Uniform Law Commission
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

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The Honorable David Cicilline
Chair
Subcommittee on Antitrust, Commercial and Administrative Law
U.S. House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Ken Buck
Ranking Member
Subcommittee on Antitrust, Commercial and Administrative Law
U.S. House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chair Cicilline and Ranking Member Buck:

We appreciate the committee's invitation to submit a letter summarizing the Uniform Restrictive Employment Agreement Act for the Subcommittee hearing on Proposals to Strengthen the Antitrust Laws and Restore Competition Online scheduled for October 1, 2021. A copy of the Act and supporting materials can be found at http://www.uniformlaws.org/ureaa/finalact.

The Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws), is a state supported organization that was established in 1892, and provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

At its July 2021 annual meeting held this year in Madison, Wisconsin, the Uniform Law Commission adopted the Uniform Restrictive Employment Agreement Act. The act is now ready for adoption by individual state legislatures and can become the centerpiece in a cooperative federalism effort to promote efficiency, mobility, and fairness in labor markets.

The Need for Reform

The danger of noncompetes is that they restrict workers from moving to more productive opportunities, potentially harming not only the worker but also social productivity. The social cost to other firms or workers is what economists call an externality, in that the contracting employer and worker don't necessarily consider the harm of their agreement on outsiders.

The dangers for low-wage workers are especially significant because those noncompetes are often

used simply to constrain workers without serving a countervailing legitimate business interest. An individual low-wage worker rarely has significant access to trade secrets and the rarely is the decisive factor in a customer's choice of firm.

Widespread use: Survey evidence from several sources suggests that approximately one in five U.S. workers is subject to a noncompete agreement, and nearly 40 percent of all workers have had a noncompete at some point in their career.[1] Higher-skilled and higher-paid workers are more likely to sign a noncompete, but even low-paid workers sign them. Indeed, hourly paid workers comprise the majority of noncompete signers.

Lack of Notice: Scholars have also empirically studied the contracting process of noncompetes. Noncompete agreements are rarely negotiated over or rejected outright. Workers often have no notice of a noncompete. Between 33 percent and 46 percent of the time, a noncompete is entered after the individual has accepted the job offer (but not with any sort of promotion or change in responsibilities).

Chilling Effect of Unenforceable Agreements: Another study by Starr and colleagues shows that noncompetes used in states that will not enforce them (e.g., California) have similar effects on employee mobility.

Broad Consensus for Reform

A broad consensus is developing across the political spectrum that reform is necessary in this field. Eighteen states enacted some noncompete legislation in 2018-21. Most focus on low-wage workers rather than more comprehensive reform, and most focus only on noncompetes rather than all post-employment restrictions. Some 36 bills in 18 different states are currently before a state legislature in some form. Despite this legislative activity, most states still rely on common law to regulate noncompetes.

Press reports suggest that the Biden Administration may seek federal legislation to adopt a California style prohibition on noncompetition agreements. The Federal Trade Commission is considering regulatory action.

The American Enterprise Institute has prepared a report arguing that noncompete agreements hinder mobility of the American workforce and reduce the overall dynamism in our economy. The AEI author declares that "the prospects of federal legislation ... have never looked better" and concludes:

"The momentum is unmistakable—and likely irreversible, as each new legislative success makes the next one easier to achieve. The challenge now is to evolve to a more coherent and comprehensive approach to reform that delivers stronger benefits to workers, entrepreneurs, and the broader economy. In any event, the rising tide of reform means this is one area of policy that is almost certain to become friendlier to workers, more embracing of competition, and more conducive to economic dynamism in the years ahead."

A Uniform Act can Harmonize the Law, While Maintaining Flexibility to Address Local Circumstances

This Uniform Act can supply a comprehensive approach to reform that helps workers,

[1] Starr, Evan and Prescott, J.J. and Bishara, Norman D, Noncompete Agreements in the U.S. Labor Force (May 7, 2020). Journal of Law and Economics, Forthcoming, Available at SSRN: https://ssrn.com/abstract=2625714 or http://dx.doi.org/10.2139/ssrn.2625714

entrepreneurs, and competition in an area that is traditionally a matter of state law. Federal legislation or regulation can complement the Uniform Act by encouraging its adoption by the states.

The Uniform Restrictive Employment Agreement Act regulates restrictive employment agreements, which are agreements that prohibit or limit an employee or other worker from working elsewhere after the work relationship ends. The act does not regulate what a worker can or cannot do while working for the original employer. A noncompete agreement (also called a noncompetition agreement, covenant not to compete, CNC, DNC, or do-not-compete agreement) is the most stringent of the restrictive employment agreements. A noncompete expressly prohibits the worker, upon termination of employment, from creating, joining, or working for a competing firm. A typical modern noncompete specifies the time, geographic area, and scope of business that the worker may not engage in.

While noncompete agreements get the most attention, they are part of a family of restrictive employment agreements. Others include *nonsolicitation agreements* prohibiting the solicitation of former customers; *no-business agreements* prohibiting doing business with former customers whether solicited or not; *no-recruit agreements* prohibiting the recruitment or hiring of former co-workers; *confidentiality agreements* (also known as nondisclosure agreements) prohibiting the use or disclosure of trade secrets or other confidential information; *payment-for-competition agreements* to pay the employer if the employee competes, solicits, recruits, or does business; and *training-repayment agreements* to pay back training expenses if the employee leaves early. All these agreements are covered by this act. *No-poach agreements* are cousins to restrictive employment agreements: while a restrictive employment agreements is an agreement between an employer and its worker, a no-poach is an agreement between two employers (perhaps joint venturers or franchisees of the same brand) not to hire each other's workers. No-poach agreements are not covered by this act.

Uniform Restrictive Employment Agreement Act -- Core Elements

The Act recognizes that noncompetes and other restrictive agreements can serve valid purposes in enhancing value during the sale of a business, as well as in protecting trade secrets and customer relationships. But these agreements can be abused, unduly limiting competition and worker mobility with few offsetting advantages.

In striking the appropriate balance, the Uniform Act prohibits most restrictive agreements for low-wage workers, requires advance notice to other workers, sets maximum durations and other requirements for a valid restrictive employment agreement, and creates penalties for prohibited agreements.

- *Wide scope*: Regulates all restrictive post-employment agreements, including noncompetes, confidentiality agreements, no-business agreements, nonsolicitation agreements, no-recruit agreements, payment-for-competition agreements, and training reimbursements agreements.
- *Low-Wage Workers*: Prohibits noncompetes and all other restrictive agreements except confidentiality agreements and training-reimbursement agreements for low-wage workers, defined as those making less than the state's annual mean wage.
- *Notice*: Requires advance notice and other procedural requirements for an enforceable noncompete or other restrictive agreement.
- *Penalties*: creates penalties and enforcement by state departments of labor and private rights of action, to address the chilling effect of unenforceable agreements.

Value of a Uniform Act

A Uniform Restrictive Employment Agreement Act provides real value to legislatures and stakeholders. Business-community and employee-advocate groups are frustrated both with the lack of

clarity within most states on when noncompetes are enforceable or unenforceable and with the diverse approaches among states. State-to-state and within-state variations make it difficult for national employers to adopt consistent policies for the various jurisdictions in which they do business and for workers to know their rights and obligations under a noncompete. The same is true of employees who need predictability in our increasingly mobile society.

Unlike most employment-law topics, stakeholders do not divide cleanly on pro-employer/pro-employee lines. Employers want both to keep current workers from leaving and to hire experienced workers from other firms.

Noncompetes and other restrictive employment agreements may serve valid purposes in the right circumstances but are too often used in ways that limit worker mobility and hinder overall economic growth. State legislatures understand this and will continue to act. The time is ripe for the states to adopt a uniform approach. The federal government can play a useful role as a catalyst for reform, without occupying a field that has traditionally been a matter of state law.

The ULC welcomes the opportunity to work with Congress on a federal-state solution to reform the law of restrictive employment agreements to make our economy more competitive and strike a better balance between the interests of employer and employees.

Respectfully submitted,

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s/Stewart J. Schwab

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