYMENT AGREEMENTS IN CALIFORNIA

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INTRODUCTION

In the fourth quarter of 2019 alone, there were 1,206,462 businesses employing 15,202,586 employees in the State of California.[1] There were broad ranges of businesses spanning over dozens of industries, from those that employed fewer than five people to businesses that employed over a thousand individuals.[2] Despite this broad array in the California workforce, none of these employers—even those in industries such as engineering, electronics production, or finance—could legally protect themselves from employees walking out the door at any moment to join a competing business, thereby exposing employers to risks and vulnerabilities with little means of protection. Throughout California, employers cannot protect themselves from losing their investments of time, effort, and money spent on training employees that they hire, and they have no remedies available if employees leave with valuable information or knowledge vital to the livelihood of their business. Even if California employers wish to place modest, reasonable restrictions on employees that they hire, employers' ability to set these simple conditions of employment are null.

This is due to a statute in the California Business and Professions Code that broadly voids all contracts that restrain individuals "from engaging in a lawful profession, trade, or business of any kind."[3] This statute places employees' freedom to leave their employer above employers' interests by allowing an employee to engage in competitive business during employment or upon termination of their employment, voiding any prior agreements in place not to do so.[4] This is not the norm among jurisdictions in the United States. On the contrary, most states will enforce post-employment restrictive covenants if the covenant is reasonable, particularly in terms of geographical and durational scope.[5] In sharp contrast,

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1. *Size of Business Data for California (Quarterly)*, STATE OF CAL. EMP. DEV. DEP'T, https://www.labormarketinfo.edd.ca.gov/LMID/Size_of_Business_Data_for_CA.html (last visited Nov. 29, 2021).

2. *Id.*

3. CAL. BUS. & PROF. CODE § 16600 (2021).

4. Bradford P. Anderson, *Complete Harmony or Mere Detente? Shielding California Employees from Non-Competition Covenants*, 8 U.C. DAVIS BUS. L.J. 8 (2007).

5. *Id.* at 11 (citing Hill Med. Corp. v. Wycoff, 103 Cal. Rptr. 2d 779 (Cal. App. 4th 2001)).

however, because of Section 16600 and courts' interpretation of this statute, California is "[t]he harshest and most well-known covenant hostile state" when it comes to post-employment agreements.[6]

The purpose of this Note is to evaluate the meaning and the harsh, unnecessary consequences of Section 16600 of the California Business Professions Code, providing insight into the powerful and unique effect it has on employer-employee relationships in the state of California and why California should adopt a more reasonable approach taken by a majority of other jurisdictions. Section I provides a background of Section 16600 and its reach, including the evolution of noncompete agreements in California; how courts interpret the statute in modern times; the limited exceptions to the blanket prohibition; and a comparison between California's noncompete law with other jurisdictions. Section II analyzes the negative consequences of Section 16600 generally and the obstructions it places on California employers, employees, and the public generally, thereby necessitating a change. Section III of this Note provides solutions and alternatives to the issues raised by Section 16600's blanket ban on noncompetes, suggesting that California join the majority of jurisdictions that take a "reasonableness" approach or provide for additional exceptions that would allow for more enforceability of noncompete agreements.

I. BACKGROUND OF SECTION 16600 OF THE CALIFORNIA BUSINESS AND PROFESSIONS CODE

Across the country, employees ranging from fast-food workers and check-cashing clerks to healthcare providers and engineers sign restrictive contractual agreements.[7] There are three key types of restrictive covenants: non-competition agreements (noncompetes), non-solicitation agreements, and confidentiality agreements.[8] Noncompete agreements, the focus of this Note, typically are created when an employee agrees not to enter into competition with an employer during or following employment for a specified time period in a particular geographic area.[9] Almost forty percent of the American workforce is currently or has been previously subject to a noncompete agreement.[10] Among all restrictive covenants, noncompetes are often seen as the most restrictive.[11] Restrictive covenants are creatures of state law, and existence of such agreements and their enforceability varies.[12] A handful

6. Barbara J. Harris, *Restrictive Covenants in the US: Navigating the Quagmire of Enforceability*, THOMPSON REUTERS PRACTICAL L. UK (Aug. 1, 2012).

7. Karla Walter, *The Freedom to Leave: Curbing Noncompete Agreements to Protect Workers and Support Entrepreneurship*, CENTER FOR AM. PROGRESS (Jan. 9, 2019, 12:01 AM), https://www.americanprogress.org/issues/economy/reports/2019/01/09/464831/the-freedom-to-leave/.

8. Stephen L. Brodsky, *Restrictive Covenants in Employment and Related Contracts: Key Considerations You Should Know*, AM. BAR ASS'N (Feb. 8, 2019), https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2019/restrictive-covenants-employment-related-contracts/.

9. *Id.*

10. Walter, *supra* note 7.

11. Brodsky, *supra* note 8.

12. *Id.*

of states have specific statutes that provide frameworks for courts to interpret them, and several states have fact-specific tests in their common law to assess when they are enforceable.[13] However, because the California legislature virtually prohibits all noncompete agreements across the board through Section 16600 of the California Business and Professions Code, the state has a reputation as "the most hostile toward restrictive covenants" among all U.S. jurisdictions.[14]

A. History and Evolution of Noncompete Agreements in California

California's practice of explicitly favoring open competition is not a new concept. California first encountered restrictive covenants in *Wright v. Ryder*, an 1868 case that discussed a covenant that restricted a steamboat carrying freight and passengers from traveling on any California body of water for ten years.[15] The court looked to common law for an answer. Though the covenant in *Wright* was deemed invalid, the court, citing common law principles, found that contracts restraining trade were valid so long as the restraints were "confined to reasonable limits of time or place, and which were founded upon sufficient consideration."[16] The common law logic was that private citizens should not be allowed to put unreasonable contractual restrictions on trade or business enterprises, since encouraging growth was "a matter of the greatest public importance."[17]

The California legislature responded in 1872 by adopting Section 1673 of the California Civil Code.[18] This section, the predecessor to section 16600,[19] provided that: Every contract by which anyone is restrained from exercising a lawful profession, trade or business of any kind, otherwise than is provided by the next two sections, is to that extent void.[20] Notably, the statute dropped any language allowing for restraints of "reasonableness" that had appeared in *Wright.*

However, the California Supreme Court did not analyze this statute until 1892 in *Vulcan Powder Co. v. Hercules Powder Co*.[21] There, the court explained that the common law rules that allowed for "reasonable" limits on time and place were "uncertain" and "perplexing."[22] Thus, the court confirmed that the California Civil Code statute had in fact replaced any common law rules of reasonableness, and

13. *Id.* For a state-by-state breakdown, see *50 State Noncompete Chart*, BECK REED RIDEN LLP (Nov. 11, 2016), https://www.beckreedriden.com/50-state-noncompete-chart-2/.

14. Joshua Horn, *Differing State Laws on Restrictive Covenants*, FOX ROTHSCHILD LLP (Aug. 2017), https://www.foxrothschild.com/publications/differing-state-laws-on-restrictive-covenants/.

15. *See* 36 Cal. 342, 357 (Cal. 1868); Steven M. Perry & Sean F. Howell, *A Tale of Two Statutes: Cipro, Edwards, and the Rule of Reason*, 24 J. ANTI. & UNFAIR COMP. 21 (2015).

16. Perry & Howell, *supra* note 15, at 21 (quoting *Wright*, 36 Cal. at 357).

17. *Id.*

18. CAL. CIV. CODE § 1673 (1872*)* (repealed 1941).

19. David L. Simson, *Customers, Co-Workers and Competition: Employee Covenants in California After Edwards v. Arthur Andersen*, 4 HASTINGS SCI. & TECH. L.J. 239, 240 (2012) (explaining that this was formerly § 1673 of the California Civil Code, but was repealed and enacted as Section 16600 of the California Code).

20. CAL. CIV. CODE § 1673 (1872*)* (repealed 1941).

21. Vulcan Powder Co. v. Hercules Powder Co., 31 P. 581 (Cal. 1892).

22. *Id.* at 581.

accordingly any contract restraining lawful profession, trade, or business was void.[23] The court reaffirmed its abandonment of the reasonableness analysis in multiple cases in the following years in the early 1900s.[24]

However, even after the statute was adopted, California courts and the Ninth Circuit applying California law did not always treat the statute as a per se ban on restrictive contracts.[25] The common law analysis that allowed for "reasonable" restraints was still permitted in some cases, especially in the Ninth Circuit.[26] Essentially, during the twentieth century, California had developed "two separate strands of case law" for cases involving restraints on trade.[27] In some cases, especially surrounding restrictive covenants in the employment context, the courts would deem all restrictions void under Section 16600.[28] Other times, courts would implement a "reasonableness" inquiry that analyzed the scope of the restraint and allowed for covenants that had a "narrow restraint."[29]

B. Courts' Interpretation of the statute in modern times

In 2008, California Supreme Court settled this dispute over the two competing strands of law in *Edwards v. Arthur Andersen LLP*.[30] In that case, Edwards, an accountant, was hired by Arthur Anderson LLP, an accounting firm.[31] The offer of employment was contingent on Edwards' agreement of a covenant to not compete.[32] This agreement stated that Edwards was not to perform professional services for any client with whom he worked for at Arthur Anderson during the past year and a half leading to his termination or resignation.[33] This prohibition was to last eighteen months following his leaving of the firm.[34] Additionally, Edwards was not to provide services to any client of the firm for one year follow his termination or resignation.[35] The agreement explicitly said that it did "not prohibit [Edwards] from accepting employment with a client."[36]

23. Simson, *supra* note 19.

24. *Id.*

25. *Id.*

26. Theo S. Arnold, *Try Poking It with A Stick: Post-Term Noncompetes in California Certainly Look Dead*, 38 FRANCHISE L.J. 55, 57 (2018); *see also* Great W. Distillery Prod. v. John A. Wathen Distillery Co., 74 P.2d 745, 746 (Cal. 1937) (finding that Section 1673 challenges are subject to the rule of reason.). In *Great West Distillery*, a plaintiff had exclusive rights to sell whiskey receipts of a distillery. *Id.* The distillery breached by selling its receipts to other purchasers in territories that were excluded by the agreement. *Id.* The California Supreme Court upheld the validity of the agreement because the restraint on the distillery was not unreasonable under the circumstances, since it did "not appear to affect the public interests and is obviously designed only to protect the respective parties in dealing with each other." *Id*. at 449–50.

27. Perry & Howell, *supra* note 15.

28. *Id.*

29. *Id.*

30. 189 P.3d 285 (Cal. 2008).

31. *Id.* at 288.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

Years later when Edwards's employment with the firm ended, Edwards filed suit against Arthur Andersen claiming that the noncompetition agreement violated Section 16600.[37] The trial court dismissed Edwards' claim, finding that the agreement fell within a "narrow restraint" exception to the California statute.[38] Because the restriction to Edwards was narrowly limited in scope and reasonable to each party, the trial court entered judgment in Andersen's favor.[39]

However, the California Court of Appeals reversed the finding, which the California Supreme Court affirmed on this ground.[40] In its opinion, the California Supreme Court acknowledged that under the common law and in many states, contractual restraints on employment were valid so long as they were reasonable.[41] However, by enacting Section 16600, the court said, "California settled public policy in favor of open competition, and rejected the common law 'rule of reasonableness.'"[42] Even narrowly tailored agreements and partial trade restrictions are void.[43] The court stated that Section 16600 is "unambiguous," and "if the Legislature intended the statute to apply only to restraints that were unreasonable or overbroad, it could have included language to that effect."[44] The court would "leave it to the Legislature" to adopt relaxed standards or additional exceptions to the blanket prohibition, but would not read any into the statute on its own.[45] The court emphasized that under section 16600, employees are not to be restrained in their abilities to practice their professions, and employee mobility was of vital importance.[46] Thus, even though the agreement Edwards signed was limited to clients of the firm and lasted no longer than one-and-a-half years, it was automatically void under California law, and the accounting firm had no way to enforce it.

After the *Edwards* decision, courts applying California law finally abandoned any remaining exceptions for narrow restraints or reasonable noncompete agreements. One year after *Edwards* in 2009, the Ninth Circuit reiterated this interpretation of Section 16600 in *Comedy Club, Inc. v. Improv West Associates*.[47] The decision in *Comedy Club* highlighted the California Supreme Court's holding that under Section 16600, "post-term covenants not to compete are invalid in

37. *Id.* at 289.
38. *Id.* at 292.
39. *Id.* at 289
40. *Id.* at 290, 297.
41. *Id.* at 290.
42. *Id.*
43. *Id.* at 291.
44. *Id.* at 293.
45. *Id.*
46. *Id.* at 291.
47. Comedy Club, Inc. v. Improv W. Assocs., 553 F.3d 1277, 1281 (9th Cir. 2009).

California regardless of whether such covenants are narrowly drawn."[48] This rationale has been consistently reaffirmed by courts in recent years.[49]

C. Exceptions to the noncompete statute

Though Section 16600 strictly prohibits enforcement of noncompete agreements as a default, there are a select few exceptions to this general rule. The California Business and Professions Code chapter on Contracts in Restraint of Trade expressly allow for express exceptions in limited contexts, all of which extend beyond the typical employer-employee relationship. One is Section 16601, which allows enforceability of noncompete agreements when a corporate owner is selling the goodwill of his business, his stock, or his ownership interest in the business.[50] Section 16602 extends a similar exception for owners of partnerships, and Section 16602.5 extends to LLCs.[51] Courts will not read into these statutory exceptions broadly. For example, a party cannot attempt to game the exceptions by "setting up minor or sham transactions for the purpose of yielding an enforceable noncompete."[52] Even though California may enforce for noncompete agreements in cases of these exceptions, they are only enforceable to the extent that they are "reasonable and necessary in terms of time, activity and territory to protect the buyer's interest."[53]

In addition to the express statutory exceptions, the default unenforceability of noncompete agreements is complicated by a potential trade secret exception. Though the definition of a "trade secret" may vary by state, nearly every jurisdiction protects employers from misappropriation of trade secrets, and California is no different in

48. Robert Milligan & Jim McNairy, *The Ninth Circuit's* Comedy Club, Inc. v. Improv West Associates *Decision Is No Laughing Matter for Franchisors*, CASETEXT (Feb. 25, 2009), https://casetext.com/analysis/the-ninth-circuits-comedy-club-inc-v-improv-west-associates-decision-is-no-laughing-matter-for-franchisors-1?sort=relevance&resultsNav=false&q=.

49. Ixchel Pharma, LLC v. Biogen, Inc., 470 P.3d 571, 587–88 (Cal. 2020) (reiterating that the California Supreme Court rejected a "narrow restraint" construction of section 16600 that allowed for enforcement of agreements that limited narrow parts of a trade or profession, noting that the court would interpret section 16600 "strictly in the context of noncompetition agreements*."*).

50. CAL. BUS. & PROF. CODE § 16601 (2021). The statute states that "[a]ny person who sells the goodwill of a business, or any owner of a business entity selling or otherwise disposing of all of his or her ownership interest in the business entity, or any owner of a business entity that sells (a) all or substantially all of its operating assets together with the goodwill of the business entity, (b) all or substantially all of the operating assets of a division or a subsidiary of the business entity together with the goodwill of that division or subsidiary, or (c) all of the ownership interest of any subsidiary, may agree with the buyer to refrain from carrying on a similar business within a specified geographic area in which the business so sold, or that of the business entity, division, or subsidiary has been carried on, so long as the buyer, or any person deriving title to the goodwill or ownership interest from the buyer, carries on a like business therein."

51. Arnold, *supra* note 26, at 56. For specific statutory language of these sections, see CAL. BUS. & PROF. CODE §§ 16602–16602.5 (2021).

52. Arnold, *supra* note 26, at 56 (discussing Bosley Med. Grp. V. Abramson, 207 Cal. Rptr. 477 (Cal. Ct. App. 1984)). In *Bosley*, a defendant's employment contract required him to buy a small stake in the plaintiff corporation and had to resell the stock back upon termination. *Bosley*, 207 Cal. Rptr. 477. The California Court of Appeals found that Section 16601 was not applicable to that situation, since that statute's purpose was to "to permit the owner of a small corporation to agree not to compete in connection with selling his entire interest in that corporation." *Id.* at 481.

53. Monogram Indus., Inc. v. Sar Indus., Inc., 134 Cal. Rptr. 714, 718 (Cal. Ct. App. 1976).

this regard.[54] Section 16600 protects employees from post-employment constraints, but California's Uniform Trade Secret Act prohibits employees from taking trade secrets from their employers during or after employment.[55] The California Supreme Court recognized this exception in *Muggil v. Reuben H. Donnelley Corp*.[56] There, the court said that Section 16600 "invalidates provisions in employment contracts prohibiting an employee from working for a competitor after completion of his employment or imposing a penalty if he does so unless [the provisions] are necessary to protect the employer's trade secrets."[57] Despite its desire to promote competition by not restraining employees, California protects trade secrets because doing so "promotes and safeguards the research and development necessary for innovation and technological development."[58] Essentially, employees are allowed to participate in business that competes with their prior employers, but they cannot use the employer's trade secrets to do so.

D. Putting the California statute into perspective

Though California has a reputation for operating "under a legal regime in which virtually all non-competition agreements are unenforceable," this is certainly not the norm.[59] Jurisdictions across the United States often allow employers to shield themselves from unfair competition by former employees via statutes or common law, though there is no uniform standard regarding enforceability, and many states have discrete differences.[60] Generally, a valid noncompete agreement in most jurisdictions will prevent an employee from "creating or working for or with a competitor company within a certain geographic area and within a certain time period after termination of the relationship with the company,"[61] so long as the agreement is reasonably necessary to protect the employer's business interest.[62] What is

54. Beck Reed Riden LLP, *supra* note 13.

55. *See* CAL. CIV. CODE § 3426 (2021). The California Trade Secrets Act defines trade secrets as "information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." *Id.*

56. Muggill v. Reuben H. Donnelley Corp., 398 P.2d 147 (1965).

57. *Id*. at 149.

58. Bradford P. Anderson, *Complete Harmony or Mere Detente? Shielding California Employees from Non- Competition Covenants*, 8 U.C. DAVIS BUS. L.J. 8, 20 (2007).

59. Viva R. Moffat, *Making Non-Competes Unenforceable*, 54 ARIZ. L. REV. 939, 946 (2012).

60. Michael A. Foley, *Competing Views on Non-Compete Agreements: Changes May be Coming Across the Nation to Employers 'and Business Purchasers 'Ability to Limit Competition*, NAT'L L. REV. (Jan. 30, 2020), https://www.natlawreview.com/article/competing-views-non-compete-agreements-changes-may-be-coming-across-nation-to. For a state-by-state break down, *see* https://www.beckreedriden.com/50-state-noncompete-chart-2/.

61. Michelle L. Evans, *Enforceability of Covenant Not to Compete*, 104 Am. Jur. 3d §3.

62. Protectable business interests often include customer relationships, confidential business information, insider information the employee may have received during employment, and a business's goodwill. On the other hand, general knowledge or employment information, price structures, or former customers are generally not protected. Kyle B. Sill, *Drafting Effective Noncompete Clauses and Other Restrictive Covenants: Considerations Across the United States*, 14 FLA. COASTAL L. REV. 365, 385–87 (2013).

considered "reasonable" in terms of duration[63] and geographic scope[64] can vary widely across jurisdictions and even within courts. What is reasonable "is a never-ending question and quest" that is heavily dependent on the circumstances of a particular case, the position of the employee, the employee's knowledge or role in the business or the type of business of the employer.[65] For example, "where the employee's knowledge and position puts him in control of customer lists that fluctuate on a yearly basis, a one-year restriction would likely be appropriate."[66] Other considerations courts use in assessing reasonableness could include length of employment, closing of the former company, or the amount of customer contact that an employee may have had.[67] Moreover, courts treat the enforceability of the covenant as a matter of law.[68] Additionally, some courts require that the noncompete agreement "not be broader than necessary to protect the legitimate interests of the employer."[69] In some instances, jurisdictions may balance interests of the employer and hardships imposed on employees, and courts can consider the interests of the public.[70]

California is known for its harsh rule against noncompetes, but Oklahoma and North Dakota have somewhat similar rules prohibiting their enforcement of these agreements.[71] In addition, some states provide specific scenarios or exceptions for when covenants may be enforced. For example, Colorado voids noncompetes for

63. *See* Bryceland v. Northey, 772 P.2d 36, 40 (Ariz. Ct. App. 1989) (indicating that a reasonable restriction for a noncompete clause in this case should be no longer than fourteen weeks). *But see* Freudenthal v. Espey, 102 P. 280, 286 (Colo. 1909) (upholding a noncompete extending five years). Interestingly, Florida's statutes set out mandated rebuttable timeframes that are considered reasonable or not. Sill, *supra* note 62, at 378. Any duration shorter than six months is presumed to be reasonable, while any duration lasting longer than two years is presumed to be unreasonable. *Id.*

64. A particular number of miles may be an appropriate measurement to determine a reasonable geographic scope for a noncompete. *See* Fuller v. Brough, 411 P.2d 18, 22 (Colo. 1966) (finding that restricting an individual from competing within forty-five miles was reasonable.). Alternatively, specific city limits may be an appropriate measurement. *See also* Flower Haven, Inc. v. Palmer, 502 P.2d 424, 426 (Colo. App. 1972) (approving a noncompete that extended throughout the City of Boulder, Colorado.) Nonetheless, what is determined to be reasonable in geographic scope may depend heavily on the size and nature of the employer. If a business is national or international, a larger geographic restriction may be more appropriate than a local single-shop business. Sill, *supra* note 62, at 382. Even so, the importance of determining a reasonable geographic scope may be decreasing. "[t]he widespread use and acceptance of the Internet in modern society and business has expanded the potential reach of services, customers, contacts, and goodwill" and thus the appropriate geographic scope of noncompete covenants also expands accordingly. *Id.* As society is discovering the feasible options of working for an employer remotely for[from?] any location, the need for a reasonable geographic scope becomes more obsolete, since direct competition with an employer can often times be done from any location.

65. Sill, *supra* note 60, at 375.

66. *Id.* at 377.

67. *Id.*

68. Michelle L. Evans, *Enforceability of Covenant Not to Compete*, 104 Am. Jur. 3d §3 (2008).

69. *Id.*

70. *Id.*

71. Ellen Rubin, *Most States Still Enforce Noncompete Agreements—and It's Stifling Innovation*, FORTUNE (June 26, 2019, 2:34 PM), https://fortune.com/2019/06/26/states-noncompete-agreements-innovation/. North Dakota permits exceptions similar to California, such as selling goodwill of a business. *See* N.D. CENT. CODE § 9-08-06 (2021). Oklahoma voids noncompete covenants, but it may enforce agreements prohibiting an employee's direct solicitation of sale of goods or services from established customers of the former employer. *See* OKLA. STAT. tit. 15, § 219A (2021).

skilled or unskilled labor services.[72] States such as Arizona, Colorado, Delaware, Massachusetts, and more, have specific exemptions for physicians.[73] South Dakota has specific exceptions that allow for insurance agent noncompetes, so long as the agreements do not exceed two years and are limited in geographic scope.[74] On the other hand, some states are more deferential to employers' wishes when assessing enforceability of noncompetes. For example, several states such as Arizona, Arkansas, and New Jersey, allow for noncompetes to be imposed on employees even after employment has begun.[75] A handful of states, including Texas, New Hampshire, and Missouri, allow for courts to reform noncompete agreements when assessing enforceability, which essentially allows courts to review a covenant that comes before them and rewrite provisions to make them more reasonable, if necessary.[76] Notably, Florida is known to have "the most pro-employer noncompete statute in the country."[77] Under Florida's statute, courts allow reasonable noncompete agreements and, in fact, explicitly prohibit courts from considering the hardship that such an agreement would place on an employee.[78] There is a spectrum of noncompete enforceability interpretation, and California's blanket prohibition is on the harshest end.

Looking to the federal level, in 2019, a bill was introduced into the Senate in an effort to effectively cease the use of noncompete agreements.[79] This bill, called the

72. COLO. REV. STAT. § 8-2-113(2) (2021). The statute states that "[a]ny covenant not to compete which restricts the right of any person to receive compensation for performance of skilled or unskilled labor for any employer shall be void." *Id.* However, the statute does not apply to contracts for sale and purchase of a business, trade secrets, expenses of training an employee working for less than two years, and employees constituting "professional staff" to executive and management personnel. *Id.*

73. *50 State Noncompete Chart*, *supra* note 13, at 2–3, 9.

74. S.D. CODIFIED LAWS § 53-9-12 (2021). The South Dakota noncompete statute states that "[a]ny independent contractor who is an insurance producer as defined in subdivision 58-1-2(16) and is a captive agent who is not an independent agent and who works exclusively for a single insurance company or an affiliated group of insurance companies, even if the single insurance company allows its captive agents to market the products of another insurance company pursuant to contract, may agree with an insurer at the time of contracting or at any time during the term of the contract: (1) Not to engage directly or indirectly in the same business or profession as that of the insurer for any period not exceeding two years from the date of termination of the independent contractor's agreement with the insurer; and (2) Not to solicit existing customers of the insurer within a specified county, first or second class municipality, or other specified area for any period not exceeding two years from the date of termination of the agreement, if the insurer continues to carry on a like business within the specified area." *Id.*

75. *50 State Noncompete Chart*, *supra* note 13, at 2, 11.

76. *Id.* at 10–11, 16; Leiza Dolghih, *Can a Court Rewrite a Non-Compete Agreement?*, NORTH TEX. L. NEWS (Dec. 16, 2019), https://northtexaslegalnews.com/2019/12/16/can-a-court-rewrite-a-non-compete-agreement/.

77. Hank Jackson, *Florida's Noncompete Statute: "Reasonable" or "Truly Obnoxious?"*, 92 FLA. BAR J. (Mar. 2018), https://www.floridabar.org/the-florida-bar-journal/floridas-noncompete-statute-reasonable-or-truly-obnoxious/.

78. *Id.*

79. Jane Flanagan & Terri Gerstein, *Welcome Developments on Limiting Non-Compete Agreements*, AM. CONST. SOC'Y (Nov. 7, 2019), https://www.acslaw.org/expertforum/new-developments-on-non-competes-new-state-laws-potential-ftc-rulemaking-and-a-bipartisan-senate-bill-that-gets-it-right-for-workers-and-businesses/. The Workforce Mobility Act of 2019 was introduced by Republican Senator, Todd Young, in October 2019. S. 2614, 116th Cong. (2019). Like California, the proposed bill would allow for noncompete agreements for the sale of a business or partnership, and it explicitly does not preclude the protection of trade

Workforce Mobility Act of 2019, contains provisions that would prohibit noncompete agreements in nearly all situations while allowing federal enforceability.[80] Additionally, the Federal Trade Commission is reviewing a petition seeking a rule that would prohibit these agreements.[81] Despite these efforts, the chairman of the Federal Trade Commission noted that his team did not have sufficient economic literature to justify such a rule at this time.[82] In essence, it seems that with our current political climate that "federal action is unlikely."[83] If federal action cannot be taken, then it is important for states to take the lead on noncompete agreements.[84]

II. NEGATIVE IMPLICATIONS OF SECTION 16600 ON EMPLOYERS, EMPLOYEES, AND THE PUBLIC GENERALLY

There are three main arguments advanced against the use of noncompete agreements. These include the argument that enforcement stifles competition, that noncompete agreements are unfair due to the inequality of bargaining power between employees and employers, and that the agreements are "akin to impermissible involuntary servitude."[85] This Note does not argue that noncompete agreements are free of flaws or will produce equitable results in every case. However, these criticisms of noncompetes greatly overlook the issues that arise when enforcement of noncompete agreements are void outright, which is the case in California. This takes away protection for investment in employees, and the principle of freedom to contract also suffers. Moreover, Section 16600's complete prohibition on enforcement, rather than an inquiry of the reasonableness of the agreement as is used in most states, leaves employers, employees, and the general public with several unfortunate consequences.

A. Lack of protection for Investment in Employees

Noncompete agreements typically are "the most effective method of protecting valuable trade information and consumer relationships from being easily appropriated by competitors."[86] However, California employers do not have this

secrets. *Id.* As of December 6, 2021, this bill has not yet passed the Senate, and the latest action includes hearings held by the Committee on Small Business and Entrepreneurship in November of 2019. *Id.*

80. Flanagan & Gerstein, *supra* note 77.

81. *Id.* However, on July 9, 2021, the Biden Administration issued an Executive Order called "Promoting Competition in the American Economy." Mark S. Goldstein et al. *What's All This Talk About Federal Regulation of Non-Compete Agreements?* EMPLOYMENT LAW WATCH (JULY 19, 2021), https://www.employmentlawwatch.com/2021/07/articles/employment-us/whats-all-this-talk-about-federal-regulation-of-non-compete-agreements/. The order does not immediately change the noncompete legal landscape, but it encourages the FTC to curtail use of unfair clauses or agreements that limit worker mobility. *Id.*

82. *Id.*

83. Walter, *supra* note 7.

84. Flanagan & Gerstein, *supra* note 77.

85. Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 VA. L. REV. 383, 406 (1993).

86. Jeremy Talcott, *Desirable Restraint: Freeing Employers and Employees from the Blankey Prohibition of California Business and Professions Code Section 16600*, 19 CHAP. L. REV. 333, 342-43 (2016).

protection available to them. Section 16600's strict stance on the unenforceability of noncompete agreements hurts long-term employment relationships and the ability for an employer to invest in personnel development.[87] A California employer can spend valuable time and resources on the training of and investment in an employee, but has virtually no assurance that the employer's "investment will not easily defect to a competitor."[88] The employer can be left uncompensated for his or her investment. Of course, there still are trade secret law protections, but these are often insufficient to prevent intellectual property dissemination.[89] This in turn harms "the long-term availability of a well-trained workforce."[90] Even if general training should not be a protectable business interest, an employer may sometimes have provided and trusted an employee with specialized training involving an employer's confidential information, which an employer may rightfully wish to protect from loss to a competitor.[91] Thus, this harms companies of all sizes, even smaller ones with more transient workforces.[92]

This is of particular importance in California, particularly in Silicon Valley, because the area is known as a "network-based industrial system that promotes collective learning"[93] and is a central location for startup companies.[94] Allowing noncompete agreements could help young companies, since they may not have resources to pay employees overly competitive salaries.[95] Because of Section 16600, "a dominant competitor could lure away a young company's best employees with promises of higher wages," and young companies have no protection from this threat.[96] Google would not be stopped from luring employees away from startup companies in their early stages of creation that are just starting to get their feet on the ground. So, in this capacity, noncompete agreements hinder, not encourage, competition, in contradiction to the main purpose of Section 16600.[97]

87. Christine M. O'Malley, *Covenants Not to Compete in the Massachusetts Hi-Tech Industry: Assessing the Need for a Legislative Solution*, 79 B.U. L. REV. 1215, 1232 (1999).

88. *Id.* Evan Starr at the University of Illinois at Urbana-Champaign has released a study showing a causal relationship between enforcement of noncompete covenants and the availability of firm-sponsored training. Talcott, *supra* note 78, at 344. Thus, California's lack of enforcement of these agreements would likely show a lack of willingness for firm-sponsored training.

89. Talcott, *supra* note 78, at 343.

90. O'Malley, *supra* note 79, at 1232.

91. Christina L. Wu, *Noncompete Agreements in California: Should California Courts Uphold Choice of Law Provisions Specifying Another State's Law*, 51 UCLA L. REV. 593, 611 (2003).

92. O'Malley, *supra* note 79, at 1232.

93. Talcott, *supra* note 84, at 341.

94. *See* Kimberly Amadeo, *Silicon Valley, America's Innovative Advantage: Five Reasons Why No One Can Copy Silicon Valley's Success*, BALANCE (May 26, 2020), http://web.archive.org/web/20200809121019/https://www.thebalance.com/what-is-silicon-valley-3305808 (finding that Silicon Valley, located south of San Francisco, California, is home to 2,000 tech companies, which is the densest concentration in the world, and range from smaller start-ups to companies such as Google and Oracle); *see also* G. Dautovic, *The 20 Most Important Startup Statistics (2021 Update)*, FORTUNLY (Aug. 31, 2021), https://fortunly.com/statistics/startup-statistics/#gref ("San Francisco and Silicon Valley are the epicenters of entrepreneurship, home to 13.5% of all global startup deals.").

95. Wu, *supra* note 89, at 611.

96. *See id.*

97. In Silicon Valley, "a blanket prohibition may only be beneficial to particular industries, and discourage innovation and investment in others." Talcott, *supra* note 84, at 342.

The strict ban can not only harm employers, but employees as well. Typical concerns with noncompete agreement enforcement include the restraints they place on employees and potential wage compression, but that does not have to be the case. In fact, when employees refrain from accepting competing offers of employment, the "increased productivity of employees" due to the increased training at a particular employer in the initial years of tenure "often also leads to higher wages, acting as a counter-balance."[98] In fact, there is evidence that "employees can earn more due to a position of increased trust" by their employer in some professions.[99] Thus, the burdens placed on employees by enforcement of noncompete agreements are balanced with, if not outweighed by, the benefits of a noncompete agreement in this context.[100]

Prohibiting noncompete agreements is also harmful in cases where there are employees that possess unique talents or skills in which an employer may want to invest.[101] An employer may wish to assure that he can receive reasonable compensation for investments in employees that are not necessarily replaceable. Examples of these situations include professional sports team players or actors. In these scenarios, revenue may depend on fan interest in a particular individual, for example. A fan may not have as much interest, and in turn an employer may be less likely to invest in a player "if players were free to switch uniforms every day or week."[102] Section 16600 provides no stability to guard against investments or the possibility of losses that may induce underinvestment by employers.[103]

B. Inhibitions on the Freedom to Contract

Section 16600's anti-enforcement stance to noncompete agreements directly interferes with the public's interest in the freedom to contract. Every first-year law student knows the general rule that the formation of a contract requires a manifestation of mutual assent and consideration. Contracts prescribing conditions of employment and requirements of both parties are not a novel concept. When creating an agreement for employment, each party agrees to certain expectations for the employment relationship, and the freedom to contract implies the notion that the expectations of both the employee and the employer should be met.[104] If such covenants were not enforceable, there would be less incentive to create agreements in the first place. Section 16600 removes the parties' abilities to carry out the consideration to which they each mutually assented. By protecting an employee's freedom to leave his employer, the California law in turn "impose[s] a corresponding restriction on an employee's freedom to contract about future use of his 'own' human capital" in the way he has willingly agreed to do, which in turn also deprives an

98. *Id.* at 346.

99. *Id.* ("[S]o long as covenants not to compete remain open to negotiation, employees and potential employers retain a mechanism to ensure that employees' skills will be put to the most efficient use.").

100. *Id.* ("So long as covenants not to compete remain renegotiable, the effect on labor mobility is slight.").

101. Sterk, *supra* note 85, at 394.

102. *Id.*

103. *Id.*

104. Wu, *supra* note 89, at 610.

employer of the services.[105] The statute takes away an employee's ability to bind himself in the future, as well as an employer's ability to create a binding relationship to an individual too.[106] By imposing a broad ban on noncompete agreements with little to no wiggle room, the California legislature and courts have taken a "paternalistic" approach by imposing what they believe is the better "trade-off[] between compensation [for employment] and future freedom for the decisions parties make by contract."[107] California may have the best intentions by implementing this restriction, but this decision is one which should be left to the individual parties, not the state.

Moreover, California's broad ban on noncompete agreements is particularly distressing for some employers who may have branches in multiple states or employees residing in different jurisdictions. In such circumstances, parties may wish to choose a certain state under which an agreement should be interpreted. A choice of law clause is a provision often used in an agreement to specify that the agreement should be interpreted under a certain state's law on which the parties agree.[108] California law usually strips parties of their ability to have these choice of law provisions for employment agreements. Even if an agreement specified that a certain state's laws should be used to interpret the agreement, it will usually fail if brought before a California court.[109] This is because, like many states, California has adopted the *Restatement (Second) of the Conflict of Law*s approach to conflict of laws.[110] This approach says that choice of law provisions are invalid if applying the specified state's law would be "contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue."[111] This determination is usually made on a case by case basis,[112] but because "the prohibition on covenants not to compete is a fundamental public policy in California," California courts will typically refuse to give force to choice of law clauses that concern noncompete agreements.[113] Thus, the case is over before it even had a chance to begin. California's broad ban is a further burden on society's interest in the freedom to contract.

105. Sterk, *supra* note 85, at 411.

106. *Id.*

107. *Id.* at 412.

108. Wu, *supra* note 89, at 595.

109. Arnold, *supra* note 26, at 72.

110. *Id.; see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

111. Arnold, *supra* note 26, at 72. "Given the reasonableness requirements that most states place on noncompete agreements, it becomes even more difficult to make the categorical claim that California public policy should outweigh another state's public policy. As California Supreme Court Justice Joyce Kennard has stated regarding the prospect of applying California law over another state's law in Advanced Bionics, 'In my view, this would do serious damage to the relationships between states. This would be the height of judicial arrogance.' How can a California court claim that California's interest in protecting employee mobility outweighs another state's interest in preventing raiding?" Wu, *supra* note 89, at 613.

112. *Id.* at 595.

113. Arnold, *supra* note 26, at 72; *see also Scott v. Snelling & Snelling, Inc.*, 732 F. Supp. 1034, 1039 (N.D. Cal. 1990) (declining to apply a choice of law clause that called for Pennsylvania law in a franchise agreement, since "California law will not give force to a choice of law clause where the contract constrains a provision which violates a 'strong California public policy.'")

C. Section 16600 Provides No Wiggle Room For Reasonable Noncompete Agreements

As mentioned, California is known as the harshest state when it comes to enforcement of noncompete agreements;[114] virtually every other jurisdiction in the United States will enforce a noncompete agreement in some capacity if the restrictions are reasonable in duration and scope, and exist to protect a legitimate business interest.[115] In these jurisdictions, courts are often able to provide adequate protections for employees while still upholding a covenant. For example, the stricter the noncompete agreement is, the shorter the duration the agreement should be enforceable.[116] When courts implement a reasonableness requirement, this helps alleviate issues that may come about when "parties to the covenant [possess] unequal bargaining power."[117] When courts are allowed to assess an agreement for reasonableness, this can help potentially disadvantaged employees from overly zealous adhesion contracts that their employer may have drafted, for example.[118] Because these significant limitations on noncompete agreements exist in most jurisdictions, in reality, "employees still enjoy a significant amount of mobility" even if they originally agreed to subject themselves to a noncompete agreement when their employment commenced.[119]

For that reason, it is difficult to argue that Section 16600's broad ban on noncompete agreements is truly appropriate or necessary to advance any of the substantial arguments made against their use. Other jurisdictions afford courts the ability to weigh the circumstances and facts of each case to decide if enforcement of a particular noncompete agreement is fair and necessary or not, but California denies employers and employees the ability to even assesses an agreement for reasonableness. Some states may want to set a high bar of what they will consider reasonable, but this option is not even available in California. This in turn exposes employers, employees, and the public in general to all of the potential negative aforementioned consequences and repercussions that follow from this strict ban.

III. SOLUTIONS AND ALTERNATIVES TO SECTION 16600

A. Adopting a Reasonable Compromise

In the interests of both California employers and the workforce as a whole, the State should revise its approach to noncompete agreement enforcement, or the lack

114. Harris, *supra* note 6, at 2.

115. Anderson, *supra* note 4, at 11.

116. Wu, *supra* note 89, at 612.

117. Sterk, *supra* note 85, at 399.

118. *Id.* at 409.

119. Wu, *supra* note 89, at 612; *see also* Mark A. Kahn, *Application Group, Inc. v. Hunter Group, Inc.*, 14 BERKELEY TECH. L.J. 283, 292 (1999) (explaining that in Maryland, for example, for a noncompete restrictive covenant to be enforceable, there must be adequate consideration, and "[t]he geographical and time limit tests are not static" and "what is geographically reasonable or temporally reasonable will depend on the specific facts of the employer-employee relationship in question.")

thereof. This most likely will need to be done through direct legislative revision of section 16600 directly, since California courts have made clear their interpretation of the statute as is. Considering that the majority of states have chosen the "reasonableness" inquiry for determining the enforceability of these agreements, the approach has been sufficiently established, and California could easily follow in those footsteps.

Moreover, a change in direction of California's approach to noncompete enforceability would not be extraordinarily abrupt. As discussed, California has historically leaned in favor of open competition. But even the first case concerning a restrictive covenant in 1868, *Wright v. Ryder*, spoke of restraints being valid if they were reasonable in time or place. In fact, it was not even clear that Section 16600 was a blanket ban and that the State was not to assess reasonableness of agreements until the California Supreme Court's decision in *Edwards v. Arthur Anderson LLP* in 2008. Therefore, changing directions to a more employer-friendly law would therefore not overturn hundreds of years of settled law.

Another crucial point is that adopting a "reasonableness" approach like other jurisdictions does not have to revoke California's soft spot for open competition. Just because a state authorizes the use of noncompete agreements as a general matter does not mean that each jurisdiction interprets them the same. In these other jurisdictions, oftentimes the standard is that a noncompete agreement may not be broader than reasonably necessary to protect the legitimate interests of the employer for it to be enforceable. Thus, even when noncompetes are legal, courts would still need to assess if the agreement is overly broad and if the employer is legitimately in need of protection in a particular case before upholding its enforceability. California could choose to do this with a pro-employer lens, like Florida, or with specific exemptions for certain types of employees, like Colorado, or anywhere in between. California courts would have broad leeway to determine if the noncompete is truly proper and would have the authority to deem an agreement unenforceable if it does encroach on open competition too much. In any matter, a broad ban on noncompete agreements as it currently stands is unnecessary and overly harsh when a reasonable compromise exists and is in widespread use in the majority of jurisdictions.

B. Additional Measures for Noncompete Agreements

Even if California's primary goal is to protect employee mobility and open competition in the workforce, this goal can still be achieved even if Section 16600 is revised. In addition to adopting the reasonableness approach like other jurisdictions, California could also take additional measures to tailor its approach to noncompete agreements.

California can and should prescribe specific provisions to alleviate the key concerns that stem from usage of noncompete agreements in the workplace. For example, if the key concern is unequal bargaining power for lower wage workers, noncompete agreement usage could be prohibited in those employer-employee relations where wages fall below a particular threshold. Several states follow this

practice.[120] Illinois is a prime example. Implemented in January 2017, the Illinois Freedom to Work Act prohibits private employers from forcing low-wage employees to agree to a noncompete clause; consequently, all such covenants are unenforceable.[121] This way, workers employed at fast-food chains, where job jumping is more common and has fewer consequences, are not held to the same standards as high-level CEOs in whom a company has invested valuable time and resources. If protecting lower wage earners is a main goal, California, like Illinois, could easily do this.

Likewise, if California is concerned about particular issues in an industry, the law surrounding noncompetes can and should be tailored to address them. Essentially, the California Legislature could promulgate rules regarding competition in those specific fields.[122] For example, California may rightly be concerned about citizens' accessibility to healthcare and the availability of doctors and other healthcare providers. The State may believe that allowing an employer to legally restrict an employee from working in a particular area or in a particular community could hinder the availability of medical care in places that truly need it. This is a valid concern, but there is a simple solution. California could add a specific provision to its noncompete law to prohibit noncompetes for healthcare employees in particular.[123] This reasoning extends beyond public healthcare needs into other industries as well. For example, Hawaii banned the use of noncompete agreements for employers and employees in the technology field.[124] Though no other states have seemed to follow Hawaii's lead yet, this example further demonstrates that states most definitely can and have created regulations to fit their individual needs. It is evident that nearly all concerns surrounding the use of noncompete agreements can

120. Illinois, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, Washington, and Oregon prohibit noncompete agreement usage for low-wage workers, though each state may have their own individual methods to determine which employees qualify as "low wage" for purposes of the exemption. Erica Hahn & Russell Beck, *Federal Noncompete Initiatives: When You Can't Convince the States, Ask the Feds*, FAIR COMPETITION L. (Dec. 24, 2019), https://www.faircompetitionlaw.com/2019/12/24/federal-noncompete-initiatives-when-you-cant-convince-the-states-ask-the-feds/.

121. 820 ILL. COMP. STAT. § 90/10 (2021). For purposes of the Illinois Freedom to Work Act, a low wage employee is one who earns (1) less than the relevant federal, state, or local minimum wage amount or (2) an hourly wage less than $13.00. 820 ILL. COMP. STAT. § 90/5 (2021).

122. In the interest of protecting attorney autonomy and the public's freedom to choose their own attorney, the American Bar Association ("ABA") has a well-established rule against most attorney non-competition clauses, established in Rule 5.6 of the ABA Modern Rules. Hazel G. Beh & H. Ramsey Ross, *Non-Compete Clauses in Physician Employment Contracts Are Bad for Our Health*, 14 HAW. B.J. 79, 85–86 (2011).

123. *See id.* This article argues in favor of an outright legislative ban for noncompete clauses for physicians in the state of Hawaii, though the same logic could apply to physicians in any state, including California. Main reasons in favor of the physician-specific ban include harm to the public and medical workforce shortages. Unlike the American Bar Association, the American Medical Association ("AMA") does not prohibit noncompete agreements in healthcare. However, the AMA Code of Ethics does discourage noncompete clauses, commenting that these agreements are unethical if they are unreasonably excessive geographically or in duration. *Id.* at 86. On the other hand, Texas law allows for noncompete agreements related to the practice of medicine to be enforced if certain circumstances are met. To be enforceable in Texas, the agreement may not deny a doctor access to patients who he had seen within one year of the contract's termination, must allow the doctor to buy out the covenant for a reasonable price, and other caveats. *See* TEX. BUS. & COM. CODE § 15.50 (2021).

124. Hahn & Beck, *supra* note 112.

be addressed by the legislature, or even the through a judicial approach.[125] A broad, blanket ban on noncompete agreements for all employees across the state is thus simply not appropriate or necessary to protect employee mobility and open competition.

C. Put the Burden on the Employer

Aside from regulating the nature of noncompete agreements, California has alternative measures it could take in order to monitor the content and methodology of noncompete agreements that are given to employees, further reducing the need for a broad ban on noncompete agreement usage while still protecting the state's interests. Another key issue generally raised by use of these agreements is a lack of transparency and employee awareness. Depending on the language of the agreement an employee signed, he or she may believe every line will be strictly enforced. To alleviate this, the California legislature should implement a transparency mandate. For example, if California adopts the reasonableness approach used in most other states, it could require that all employment contracts that contain a noncompete agreement must also state that such agreements are generally disfavored by courts and are only enforceable when they are reasonable in terms of duration, geography, and activity. Mandating that this caveat be present alongside any noncompete agreement provides clarity to every employee subject to this contract. Thus, if an employee finds himself or herself wanting to leave an employer and breach a noncompete agreement, the employee will know the court's stance on them and generally how they work. This will increase the confidence of the employee if the agreement is quite clearly unreasonable for the employee's particular circumstances. At the very least, the mandated transparency could lead an employee to consult a lawyer regarding the merit of the agreement.

In a similar manner, California should prescribe the timeframe during which noncompete agreements can by implemented by employers. This addresses the concern that arises when employers spring a noncompete agreement on employees *after* employment has already commenced. This problem could be substantial because, if put in such a situation, the employees would have no practical options besides either quitting the jobs they had already started or signing the new noncompete agreement as is. A solution to this could be a mandate prescribing that, to be enforceable, the covenant must (among other things) be given to the employee and signed before employment has begun. Contracts that arise after the individual has started working should be invalid, even if signed by the employee. This would help promote the disadvantaged employee's bargaining power and create a more even playing field, since the employee would have to be aware of the provision before agreeing to employment in the first place. This approach could come from different sources. The legislature could address the timing provision specifically, or, alternatively, courts could consider the timing the agreement was given (i.e., before

125. *See* Murfreesboro Med. Clinic, P.A. v. Udom, 166 S.W.3d 674, 683 (Tenn. 2005) (finding that noncompete agreements for a physician were against public policy and thus unenforceable because of "the ethical problems raised by them" and the "legislature's decision not to statutorily validate all such covenants.").

or after employment had begun) when assessing the reasonableness of any particular noncompete contract. Forcing the employer to be more diligent in the timing of administering noncompete agreements helps control their usage throughout the state, therefore lessening the burden placed on the employees.

Another final effort that California should use to control noncompete usage is to allow attorney's fees to be recoverable by employees.[126] Several of the solutions this Note has suggested as an alternative to Section 16600 are geared toward helping the employee, but many may involve consulting an attorney or going before a court to have an agreement held unreasonable and unenforceable. Allowing attorney's fees to be recoverable alleviates the financial burden on the employee, who most likely is in a lesser financial position than the employer to pay for such costs.[127] The burden of paying a lawyer would thus not fall on the employee subject to a noncompete, and that would be one less hurdle the employee would have to consider. Recoverable attorney's fees could be a preemptive option for employees seeking declaratory judgment, or it could be subsequently available if or when an employer sues an employee for an alleged breach. This incentivizes employees to bring forth their grievances if they believe they have been wronged. Likewise, it incentivizes employers not to draft unreasonable agreements or attempt to subject new employees to unenforceable noncompetes, since the employers will know that an employee now has the financial resources to go before a judge at the employer's expense. Recoverable attorney's fees are a reasonable alleviation to an issue raised by noncompetes, while still not banning noncompete agreements outright.

CONCLUSION

The employer-employee dynamic in the workplace affects almost everyone. Regardless of the size or industry of the business, an effective, flexible, employer-employee dynamic and relationship is essential for the success of each party. Throughout history, restrictive noncompete agreements have been a useful tool to protect this dynamic, as they are created when both parties agree that an employee will not enter into competition with an employer during or following employment in a certain area and/or a specified time period. Importantly, however, the law

126. For instance, "[m]ost courts follow the American Rule concerning the award of attorney's fees. The American Rule states that attorney's fees may be awarded where provided by statute or contact. Where a statute is involved, the courts will strictly apply the language of the statute to determine whether the recovery of attorney's fees is warranted." Michelle L. Evans, *Enforceability of Covenant Not to Compete*, 104 Am. Jur. 3d §11. The State of Texas provides one example of attorney's fees for noncompete actions. The relevant Texas law reads that "the court may award the promisor the costs, including reasonable attorney's fees, actually and reasonably incurred by the promisor in defending the action to enforce the covenant." TEX. BUS. & COM. CODE § 15.51 (2021). Here, the Texas legislature has given the court discretion to award attorney fees and to determine what fees are reasonable to compensate the employee (or even the employer) in defending the action. California could follow this approach or even take this in a more specific direction, e.g. allow the court to award attorney's fees if the employee is the prevailing party and provide factors to consider when assessing what the reasonable amount of compensation would be.

127. *See* Jeff Mokotoff, *Non-Compete News: Sixth Circuit Gives Attorneys' Fees to Employer*, FORD HARRISON, Jan. 23, 2019, https://www.fordharrison.com/non-compete-news-sixth-circuit-gives-attorneys-fees-to-employer (discussing attorneys' fees in noncompete cases).

surrounding these agreements is subject to each state, so each jurisdiction has control over how employers and employees may enter into contracts with one another. This holds true for the 1,622,756 businesses that employed 17,907,776 employees in the state of California in 2019.[128] In this "most well-known covenant hostile state," each one of these businesses and employees are unable to willingly enter into a valid, enforceable noncompete agreement due to Section 16600 of the California Business and Professions Code.[129] Not a single employer, even in highly technical industries like engineering or electronic production, had any legal method to protect themselves from essential, highly-trained employees walking out the door to join a competitor and thus putting the employer's livelihood in jeopardy.

Section 16600 harshly and broadly prohibits all contracts that restrain individuals from engaging in any sort of profession, trade, or business, regardless of the circumstances from which the agreement derives. Though there are a select few exceptions to this general rule for corporate owners selling ownership interests and trade secrets, this approach to noncompete covenant enforceability is quite unique to California. As discussed, most jurisdictions in the United States do not have such a widespread prohibition. Instead, the courts normally assess post-employment restrictive covenants to see if they are reasonable under the circumstances of a particular case in terms of durational and geographical scope. California has no extenuating circumstances that other states do not have in their workforce that would warrant such a strict ban on noncompetes when there are other viable and more appropriate options. Instead, California leaves no wiggle room for even the most reasonable noncompete agreements.

Noncompete law in the State of California has not always been this harsh. The first case discussing a restrictive covenant in 1868 upheld the use of these agreements that were "confined to *reasonable* limits of time or place."[130] Though subsequent state law and interpretation by both California courts and the Ninth Circuit strayed from the "reasonableness" approach, the dispute was not settled until 2008 in *Edwards v. Arthur Andersen LLP*, in which the California Supreme Court explained that it would not read a "reasonableness" standard into Section 16600, and if it should, that direction would need to come from the legislature.[131] The fact that this interpretation and approach to noncompete agreements has been debated for years and settled only recently, along with the court's language indicating it would be receptive to a change from the legislature, leaves wide open the possibility of reforming noncompete agreements to be better suited to fit the needs of employees and employers in the state of California.

The approach to noncompetes in California should be reformed for a number of reasons. So long as courts enforce Section 16600 in this harsh manner, employers' valuable trade information and consumer relationships may not be able to receive adequate protection from misappropriation by competitors. This hurts long-term employment relationships and employers' ability to invest in the development of their

128. *Size of Business Data for California (Quarterly)*, *supra* note 1.

129. CAL. BUS. & PROF. CODE § 16600 (2021).

130. Perry & Howell, *supra* note 15.

131. *Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 293 (Cal. 2008).

individual employees. Section 16600 harms employees as well. Employees in their initial years of tenure may be able to earn more compensation if they are put in positions of increased trust and training by their employer, backed by a guarantee that the employee will not flee to a competitor. Moreover, Section 16600's anti-enforcement stance directly interferes with the public's interest in the freedom to contract. The law imposes a restriction on an employee's freedom to contract about future use of his own human capital and strips both the employer and employee of their ability to create a binding relationship. This paternalistic approach thus burdens society's interest in maintaining the ability to create contracts freely.

Admittedly, usage of noncompetes in the workforce is not always a win-win. There are valid arguments that noncompete enforcement between employees and employers stifles competition and is unfair due to the inequality of bargaining power between the parties. However, solutions and alternatives do exist to assuage these concerns that do not involve prohibiting the covenants completely, thus allowing parties to reap the benefits of them as well. Most obviously, California can adopt the approach that most other states have done, which involves courts assessing covenants on a case-by-case basis to see if the agreement is reasonable and therefore enforceable. The state could set its own bar for what it considers reasonable, thus still maintaining its protection of open competition and equal bargaining power to the extent necessary. Moreover, California can prescribe specific provisions for lower wage workers or workers in particular industries of concern. This can help address specific apprehensions that the state may have with noncompete usage. Likewise, additional approaches can further be taken that put the burden on the employer. For example, the law could require employers who wish to use noncompetes to have caveats in their contracts explaining that they will only be enforced if a court deems it to be reasonable in terms of time, activity, or geography. Attorney's fees could also be guaranteed to be recoverable from employers, thus removing the burden from the employee if or when an issue arises, which would incentivize employers to act appropriately.

In sum, Section 16600 of the California Business and Professions Code is overly harsh in completely prohibiting usage of noncompete agreements between employers and employees. This harms both parties and limits the public's interest in freedom to contract, and it is unnecessary to protect open competition and equalize bargaining power. California should instead join the overwhelming majority of other jurisdictions in analyzing noncompete agreements on a more individual basis, inquiring if a particular agreement is reasonable for both parties in terms of its geographic, durational, and activity limitations. To supplement that, additional measures can be taken to protect specific concerns or industries if the state wishes. Ultimately, a broad ban on these contracts is unduly harsh and harmful, and it is not necessary to achieve the State's goals. In the interest of employers and employees throughout the State of California, it is imperative that California reform its approach to enforcement of noncompete agreements in the workforce.