NON-COMPETES AND WORKPLACE MORALE – A CLASS EXERCISE AS THE FTC RULE IS CHALLENGED

Perry Z. Binder *

ABSTRACT:

This article examines non-compete agreements and their effect on employee morale through a module presented in flexible formats. While the Federal Trade Commission passed a Rule in 2024 eliminating non-competes for many workers in the United States, that regulation faces legal and political challenges. As it remains unclear whether all or a portion of the Rule will be implemented, this paper offers hypothetical scenarios that legal studies professors can adapt to their current state laws. These diverse exercises include a writing component and team presentations, or merely a group breakout and class discussion. The ultimate goal of these activities is to have students critically examine and balance the value of "lawyering up" their businesses with the effect on workplace productivity tied to potentially lower employee morale. Section I details the module formats. Section II discusses the law of non-competes, as compared to other types of restrictive covenants. Section III reviews student feedback and what the author would do differently with the project in the future. Finally, this assignment has been used effectively in both *Legal & Ethical Environment of Business* and MBA law courses.

I. INTRODUCTION

It is impossible to unsign a contract,
so do all your thinking before you sign.

—Warren Buffett

It hurts a lot when . . . you don't even understand
what you're reading in your contract.

—Mary J. Blige

We often hear that "[f]irst impressions count. That's why it's important that HR has everything set up to give new starters a first day at work to remember."[1] However well-intentioned a "surprise them" tip[2] is for human resources professionals, the biggest surprise of all for the employee who quit a good job for this new one, is to discover a non-compete clause buried in the paperwork signed on day one.

In many states, non-compete agreements[3] do not just apply to company executives. Those expected to sign these contracts include "hair stylists, yoga instructors, teenage camp counselors and fast food

---

* JD, Clinical Associate Professor of Legal Studies, Robinson College of Business at Georgia State University.

[1] *7 Ways That HR Can Give New Starters A Perfect First Day (with Welcome Message Examples),* EMPLOYMENTHERO (June 14, 2022, updated Aug. 16, 2024), https://employmenthero.com/blog/welcome-new-employee/ (last visited Nov. 1, 2024).

[2] *Id.*

[3] A non-compete is "an agreement between the employer and the employee that prohibits the employee from competing with his employer in a business which is the same as or is similar to his employer's business" [and must be reasonable in] "territory, activity, and time restrictions." Gary P. Kohn, *A Fresh Look: Lowering the Mortality Rate of Covenants Not to Compete Ancillary to Employment Contracts and to Sale of Business Contracts in Georgia,* 31 EMORY L.J. 635, 651-652 (1982) (brackets added).

workers."[4] Some temporary warehouse workers "sign a non-compete agreement when they are hired and again prior to receiving severance."[5] Further, even in states where non-competes are unenforceable under the law,[6] some companies "routinely insert [them] in employment contracts" since "people often wrongly believe their signature binds them, even to illegal terms."[7]

In 2024, the Federal Trade Commission (FTC) announced a Rule banning non-competes in the workplace with some exceptions.[8] Soon thereafter, lawsuits were filed to prevent the Rule's implementation.[9] It remains unclear how long it will take to resolve these lawsuits and other potential challenges.[10]

---

[4] Michael McCann, *Pro teams claim analytics are 'Mine!' through non-disclosure agreements*, SPORTICO (Mar. 3, 2021, 5:55 AM), https://www.sportico.com/law/analysis/2021/analytics-sports-nondisclosure-agreements-1234623912/, citing Michael A. Heller & James Salzman, MINE! (Doubleday 2021).

[5] Nick Stumo-Langer, *Non-compete agreements could prevent workers from finding new jobs during and after the pandemic*, MINNPOST (May 15, 2020), https://www.minnpost.com/community-voices/2020/05/non-compete-agreements-could-prevent-workers-from-finding-new-jobs-during-and-after-the-pandemic/. "An agreement obtained by a reporter for The Verge in 2015 stated that the employee will not support the development or sale of 'any product or service that competes or intended to compete with any product or service sold or offered' by Amazon for 18 months. When your former employer calls itself the everything store, you are limited from doing a lot." *Id.*

[6] These states include California, Oklahoma, Minnesota, and North Dakota. State Noncompete Law Tracker, ECONOMIC INNOVATION GROUP, https://eig.org/state-noncompete-map/ (last visited Nov. 1, 2024).

[7] Pro teams claim analytics, *supra* note 4 (brackets original).

[8] Robert J. Simandl, Craig T. Papka & Maeve G. O'Malley, *FTC Issues Final Rule Banning Non-Competes*, THE NAT'L L. REV. (Apr. 30, 2024), https://natlawreview.com/article/ftc-issues-final-rule-banning-non-competes. The FTC listed the following reasons as justification for passing the Rule:

- Noncompetes restrict the freedom of American workers and suppress wages.

- Noncompetes stifle new businesses and new ideas.

- Noncompetes are widespread throughout the U.S. economy.

Fact Sheet on the FTC's Noncompete Rulemaking, FTC, https://www.ftc.gov/system/files/ftc_gov/pdf/Non-Compete-Fact-Sheet.pdf (last visited Nov. 1, 2024).

To read the FTC Rule in its entirety, see *Non-Compete Clause Rule*, 89 Fed. Reg. 38342 (2024), https://www.federalregister.gov/documents/2024/05/07/2024-09171/non-compete-clause-rule (last visited Nov. 1, 2024).

[9] To date, lawsuits have been filed in Florida, Pennsylvania, and Texas. See Justin A. Allen & Jack H. Robinson, *FTC Noncompete Ban Rule Survives Challenge in Pennsylvania Federal Court, but Still Contested in Florida and Texas*, THE NAT'L L. REV. (July 24, 2024), https://natlawreview.com/article/ftc-noncompete-ban-rule-survives-challenge-pennsylvania-federal-court-still and Daniel Wiessner, *US judge pauses Chamber's legal challenge to FTC noncompete ban*, REUTERS (May 3, 2024, 5:05 PM), https://www.reuters.com/legal/government/us-judge-pauses-chambers-legal-challenge-ftc-noncompete-ban-2024-05-03/.

[10] Jeanne Sahadi, *Noncompete agreements aren't going anywhere. What to know if you sign one*, CNN (Sept. 2, 2024, 6:00 PM), https://www.cnn.com/2024/09/02/business/noncompete-agreements-what-to-know-now/index.html. It is additionally unclear whether the new administration will reverse course on the Rule's implementation. Mark L. Daniel, *The Future of Federal Non-Compete Bans in a Trump Administration*, THE NAT'L L. REV. (Nov. 26, 2024), https://natlawreview.com/article/future-federal-non-compete-bans-trump-administration ("Predicting the incoming Trump administration's position on non-compete bans is not straightforward.").

While most states have statutes addressing non-competes,[11] these laws are being examined and changed yearly.[12] Presently, only a handful of states require employers to disclose to job candidates that signing a non-compete agreement is a condition of employment.[13] In other states, these surprise agreements may have a profound effect on employee morale. If "you trap them with a non-compete, you may end up with a staffer who is disengaged, uninspired and/or unfulfilled."[14] Likewise, employee performance may suffer. In an experiment with over 1,000 participants, researchers at Harvard University concluded:

---

[11] See *infra* note 28.

[12] See John R. FitzGerald & Pauline R. Wizig, *States with Pending Legislation to Ban Employee Noncompetes: Maine Poised to be Next State to Enact a Ban*, FOLEY & LARDNER (March 25, 2024), https://www.foley.com/insights/publications/2024/03/states-ban-employee-noncompetes-maine/; Zachary Folk, *Which States Have Banned Non-Compete Clauses? Here's What To Know As New York Could Be Next*, FORBES (Dec. 6, 2023, 5:00 PM), https://www.forbes.com/sites/zacharyfolk/2023/12/06/which-states-have-banned-non-compete-clauses-heres-what-to-know-as-new-york-could-be-next/?sh=13fad76b95c0; and *In four years, 16 states have changed their non-compete laws, affecting thousands of companies*, NORTH TEXAS LEGAL NEWS (May 26, 2020), https://northtexaslegalnews.com/2020/05/26/in-four-years-16-states-have-changed-their-non-compete-laws-affecting-thousands-of-companies/ (last visited Nov. 1, 2024).

[13] COLO. REV. STAT. § 8-2-113 (2023) (establishing the duty of an employer to provide a copy of the agreement containing the noncompete, provide a separate additional notice of the named agreement accompanied by a signature from the worker, an explicit statement that the agreement contains a potentially restrictive noncompete covenant, and the employer must direct the worker to specific portions of the text); D.C. CODE § 32-581.01–.03 (2022) (allowing noncompete clauses for highly compensated employees but requiring written notice, timely furnishing a copy of the non-compete agreement, inclusion of boilerplate language, and a copy and notice of workplace policy for covenants allowed under the non-compete ban act); 820 ILCS 90/20 (2023) (requiring that within 14 days of the inception of employment the employer: (1) give notice to the employee of any required non-compete or non-solicitation covenant; (2) provide a written copy for review; and (3) advise the employee in writing of the employee's right to counsel); LA. R.S. § 37:1448.1 (2023) (exclusively relating to noncompete and non-solicitation of customer covenants between real estate brokers and licensees must be displayed prominently and in no less than ten-point typeface and allows the licensee to rescind the agreement "by or before midnight of the third business day the later of the execution or delivery of the agreement"); MASS. GEN. LAWS C. 149, § 24L (2018) (requires employers to disclose a required non-compete agreement to the worker either before a formal offer of employment or 10 business days before the start of the job); ME. REV. STAT. ANN. TIT. 26 § 599-A (2019) (prior to making an offer of employment, an employer must disclose to a potential employee that he or she will be asked to sign a non-compete agreement if hired); N.H. REV. STAT. § 275:70, 275:70-a (2014) (requires a non-compete agreement to be provided prior to acceptance of a job offer); OR. REV. STAT. § 653.295 (2017) (a non-compete contract must be provided at the time of the job offer, at least two weeks prior to the start of the employment); and WASH. REV. CODE § 49.62.020 (2023) (an employer must disclose the terms of a non-compete agreement in writing to prospective employees no later than the time of acceptance of the offer of employment).

[14] *Non-Competes are Non-Effective*, POMPEOGROUP (Mar. 21, 2020), https://pompeo.com/non-competes-are-non-effective/ (last visited Nov. 1, 2024).

> We believe that limits on future employment not only dim workers' external prospects but also decrease their perceived ownership of their jobs, sapping their desire to exert themselves and develop their skills. The resulting drop in performance may be more damaging to companies than the actual loss of the employees would be.[15]

Ultimately, people may be forced to uproot families and move elsewhere to find gainful employment because of terms in a non-compete agreement.[16]

This paper examines non-competes and workplace morale through a class exercise which may be assigned in different formats. These flexible modules allow legal studies professors to gauge how much in-class and outside-of-class time they wish to devote to this topic. Section II of the article describes the exercise, student survey questions, feedback, and learning outcomes. Section III further discusses the module and the current state of non-compete laws. Finally, while this assignment was designed for *Legal & Ethical Environment of Business* courses, it has also been used effectively in MBA law classes.

II. NON-COMPETE EXERCISE FORMATS, SURVEYS, AND LEARNING OUTCOMES

The exercise is flexible and can be completed as:

1- an in-class module with minimal preparation; or
2- a group project with a writing component and a class presentation.

A. Module Formats & Anonymous Student Survey Questions

For the in-class format, the author assigns textbook reading on contracts and encourages students to quickly read on the internet about their state's non-compete laws. In addition, they are asked to read the non-compete module and be prepared to discuss it with fellow students in a breakout session, and then together when the class reconvenes.[17]

---

[15] On Amir & Orly Lobel, *How Noncompetes Stifle Performance*, HARV. BUS. REV. MAG. (Jan.-Feb. 2014), https://hbr.org/2014/01/how-noncompetes-stifle-performance.

[16] During the pandemic, when several anesthesiologists had their hospital contracts cancelled, "terminating a relationship with a practice that began more than a half-century ago," a non-compete prevented them from being re-hired." Eric Starkman, *Beaumont Health Terminates More Than 70 Heroic Covid Docs*, DEADLINE DETROIT (July 3, 2020, 7:50 AM), https://www.deadlinedetroit.com/articles/25676/starkman_beaumont_health_terminates_more_than_70_heroic_covid_docs. "As part of an earlier sellout of their practice to a publicly traded company called Mednax in 2011, Beaumont's elite anesthetists signed non-compete clauses, which prevents them from joining NorthStar even if they wanted to." *Id.*

[17] For a journal article that discusses other ways to engage with students about non-competes, see Tonia Hap Murphy, *Covenants Not to Compete in Employment Contracts: Worth a Closer Look in the Classroom*, 32(1) J. LEGAL STUD. EDUC. 131 (2015). For other journal articles dealing with non-competes or anti-competitive employment clauses, see generally Norman D. Bishara & Michelle Westermann-Behaylo, *The Law and Ethics of Restrictions on an Employee's Post-Employment Mobility,* 49(1) AM . BUS. L.J. 1 (2012); Gregory Day, *Anticompetitive Employment*, 57(3) AM. BUS. L.J. 487 (2020); Christopher P. Dinkel, *The Future of Work and U.S. Public Opinion on Noncompete Law: Evidence from a Conjoint Experiment,* 60(4) AM . BUS. L.J. 749 (2023);

Further, in the university's Learning Management System (LMS), the author posts a pre-exercise anonymous student survey, to be completed before the class module. The facts presented in these questions differ from the exercise but they all pose that non-compete terms will be enforced, whether employees quit, are fired, or are laid off. In a recent semester, 37 out of 40 students answered two simple Yes/No questions:

> 1- You are currently working as a Manager in clothing retail for 5 years and earn $5,000 more than comparable positions in the area. You are the only store manager and today you were told to sign a non-compete …[18]
>
> Yes
>
> No (knowing you will be fired)
>
> 2- In this scenario, you are the business OWNER. You just got back from your lawyer's office and she insists that you have your manager sign a non-compete …[19]
>
> Yes
>
> No

The main purpose of the pre-exercise survey is to gauge students' general attitudes about non-competes before a deep dive into the material. At the start of class, the results[20] are shared with students with an ensuing brief discussion of the responses.

Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45(1) AM. BUS. L.J. 107 (2008); Nathaniel Grow, *Free Agency for the Front Office: How Data Analytics and Noncompete Agreements Threaten to Disrupt Competitive Balance in U.S. Professional Sports Leagues*, 58(1) AM . BUS. L.J. 121 (2021); and Marisa Anne Pagnattaro, *'The Google Challenge': Enforcement of Noncompete and Trade Secret Agreements for Employees Working in China*, 44(4) AM. BUS. L.J. 603 (2007).

[18] See Appendix A for a full set of facts.

[19] *Id.*

[20] Question 1: 12 Yes and 25 No. Question 2: 18 Yes and 19 No.

At that point, the exercise is displayed on the projector screen for the class to re-read:

> For the past eight years, you have been a middle manager at the BLAW company, currently with seven employees on your team. Today, BLAW's ten middle managers including you were called into a meeting by your supervisor, a senior vice president who just met with the company president and in-house counsel. The senior VP advised that each manager and their team members will need to sign a non-compete agreement…[21]

Then, students are instructed to form impromptu teams of two or three people to discuss possible solutions to the module for 5-10 minutes. These activities can be done in person and online. For the latter, it is important to set up randomly assigned groups of, e.g., three people in the LMS, and set a timer to have everyone return to the main room.

Next, the Instructor reconvenes the class and asks each team for input on how they would navigate these issues as if they were middle managers facing this situation. After students exhaust their ideas, the Instructor weighs in with thoughts and offers additional solutions.

The author uses the above assignment in both *Legal & Ethical Environment of Business* and MBA law classes. To dive deeper into the subject matter, the author assigns the exercise in a different format in MBA classes.

MBA students are asked to research the state law on non-competes, write a memorandum detailing the law, express how they would navigate the above-mentioned exercise in an actual job, offer possible solutions along with any "compromise solutions" with the employer, and address the complex issue of workplace morale when a non-compete is involved.

These students are given the pre-exercise survey before working on the group project to gauge their thoughts on the subject. Similarly, they are given the post-exercise survey after the project is completed, graded, and discussed in class. Finally, in some semesters, MBA teams presented their solutions in front of the class.

B. Student Discussion of Non-Competes and Workplace Morale

Prior to going over the law of non-competes, the class examines business issues from the exercise to get a feel for how participants would handle tense and stressful workplace situations. They are asked to think critically and devise practical solutions—before being taught a variety of legal options.

The class discussion usually begins with some students saying: "If I sign it, it's no big deal because either the employer will never find out where I'm going to work next," or "It probably won't be enforceable." For possible solutions, typical student responses include:

[21] See Appendix B for a full set of facts.

- Speaking with peers on what they are going to do;
- Trying to negotiate the length of time for a non-compete;
- Having it only apply when employees quit a job and not when they are fired or laid off; and
- Getting all ten managers to speak and agree that as a unit they do not wish to sign the agreements, since "they are the company."

The last response above generates a robust class debate. While many students acknowledge it as a viable solution, some point out that not everyone has the luxury of threatening to quit. A few people express that many individuals live paycheck to paycheck and have greater financial responsibilities than others. Anecdotally, a student stated that he was with a company for ten years and was approached to sign a non-compete. He wanted to stay with the company so he said he would show it to an attorney and negotiate greater compensation in exchange for signing the agreement.[22]

At this point, the Instructor asks students to defend or criticize this statement: "The benefits of non-competes to a business outweigh the potential lower morale of its employees subject to such an agreement." They engage in a thoughtful discussion of whether non-competes would affect job productivity. To give them an additional real world instance to ponder, pose the following hypothetical:

> A small airline trained its mechanics and had them sign an 18-month non-compete covering the surrounding three counties where there are major airports if they leave the airline "for any reason." Invariably, someone left and found work as a mechanic at another airline in

---

[22] "Under most states' common law . . . [n]on-compete agreements must be supported by valid consideration, which means that the employee must receive something of value in exchange for agreeing to the restrictions. For example, the offer of initial employment, a promotion, or *additional compensation may serve as valid consideration*." Jeffrey Scott Tenenbaum, *Employee Non-Compete Agreements: What Every Association Needs to Know in a Rapidly Evolving Legal and Regulatory Landscape*, AMERICAN BAR ASS'N BUSINESS LAW TODAY (June 2023), https://www.americanbar.org/groups/business_law/resources/business-law-today/2023-june/employee-non-compete-agreements-what-every-association-needs-to-know/ (brackets and emphasis added).

In the television show, *Mad Men*, Donald Draper tried his best to stay contract-free as an advertising creative director but eventually took $5,000 in exchange for signing a three-year non-compete. Mad Men, Seven Twenty Three, IMDb, https://www.imdb.com/title/tt1472778/plotsummary/ (last visited Nov. 1, 2024). Season Three of Mad Men is set in 1963. Rose Maura Lorre, *New a New Binge? Travel Back in Time With Our Ultimate Guide to Everything Mad Men*, PARADE (March 26, 2021), https://parade.com/1183764/rose-maura-lorre/mad-men/. Per one calculation, $5,000 in 1963 may be worth $50,452 in 2024. DOLLARTIMES, https://www.dollartimes.com/inflation/inflation.php?amount=5000&year=1963 (last visited Nov. 1, 2024).

the prohibited geographic region. The airline found out about it and filed a breach of contract Complaint against the ex-employee, along with a count for an injunction to prevent the ex-employee from working at the new airline, and possibly a count for tortious interference with contractual relations[23] against the hiring airline. After obtaining a judgment, the airline tacked a copy to the mechanics' employee bulletin board, to show employees what will happen to them if they leave the airline.

Students probe the morale issues prompted by the employer's actions. Finally, the Instructor goes over the pending FTC Rule on non-competes and educates students on the law governing their state.[24]

C. Post-Exercise Anonymous Student Feedback and Learning Outcomes

After a comprehensive module discussion, the author provides anonymous post-exercise questions. The first two questions mirror the pre-exercise survey with similar results.[25] An additional question involving workplace morale had the following results:

As the manager, assume that you signed the agreement. What effect would this contract have on your morale in the workplace?

---

[23] A plaintiff must establish the following elements in a tortious interference with an existing contract cause of action:

1. Existence of a valid contractual relationship or business expectancy;
2. Knowledge of the contractual relationship or expectancy by the defendant;
3. Intentional interference inducing or causing a breach or termination of the contractual relationship or expectancy; and
4. Resultant damage to the party whose contractual relationship or expectancy has been disrupted.

David N. Anthony, *Tortious Interference with Contract or Business Expectancy: An Overview of Virginia Law*, THE VIRGINIA BAR ASS'N NEWSLETTER, 9 (Oct./Nov. 2006), *citing* Chaves v. Johnson, 230 Va. 112, 120 (1985).

[24] As an example of state law, see GA. **CODE** ANN. § 13-8-53 (2011). Georgia voters in 2010:

approved an amendment to the constitution which allowed the state to enact the Georgia Restrictive Covenants Act expanding the enforceability of noncompetes the following year. In Georgia, an employee affected by a non-compete must either regularly solicit customers or make sales, hold a management position, or otherwise act as a key employee or professional. Time restraints of up to two years are presumed to be reasonable, while time restraints greater than two years are presumed to be unreasonable.

[The provision also] [e]xpanded the enforceability of noncompetes by allowing the courts to engage in blue penciling and examine noncompete covenants separately from nonsolicitation covenants. (Effective 5/11/2011, not retroactive)

See State Noncompete Law Tracker, *supra* note 6 (brackets added). Further, Georgia has no wage threshold or an industry ban for non-compete agreements. *Id.* For additional information on select state non-compete laws, see *infra* notes 40 and 42.

[25] Thirty-three students responded. As to whether they would sign as a manager, 7 Yes and 26 No, an 11% difference. As to whether they would insist on a non-compete as an owner, 16 Yes and 17 No, which was virtually the same as the pre-exercise survey data.

Significant 24

Moderate 6

None 3

The 24 students in the "Significant" category closely match the number of students (26) who would not sign the agreement. However, in another question focusing on the owner's perceptions, 18 students previously said they'd insist on the non-compete but 31 students decided to run the business with Significant or Moderate worker morale issues:

You are now the business owner in the above situation and your manager signed the non-compete. What effect do you think this contract would have on the manager's morale in the workplace?

Significant 14

Moderate 17

None 2

In the class that followed the post-exercise survey, the author asked students what "Moderate" meant and asked them to balance the significant to moderate drop in job productivity with having employees sign a non-compete.

Further, they were asked to post anonymous comments on whether they would sign a non-compete as a manager and whether they would insist on a non-compete as an owner. Students who responded that they would sign a non-compete included:

- "The non-compete will not affect the status of most employees;"
- "Can't bear loss for 4 months [time estimated in the module to find comparable work] but this will definitely frustrate me in my day-to-day duties;" and
- "I don't like it but I don't have a choice because I will be fired and the law of this country does not protect workers."

For those who would refuse to sign the non-compete, responses varied as follows:

- [If I signed and got fired], "it will significantly affect my career for more than two years [length of non-compete in the exercise];"
- "Limitations on how I can move outside of work sounds like a red flag to me. I'd rather find a new job;" and
- "It would show a lack of trust in employees."

Student comments as an owner, on having employees sign the non-compete include:

- "I'm implementing my lawyer's advice;"
- "As an owner, I would want the manager to work in my business and when they leave not take my business secrets;" and
- "As an owner, I will protect my business interest first."

Finally, the student responses on an owner not insisting on a non-compete included:

- "As an owner, I do not want to put my employees in an uncomfortable position;"
- "I think that the Manager would be demoralized and not feel valued;" and
- "The non-compete causes anxiety about job mobility despite the $1,000/year compensation increase."

Hopefully, students found the survey questions and the module interesting and eye-opening. These activities are offered to achieve the following learning outcomes, as students:

- Gain strategic thinking skills with a fact-shifting real world scenario;
- Appreciate the complexity of morale issues tied to employment contracts, from both an employee and employer perspective;
- Grapple with whether to always "lawyer up" or balance a lawyer's advice with business and productivity issues in a company;
- Learn soft skills in negotiating job offers, such as tactfully finding out from a recruiter or company point person whether the job is subject to a non-compete, before quitting a current job;[26] and
- Discover that accepting a job is more than just the "job title, salary, and start date."

As a wrap-up, the author shares what an independent contractor[27] might do in the following scenario: "You are sent a one-page contract that states at the end: 'This agreement is subject to the company policy handbook'." Here, the contractor needs to inquire from the appropriate person whether there is a non-compete in the handbook tied to the agreement, and if so, decide whether the project is worth pursuing.

---

[26] There are only a handful of states where an employer is required to disclose prior to employment whether a job is subject to a non-compete. See *supra* note 13.

[27] "The general rule is that an individual is an independent contractor [and not an employee] if the person for whom the services are performed has the right to control or direct only the result of the work and not what will be done and how it will be done." *Independent contractor defined*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined (last visited Nov. 1, 2024) (brackets added).

III. DISCUSSION OF NON-COMPETE LAWS

Currently, most states have non-compete laws.[28] It would be difficult to detail every state's law, given how fluid the landscape is in each legislative session. For example, the New York legislature passed a law covering all individuals which was vetoed in 2024 by the governor who nevertheless "indicated that she would support a bill that allows noncompete agreements for high earners."[29] Thus legal studies professors should be knowledgeable of the current law of their respective states, how the FTC Rule[30] would impact those laws, and the possibility that the Rule may not be implemented.

---

[28] ALA. CODE §§ 8-1-190 – 197 (2015); A.R.S. § 23-494 (2002); ARK. CODE § 4-75-101 (2015); CAL. BUS. & PROF. §§ 16600 – 16602.5 (2023); and CAL. BUS. & PROF. §§ 17200; 17202–17203; 17207 (remedies); COLO. REV. STAT. § 8-2-113 (2024) (2024 Colo. HB. 1324 was approved in 2024 amending (3)(a), (8)(a), (8)(b), and added (8)(d) and (9); CONN. GEN. STAT. § 31-50a (2007) (governs non-competes in security industry); CONN. GEN. STAT. § 31-50b (2007) (governs non-competes in broadcast industry); CONN. GEN. STAT. § 20-14p (for physicians); 20-12k (for physician's assistants); and 20-68l (covenant not to compete); DEL. CODE TIT. 6, § 2707 (2012); D.C. CODE § 32-581.01–.05 (for agreements 10/1/2022 and on) and D.C. Code § 28-4502 (1981) (making contracts to restrain trade or commerce illegal); FLA. STAT. ANN. § 542.335 (2019); GA. **CODE** ANN. § 13-8-53 (2011); HAW. REV. STAT. § 480-4 (2015); IDAHO CODE §§ 44-2701–04 (2008); 820 ILCS 90/5 (2022); IND. CODE § 25-22.5-5.5-2 (2023); LA. REV. STAT. ANN. § 23:921 (2020); ME. REV. STAT. TIT. 26, c. 7, § 599-A (2019); MD. CODE ANN., LAB. & EMPL. § 3-716 (2019); MASS. GEN. LAWS c. 149, § 24L (2018); MICH. COMP. LAWS § 445.774a (1984); MINN. STAT. § 181.988; 28 MO. STAT. ANN. § 431.202 (2001); MONT. CODE ANN. § 28-703-05 (1947); NEV. REV. STAT. §§ 613.195 – 200 (2017); N.H. REV. STAT. 275-70 (2014), 275:70-a (2014); N.C. GEN. STAT. § 75-4 (1913); N.D. CENT. CODE § 9-08-06 (2019); OKLA. STAT. TIT. 15 §§ 217 – 219 (2001); OR. REV. STAT. § 653.295 (2019); R.I. GEN. LAWS §§ 28-59-1 – 3 (2019); S.D. CODIFIED LAWS § 53-9-8 (2005); TEX. BUS. & COM. CODE §§ 15.50 – .52 (2009); UTAH CODE ANN. §§ 34-51-101 – 301 (2016); 26 V.S.A. § 281 (2017); WASH. REV. CODE §§ 49.62.005 – 900 (2019); and WIS. STAT. ANN. § 103.465 (2016).

[29] Paul F. Downs and Vincent Nguyen, *New York's New Approach to Noncompete Agreements*, NEW YORK STATE BAR ASS'N (Feb. 1, 2024), https://nysba.org/new-yorks-new-approach-to-noncompete-agreements/.

[30] The FTC Rule bans non-competes except for senior executives. "Senior executive" refers to a worker who:

(1) Was in a policy-making position; and

(2) Received from a person for the employment:

(3) Total annual compensation of at least $151,164 in the preceding year.

§910.1, cited in *Noncompete Rule*, FTC,

https://www.ftc.gov/legal-library/browse/rules/noncompete-rule (last visited Nov. 1, 2024).

While some states ban non-competes,[31] only a handful without such a ban require employers to inform people receiving job offers that they will be subject to one.[32] To re-emphasize the point, students must inquire about non-competes before accepting an offer and quitting a current job. In this regard, the Instructor facilitating this Module should ask students whether they actually read the things they sign. In the old days, this signing tradition was usually on the first day of work; now, most places do electronic onboarding so people can see what they will be signing before commencing work.[33] For example, at Amazon, "newly hired employees can start filling out their onboarding forms, taking required training courses and completing other requirements using a personal email address and account."[34]

The author suggests to students that there are at least three ways to read a contract:

1- Don't read anything (a few honest students raise their hands);
2- Read every word of the contract (no hands usually go up); and
3- The "pretend" read, where you take your finger and quickly go down the page but don't actually read anything (a majority of hands go up with a laugh).

At a minimum, they need to go with option three but instead of pretending, they should be on the lookout for a non-compete clause. Sometimes this language is bundled with non-disclosure[35] and non-solicitation[36] clauses and the Instructor should explain the differences. However, the sobering reality of this exercise is that many students do not have multiple job offers right out of college and often need to take what is offered. Thus, perhaps there is some appeal to having a uniform non-compete law that would protect people just entering the workplace, as the FTC Rule accomplishes.[37]

---

[31] For example, Colorado banned non-compete clauses in 2022, but left a carve-out for contracts for "highly compensated workers"—anyone making more than $112,500 in 2023. Massachusetts also passed legislation to restrict non-compete clauses in 2018, fully banning them for doctors, nurses, psychologists, social workers, broadcast industry workers, and lawyers." See Which States Have Banned Non-Compete Clauses?, *supra* note 12. For an update of California's law that bans non-competes, see *infra* note 42.

[32] See *supra* note 13.

[33] *Pre-Employment Onboarding Gives Employees a Headstart On Day One*, CORNERSTONE, https://www.cornerstoneondemand.com/resources/article/pre-employment-onboarding-gives-employees-headstart-day-one/ (last visited Nov. 1, 2024).

[34] *Id.*

[35] In a non-disclosure or confidentiality agreement, the signor promises "not to disclose employer confidential information…to prevent unfair competition from the employer's competitors." Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?,* 25 WM. MITCHELL L. REV. 627, 627 (1999).

[36] Non-solicitation agreements "prohibit individuals from recruiting others to a competitor's business using information obtained from, and to the detriment of, their former place of employment" and seek to "prohibit employees from soliciting their co-workers for a period of specified years after the employee leaves her or her former employment." Elizabeth E. Nicholas, *Drafting Enforceable Non-solicitation Agreements in Kentucky,* 95 KY. L.J. 505, 505 (2006/2007).

[37] Here is one of the many worker accounts documented in the FTC's Final Rule on the overreach of non-competes:

In October 2020, I started working as a bartender at a company called [REDACTED] for $10 an hour. On my first day, I unknowingly signed a 2-year non-compete, slipped between other paperwork while my boss rushed me, and

For a balanced discussion, the Instructor should ask students whether there are any circumstances where a non-compete might seem reasonable, using various scenarios:

1- You are a 70-year-old dentist intending to retire in two years. You wish to mentor a recent graduate of your alma mater dental school and then turn the practice over to that person. Is a two-year non-compete reasonable? To not quit and set up a dental practice within a 25-mile radius?;
2- Two partners formed a small business. Bad blood between the partners breaks up the company and they each set up separate competing businesses 30 miles apart. You get hired at one of these places. Would it be reasonable to have you sign a limited non-compete agreement to not go work for the rival or is having a non-disclosure and non-solicitation agreement enough?; and
3- You are purchasing a brick-and-mortar car parts store and its inventory for one million dollars. Should you insist on a non-compete?

The first two scenarios generate rich student discussions on the pros and cons of non-competes from both the employer[38] and employee[39] perspectives. The third scenario points out the importance of insisting on a non-compete when purchasing a business. In fact, the FTC Rule lists this as one of the exceptions to permit non-competes.[40]

---

downplayed its importance…. At [REDACTED], I was sexually harassed and emotionally abused. I needed money, so I searched for a new job while remaining at [REDACTED] for one year. I was eventually offered a bartending job at a family-owned bar with better wages, conditions, and opportunities. Upon resigning, I was threatened with a non-compete I didn't know existed. Still, I couldn't take it anymore, so believing it was an unenforceable scare tactic, I took the new job, thinking our legal system wouldn't allow a massive company with over 20 locations to sue a young entry-level worker with no degree. In December 2021, I was sued for $30,000 in ‘considerable and irreparable damages’ for violating the non-compete.

Non-Compete Clause Rule, fn. 53, *supra* note 8.

[38] From an employer perspective, see Kennedy v. Shave Barber Co., 348 Ga. App. 298 (2018) (A barber shop owner successfully enforced a non-compete where Kennedy would not work in the men’s grooming industry within a 3-mile radius for two years after leaving. Kennedy resigned and opened a new salon 2.1 miles from The Shave.).

[39] From the employee perspective, see *supra* notes 4-7.

[40] Per §910. Exceptions:

(a) **Bona fide sales of business**. The requirements of this part 910 shall not apply to a non-compete clause that is entered into by a person pursuant to a bona fide sale of a business entity, of the person’s ownership interest in a business entity, or of all or substantially all of a business entity’s operating assets.

Non-Compete Clause Rule, *supra* note 8. Georgia’s Restrictive Covenants Act (GA. CODE ANN. §§ 13-8-50 et seq.), governing Georgia non-compete agreements entered into after May 2011, states that five years may be a reasonable length of time for sale of business agreements. In 2019, the Georgia Court of Appeals confirmed that

Further, it is important to point out that if the FTC Rule is implemented, it will not limit a state's right to enforce their own statutes which provide consumers with greater protections.[41] For example, California expanded its ban on non-competes in 2024 by passing a law that "renders any contract with restraint on trade unenforceable, regardless where and when the contract was signed, or whether the agreement was signed and employment was established outside California."[42]

Finally, when friends, relatives, or co-workers tell our students to sign a non-compete because "It won't be enforceable in our state," or "The employer will never find out where you go," or "They'll never try to enforce it," the Instructor should remind them that litigation can be expensive, especially if ordered to pay the other side's attorneys' fees. Students also need to be sensitized to the stress of litigation.[43] Ultimately, legal studies teachers should give students the

---

"a non-compete may be enforced for the longer of five years or the time period during which the buyer pays the seller for the business." David R. Anderson, *Non-Compete News: Georgia Court Interprets Non-Compete Statute's "Sale-of-a-Business" Provision*, BEST LAWYERS (Dec. 15, 2022, 4:30 PM), https://www.bestlawyers.com/article/non-compete-news-georgia-court-interprets/4935, referencing Bearoff v. Craton, 350 Ga. App. 826 (2019).

[41] Per §910.4:

(a) This part will not be construed to annul, or exempt any person from complying with any State statute, regulation, order, or interpretation applicable to a non-compete clause, including, but not limited to, State antitrust and consumer protection laws and State common law, except that this part supersedes such laws to the extent, and only to the extent, that such laws would otherwise permit or authorize a person to engage in conduct that is an unfair method of competition under § 910.2(a) or conflict with the notice requirement in § 910.2(b).

(b) Except with respect to laws superseded under paragraph (a) of this section, no provision of this part shall be construed as altering, limiting, or affecting the authority of a State attorney general or any other regulatory or enforcement agency or entity or the rights of a person to bring a claim or regulatory action arising under any State statute, regulation, order, or interpretation, including, but not limited to, State antitrust and consumer protection laws and State common law.

Non-Compete Clause Rule, *supra* note 8.

[42] Lena Kempe, *California's Noncompete Law Has Immediate Effects for Business*, BLOOMBERG LAW (Feb. 6, 2024, 4:30 AM), https://news.bloomberglaw.com/us-law-week/californias-noncompete-law-has-immediate-effects-for-business. Further, CAL. BUS. & PROF. § 16600 (2023) required employers to notify employees hired after January 1, 2022, who had a non-compete in their contracts by February 14, 2024, in writing, that their non-competes are void.

Compare California law with a recent ruling by the Georgia Supreme Court in Motorsports of Conyers, LLC v. Burbach, 317 Ga. 206 (2023) (Georgia will honor a choice of law clause in a non-compete and apply another state's law (Florida) if the non-compete is deemed reasonable by the court under Georgia law and does not violate the state's public policy.).

[43] **Eric T. Cooperstein,** *Ethics: Navigating Your Clients' Mental Health Issues*, THE HENNEPIN LAWYER (Sept. 2021). Consider this person's stress in a story documented in the FTC's Final Rule:

A former employer had me sign a non-compete when I started employment at an internship in college. It was a part-time position of 20 hours of work as an electrical engineer, while I finished university. After university, I worked for this employer another 4 years full time, but then found a better job in another state. It was not a competitor, but a customer of my former employer. My former employer waited till the day after my 4-week notice to tell me that I had signed a non-compete agreement and that it [barred] me from working for any competitor, customer or any potential customer *up to 5 years after leaving the company with no geographic limitations. This was effectively the entire semi-conductor industry and put my entire career at risk.*

tools to pause and consider career and legal options if faced with signing a non-compete agreement.

IV. CONCLUSION

Most Legal Environment textbooks do not provide state-specific information on non-compete agreements. To fill that void, in the absence of a uniform rule, the Non-Competes and Workplace Morale exercise may prove helpful in teaching students about a complex real world business problem.

Non-Compete Clause Rule, *supra* note 8 (brackets original and emphasis added).

APPENDIX A

Anonymous Pre-Exercise Student Survey
(for all Module formats)

Module I. *Survey completed prior to non-compete class discussion*

Modules II & III. *Survey completed before non-compete team project is assigned.*

1- You are currently working as a Manager in clothing retail for 5 years and earn $5,000 more than comparable positions in the area. You are the only store manager and today you were told to sign a non-compete with $1,000/year extra compensation (covering Manager in the clothing retail business for 2 years in the 29 county metro city area). The non-negotiable agreement applies whether you quit, are fired, or are laid off and must be signed in the next seven days. Will you sign this agreement? Given your expertise and salary, you estimate it will take approximately 4 months to find a comparable position in clothing retail but you will be eligible for unemployment benefits in the interim. (without severance pay or health insurance assistance from the company)

Yes

No (knowing you will be fired)

2- In this scenario, you are the business OWNER. You just got back from your lawyer's office and she insists that you have your manager sign a non-compete with $1,000/year extra compensation (covering Manager in the clothing retail business for 2 years in the 29 county metro city area). The non-negotiable agreement applies whether the manager quits, is fired, or is laid off and must be signed in the next seven days. Will you implement your lawyer's advice?

Yes

No

APPENDIX B

Non-Competes and Workplace Morale Exercise

Module 1 – No Assigned Teams

There are no assigned teams or a memo to write. Instead, students prepare for class by answering the anonymous survey and doing the assigned reading on non-compete agreements. (The applicable state law is supplied in class.) Then, students in class break up into impromptu teams of three for 15 minutes to think about the non-compete issues and re-group for a class discussion.

For the past eight years, you have been a middle manager at the BLAW company, currently with seven employees on your team. Today, BLAW's ten middle managers including you were called into a meeting by your supervisor, a senior vice president who just met with the company president and in-house counsel. The senior VP advised that each manager and their team members will need to sign a non-compete agreement:

> Terms: If you leave BLAW -- whether you quit, are fired, or laid off -- you are not permitted to perform the same job function (or a remotely similar job function) for another or in your own business in the state for a period of two years.

Those who refuse to sign the agreement will need to depart from BLAW with minimal severance. The senior VP has given you one week to communicate this message to your team.

1. It is now one week later. Examine each section below separately:
   - a- Devise a strategy that may avoid having your team and you sign the non-compete. Discuss how you will navigate these waters. With whom will you consult inside the company? Outside the company?
   - b- Assume that BLAW rejects everyone's efforts to avoid signing the agreement. You wish to stay with BLAW despite the non-compete but are uncomfortable with its terms. Is there a compromise solution? Explain.

2. Defend or criticize this statement: The benefits of non-competes to a business outweigh the potential lower morale of its employees subject to such an agreement.

Modules 1I & III – Assigned Teams

Module II. *Written team memos with a class discussion on strategy (students break up into assigned teams for 15 minutes and then re-group for the discussion).*

Module III. *Written team memos and team presentations in the class on strategy.*

REPEAT facts from the scenario in Module I.

Teams need to write a memorandum on the three questions below. You will be graded on the following items:

a. whether your information is factually correct and your ideas are sound, logical, and well-reasoned
b. the organization of your memorandum
c. spelling and grammar
d. how well you follow instructions

1- Research the non-compete state laws, and then examine the enforceability of the above non-compete Terms based on state law. Note: We are not discussing non-disclosure or non-solicitation agreements in this hypothetical.

2- It is now one week later. Examine each section below separately:

a- Devise a strategy that may avoid having your team and you sign the non-compete. Discuss how you will navigate these waters. With whom will you consult inside the company? Outside the company?
b- Assume that BLAW rejects everyone's efforts to avoid signing the agreement. You wish to stay with BLAW despite the non-compete but are uncomfortable with its terms. Is there a compromise solution? Explain.

3- Defend or criticize this statement: The benefits of non-competes to a business outweigh the potential lower morale of its employees subject to such an agreement.

APPENDIX C

Anonymous Post-Exercise Student Survey
(completed after class discussion of non-competes in all Module formats)

1- Repeat question 1 from Survey I.

2- Repeat question 2 from Survey I.

3a- As the MANAGER, assume that you signed the agreement. What effect would this contract have on your morale in the workplace?

Significant

Moderate

None

3b- Briefly add a comment to support your choice as MANAGER.

4a- You are now the business OWNER in the above situation and your manager signed the non-compete. What effect do you think this contract would have on the manager's morale in the workplace?

Significant

Moderate

None

4b- Briefly add a comment to support your choice as OWNER.