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Independent Contractors & Noncompetition Covenants: A Modified Approach

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INDEPENDENT CONTRACTORS & NONCOMPETITION COVENANTS: A MODIFIED APPROACH

*Matthew J. Sandor**

This Note examines the way in which noncompetition covenants should be applied to independent contractors. An increasing portion of the American labor force is now employed outside the traditional employer-employee context. Today, nearly sixty million American workers are categorized as independent contractors, with many subject to noncompetition covenants that restrict their ability to participate in the labor market freely. In response to this dramatic change, state courts and legislatures have used a variety of approaches in enforcing noncompetes in the independent contractor context. These approaches run the gamut, with some states liberally construing noncompetes against independent contractors while others have banned the practice outright. This Note explores these varying approaches and advocates for a new, modified test for courts to use when analyzing independent contractors' noncompetition covenants that asks (1) whether the employer has a protectable, legitimate business interest and (2) whether the independent contractor is vulnerable. This approach preserves the beneficial use of noncompetes when an employer's legitimate interests are at stake while also protecting the interests of the millions of Americans in nontraditional employment.

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INTRODUCTION

Nearly sixty million American workers are categorized as independent contractors.¹ This number is increasing as more workers, for a variety of reasons, are engaging in employment arrangements other than the traditional nine-to-five employer-employee relationship.² Although some workers choose this work arrangement, many others are forced into it. Workers have

1. *Who Are Independent Contractors, and How Would the PRO Act Limit Their Opportunity?*, AMS. FOR PROSPERITY (Apr. 7, 2021), <https://americansforprosperity.org/who-are-independent-contractors-pro-act/> [<https://perma.cc/S2AD-YDMP>].

2. See, e.g., Carolyn Ockels, Steve King & Gene Zaino, *Workers Don't Feel Like a 9-to-5 Job Is a Safe Bet Anymore*, HARV. BUS. REV. (Mar. 23, 2022), <https://hbr.org/2022/03/workers-dont-feel-like-a-9-to-5-job-is-a-safe-bet-anymore> [<https://perma.cc/L22Z-W25V>] (identifying increasing confidence in workers and the COVID-19 pandemic, among other factors, as driving people away from “traditional employment”).

little control over which category they fall into or the contract terms under which they work. One such term that a worker might feel compelled to agree to is a noncompetition covenant.³

A noncompetition covenant restricts a worker from engaging in “the same type of business” as their former employer,⁴ usually for an explicit period of time and/or within a certain geographic area.⁵ The worker’s agreement to a noncompetition covenant can have harmful consequences, like restricting their ability to earn a living in their chosen profession or imposing liability for a stipulated monetary amount if they breach their noncompete.⁶ In the employer-employee context, most state courts have developed tests to prevent the enforcement of noncompetition covenants that would do more harm than good.⁷ However, such protections do not always extend to independent contractors.

The validity of the noncompetition covenant for an independent contractor varies by state. For example, in Minnesota, courts may rule against a worker, at least in part because they are considered an independent contractor rather than an employee.⁸ And even if the court might not make the worker pay monetary damages to the former employer,⁹ the independent contractor will no longer be able to engage in similar work.

3. This Note comes on the heels of the Federal Trade Commission’s proposed ban on noncompetition covenants altogether, which is not effective as of this Note’s publication. *See* Non-Compete Clause Rule, 88 Fed. Reg. 3842 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

4. This Note will use the term “employer” to identify the counterparty to both employees and independent contractors. A noncompetition covenant, or a covenant not to compete, is a “promise . . . in a[n] . . . employment contract, not to engage in the same type of business for a stated time in the same market as the . . . employer.” *Covenant*, BLACK’S LAW DICTIONARY (11th ed. 2019). This Note uses the terms “noncompetition covenant,” “covenant not to compete,” and “noncompete” interchangeably.

5. *See id.*

6. The potential for monetary penalties presents the concept of “liquidated damages,” a separate contract issue. *See Damages*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“An amount contractually stipulated as a reasonable estimation of actual damages to be recovered by one party if the other party breaches.”). Liquidated damages are outside of the scope of this Note, as are other restrictive covenants. For more on liquidated damages, see generally 24 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 65:1 (4th ed. 2022). For more on restrictive covenants, see generally 6 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 13:1 (4th ed. 2022).

7. *See* Richard E. Kaye, *Cause of Action to Enforce Noncompetition Covenant in Employment Contract*, in 36 CAUSES OF ACTION 103, § 2 (2d ed. 2008) (explaining that generally, to enforce a noncompetition covenant, an employer must establish that (1) the covenant is “ancillary” to a valid employment contract, (2) the covenant satisfies contract principles such as assent and consideration, (3) the restrictions are “reasonable[,]” and (4) the worker breached the restriction).

8. *See* Schmit Towing, Inc. v. Frovik, No. A10-362, 2010 WL 4451572, at *3 (Minn. Ct. App. Nov. 9, 2010). Despite recognizing that noncompetition covenants are not favored generally, the *Frovik* court nonetheless held after remand that the covenant was enforceable in part because the defendant was an independent contractor. *See generally* Schmit Towing, Inc. v. Frovik, No. A12-0989, 2012 WL 6652637 (Minn. Ct. App. Dec. 24, 2012) (upholding after remand the trial court’s determination that the noncompetition covenant was enforceable, though not allowing for liquidated damages).

9. *See Frovik*, 2012 WL 6652637, at *4–5; *Damages*, *supra* note 6.

Part I of this Note provides background on two issues: (1) the change in the classification of workers and (2) noncompetition covenants. Part II explores the current approaches taken in cases in which these two issues intersect and categorizes those approaches into four analytically distinct methods. Part III suggests a new framework for courts that will adequately protect independent contractors from noncompetition covenants by better balancing employer interests with current worker needs, particularly given the rapid changes in the workforce and the shift toward more nontraditional work arrangements.¹⁰

I. A TALE OF TWO LABOR ISSUES

Noncompetition covenants are the subject of much scrutiny, with many arguing that they curtail economic growth.¹¹ At the same time, the rise of the “gig” economy and app-based companies, like Uber and Lyft, that hire on-demand workers have created challenges in classifying those workers.¹² The more nontraditional workers there are, the less relevant current noncompetition jurisprudence, which often focuses on the traditional employer-employee relationship, will become.¹³ Indeed, the changing structure of work may make it easier for employers to exploit loopholes in the traditional employment model,¹⁴ such as through the application of noncompetition covenants to independent contractors.¹⁵ This vulnerability is especially pertinent in certain developing industries like transportation and information management as they continue to grow through the use of independent contractor work.¹⁶ This part explores how and why these two

10. This Note will use the terms “nontraditional work arrangements,” “informal work arrangements,” and “alternative work arrangements” interchangeably to refer to workers engaged in a work arrangement that is not defined as employer-employee.

11. See, e.g., ALEXANDER J.S. COLVIN & HEIDI SHIERHOLZ, ECON. POL’Y INST., NONCOMPETE AGREEMENTS 1–2 (2019), www.epi.org/publication/noncompete-agreements/ [<https://perma.cc/U3WZ-TVGX>].

12. See generally Lauren Feiner, *Uber, Doordash Plunge After Labor Department Proposes Change to Gig Worker Classification*, CNBC (Oct. 11, 2022, 4:07 PM), <https://www.cnbc.com/2022/10/11/uber-doordash-plunge-as-labor-dept-proposes-gig-worker-change.html> [<https://perma.cc/FVE5-KYCD>].

13. See *infra* Part II (identifying the different ways state courts have attempted to apply noncompete jurisprudence to the independent contractor context).

14. Although there is increasing momentum to further restrict the enforceability of noncompetition covenants, see Chris Marr, *Employee Noncompete Clause Limits Adopted by Three More States*, BLOOMBERG L. (June 29, 2021, 5:30 AM), <https://news.bloomberglaw.com/daily-labor-report/employee-noncompete-clause-limits-adopted-by-three-more-states> [<https://perma.cc/C2LN-PLT6>]; *infra* Part I.B.2 (discussing rationales behind restricting noncompetes), it is possible that such movement could be undermined should a worker be classified as an independent contractor rather than an employee, see, e.g., S.B. 169, 81st Legis. Assemb., Reg. Sess. (Or. 2021) (amending Oregon’s noncompetition laws pursuant to “agreement[s] entered into between an employer and employee”).

15. See DONALD J. ASPELUND & JOAN E. BECKNER, EMPLOYEE NONCOMPETITION LAW § 3:5 (2022), Westlaw EMPNONCOMP (“[T]here is often little discussion” of courts enforcing “covenants not to compete against independent contractors.”).

16. See LINA MOE, JAMES A. PARROTT & JASON ROCHFORD, NEW SCH. CTR. FOR N.Y.C. AFFS., THE MAGNITUDE OF LOW-PAID GIG AND INDEPENDENT CONTRACT WORK IN NEW YORK

topics—the structure of work and noncompetition covenants—have developed.

A. *The Tale of the Structure of Work Relationships*

There is no hard line between independent contractors and employees.¹⁷ Generally, an independent contractor is “someone who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it.”¹⁸ Classification as an independent contractor is often determinative of whether certain state statutes apply (e.g., workers’ compensation laws),¹⁹ as well as whether the worker is covered by federal labor protections.²⁰ This classification impacts how a court construes a noncompetition covenant.²¹ Therefore, this distinction may become more important as the number of people engaged in nontraditional work arrangements increases.²²

1. The Traditional Work Relationship

Both state and federal labor laws have developed based on the assumption that most Americans were employed by one employer with relatively little

STATE 12 (2020), https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5e424affd767af4f34c0d9a9/1581402883035/Feb112020_GigReport.pdf [<https://perma.cc/R3VY-8NNTL>] (describing the transportation industry as a “main source” of the rapid growth of app-based independent contractor work in New York State).

17. See R.T.K., Annotation, *Tests in Determining Whether One Is an Independent Contractor*, 75 A.L.R. 725 (1931) (identifying other “tests and pertinent circumstances” to distinguish between an employee and an independent contractor, including, among numerous other factors, whether the worker (a) “performs work for anyone [the worker] wishes,” (b) “has the right to use the labor of others,” (c) provides their own labor, materials, and appliances, and (d) the time for which the worker is employed); see also RESTATEMENT (SECOND) OF AGENCY § 220 (AM. L. INST. 1958) (listing factors used to determine whether a worker is an employee or an independent contractor, including, for example, “the extent of control . . . exercise[d] over the details of the work,” whether the work is “done under the direction of the employer,” and whether the “employer or the work[er] supplies the instrumentalities”).

18. *Independent Contractor*, BLACK’S LAW DICTIONARY (11th ed. 2019).

19. 1 MODERN WORKERS COMPENSATION § 106:31 (2023), Westlaw MWC (“An independent contractor is . . . not covered by a state workers’ compensation statute.”).

20. These include protections like those provided by the Occupational Safety and Health Act of 1970 (OSHA). Pub. L. No. 105-197, 112 Stat. 638 (codified as amended in scattered sections of the U.S.C.); see 29 U.S.C. §§ 651–678. To learn more about the protections provided by OSHA, see *OSHA Worker Rights and Protections*, U.S. DEP’T OF LAB., <https://www.osha.gov/workers> [<https://perma.cc/4HJ7-UW75>] (last visited Mar. 6, 2023); see also Richard Reibstein, *What About Vaccination Mandates for Independent Contractors?*, LOCKE LORD (Oct. 2021), <https://www.lockelord.com/newsandevents/publications/2021/10/what-about-vaccination-mandates> [<https://perma.cc/YWH6-RSQ7>] (“[I]ndependent contractors are not covered by [OSHA].”).

21. See S.B. 169, 81st Legis. Assemb., Reg. Sess. (Or. 2021); see also *infra* Parts II.B–C (examining decisions in which a worker’s classification played a role in the court’s treatment of the noncompete at issue).

22. See *Who Are Independent Contractors, and How Would the PRO Act Limit Their Opportunity?*, *supra* note 1.

movement among firms or industries.²³ Although more recent labor regulations better address increased mobility, employment law still largely relies on the assumption that workers are classified as employees.²⁴

The rise of labor unions illustrates that the law has developed under the assumption that most people work one job for one employer.²⁵ Individual workers possessed little bargaining power at the advent of the Industrial Revolution in the mid-1800s.²⁶ Without formal help from the government, trade workers gained bargaining power via the skills they could offer and a strike's potential impact on employers.²⁷ The Great Depression dealt a big blow to worker bargaining power, as many workers became increasingly willing to accept work without regard for workplace safety protections, thereby threatening the bargaining leverage that labor unions possessed.²⁸ This changed with the passage of New Deal legislation, such as the National Labor Relations Act²⁹ (NLRA) in 1935, which, among other protections, requires employers to bargain in good faith with labor unions when the union is supported by a majority of employees.³⁰ At the time, initiatives like these covered most of the workforce, giving workers meaningful opportunities to balance out bargaining power disparities.³¹

Government initiatives like enacting the NLRA were designed to address the needs of the traditional employment relationship dominating the American workforce at the time.³² First, most knowledge obtained by employees was firm specific.³³ As a result, employees then were less free to change jobs and had less bargaining power because most of the skills that

23. See Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 574–75 (2001) (arguing that much of the existing labor regulation at the time was rendered “obsolete” in part due to increased “lateral employment mobility”).

24. For example, the American Rescue Plan Act of 2021 does much to address “multiemployer [pension] plans.” Pub. L. No. 117-2, §§ 9701–9704, 135 Stat. 4, 186–99 (codified as amended in scattered sections of 26 and 29 U.S.C.); see *U.S. Department of Labor Statement on PBGC “Special Financial Assistance” Interim Final Rule for Eligible Multiemployer Plans*, U.S. DEP’T OF LAB. (July 2021), <https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/arp/dol-statement-on-pbgc-special-financial-assistance-interim-final-rule.pdf> [<https://perma.cc/YZ97-G9RY>].

25. See *Labor Movement*, HISTORY, <https://www.history.com/topics/19th-century/labor> [<https://perma.cc/MJ5X-F59U>] (Mar. 31, 2020).

26. See *id.*

27. See *id.*

28. See *Labor Unions During the Great Depression and New Deal*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/great-depression-and-world-war-ii-1929-1945/labor-unions-during-great-depression-and-new-deal/> [<https://perma.cc/ASM5-PUMC>] (last visited Mar. 6, 2023).

29. Ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169).

30. 29 U.S.C. § 158.

31. See *id.* § 151 (declaring that the NLRA was meant to “protect[] the exercise by workers” of certain rights to help rectify an “inequality of bargaining power”).

32. See *id.*

33. See Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163, 1201 (2001).

they acquired with one firm were useless to another firm.³⁴ Second, more jobs then were industrial, whereas today, technology-dependent jobs dominate the labor market.³⁵ Workers then needed to be on the employer's worksite to get the job done, in stark contrast to many workers' ability to work remotely today.³⁶ Third, because of the nature of work at the time, people necessarily had less mobility.³⁷ Compared to today's transportation costs and the increased ability to work remotely or to work in a location different from one's coworkers, the lack of mobility then further contributed to the development of the traditional nine-to-five job.³⁸

In sum, the labor market naturally restricted workers' ability to take their skills to another, potentially competitive, firm.³⁹

2. A Shift Toward Nontraditional Work Relationships

The mid-2010s saw a trend of increased "informal work," largely in the form of independent contract work.⁴⁰ As the Federal Trade Commission

34. *See id.* at 1201–02.

35. *See id.* at 1199.

36. *See* André Dua, Kweilin Ellingrud, Phil Kirschner, Adrian Kwok, Ryan Luby, Rob Palter & Sarah Pemberton, *Americans Are Embracing Flexible Work—and They Want More of It*, MCKINSEY & CO. (June 23, 2022), <https://www.mckinsey.com/industries/real-estate/our-insights/americans-are-embracing-flexible-work-and-they-want-more-of-it> [<https://perma.cc/XMC9-4M4R>] (“A remarkable 58 percent of employed respondents . . . report having the option to work from home for all or part of the week.”).

37. *See* Arnow-Richman, *supra* note 33, at 1201–02.

38. *See generally* Kathryn Anne Edwards, *Worker Mobility in Practice*, ECON. POL'Y INST. (May 12, 2022), <https://www.epi.org/unequalpower/publications/worker-mobility-in-practice/> [<https://perma.cc/S6T3-WWAZ>] (“Workers willing to enhance their labor market prospects by moving must not only pay the costs of the move but also have access to considerable savings.”).

39. *See* Arnow-Richman, *supra* note 33, at 1198 (describing labor market developments as “motivating employers’ increased reliance on noncompete agreements”).

40. Anat Bracha & Mary A. Burke, *Wage Inflation and Informal Work 1* (Fed. Rsrv. Bank of Bos., Current Policy Perspectives No. 18-2, 2018), <https://www.bostonfed.org/publications/current-policy-perspectives/2018/wage-inflation-and-informal-work.aspx> [<https://perma.cc/HU4G-CNEJ>] (click “Full Text Document”). Though estimates vary, research suggests that informal work arrangements have been on the rise. *See, e.g., id.* at 2 (estimating that in 2015 and 2016, about “34 percent of U.S. adults participated in informal work”); Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015*, at 2 (Nat’l Bureau of Econ. Rsch., Working Paper Series, Paper No. 22667, 2016), https://www.nber.org/system/files/working_papers/w22667/w22667.pdf [<https://perma.cc/PG6Y-RL5U>] (estimating a rise in the percentage of workers “engaged in alternative work arrangements” from 10.7 percent in 2005 to 15.8 percent in 2015). *But see* *Contingent and Alternative Employment Arrangements News Release*, U.S. BUREAU OF LAB. STAT. (June 7, 2018, 10:00 AM), <https://www.bls.gov/news.release/conemp.htm> [<https://perma.cc/J8B9-6GKE>] (finding the number of workers in alternative arrangements to have fallen to 10.1 percent in 2017). Researchers have used a variety of terms, such as “informal work” or “alternative work,” to describe work arrangements that fall outside of the traditional employer-employee work relationship. Other notable categories of nontraditional work arrangements that are captured in these figures are gig workers and freelancers, which tend to have some overlap in definition. *See Freelancer*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/freelancer> [<https://perma.cc/HHJ4-VCMC>] (last visited Mar. 6, 2023) (“[A] person who pursues a profession without a long-term commitment to any one employer.”); *Gig*

recently acknowledged, the gig economy now plays a much larger role in the day-to-day lives of many people, even if they are not gig workers themselves.⁴¹ Much of this growth has been driven by technological change because people can now earn income “on-demand” through a “digital service like an app.”⁴² Work in alternative arrangements stretches across industries, from construction and education to health and sales.⁴³ Most jobs can conceivably be converted from an employer-employee relationship to a more flexible, nontraditional arrangement under which workers perform similar job functions in either a different location or outside of the traditional nine-to-five workday.⁴⁴

The modern work relationship differs from that of the early-to-mid-1900s in a few key ways.⁴⁵ First, rather than working in manufacturing, many workers today rely on jobs in “information management” or other “service-sector jobs.”⁴⁶ Second, employers today “must be capable of altering business strategies,” resulting in long-term employment no longer being a guarantee for many workers.⁴⁷ Third, rather than promising long-term employment, employers today offer work experiences “that will keep [workers] marketable to other employers,” rather than just firm-specific training, recognizing that a worker’s relationship is “with the market rather than the company.”⁴⁸ Ultimately, today’s workforce is much more mobile.⁴⁹

3. Accounting for the Shift

Certainly when it comes to skilled work, it is likely that some workers are demanding increased flexibility.⁵⁰ Especially in a post-COVID-19 world in which some firms and workers alike have proven that they can operate

Worker, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/gig%20worker> [<https://perma.cc/EE8G-KHSV>] (last visited Mar. 6, 2023) (“[A] person who works temporary jobs typically in the service sector as an independent contractor or freelancer.”). This Note generally treats gig workers and freelancers as being in the same category as independent contractors, contributing to the larger, general category of nontraditional work arrangements.

41. See FED. TRADE COMM’N, FTC POLICY STATEMENT ON ENFORCEMENT RELATED TO GIG WORK 1 (2022), <https://www.ftc.gov/legal-library/browse/policy-statement-enforcement-related-gig-work> [<https://perma.cc/5CZN-9K5M>] (“One study suggests the gig economy will generate \$455 billion in annual sales by 2023.”).

42. *Id.* at 2.

43. See Katz & Krueger, *supra* note 40, at 11.

44. See Dua et al., *supra* note 36, at 4 (discussing remote work and concluding that “[w]hen offered, almost everyone takes the opportunity to work flexibly”).

45. See Arnow-Richman, *supra* note 33, at 1199–200.

46. *Id.* at 1999.

47. *Id.* at 1200.

48. *Id.* at 1201–02.

49. *Id.* at 1200 (“[E]mployees today can anticipate frequent lateral moves both between and within companies . . . over the course of their careers.”).

50. See SUSAN LUND, ANU MADGAVKAR, JAMES MANYIKA, SVEN SMIT, KWEILIN ELLINGRUD, MARY MEANEY & OLIVA ROBINSON, MCKINSEY GLOB. INST., THE FUTURE OF WORK AFTER COVID-19, at 37 (2021), <https://www.mckinsey.com/featured-insights/future-of-work/the-future-of-work-after-covid-19> [<https://perma.cc/VHV3-BE7A>] (click “Full Report”); see also Dua et al., *supra* note 36 (“Most industries support some flexibility, but digital innovators demand it.”).

remotely with success, workers are increasingly willing to abandon the “traditional workplace” in favor of work arrangements that allow for more flexibility.⁵¹ However, although this rationale accounts for some of the increase in alternative work arrangements, it is unlikely to be the main reason.⁵²

The shift in work might be involuntary for many.⁵³ A report from McKinsey Global Institute predicted that almost all growth in labor demand in the next decade will come from high-wage occupations, with low-wage workers being impacted disproportionately.⁵⁴ Low demand for low-wage jobs raises several new concerns.⁵⁵ For instance, low-skill workers are more likely to need to find a job “within a different occupational category,”⁵⁶ getting the worst of both worlds—they do not have the old guarantee of employment for life (like in the traditional workforce),⁵⁷ and they also do not have transferable skills from their past employment.⁵⁸

Low demand for labor is likely to have influenced the shift toward nontraditional work arrangements.⁵⁹ Improvements in technology are lowering the transaction costs of hiring contractors as needed,⁶⁰ leading companies to contract out “non-core activities” such as janitorial and food services in order to realize efficiency gains.⁶¹ Additionally, low-skill jobs also face the risk of being completely displaced by automation.⁶² This is a story of decreased demand for low-skill manufacturing jobs, rather than a story of the workforce demanding more flexible work arrangements.⁶³

B. *The Tale of the Noncompetition Covenant*

Noncompetition covenants restrict workers from working for competitors or from starting a competing business, usually within certain geographic bounds and/or for a certain time period.⁶⁴ Some states have barred such

51. Rosalind Smith, *What Will the Future of Work Look Like for Independent Contractors?*, MAUVE GRP., <https://mauvegroup.com/blog/what-will-the-future-of-work-look-like-for-independent-contractors> [<https://perma.cc/NT2W-B4QF>] (last visited Mar. 6, 2023).

52. See Katz & Krueger, *supra* note 40, at 23.

53. See LUND ET AL., *supra* note 50, at 79.

54. *Id.*

55. See, e.g., *id.* at 83, 89.

56. See *id.* at 86.

57. See Arnow-Richman, *supra* note 33, at 1201.

58. See *id.* at 1202.

59. See Katz & Krueger, *supra* note 40, at 23–24.

60. See *id.* at 23.

61. See *id.* at 23–24.

62. See LUND ET AL., *supra* note 50, at 83.

63. See Katz & Krueger, *supra* note 40, at 23.

64. See 104 AM. JUR. PROOF OF FACTS 3D 393, § 3, Westlaw (database updated Feb. 2023); see also COLVIN & SHIERHOLZ, *supra* note 11, at 1 (describing noncompetes as “employment provisions that ban workers at one company from going to work for, or starting, a competing business within a certain period of time”).

covenants entirely by statute, while others allow them if they are narrow and deemed necessary to protect an employer's "legitimate interests."⁶⁵

1. Legitimate Employer Concerns and the Rise of the Noncompetition Covenant

The late 1990s saw much scholarship regarding covenants not to compete,⁶⁶ coinciding with an uptick in litigation seeking to enforce them.⁶⁷ Work, previously characterized by long-term employment relationships, had reached a point at which "job hopping" became more common.⁶⁸ This was driven, at least in part, by a shift in the labor market from manufacturing jobs to information management and service jobs.⁶⁹ So, although courts prior to this shift considered noncompetes to be presumptively void, they became increasingly willing to consider the merits of the provisions in employment contracts.⁷⁰

Courts, while diverging slightly on their reasoning, upheld noncompetition covenants they deemed to be reasonable.⁷¹ Training new workers in the new employment model came at a cost to employers, and the skills learned were more applicable to industries as a whole, rather than being firm specific.⁷² In a market where high-skilled labor was increasingly scarce, noncompetition covenants became a viable tool for protecting the increasingly valuable asset that was the worker and helped to ensure that companies would recoup the investment they made in training.⁷³

When deciding whether a noncompete is enforceable, courts began to ask, and still ask, whether the employer has a legitimate interest that should be protected.⁷⁴ In other words, does the employer really need this clause in the contract? Protection against competition alone is not a legitimate interest;⁷⁵ legitimate interests are "special circumstances which together form the good

65. See 104 AM. JUR. PROOF OF FACTS 3D, *supra* note 64, at 393, § 3 (collecting cases).

66. See, e.g., Arnow-Richman, *supra* note 33, at 1164–65; Stone, *supra* note 23, at 577–78 ("Courts have become increasingly receptive to employer efforts to limit employee use of human capital by . . . expanding the circumstances under which they will enforce covenants not to compete.").

67. See Stone, *supra* note 23, at 577.

68. See Arnow-Richman, *supra* note 33, at 1198.

69. See *id.* at 1199.

70. See Stone, *supra* note 23, at 579 ("The [courts] believed such covenants suppressed employee mobility, interfered with the labor market, and restrained trade.").

71. To determine reasonableness, state courts developed their own tests to evaluate noncompetition clauses. See Kaye, *supra* note 7. Generally, a restraint will be held unreasonable if "(a) the restraint is greater than is needed to protect the [employer]'s legitimate interest, or (b) the [employer]'s need is outweighed by the hardship to the [employee] and the likely injury to the public." RESTATEMENT (SECOND) OF CONTS. § 188 (AM. L. INST. 1981).

72. See Arnow-Richman, *supra* note 33, at 1201.

73. See generally *id.* at 1202–06.

74. 6 WILLISTON & LORD, *supra* note 6, § 13:4 ("If the restraint imposed by a [noncompete] is greater than is necessary for the protection of the [employer], the [noncompete] is necessarily invalid.").

75. C.T. Drechsler, Annotation, *Enforceability of Restrictive Covenant, Ancillary to Employment Contract, as Affected by Duration of Restriction*, 41 A.L.R.2d 15, § 13[a] (1955).

will of the employer's business."⁷⁶ Although courts will describe them differently, these "circumstances" tend to include situations in which (1) the worker has a "special influence . . . with the customers of the employer,"⁷⁷ (2) the worker has obtained either "trade secrets"⁷⁸ or "confidential information,"⁷⁹ or (3) there has potentially been some "acquisition of experience or skill" by the worker.⁸⁰ Most litigation in the area revolves around the first interest—influence on customers—and it is not difficult to see why "[f]irms operating in competitive markets place great value on relationships with customers."⁸¹

Courts then balance the employer's legitimate interest against the harm that a worker may suffer because of a noncompete.⁸² For example, consider a situation in which a sales manager doing work in three cities leaves their job.⁸³ An employer has a legitimate interest in restricting that manager's ability to work in the same business, as there is a real risk that the manager could take the employer's customers elsewhere.⁸⁴ However, if the manager works in Tennessee, for example, a court would likely consider it reasonable for the noncompete to restrict the manager's ability to work in Tennessee but would likely strike down the noncompete as overbroad if it restricts their ability to work in Canada.⁸⁵ Most state courts currently undertake a similar analysis, recognizing that employers may face circumstances in which the enforcement of a noncompete is reasonable.⁸⁶

2. Momentum for Banning Noncompetition Covenants

Since the initial push in the late 1990s to enforce reasonable noncompetition covenants, there has been a shift in favor of restricting the

76. *Id.*

77. C.T. Drechsler, Annotation, *Enforceability of Restrictive Covenant, Ancillary to Employment Contract, as Affected by Territorial Extent of Restriction*, 43 A.L.R.2d 94, § 23[a] (1955); see also *id.* § 4[f] ("Protection of this asset [the customer base] against appropriation by an employee is recognized everywhere as an important legitimate interest of the employer."); Kaye, *supra* note 7, § 19 (noting that a worker may acquire "particularized knowledge" of customers and develop "good will" that attaches to themselves, rather than their employer).

78. Trade secrets may be defined as "any formula, process, pattern, device, or compilation of information" that a business has and its competitors do not. See Kaye, *supra* note 7, § 15. To find out more about factors considered in whether a trade secret exists, see *id.*

79. The question of whether information is confidential follows an analysis similar to that for trade secrets. For more on the factors a court may consider, see *id.*

80. See Drechsler, *supra* note 75, § 13[a]. Acquisition of experience or skill is a somewhat weaker interest than customer influence or trade secrets and confidential information. See *id.*

81. Stone, *supra* note 23, at 586.

82. See, e.g., 6 WILLISTON & LORD, *supra* note 6, § 13:4 (examining whether the purported need for a noncompete "outweigh[ed] the undue oppression which would befall" the worker).

83. See Allright Auto Parks, Inc. v. Berry, 409 S.W.2d 361, 364 (Tenn. 1966).

84. See *id.* at 365 ("Had the employer not undertaken to include [forty-three cities where the worker did not work], the right to restrain the employee might have been secured.")

85. See 6 WILLISTON & LORD, *supra* note 6, § 13:4 & n.15.

86. See RESTATEMENT OF EMP. L. § 8.06 (AM. L. INST. 2015) (stating that a noncompetition covenant is enforceable "only if it is reasonably tailored in scope, geography, and time").

use of noncompetition covenants again.⁸⁷ Underlying this argument are two problems: (1) the equity problem, i.e., that noncompetes are used to the detriment of the worker,⁸⁸ and (2) the public policy problem, i.e., that noncompetes are an economic detriment to society as a whole.⁸⁹

The equity problem, which posits that it is unfair to apply noncompetes to certain workers—namely, those with lower incomes—faces little criticism.⁹⁰ Hypothetically, the current balancing tests used in most states⁹¹ account for this problem, but low-wage workers have, on occasion, found themselves facing potential liability.⁹² In response, a handful of state legislatures have banned noncompetes as applied to employees whose incomes are below a certain threshold.⁹³ However, despite calls to action from the federal government and legislation proposed in numerous states, such restrictions are the exception rather than the norm.⁹⁴

The public policy problem deals more with the idea that innovation will be stalled by restricting the movement of human capital and, therefore, focuses more on society as a whole.⁹⁵ Such arguments are more economic than

87. See, e.g., Rachel Arnow-Richman, *The New Enforcement Regime: Revisiting the Law of Employee Competition (and the Scholarship of Professor Charles Sullivan) with 2020 Vision*, 50 SETON HALL L. REV. 1223, 1259 (2020) (“Bolder statutory limitations and procedural requirements must be devised.”); Robert McAvoy, *How Can Federal Actors Compete on Noncompetes?: Examining the Need for and Possibility of Federal Action on Noncompetition Agreements*, 126 DICK. L. REV. 651, 682 (2022) (arguing that “Congress should pass legislation that generally bans noncompetes with certain exceptions that are limited by time and geography”). But see Jonathan M. Barnett & Ted Sichelman, *The Case for Noncompetes*, 87 U. CHI. L. REV. 953, 1046 (2020) (“Contrary to the direction of recent scholarship, popular commentary, and policy activity, there is little certainty concerning the net efficiency effects of noncompetes in general and reasonable grounds to believe they have a net positive effect in certain innovation environments.”).

88. See Arnow-Richman, *supra* note 33, at 1214–15.

89. See WHITE HOUSE, STATE CALL TO ACTION ON NON-COMPETE AGREEMENTS (2016), <https://obamawhitehouse.archives.gov/sites/default/files/competition/noncompetes-calltoaction-final.pdf> [<https://perma.cc/33L9-RYMD>] (“[T]here is gross overuse of non-compete clauses . . . at the expense of workers, entrepreneurship, and the broader economy.”); see also Majed Dakak & Ryan Davis, *Federally Banning Non-Compete Agreements*, LAW.COM (May 13, 2022, 5:00 AM), <https://www.law.com/therecorder/2022/05/13/federally-banning-non-compete-agreements/> [<https://perma.cc/F7WJ-E7R2>] (“[O]pponents say non-competes prevent talent from best allocating their skills, hurting innovation.”).

90. See, e.g., Barnett & Sichelman, *supra* note 87, at 962 & n.32.

91. See Kaye, *supra* note 7.

92. See, e.g., Jenna L. Brownlee & Caitlin A. Kelly, *To Compete or Not to Compete: Illinois’ Movement to Eliminate Noncompete Agreements*, 48 LOY. U. CHI. L.J. 1233, 1246 (2017) (describing a lawsuit brought by the Illinois attorney general against the sandwich chain Jimmy John’s, which had its employees sign noncompete agreements restricting their ability to work for similar businesses for two years).

93. See, e.g., ME. STAT. tit. 26, § 599-A (2022) (noncompetes void as applied to an “employee earning wages at or below 400% of the federal poverty level”); MD. CODE ANN., LAB. & EMPL. § 3-716 (LexisNexis 2022) (noncompetes void as applied to an employee making less than “\$15 per hour” or “\$31,200 annually”); *infra* Part II.D (reviewing examples of state statutes that ban noncompetes for low-wage workers).

94. See WHITE HOUSE, *supra* note 89; *infra* Part II.D.

95. See WHITE HOUSE, *supra* note 89.

legal,⁹⁶ and they are feasibly considered in states whose courts use noncompete tests that explicitly consider public policy.⁹⁷ Indeed, in response to such concerns, some state legislatures have banned noncompetes in certain industries.⁹⁸ Although the public policy rationale is worth acknowledging, it is less relevant than the first rationale—equity for individual workers—for purposes of this Note. While the economic merits of noncompetition covenants are a popular public debate topic, a court reviewing a noncompetition covenant is theoretically cabined to considering equitable principles as applied to the worker before them, and thus, this Note similarly cabins its discussion.

C. *The Tales Converge*

Alongside the noncompete’s increasing unpopularity is a simultaneous shift in work: an increased prevalence of alternative work arrangements.⁹⁹ Independent contractors face a heightened threat of deprivation of employment protections.¹⁰⁰ In particular, employers may seek to exploit the ability to control worker tasks without taking responsibility for worker protections such as overtime pay or health and safety precautions.¹⁰¹ As the number of independent contractors continues to grow, the seemingly niche issue of noncompetition covenants may arise more often in this context.¹⁰²

Technology companies in particular consistently employ noncompetes, and thus this growing sector has highlighted the issues regarding enforcement of noncompetes.¹⁰³ Executives at these companies have access to trade secrets or confidential information, and they are usually asked to sign noncompetes for this reason.¹⁰⁴ But there is a significant danger that “unskilled laborers” and “entry-level” workers are required to sign them,

96. See, e.g., U.S. DEP’T OF TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 3–4 (2016), https://home.treasury.gov/system/files/226/Non-Compete_Contracts_Economic_Effects_and_Policy_Implications_MAR2016.pdf [<https://perma.cc/EB4F-T2WW>] (explaining that noncompetes potentially hinder the “matching of workers and firms” and may also “induce workers to leave their occupations entirely [and] forego[] accumulated training and experience”).

97. See *infra* Part II.A (describing the balancing tests state courts use for noncompetes as applied to employees); *infra* note 125 and accompanying text.

98. See, e.g., HAW. REV. STAT. § 480-4 (2022) (stating that any noncompete “relating to an employee of a technology business” would be treated as void); *infra* Part II.D (reviewing examples of state statutes that ban noncompetes in certain industries).

99. See Ockels et al., *supra* note 2; *supra* Part I.A.2 (discussing the rise of “informal” work arrangements).

100. See FED. TRADE COMM’N, *supra* note 41, at 4–5.

101. See *id.*

102. See ASPELUND & BECKNER, *supra* note 15.

103. See Hannah Ceriani, *The Debate over Non-Competes Among Tech Companies*, RICH. J.L. & TECH. BLOG (Feb. 22, 2022), <https://jolt.richmond.edu/2022/02/22/the-debate-over-non-competes-among-tech-companies/> [<https://perma.cc/M4MG-9U64>].

104. See Sophie Quinton, *Why Janitors Get Noncompete Agreements, Too*, PEW CHARITABLE TRS. (May 17, 2017), www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/05/17/why-janitors-get-noncompete-agreements-too [<https://perma.cc/A5CU-VH6X>].

too.¹⁰⁵ Much of the debate surrounding noncompetes focuses on their application to employees.¹⁰⁶ But this debate has largely ignored those not categorized as “employees”—namely the “unskilled laborers” who are classified as “independent contractors,” such as data-entry workers or janitors.

Labor law provides employees with mechanisms, like collective bargaining, to limit the overreach of noncompetition covenants.¹⁰⁷ However, independent contractors are not covered by the NLRA and do not have access to those same mechanisms.¹⁰⁸ This disconnect presents several important questions that may guide a court’s consideration of the issue of noncompetition covenants as applied to independent contractors.¹⁰⁹ One is whether employers have any legitimate interest in restricting the mobility of those contractors.¹¹⁰ Another is whether independent contractors have more bargaining power than employees do and, therefore, whether they can better control what goes in their contracts—including noncompete clauses.¹¹¹ However, noncompetes may decrease bargaining power not only for employees, but also for any workers required to sign them.¹¹² Despite a worker’s classification as a contractor, opportunities for work still may be limited, and there may be a heavy reliance on certain employers, as is the case with traditional employees.¹¹³ As a result, although there tends to be an assumption that independent contractors are on more equal footing with an employer compared to employees,¹¹⁴ the reality is that independent contractors in many fields are required to accept worse contract terms than similarly situated workers falling in the employee category.¹¹⁵

105. *Id.*

106. *See, e.g.*, Arnow-Richman, *supra* note 33.

107. *See, e.g.*, 29 U.S.C. § 157.

108. *See id.* § 151 (identifying the prevention of “industrial strife or unrest” resulting from the “denial . . . of the right of employees to organize” as an underlying purpose of the NLRA).

109. *See infra* Part III (arguing that questions of employer interests and worker vulnerability should guide a court’s analysis).

110. *See supra* Part I.B.1; *supra* notes 77–80 and accompanying text.

111. *See* Tanya Goldman & David Weil, *Who’s Responsible Here?: Establishing Legal Responsibility in the Fissured Workplace*, 42 BERKELEY J. EMP. & LAB. L. 55, 60 & n.21 (2021) (describing the flaw with this assumption and noting that “[m]ost of our critical workplace protection laws . . . excluded certain categories of vulnerable workers and conditioned access to critical rights on employment status”).

112. *See* Anna Stansbury & Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy* 12 (Nat’l Bureau of Econ. Rsch., Working Paper Series, Paper No. 27193, 2020), https://www.nber.org/system/files/working_papers/w27193/w27193.pdf [<https://perma.cc/24MQ-KA5Z>]. For a broader discussion of how “reduced worker power” impacts the labor market, see generally *id.*

113. *See infra* Part III.B.

114. *See* Eric A. Posner, *The Economic Basis of the Independent Contractor/Employee Distinction*, 100 TEX. L. REV. 353, 380–81 (2021) (“Labor law assumes that employees lack bargaining power.”).

115. *See, e.g.*, *Schmit Towing, Inc. v. Frovik*, No. A12-0989, 2012 WL 6652637, at *1 (Minn. Ct. App. Dec. 24, 2012) (describing how an independent contractor “was told that if he failed to sign the agreement [that included a noncompetition covenant] he would no longer be permitted to work” for the employer).

The convergence of the noncompete and worker-classification debates raises new concerns that current noncompetition jurisprudence will not adequately address the needs of workers. Next, Part II of this Note reviews that jurisprudence, examining the current treatment of noncompetition covenants for independent contractors.

II. VIEWS ON NONCOMPETITION COVENANTS AS APPLIED TO INDEPENDENT CONTRACTORS

There has been an increased push to narrow the scope of noncompetition covenants.¹¹⁶ However, as a contract issue, the law on noncompetes varies by state.¹¹⁷ When reviewing a noncompetition covenant, the first task is to determine which state's law governs the worker's contract, followed by an individualized factual analysis.¹¹⁸ A number of courts have not spoken on the application of a noncompete to an independent contractor, and the ones that have do not address it very often.¹¹⁹ This part categorizes the existing views on noncompetition covenants in the independent contractor context into four analytically distinct approaches: (1) treating independent contractors like employees, (2) giving independent contractors greater protection than employees, (3) giving independent contractors less protection than employees, and (4) imposing total or partial bans on noncompetes.

A. *Treat Them Like Employees*

Most state courts that have addressed this issue do not differentiate between employees and independent contractors when interpreting noncompetition agreements.¹²⁰ The “employee test” evaluates whether the covenant not to compete is tailored enough to meet a legitimate business interest.¹²¹

116. See Edward Segal, *How Biden's Proposed Ban on Non-Compete Agreements Would Impact Companies*, FORBES (July 9, 2021, 9:04 AM), <https://www.forbes.com/sites/edwardsegal/2021/07/09/how-bidens-proposed-ban-on-non-compete-agreements-would-impact-companies/> [<https://perma.cc/3G77-QGY8>].

117. See *Contract*, WEX LEGAL DICTIONARY, <https://www.law.cornell.edu/wex/contract> [<https://perma.cc/6WFM-PNSV>] (last visited Mar. 6, 2023) (“Contract law is generally governed by state common law.”).

118. See *id.*

119. See, e.g., *Renal Treatment Ctrs.-Mo., Inc. v. Braxton*, 945 S.W.2d 557, 563 (Mo. Ct. App. 1997) (noting that the issue of “whether covenants not to compete apply to an independent contractor” was one of first impression); *Baker v. Hooper*, No. 03A01-9707-cv-00280, 1998 WL 608285, at *3 (Tenn. Ct. App. Aug. 6, 1998) (same).

120. See, e.g., *Key Realty, Ltd. v. Hall*, 173 N.E.3d 831, 849 (Ohio Ct. App. 2021) (“[T]he distinction between at-will employee and independent contractor is ‘not relevant’ when considering the enforceability of a noncompete agreement.” (quoting *Fin. Dimensions, Inc. v. Zifer*, No. C-980960, 1999 WL 1127292, at *4 (Ohio Ct. App. Dec. 10, 1999))), *aff'd*, 189 N.E.3d 785 (Ohio 2022); *Reddy v. Cmty. Health Found. of Man*, 298 S.E.2d 906, 919 (W. Va. 1982) (“[T]he semantic distinction between an ‘employee’ and an ‘independent contractor’ should not be a controlling factor where the analysis we have endorsed of a restrictive covenant reveals a sound, legitimate, economic basis for enforcing the covenant.”).

121. See Kaye, *supra* note 7.

Although it may vary from state to state, the test will require that the covenant (1) further a legitimate interest of the employer¹²² and (2) be reasonably tailored “in scope, geography, and time to further a protectable interest of the employer.”¹²³ Some courts will also explicitly consider general contract principles¹²⁴ or public policy¹²⁵ in their tests.

These courts support their decisions by either (1) relying on statutory or restatement language governing principal-agent relationships or (2) focusing primarily on the question of whether a legitimate business interest exists.

1. Principal-Agent Relationships, Rather than Employer-Employee Relationships, as the Focus

Some courts have analogized independent contractors’ relationships to the principal-agent relationship to justify treatment of independent contractors as employees. For example, principal-agent relationships are similar to employer-employee relationships but include a wider range of relationships.¹²⁶ Although “not all independent contractors are agents,” some courts have found any extension of the narrower employer-employee relationship to be instructive in a noncompete analysis.¹²⁷ When the relevant statute governing noncompetes uses the terms “principal” and “agent” rather than “employer” and “employee,” courts have treated independent contractors as it would employees.¹²⁸

122. See RESTATEMENT OF EMP. L. § 8.07(a) (AM. L. INST. 2015); *supra* Part I.B.1 (discussing protectable, legitimate employer interests in the employee context); see also RESTATEMENT OF EMP. L. § 8.07(b) (AM. L. INST. 2015) (identifying legitimate employer interests to be (1) containing trade secrets and protectable confidential information, (2) customer relationships, (3) reputation in the market, and (4) purchase of a business owned by the employee); Drechsler, *supra* note 77 and accompanying text.

123. See RESTATEMENT OF EMP. L. § 8.06 (AM. L. INST. 2015) (a noncompetition covenant is enforceable “only if it is reasonably tailored in scope, geography, and time”).

124. See, e.g., *Piercing Pagoda, Inc. v. Hoffner*, 351 A.2d 207, 210 (Pa. 1976) (noting that a covenant “must be supported by adequate consideration”); *Hassler v. Circle C Res.*, 505 P.3d 169, 174 (Wyo. 2022) (explaining that enforceable noncompetes must be “based on reasonable consideration”); see also *Kaye*, *supra* note 7 (requiring compliance with contract principles like assent and consideration as necessary to enforce a noncompete). Although a discussion of these contract law concepts fall outside of the scope of this Note, they remain relevant as a worker’s classification might affect a court’s determination on whether to require compliance with these principles at all. See *infra* Part II.C.

125. See, e.g., *Caring Hearts Pers. Home Servs., Inc. v. Hopley*, 130 P.3d 1215, 1222 (Kan. Ct. App. 2006) (considering whether a covenant is “injurious to the public welfare”); *Pollack v. Calimag*, 458 N.W.2d 591, 598 (Wis. Ct. App. 1990) (holding that to be enforceable, a noncompetition covenant must “not be contrary to public policy”).

126. See RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006) (“Agency is the fiduciary relationship that arises when . . . a ‘principal’ . . . manifests assent to . . . an ‘agent’ . . . that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”).

127. See RESTATEMENT (FIRST) OF AGENCY § 2 cmt. b (AM. L. INST. 1933). Not every agent is an employee. See RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006) (collecting cases that define “when the agent is not an employee”).

128. This was the case when the issue was raised in Wisconsin state court. See *Pollack*, 458 N.W.2d at 598 (noting that the applicable statute, WIS. STAT. § 103.465 (1990), governed agreements “of the employer or principal”).

Several courts have identified the same linguistic distinctions in restatements of contract law to support their rulings in this context. At least two states, Pennsylvania¹²⁹ and Tennessee,¹³⁰ have done so, albeit in interpreting different restatement provisions. In *Quaker City Engine Rebuilders, Inc. v. Toscano*,¹³¹ a Pennsylvania state court explicitly highlighted such language.¹³² The restatement language it pointed to discussed restraints in the context of “agent” and “principal” relationships, in addition to “servant” and “employer” relationships.¹³³ This, the court reasoned, justified an extension in the use of “restrictive covenants” in the independent contractor context.¹³⁴ The court, in addition to this rationale, also analyzed cases decided by the Supreme Court of Pennsylvania and extrapolated principles that were consistent with the restatement language.¹³⁵

The Tennessee state court in *Baker v. Hooper*¹³⁶ did not rely on explicit language in the restatement referring to principals and agents but rather on language that noncompetes could be valid in relationships beyond just that of employer-employee.¹³⁷ The restatement provision cited by the court focused on whether the employer-principal had a legitimate interest, noting that “other situations” could give rise to a legitimate interest.¹³⁸ The *Baker* court also relied on a survey of how state courts, like those of North Carolina and Georgia, treat the issue.¹³⁹ In sum, courts going this route look for language other than “employer” and “employee” to justify the application of the employee noncompete test to the independent contractor before them.

2. Legitimate Business Interests as the Focus

A few state courts have reasoned that the validity of a noncompete is derived from an employer’s interests, and that the “semantic distinction between an ‘employee’ and an ‘independent contractor’” is of little relevance to the analysis.¹⁴⁰

129. See *Quaker City Engine Rebuilders, Inc. v. Toscano*, 535 A.2d 1083, 1088–89 (Pa. Super. Ct. 1987) (relying on the RESTATEMENT (FIRST) OF CONTS. § 516 (AM. L. INST. 1932) mention of “agent” and “principal”).

130. See *Baker v. Hooper*, No. 03A01-9707-CV-00280, 1998 WL 608285, at *3 (Tenn. Ct. App. Aug. 6, 1998) (relying on a note in the RESTATEMENT (SECOND) OF CONTS. § 188 (AM. L. INST. 1981) that relationships giving rise to a “legitimate interest” may sustain a noncompete).

131. 535 A.2d 1083 (Pa. Super. Ct. 1987).

132. *Id.* at 1088.

133. RESTATEMENT (FIRST) OF CONTS. § 516(f) (AM. L. INST. 1932).

134. See *Toscano*, 535 A.2d at 1088.

135. See *id.* at 1087–88. Specifically, the court pointed to multiple examples in which “restrictive covenant[s] outside the traditional employee/employer relationship” were upheld, including in a franchiser-franchisee relationship. *Id.*

136. No. 03A01-9707-CV-00280, 1998 WL 608285 (Tenn. Ct. App. Aug. 6, 1998).

137. See *id.* at *3 (noting that the list of relationships in the restatement was not exclusive).

138. RESTATEMENT (SECOND) OF CONTS. § 188 cmt. e (AM. L. INST. 1981).

139. See 1998 WL 608285, at *3.

140. *Reddy v. Cmty. Health Found. of Man*, 298 S.E.2d 906, 919 (W. Va. 1982); see also *Kegel v. Tillotson*, 297 S.W.3d 908, 912 (Ky. Ct. App. 2009) (deeming the issue of “status as an independent contractor . . . [as] a distinction without merit”).

An Illinois appellate court further explained this rationale in *Eichmann v. National Hospital & Health Care Services, Inc.*,¹⁴¹ in which it determined that independent contractors should be treated the same as employees.¹⁴² There, the court explained that the true point of contention was whether the employer's interest—preventing the plaintiff insurance broker from taking its customers—was a legitimate one.¹⁴³ At the same time, the court brushed aside arguments regarding the relative bargaining strength of employees and independent contractors as irrelevant.¹⁴⁴ Other state courts have provided similar analyses.¹⁴⁵

At least one court has found an employer's identified interest to be insufficient regardless of whether the worker was classified as an employee or an independent contractor.¹⁴⁶ In *Century 21 Access America v. Garcia*,¹⁴⁷ a Connecticut court reviewed a noncompetition covenant as applied to a real estate agent who, in the five months before leaving the plaintiff's business, had received little training, made just one sale, and was not "privity to any valuable or strategic corporate information."¹⁴⁸ As a result, the court found the noncompetition covenant to be "punitive and not reasonable."¹⁴⁹ As *Garcia* illustrates, the common thread among state courts in this category is that they find employees and independent contractors "sufficiently analogous" to treat them similarly, regardless of the legal rationale underlying the decision.¹⁵⁰

B. Greater Protection than Employees

A handful of state courts have been willing to uphold noncompete covenants as applied to independent contractors, but warn that the bar should be even higher than when enforcing noncompetes in the employer-employee context.¹⁵¹

141. 719 N.E.2d 1141 (Ill. App. Ct. 1999).

142. *Id.* at 1146.

143. *See id.*

144. *See id.*

145. *See, e.g., Prudential Locations, L.L.C. v. Gagnon*, 509 P.3d 1099, 1108 (Haw. 2022) (finding a noncompete unenforceable against a real estate broker for lack of "legitimate purpose"); *Zellner v. Stephen D. Conrad, M.D., P.C.*, 589 N.Y.S.2d 903, 906 (App. Div. 1992) (stating that "what matters" is that the worker "was paid for the work he did and had no contractual expectation of anything more").

146. *See Century 21 Access Am. v. Garcia*, No. 4000081, 2004 WL 1966048, at *2 (Conn. Super. Ct. Aug. 6, 2004).

147. No. 4000081, 2004 WL 1966048 (Conn. Super. Ct. Aug. 6, 2004).

148. *Id.* at *1–2.

149. *Id.* at *2.

150. *Quaker City Engine Rebuilders, Inc. v. Toscano*, 535 A.2d 1083, 1087 (Pa. Super. Ct. 1987).

151. *See Ag Spectrum Co. v. Elder*, 191 F. Supp. 3d 966, 972 (S.D. Iowa 2016) ("It seems a reasonable distillation of existing Iowa law that non-compete agreements involving independent contractors are enforceable in Iowa but with even greater restraint than would be applied in cases involving former employees."); *aff'd*, 865 F.3d 1088 (8th Cir. 2017); *EDIX Media Grp., Inc. v. Mahani*, No. CIV.A. 2186-N, 2006 WL 3742595, at *8 (Del. Ch. Dec. 12, 2006) ("The legitimate economic interests of an employer in restricting the substantially similar activities of an independent contractor will be more limited than they would be with

In *Ag Spectrum v. Elder*,¹⁵² the U.S. District Court for the Southern District of Iowa applied Iowa state law on this issue.¹⁵³ There, the plaintiff, a seller of agricultural products, sued the defendant, an independent contractor who used his own business to sell plaintiff's products, after the termination of their working relationship.¹⁵⁴ In holding the noncompetition covenant to be unenforceable, the court listed the reasons why employers have much less interest in limiting the competitive activity of independent contractors relative to employees, including that employers are less likely to "invest in training" and that independent contractors "do not reap the same benefits from employment as do employees" under Iowa employment statutes.¹⁵⁵ However, the court ultimately concluded that the plaintiff company did not show that the noncompete was "reasonably necessary to protect its business," and did not rely on the independent contractor's perspective.¹⁵⁶

A Delaware court further detailed why independent contractors should not be treated the same as employees in *EDIX Media Group, Inc. v. Mahani*.¹⁵⁷ There, an independent contractor working for a company in the niche industry of "after-market modifications" to cars was sued by the company for trying to work in the same field after their working relationship was terminated.¹⁵⁸ In reviewing the noncompete, the court acknowledged that although other jurisdictions have treated independent contractors like employees, there were "strong reasons to recognize the distinction."¹⁵⁹ Like the *Elder* court, the *Mahani* court explained that independent contractors receive less training from employers, are subject to "greater risk of non-payment," and are "responsible for paying their own income taxes."¹⁶⁰

The court further emphasized that the intimacy of the "traditional employee/employer relationship" is not applicable to independent contractors.¹⁶¹ For example, employees enjoy lesser "legal duties" because an employer "is responsible for the employees' torts in negligence."¹⁶² The Delaware court found that enforcing the noncompete would create "such an injustice" that the contractor would essentially "be forced entirely from employment" in the industry.¹⁶³

respect to an employee."); *Starkings Ct. Reporting Servs., Inc. v. Collins*, 313 S.E.2d 614, 615 (N.C. Ct. App. 1984) ("Defendant here was truly an independent contractor and not an employee of plaintiff's.").

152. 191 F. Supp. 3d 966 (S.D. Iowa 2016), *aff'd*, 865 F.3d 1088 (8th Cir. 2017).

153. *Id.* at 972.

154. *Id.* at 969.

155. *Id.* at 973.

156. *Id.* at 975; *see also supra* Part II.A.2 (discussing court decisions that treat independent contractors and employees the same by focusing primarily on whether the employer has a legitimate business interest to protect).

157. No. CIV.A. 2186-N, 2006 WL 3742595 (Del. Ch. Dec. 12, 2006).

158. *See id.* at *1.

159. *See id.* at *7.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at *8.

Workers that fall outside the scope of “employee” tend to use their own equipment, exert more control over how they get work done, and receive less confidential information than employees do.¹⁶⁴ These considerations alone have caused some courts to treat the worker’s classification as its own factor in the noncompete analysis, although without much more explanation.¹⁶⁵

C. *Less Protection than Employees*

No state court has explicitly stated that independent contractors need less protection from the enforcement of a noncompetition covenant than employees do. However, some courts have declined to extend certain protections to contractors that they may have otherwise granted if not for the difference in classification.¹⁶⁶ The rationale for holding noncompetes to a lower standard in the independent contractor arena is sparse.¹⁶⁷

Two courts have nevertheless gone in this direction.¹⁶⁸ Idaho did so without explanation in *Trumble v. Farm Bureau Mutual Insurance Co. of Idaho*.¹⁶⁹ There, the court dealt with a “non-competition clause [that was also] a forfeiture provision.”¹⁷⁰ In evaluating the provision, the court found the worker’s classification as an independent contractor to be crucial, holding that “the reasonableness analysis applicable to employees” when reviewing a forfeiture provision did not apply, with no explanation of the distinction’s relevance.¹⁷¹

A Minnesota court came to a similar conclusion in *Schmit Towing, Inc. v. Frovik*,¹⁷² giving a “separation of powers”-esque rationale rather than a legal

164. See *Starkings Ct. Reporting Servs., Inc. v. Collins*, 313 S.E.2d 614, 615–16 (N.C. Ct. App. 1984).

165. See *id.* (noting that the defendant “used her own equipment, paid her own operating expenses, and was not subject to any . . . direction or control by plaintiff” as support for voiding a noncompete).

166. See, e.g., *Trumble v. Farm Bureau Mut. Ins. Co. of Idaho*, 456 P.3d 201, 212 (Idaho 2019) (“[S]tatus as an independent contractor [is] distinguish[able from] cases holding that forfeiture clauses are subject to a reasonableness analysis.”); *Schmit Towing, Inc. v. Frovik*, No. A10-362, 2010 WL 4451572, at *3 (Minn. Ct. App. Nov. 9, 2010) (declining to impose the requirement for independent consideration for a noncompetition covenant “outside of the employer-employee context [such that i]mposing the requirement . . . would therefore require an extension of existing law”).

167. See, e.g., *Trumble*, 456 P.3d at 212 (concluding that the defendant’s “status as an independent contractor distinguished the cases” in which the defendant was an employee, without further explanation).

168. See *supra* note 166 and accompanying text.

169. 456 P.3d 201 (Idaho 2019).

170. *Id.* at 212. For a definition of forfeiture, see *Forfeiture*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“The loss of a right, privilege, or property because of a . . . breach of obligation.”). This is an example of a case in which the worker’s classification resulted in a court not requiring the presence of certain contract principles to enforce a noncompete. See *supra* note 124 and accompanying text.

171. See *Trumble*, 456 P.3d at 212. The *Trumble* court ultimately held that the forfeiture provision was not a restraint on trade. *Id.* (noting that forfeiture provisions, like the one at issue, “do not prohibit competition; they simply impose contractual forfeitures”).

172. No. A10-362, 2010 WL 4451572 (Minn. Ct. App. Nov. 9, 2010).

one.¹⁷³ There, the court explained that when evaluating a noncompete in the employer-employee context, independent consideration—a contract law requirement that an employer give something in exchange for a noncompete—is necessary to sustain it.¹⁷⁴ The court found that the employer had not provided independent consideration in return for the addition of a noncompetition provision in the worker’s contract.¹⁷⁵ However, because the worker was an independent contractor, the court determined that the requirement did not apply.¹⁷⁶ Minnesota’s intermediate appellate courts had previously held that the requirement “only . . . applied in the context of employer-employee relationships,” and extending it to an independent contractor would require an “extension of existing law,” a task for the legislature or the state’s high court.¹⁷⁷ Beyond this discussion, the *Frovik* court declined to explicitly compare independent contractors to employees.¹⁷⁸

Further, some scholars have noted that classification needs to be monitored more closely.¹⁷⁹ If a worker is properly classified, it follows that employees are not protected by “market competition” in the way that independent contractors are.¹⁸⁰ The correctly classified independent contractor likely has assets that they own (unlike the employee, who does not),¹⁸¹ so the independent contractor therefore has more bargaining power and is in less need of protection.¹⁸² Because a “genuine independent contractor” is likely regarded as “a seasoned individual who has the ability and the means necessary to absorb all risks incident to making the profit,” it is presumed that the contractor’s expertise gives them bargaining power beyond that of

173. *See id.* at *3 (explaining that to apply a certain contract requirement beyond the employer-employee relationship would be an extension of existing law, a “task . . . fall[ing] to the supreme court or the legislature” (quoting *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. Ct. App. 1987))).

174. *See id.* at *2; *Consideration*, BLACK’S LAW DICTIONARY (11th ed. 2019) (explaining that consideration is “something . . . bargained for . . . which motivates a person to do something”). Courts will require that a noncompete is “supported by adequate consideration” but will not necessarily hold an employer to that requirement if the contract is with an independent contractor rather than an employee. *See Frovik*, 2010 WL 4451572, at *2 (quoting *Sanborn Mfg. Co. v. Currie*, 500 N.W.2d 161, 164 (Minn. Ct. App. 1993)).

175. *See Frovik*, 2010 WL 4451572, at *1.

176. *See id.* at *3 (holding that “the post-employment independent-consideration requirement” did not apply to independent contractors).

177. *Id.* (citing *Sanborn Mfg. Co. v. Currie*, 500 N.W.2d 161, 164 (Minn. Ct. App. 1993)).

178. *See id.*

179. *See, e.g.*, Goldman & Weil, *supra* note 111, at 68 (noting that “there are significant costs for society as a whole when workers are misclassified as independent contractors”); Posner, *supra* note 114, at 370, 373.

180. *See Posner, supra* note 114, at 370, 373 (arguing that independent contractors should not receive the employment law protections that employees receive because “competition adequately protects them”).

181. *See* RESTATEMENT (SECOND) OF AGENCY § 220 (AM. L. INST. 1958) (noting that whether the “employer or the [worker] supplies the instrumentalities” is relevant to determining a worker’s classification).

182. *See Posner, supra* note 114, at 360 n.17.

“the ordinary worker.”¹⁸³ Such beliefs are likely to be driving the distinction made by the courts in this category, regardless of the argument’s validity.¹⁸⁴

D. Total or Partial Bans on Noncompetition Covenants

Much of the law discussed in Part II of this Note thus far comes from state common law.¹⁸⁵ Courts are often reluctant to disagree with their prior decisions, and even when they do, changes in jurisprudence are likely to come at a snail’s pace.¹⁸⁶ It comes as little surprise, therefore, that all bans, whether totally or in part based on certain worker attributes, have come from state legislatures. This is notable—because state courts have developed tests to uphold some noncompetition covenants as reasonable, it is unlikely that those same courts will develop rules banning them altogether on their own. The reasoning of the *Frovik* court would prevail in this context: a ban constitutes a dramatic enough change in the law such that it should come from the legislature rather than the courts.¹⁸⁷ This has proven to be the case thus far.

At least one state, Washington, has banned noncompetition covenants as void and unenforceable for independent contractors if the contractor makes under \$250,000 per year.¹⁸⁸ Washington also bans noncompetition covenants for employees, but only if they make under \$100,000 per year, affording employees less protection than independent contractors.¹⁸⁹

A handful of states have banned noncompetition covenants for low-wage or hourly workers.¹⁹⁰ For example, Nevada has banned noncompetition

183. 13 LA. CIV. L. TREATISE § 74 (5th ed. 2022), Westlaw LACIVL PREMAT.

184. As a result, antitrust law is likely seen as an alternative source of protection for independent contractors. However, antitrust law arguably has the opposite effect, limiting independent contractors’ ability to organize like employees. *See, e.g.*, Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 976 (2016) (discussing how the “threat of antitrust liability” constrains contractors’ “ability to organize”).

185. Common law is the “body of law derived from judicial decisions, rather than from statutes or constitutions.” *Common Law*, BLACK’S LAW DICTIONARY (11th ed. 2019); *see also supra* Parts II.A–C (reviewing state common law rules regarding noncompetes as applied to independent contractors).

186. Courts largely adhere to the principle of stare decisis, “under which a court must follow earlier judicial decisions” when facing the same legal issue again. *Stare Decisis*, BLACK’S LAW DICTIONARY (11th ed. 2019); *see also* Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 189 (2006) (“When legal rules are emerging, they are built slowly, piece by piece. Once established by a body of precedent, a legal rule can only change slowly.”). Though the concept of stare decisis is implicated throughout this Note, whether courts should strictly adhere to such a principle is outside the scope of this Note.

187. *See Schmit Towing, Inc. v. Frovik*, No. A10-362, 2010 WL 4451572, at *3 (Minn. Ct App. Nov. 9, 2010).

188. WASH. REV. CODE § 49.62.030 (2023).

189. *Id.* § 49.62.020.

190. These states include, among others, Maine, *see* ME. STAT. tit. 26, § 599-A (2023), Maryland, *see* MD. CODE ANN., LAB. & EMPL. § 3-716 (LexisNexis 2022), New Hampshire, *see* N.H. REV. STAT. ANN. § 275:70-a (2023), Rhode Island, *see* 28 R.I. GEN. LAWS § 28-59-3(a) (2022), and Virginia, *see* VA. CODE ANN. § 40.1-28.7:8 (2022). *See also* Jerry Cohen, Karen Breda & Thomas J. Carey Jr., *Employee Noncompetition Laws and Practices:*

covenants for employees paid an hourly wage.¹⁹¹ Some political consensus is forming around the idea that low-wage earners should be shielded from noncompetes.¹⁹² This consensus addresses the equity problem, while remaining silent on the policy problem.¹⁹³

Alternatively, as noncompetition covenants pose a larger threat to some industries than to others, some state legislatures have decided to ban them in particular industries.¹⁹⁴ Hawaii, for example, has banned noncompetition covenants in the technology industry.¹⁹⁵ Similarly, Colorado bans them as applied to physicians,¹⁹⁶ and Utah restricts their use in the broadcasting industry.¹⁹⁷ The rationales behind industry-specific bans are similar to those behind total bans in that they concern competition and innovation.¹⁹⁸ Simply put, these statutes were passed with the idea of promoting “the growth of new businesses in the economy” and curtailing the effect of noncompete agreements “driving skilled workers to other jurisdictions.”¹⁹⁹

Four jurisdictions have taken that reasoning a step further, banning noncompetition covenants without any distinction as to whom they are being applied.²⁰⁰ The most famous of these examples is California’s section 16600,²⁰¹ in effect since 1872. California courts have repeatedly upheld the statute as promoting “settled public policy in favor of open competition,” simultaneously rejecting the common-law reasonableness tests that the majority of other states use.²⁰² Arguments in favor of such bans echo the sentiment that bans are good for competition and worker mobility.²⁰³

A Massachusetts Paradigm Shift Goes National, 103 MASS. L. REV. 31, 49 (2022) (citing various state “reform bills”).

191. NEV. REV. STAT. § 613.195(3) (2023).

192. See Chris Marr, *Red State Lawmakers Look at Noncompete Bans for Low-Wage Workers*, BLOOMBERG L. (Feb. 9, 2022, 5:30 AM), <https://news.bloomberglaw.com/daily-labor-report/red-state-lawmakers-look-at-noncompete-bans-for-low-wage-workers> [<https://perma.cc/KK58-YLTY>].

193. See *supra* Part I.B.2.

194. See WHITE HOUSE, NON-COMPETE REFORM: A POLICYMAKER’S GUIDE TO STATE POLICIES 6–7 (2016), https://obamawhitehouse.archives.gov/sites/default/files/competition/state-by-statenoncompetesexplainer_unembargoedfinal.pdf [<https://perma.cc/Z5W5-DLAU>].

195. HAW. REV. STAT. § 480-4(d) (2022) (prohibiting “noncompete clause[s] . . . in any employment contract relating to an employee of a technology business”). The statute provides that “technology business means a trade or business that derives the majority of its gross income from the sale or license of products or services resulting from its software development or information technology development, or both.” *Id.*

196. See COLO. REV. STAT. ANN. § 8-2-113(5) (2023).

197. See UTAH CODE ANN. § 34-51-201(2) (LexisNexis 2022).

198. See *infra* notes 202–04 and accompanying text.

199. Prudential Locations, LLC v. Gagnon, 509 P.3d 1099, 1107 n.7 (Haw. Apr. 1, 2022) (quoting 2015 Haw. Sess. Laws 514 § 1).

200. The four jurisdictions are (1) California, see CAL. BUS. & PROF. CODE § 16600 (West 2023), (2) North Dakota, see N.D. CENT. CODE § 9-08-06 (2023), (3) Oklahoma, see OKLA. STAT. tit. 15, § 217 (2023), and (4) Washington, D.C., see D.C. CODE § 32-581.02 (2023).

201. BUS. & PROF. § 16600.

202. Edwards v. Arthur Andersen LLP, 189 P.3d 285, 290 (Cal. 2008).

203. See, e.g., Exec. Order No. 14,036, Promoting Competition in the American Economy, 86 Fed. Reg. 36987, 36992 (July 9, 2021).

Noncompetes in the independent contractor context are complex, as highlighted by the lack of consensus among state courts and legislatures. The four current approaches all focus on a comparison between independent contractors and employees. Informed by these four approaches, Part III suggests a new approach for courts to take that does not require a comparison between independent contractors and employees, shifting the focus solely to the parties involved—the employer and the independent contractor.

III. A MODIFIED TEST FOR NONCOMPETITION COVENANTS AS APPLIED TO INDEPENDENT CONTRACTORS

From the judiciary's perspective, a bright-line rule governing the application of noncompetes to independent contractors would be the easiest to implement—and perhaps the easiest to understand. However, in the world of noncompetition covenants, the “caselaw has established that no bright-line rule exists.”²⁰⁴ The risk of inequitable application of noncompetition agreements is too great to create a bright-line rule.²⁰⁵ A hard-and-fast rule banning noncompetition covenants partially or totally,²⁰⁶ or providing little to no protection for workers at all,²⁰⁷ would “sacrific[e] equity for certainty.”²⁰⁸ An outright ban of any sort ignores the reality that employers have interests worth protecting.²⁰⁹ At the same time, to provide no protection to independent contractors ignores the reality that an increasing share of workers may be vulnerable in the modern economy.²¹⁰ A one-size-fits-all approach ignores the fact that independent contractors are not a monolith, given that noncompetes potentially have drastically different impacts on Uber drivers and software engineers falling under the expansive umbrella of “independent contractor.”

This part sets out a number of factors worthy of examination when state courts consider whether to enforce a noncompete against an independent contractor. Although some courts may think employees and independent contractors are “sufficiently analogous,”²¹¹ rendering a specialized inquiry

204. John C. Anderson, *Noncompetes: Consideration, Peppered with Confusion*, ILL. BAR J., Nov. 2018, at 32, 34.

205. See, e.g., *EDIX Media Grp., Inc. v. Mahani*, No. CIV.A. 2186-N, 2006 WL 3742595, at *8 (Del. Ch. Dec. 12, 2006) (deeming a noncompete unenforceable after considering all of the material facts presented in the case).

206. See *supra* Part II.D.

207. See *supra* Part II.C.

208. *Rule*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a bright-line rule as one “that tends to resolve issues, esp. ambiguities, simply and straightforwardly, sometimes sacrificing equity for certainty”).

209. See *supra* Part I.B.1 (noting protectable, legitimate business interests and recognizing situations in which a noncompete could be essential to the employer).

210. See *supra* Part I.A.2 (identifying that labor law affords employees some protections that independent contractors do not receive).

211. *Quaker City Engine Rebuilders, Inc. v. Toscano*, 535 A.2d 1083, 1087 (Pa. Super. Ct. 1987); see also *supra* Part II.A (discussing different rationales used to treat independent contractors and employees in the same manner).

unnecessary, the distinction has made a difference in other courts.²¹² Given the growth of nontraditional work arrangements²¹³ and the many “strong reasons” discussed below for considering a worker’s classification status,²¹⁴ it is appropriate to establish a separate test for reviewing noncompete covenants as applied to independent contractors. The best test would require courts to consider the case-specific facts to achieve the most equitable outcomes and would seek to answer the questions highlighted at the intersection of the noncompetition covenant and worker-classification tests.²¹⁵ The goal of this part is to develop a framework that allows for noncompetition covenants to be enforced only when fair to both parties in the work arrangement. This Note argues that, unlike the current approaches, the proper test should not use a standard that is stricter or looser than the test in the employer-employee context but rather one that applies different considerations altogether.

First, the inquiry begins with the familiar threshold question of whether the employer has a legitimate business interest to protect.²¹⁶ Second, courts should consider the noncompete in light of the independent contractor’s vulnerabilities.

A. *Does the Employer Have a Legitimate Business Interest?*

Step one of the test for the application of noncompetes to independent contractors is similar to the test that most courts use for employees.²¹⁷ If an employer does not have a legitimate business interest, a noncompetition covenant in this context should be treated as *per se* invalid.²¹⁸ Otherwise, a noncompetition covenant simply amounts to a restriction of competition, which alone is not a protectable employer interest.²¹⁹

There is no concrete list delineating what constitutes a legitimate interest.²²⁰ However, legitimate interests in the independent contractor context should mimic two of those that are considered in the employee context: (1) the worker has access to valuable employer knowledge or (2) the worker has a large influence over customers.²²¹ The idea underlying each is

212. *See supra* Part II.C (discussing court decisions denying independent contractors protection based on their classification).

213. *See supra* note 40 and accompanying text.

214. *EDIX Media Grp., Inc. v. Mahani*, No. CIV.A. 2186-N, 2006 WL 3742595, at *7 (Del. Ch. Dec. 12, 2006).

215. *See supra* Part I.C (identifying the relevant questions as, first, whether employers ever have a protectable interest and, second, whether the independent contractor is vulnerable and therefore requires protection).

216. *See supra* note 74 and accompanying text.

217. *See supra* note 122 and accompanying text.

218. *See supra* note 74 and accompanying text.

219. *See Drechsler, supra* note 75.

220. *See generally* 104 AM. JUR. PROOF OF FACTS 3D, *supra* note 64, at 393, § 3 (collecting cases).

221. *See supra* notes 76–81 and accompanying text. This list is not meant to be exhaustive. For example, in the employee context, investment in employee training has been identified as a potential legitimate interest, and it is feasible that an independent contractor could receive such training. *See, e.g.,* *Kaye, supra* note 7, § 17; *Ag Spectrum Co. v. Elder*, 191 F. Supp. 3d

that, without the noncompetition covenant, the worker's departure could be detrimental to the employer's business.²²² This first part of the test is in line with most states' current noncompete jurisprudence.²²³

1. Access to Knowledge

It is possible that independent contractors must be made privy to inside information in order to work for an employer.²²⁴ For example, someone developing new technology for a company necessarily has access to a trade secret, i.e., the technology itself.²²⁵ The risk to the company does not change depending on a worker's classification; if the worker understands how the technology works, then by going to work elsewhere, the worker could potentially destroy the company's competitive advantage by taking those trade secrets with them.²²⁶ This consideration is especially salient in the technology industry, in which proprietary technology can make up entire businesses. Another example, particularly relevant to sales-oriented businesses, is that an employer may have a protectable interest when it comes to a customer list. If the list is something that is not easily compiled, it should be treated by courts like a trade secret, therefore rendering the noncompete more likely enforceable.²²⁷

Another relevant consideration within this category is the nature of the job and the worker's position relative to others working for the employer.²²⁸ For example, a contractor providing high-level managerial services may need to be privy to information about the employer that is not public, and therefore, the employer would have a legitimate interest to protect.²²⁹ However, if a relatively low-level worker with no need to access confidential information is barred from working for a competitor, a noncompete would likely hurt the worker with little to no benefit for the employer enforcing the agreement besides restraining the market for labor, which is not a legitimate business

966, 973 (S.D. Iowa 2016) (noting that employers are less likely to "invest in training" for independent contractors), *aff'd*, 865 F.3d 1088 (8th Cir. 2017). However, this rationale is rarely used to support a noncompete for employees and is even less likely to succeed in the independent contractor context.

222. See Drechsler, *supra* note 77, § 4[e] ("[T]he employer must be able to point out . . . circumstances which render the restrictive covenant reasonably necessary for the protection of his business.").

223. See, e.g., *supra* note 74 and accompanying text.

224. This inside information consists both of trade secrets and confidential information, but given the substantial overlap, this Note treats them as one. See *supra* notes 78–79 and accompanying text.

225. See Ceriani, *supra* note 103.

226. See Drechsler, *supra* note 77, § 1[a] ("[A] former employee is precluded from using for his own advantage, and to the detriment of his former employer, information or trade secrets acquired by or imparted to him in the course of his employment.").

227. See Kaye, *supra* note 7, § 18.

228. See *id.* § 8 (noting "the nature of the position held" as relevant to the reasonableness of a noncompete).

229. See *id.* § 15 ("[I]t is proper to consider whether the particular position or capacity in which the [worker] is employed would in fact require the [worker] to disclose or make use of a prior employer's confidential information.").

interest.²³⁰ As a result, consideration of this factor also accomplishes what some noncompete bans seek to do: prevent the unfair enforcement of noncompetes against workers with low wages.²³¹

2. Influence over Customers

Protection of customer lists is not the only customer-related employer interest worthy of protection.²³² Employers may have a protectable interest when a worker exerts “special influence” over “customers of the employer.”²³³ Especially in sales-oriented businesses, an employer’s largest assets are generally its customer contacts and goodwill.²³⁴ Contractors dealing with customers might have “particularized knowledge” of how to deal with them, and the goodwill ends up attaching to the contractor rather than the employer.²³⁵ This is especially true when customers create “repeat business” and are not just “one-time” customers.²³⁶ Should the contractor leave and take their former employer’s customers with them, it could pose a serious risk to the business, justifying the use of a noncompete.

B. Is the Independent Contractor Vulnerable?

Although the first part of the proposed inquiry regarding an employer’s legitimate interests echoes most tests for noncompetition covenants in the employee context, the second part is where the inquiry for independent contractors should diverge. There are times when a noncompete would be void, regardless of a worker’s classification;²³⁷ such situations tend to be those that fail at step one of the test, before considering the worker at all.²³⁸

But what should the court do next if an employer does have a legitimate interest to protect? First, it should still maintain its requirements that a noncompete be reasonable in duration, scope, and geography.²³⁹

Next, although courts have implied that independent contractors should receive more or less protection than employees,²⁴⁰ courts should not compare independent contractors to employees. Instead, they should acknowledge

230. *See id.* (noting that it “may not be appropriate to prevent” a worker from “working in the same business or industry in a capacity that would not implicate confidential information”).

231. *See supra* Part II.D (discussing bans on noncompetes as applied to workers making below a particular wage threshold).

232. *See supra* note 227 and accompanying text.

233. *See Drechsler, supra* note 77, § 23[a].

234. *See Kaye, supra* note 7, § 19 (noting that workers that have “substantial contact” with customers are in a unique “position to take for [their] own benefit the employer’s good will”).

235. *See id.*

236. *Id.*

237. *See, e.g., Century 21 Access Am. v. Garcia*, No. 4000081, 2004 WL 1966048, at *1 (Conn. Super. Ct. Aug. 6, 2004).

238. *See supra* Part II.A.2 (identifying state court decisions reasoning that the legitimate business interest part of the inquiry should be the main focus in deciding whether to enforce a noncompete, and therefore treating employees and independent contractors the same).

239. *See* RESTATEMENT OF EMP. L. § 8.06 (AM. L. INST. 2015).

240. *See supra* Parts II.B–C.

that independent contractors are different from employees and evaluate noncompetition covenants using an inquiry that is better tailored for such a work arrangement. The second part of this test consists of considerations that help courts answer the ultimate question: is it equitable to enforce a noncompetition covenant against the independent contractor?

There are several reasons for “recogniz[ing] the distinction” between employees and independent contractors.²⁴¹ Independent contractors, like employees, are not on equal bargaining terms with employers,²⁴² and yet, they do not get many of the protections that employees do, like the ability to organize.²⁴³ The court should also take into account other factors, such as how integrated a contractor is in the employer’s business, as well as the number of contractors an employer is using in a similar function. Consideration of such factors is not so different from the current jurisprudence of most noncompete common law. So, rather than adopting a ban (as some state legislatures have decided to do), a modified inquiry for independent contractors represents a reasonable, less drastic change for a state court.

A court reviewing a noncompete may find that any one of these factors, or another fact specific to a worker’s situation, is strong enough to invalidate a noncompete. The rest of this part reviews each of these considerations in turn.²⁴⁴

1. Duration, Scope, and Geography

Although this Note advocates for a divergence in the second part of the traditional test for noncompetes as applied to independent contractors, it does not advocate that “reasonableness” requirements should disappear in this context.²⁴⁵ Like in the employee context, one guiding principle in the inquiry should be that a noncompete is tailored to meet the employer’s legitimate interest.²⁴⁶ Regardless of the context, protection against competition alone is still not a legitimate business interest.²⁴⁷ This necessarily requires consideration of the noncompete’s terms. However, given the less predictable nature of an independent contractor’s relationship with an

241. *EDIX Media Grp., Inc. v. Mahani*, No. CIV.A. 2186-N, 2006 WL 3742595, at *7 (Del. Ch. Dec. 12, 2006).

242. Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1684 (2016) (noting that today’s independent contractors “lack . . . entrepreneurial power”).

243. See *supra* Part I.A.1 (discussing the NLRA).

244. Implied throughout this part of the test is a consideration of public policy. Although much scholarship exists regarding the economic policy behind noncompetition agreements, this Note advocates that if a court decides to bring in any policy considerations, it should focus on potential impacts to the individual worker before it rather than opine on economic policy. See, e.g., *supra* note 89 and accompanying text. Indeed, the difficulty involved in opining on economic policy likely contributes to the fact that bans of any sort have come from state legislatures, not courts. See *supra* Part II.D.

245. See RESTATEMENT (SECOND) OF CONTS. § 188 (AM. L. INST. 1981).

246. See RESTATEMENT OF EMP. L. § 8.06 (AM. L. INST. 2015).

247. See Drechsler, *supra* note 75.

employer, these terms are necessary considerations, but they are not the only ones. Nevertheless, the more tailored a noncompete's terms are, the more likely a court should uphold it.

2. Bargaining Power

One potential rebuttal to the idea that independent contractors should be protected from noncompetition covenants is that the purpose of labor law is to put employers and workers on equal footing when bargaining,²⁴⁸ and independent contractors already have substantial bargaining power.²⁴⁹ Yet in reality, independent contractors do not often have equal bargaining power with employers.²⁵⁰

If a court finds that a contractor could realistically bargain for the removal or narrowing of a noncompete, then this would point toward the noncompete being reasonable. But if agreeing to the noncompete is beyond the contractor's control, then a court should consider this as weighing in favor of invalidation.

The "independent contractor" classification once applied to a narrower set of workers "whose skills demanded higher pay in the open market."²⁵¹ Now, however, many more workers fall under this umbrella.²⁵² It is no longer a reasonable assumption that independent contractors have enough power to control contractual terms such that a noncompete will always be fairly bargained for. As a result, an independent contractor faces greater risks, as the *Elder* court noted, like less investment in the contractor's training, which further harms the worker's bargaining power.²⁵³ If an independent contractor attempts to challenge the noncompete agreement in their contract, there is a high probability that an employer would tell a worker to forget it and hire someone else.

Nothing should prohibit a court from looking at the fact-specific circumstances surrounding the contractor's agreement. Independent contractors are not an easily defined category of worker.²⁵⁴ Because each worker's bargaining power will vary tremendously, it is likely to have a crucial impact on whether the independent contractor is vulnerable and, thus, whether the noncompete should apply.

248. See Goldman & Weil, *supra* note 111, at 59 ("The core purpose of worker protections is to remedy the unequal nature of working relationships.").

249. See *supra* note 111 and accompanying text.

250. See Naomi B. Sunshine, *Employees As Price-Takers*, 22 LEWIS & CLARK L. REV. 105, 133 n.158 (2018) (citing Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479, 495 (2016)).

251. Cunningham-Parmeter, *supra* note 242, at 1684.

252. See *id.* ("For example, some low-skilled employees such as janitors and restaurant servers who once indisputably enjoyed employee status now work for businesses that designate them as independent contractors."); *supra* Part I.A.2.

253. See *Ag Spectrum Co. v. Elder*, 191 F. Supp. 3d 966, 973 (S.D. Iowa 2016), *aff'd*, 865 F.3d 1088 (8th Cir. 2017).

254. See *supra* Part I.A.2 (discussing a range of "informal work arrangements," from "gig" workers utilizing app-based services to construction workers).

3. Integration

Another important consideration for courts is a contractor's integration into the employer's operation. Closely related to bargaining power, integration may mean that independent contractors find themselves dependent on a particular company.²⁵⁵ One way to think about this factor is whether a worker is similar to a traditional employee.²⁵⁶ When evaluating this factor, a court should look to substance over form and consider voiding a noncompete if the worker is as integrated as an employee.

The integration factor should not track the instinct of courts to uphold a noncompete when a worker is more integrated.²⁵⁷ Although heavier integration of a worker might coincide with a likely protectable interest for the employer,²⁵⁸ greater integration also highlights the independent contractor's vulnerability—the employer may retain control over their work, despite the independent contractor lacking protections afforded to employees under labor laws.²⁵⁹ As the *Mahani* court noted, the employee enjoys lesser “legal duties” than the independent contractor does.²⁶⁰

Take, for example, a barista working at a law firm's café. The firm used to hire a barista as an employee of its own but has recently decided to hire an “outside” independent contractor instead. The current barista, although an independent contractor, in reality does all of their work with the same firm full-time. This relationship with the firm is fundamentally different from that of, for example, a caterer hired to work firm events once every month. The caterer is less reliant on the firm for their income and less intertwined with the firm's day-to-day business. Although the barista is not in the same business as the lawyers at the firm are, they work in the same building, interact with each other daily, and likely identify as working for the same firm. This factor is admittedly relative. However, the barista is more integrated, and therefore more reliant on the firm, rendering a noncompete in this context more likely to be void.

The modified approach identifies considerations that will best guide the court to an equitable outcome when reviewing a noncompete. It maintains the more general requirement that an employer must have a legitimate business interest to protect. Then, unlike the approaches reviewed in Part II, the modified approach requires a specialized inquiry into the independent contractor's vulnerability by considering the independent contractor's particular situation. This approach better recognizes the changes occurring across the workforce.

255. See Cunningham-Parmeter, *supra* note 242, at 1684.

256. See *id.* In his article, Professor Keith Cunningham-Parmeter discusses the recategorization of some workers who used to be employees as independent contractors, despite doing largely the same job for the same company. See *id.*

257. See *supra* notes 77–79 and accompanying text.

258. See *supra* notes 77–79 and accompanying text.

259. See generally *supra* Part I.A.1.

260. EDIX Media Grp., Inc. v. Mahani, No. CIV.A. 2186–N, 2006 WL 3742595, at *7 (Del. Ch. Dec. 12, 2006).

CONCLUSION

The makeup of the workforce is changing, with more workers falling outside of the traditional employer-employee context.²⁶¹ But protections for the workforce are failing to keep up.²⁶² Noncompetes are one way for employers to exert influence over a worker, with great potential for abuse and inequitable outcomes.²⁶³ This Note does not call for banning noncompetes for independent contractors altogether, nor does it argue that no protection is necessary. Rather, a modified inquiry, based on the general tests used in the employee context, provides a reasonable approach for state courts facing this issue. Courts should still first ensure that employers seeking to enforce a noncompete have a protectable, legitimate business interest.²⁶⁴ Then, the court should shift its focus to the specific circumstances of the independent contractor before it. If it finds that the noncompete's terms are unreasonable, that the contractor lacked the bargaining power to reasonably negotiate the noncompete, or that the contractor is fully integrated and reliant on the employer, then the court may conclude that the noncompete is invalid.

Noncompete covenants, when narrowly tailored, can be justified. Courts face a challenging task when reviewing them and, regardless of whether an employer seeks to enforce one against an employee or an independent contractor, there is no easy way out—the reviewing court must dig into the facts. The worker's classification—much more than a mere semantic distinction—is a key fact. The court should tailor its review accordingly.

261. See *Who Are Independent Contractors, and How Would the PRO Act Limit Their Opportunity?*, *supra* note 1.

262. See Goldman & Weil, *supra* note 111, at 65 (noting that modern work arrangements have “undermined the rights and protections typically afforded workers via employment”).

263. See, e.g., WHITE HOUSE, *supra* note 89.

264. See *supra* Part I.B.1 (discussing valid legitimate interests in the noncompete context).