NEW YORK UNIVERSITY
JOURNAL OF LAW & BUSINESS

VOLUME 15 SUMMER 2019 NUMBER 3

CONTRACTING JURISDICTION: ARBITRATION OF NONCOMPETITION DISPUTES IN EMPLOYMENT AGREEMENTS

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The law surrounding noncompetition agreements varies greatly among states. How broad can such an agreement be? What type of work can it cover? How long can it be enforced, if at all? Different states express vastly different policy preferences on the scope and enforceability of noncompetition agreements through legislation and common law. This creates uncertainty for both employers and employees. Increasingly, with support from the U.S. Supreme Court, arbitration clauses are being used to override the laws of particular states by contracting for the substantive law that will govern an eventual noncompetition dispute between employer and employee. This Article examines the ways in which noncompetition clauses and arbitration clauses must be drafted and read together within an employment agreement. It further explores the implications for the increasingly federalized nature of this aspect of employment law, analyzing recent state and federal case law. On balance, arbitration greatly bolsters the enforceability of noncompetition agreements by selecting favorable and predictable governing law.

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INTRODUCTION

This Article examines the intersection of two increasingly common clauses in employment agreements: arbitration clauses and noncompetition clauses. Both provisions are typically drafted to protect employers from liability, albeit in very different ways.

Arbitration clauses are designed to send any disputes that emerge between the employer and employee to private arbitration, thereby avoiding the courthouse. There are many reasons that employers often prefer to arbitrate, rather than litigate, disputes. Among these reasons: arbitration is believed to be less expensive[1] and faster.[2] Some scholars have argued that

1. Albert Bates, Jr., *Controlling Time and Cost in Arbitration: Actively Managing the Process and "Right-Sizing" Discovery*, 67 DISP. RESOL. J. 54, 57 (noting that resolving disputes through arbitration usually lowers overall party expenses).

2. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010) (noting that arbitration provides various benefits, including "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes"); *see also* Neal M. Eiseman, John E. Bulman & R. Thomas Dunn, *A Tale of Two Lawyers: How Arbitrators and Advocates Can Avoid the Dangerous Convergence of Arbitration and Litigation*, 14 CARDOZO J. CONFLICT RESOL. 683, 707 (2013) (considering litigators' attitudes towards commercial arbitration and concluding that "the consensus is still generally that arbitration is faster than litigation").

it might be a more favorable forum for employers.[3] Arbitration also has the important benefit of privacy, minimizing the likelihood of embarrassing headlines about a former employee's grievances.[4] Moreover, arbitration allows employers to resolve disputes without overblown discovery or endless appeals.[5] Arbitration decisions are generally final.[6]

Noncompetition clauses are another favored tool of employers in employment agreements. They are designed to limit an employee's ability to start or work for a competing business after her employment.[7] Such clauses might also prohibit the

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3. Lisa A. Nagele-Piazza, *Unaffordable Justice: The High Cost of Mandatory Employment Arbitration for the Average Worker*, 23 U. MIAMI BUS. L. REV. 39, 42 (2014) ("Employees are often forced to agree to arbitration or lose their jobs, and since agreements are usually non-negotiable and drafted by the employer, the agreements may be one-sided or inherently designed to favor the employer.").

4. *See* Thomas J. Stipanowich, *In Quest of the Arbitration Trifecta, or Closed Door Litigation?: The Delaware Arbitration Program*, 6 J. BUS. ENTREPRENEURSHIP & L. 349, 372 (2013) (noting that arbitration allows "private and confidential dispute resolution proceedings, in contrast to the presumptively public forum of litigation"); *see also* Christopher R. Drahozal, *Confidentiality in Consumer and Employment Arbitration*, 7 Y.B. ARB. & MEDIATION 28, 31–35 (2015) (discussing the confidentiality of arbitration proceedings, as well as the limits of that confidentiality).

5. Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 588 (2008) (explaining that judicial review of arbitral awards is limited, thus "maintain[ing] arbitration's essential virtue of resolving disputes straightaway," rather than permitting "full-bore legal and evidentiary appeals").

6. Generally, arbitral awards are not subject to appeal, unless appeals are permitted through the parties' agreement, or unless the award is subject to vacatur under the narrow grounds of 9 U.S.C.A. § 10(a) or its state law equivalents. *See, e.g.*, United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 30 (1987) ("As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the court cannot overturn his decision simply because it disagrees with his factual findings, contract interpretations, or choice of remedies."); Kanuth v. Prescott, Ball & Turben, Inc., 949 F.2d 1175, 1178 (D.C. Cir. 1991) ("Courts have recognized that judicial review of arbitral awards is extremely limited."); Monte v. S. Delaware Cty. Auth., 335 F.2d 855, 857 (3d Cir. 1964) ("[A]n agreement that an arbitration award shall itself be final and binding upon the parties generally precludes judicial review."); Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co., 748 F.3d 708, 711 (6th Cir. 2014) ("Because arbitration's essential virtue is resolving disputes straightaway, judicial review of arbitral awards is extremely narrow and exceedingly deferential.").

7. *See* Griffin Toronjo Pivateau, *Enforcement of Noncompetition Agreements: Protecting Public Interests Through an Entrepreneurial Approach*, 46 ST. MARY'S L.J. 483, 485 (2015) (noting usages of noncompetition agreements).

employee from soliciting clients or fellow employees to leave the company.[8] They are particularly common for technology and financial businesses, where proprietary information is critical. But they also exist in industries ranging from construction to healthcare, and are becoming increasingly prevalent. As one scholar recently noted in *The New York Times*, noncompetition agreements were "[o]nce reserved for a corporation's most treasured rainmakers, [but] are now routinely applied to low-wage workers like warehouse employees, fast-food workers and even dog sitters. One out of every six workers without a college degree have signed one."[9]

Many courts view noncompetition agreements unfavorably. Some jurisdictions have outright statutory bans or restrictions, such as California, Montana, Oklahoma, and North Dakota.[10] Some states that lack these statutory restrictions nevertheless resist their enforcement through common law, viewing such agreements as unfair restrictions on employee mobility.[11]

Thus, employers seeking to enforce noncompetition agreements face several risks. First, if they exist in an "unfriendly" jurisdiction, they may be out of luck regardless of the terms of their employment agreement. Second, even if they exist in a "friendly" jurisdiction, judges may still apply various common law public policy doctrines to weigh against enforcement. Moreover, employers risk that the employee could leave their company and race to an unfriendly jurisdiction, seeking a declaratory judgment voiding the noncompetition agreement. Even if the employer files an enforcement action in a more supportive jurisdiction, this multijurisdictional battle could be costly and procedurally knotty. Moreover, there could be inconsistent decisions or haphazard enforcement.

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8. *Id.* at 487–88 ("[N]on-solicitation provisions, whether aimed at customer or employee solicitation, are forms of noncompetition.").

9. Orly Lobel, *Companies Compete, but Won't Let Their Workers Do the Same*, N.Y. TIMES (May 4, 2017), https://www.nytimes.com/2017/05/04/opinion/noncompete-agreements-workers.html.

10. Viva R. Moffat, *Making Non-Competes Unenforceable*, 54 ARIZ. L. REV. 939, 944 (2012) (noting that a number of states "have a strong rule against the enforceability of non-competes").

11. *See* M. Scott McDonald, *Noncompete Contracts: Understanding the Cost of Unpredictability*, 10 TEX. WESLEYAN L. REV. 137, 146 (2003) (discussing variations in non-competition agreement law from state to state).

While forum selection clauses[12] in contracts can mitigate this mess, these clauses, too, are unreliably enforced.[13]

Arbitration offers a solution. With few exceptions, courts enforce arbitration agreements. Indeed, the Federal Arbitration Act states that such agreements are "valid, irrevocable, and enforceable,"[14] a phrase the U.S. Supreme Court has interpreted as "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."[15] A properly drafted arbitration clause can ensure that any disputes relating to the enforcement of a noncompetition agreement are heard by a particular tribunal under particular rules, applying particular law. Through an arbitration clause the parties can agree on the substantive law that would govern the arbitration before any dispute emerges. While enforcement of noncompetition clauses is uneven, courts acknowledge that there is an overwhelming presumption favoring the enforcement of arbitration agreements.[16]

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12. A forum selection clause is a contractual provision that designates the jurisdiction, location, and/or substantive law that would govern potential disputes to a contract.

13. *See* Michael D. Moberly & Carolyn F. Burr, *Enforcing Forum Selection Clauses in State Court*, 39 SW. L. REV. 265, 267 (2009) (discussing "judicial antipathy" towards forum selection clauses in many jurisdictions); Richard A. Gantner, *Contracts—Forum Selection—Absent Bad Faith, Fraud, or Overreaching, a Reasonable Forum Selection Clause in a Commercial Cruise Form Contract is Enforceable*—Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991)*, 22 SETON HALL L. REV. 505, 511 (1992) (noting that historically, American courts have been "wary of contract terms purporting to limit jurisdiction to a particular forum because they believed such provisions to symbolize veiled attempts to oust a court of competent jurisdiction").

14. 9 U.S.C. § 2 (1947).

15. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (Blackmun, J., concurring).

16. Millrock Tech. Inc. v. Pixar Bio Corp., No. 1:18:CV-0666 (GTS), 2018 WL 6257499, at *2 (N.D.N.Y. Nov. 30, 2018) ("Pursuant to 9 U.S.C. § 9, any party to an arbitration may apply to a federal court for an order confirming the award resulting from the arbitration, and the court 'must grant . . . an order [confirming the arbitration award] unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.'"); Landy Michaels Realty Corp. v. Local 32B-32J, Serv. Emps. Int'l Union, AFL-CIO, 954 F.2d 794, 797 (2d Cir. 1992) ("We still adhere firmly to the propositions that . . . an arbitration award should be enforced, despite a court's disagreement with it on the merits, if there is 'a barely colorable justification for the outcome reached.'" (internal citations omitted)).

As noncompetition clauses and arbitration clauses have separately come into vogue in employment agreements, their intersection raises fascinating issues. Will courts enforce arbitration awards that favor noncompetition agreements even when the jurisdiction in which the court sits does not? Do noncompetition clauses result in a boon to companies at the expense of employees? Can employees be prevented from seeing a judge, and held to an arbitration agreement, even when they argue that their livelihood is at stake? In recent years, these questions have received attention from arbitral tribunals, state courts, federal courts, and the U.S. Supreme Court. This article examines the ways in which these two clauses must be drafted and read together within an employment agreement. It further explores the implications for the increasingly federalized nature of this aspect of employment law, concluding that arbitration is being used to increase the overall enforceability of noncompetition agreements by selecting favorable governing law.

I.
The Legal Framework for Noncompetition Agreements

A. *What Are Noncompetition Agreements?*

Noncompetition agreements are "promise[s] [usually in an] employment contract not to engage in the same type of business for a stated time in the same market as the . . . employer."[17] They are sometimes referred to as "noncompete covenants," "restrictive covenants," or "promises not to compete"—terms that refer to the same type of bilateral contracts between an employer and an employee in which an employee agrees to restrict future activity beyond her time working for the employer.[18] As their title suggests, the goal of noncompetition agreements is to give employers comfort that employees will not compete against their core business or abscond with critical clients or proprietary information.

Noncompetition agreements sometimes refer to four separate, but interrelated, covenants, which are often encompassed in the same clause: "(1) general noncompetition; (2)

17. *Covenant Not to Compete*, Black's Law Dictionary (10th ed. 2014).

18. *See Noncompetition Covenants*, 21 Bus. Torts Rep. 364, 365 (2009) (discussing related covenants that are often incorporated into employment contracts).

customer (or client) non-solicitation; (3) employee non-solicitation; and (4) non-disclosure."[19] A thorough noncompetition agreement would seek to prevent employees from joining a competing business, soliciting existing customers or employees from their old employer, or using confidential business information learned while working for their old employer. A well-drafted agreement would be tailored to the particular employee, employer, industry, and job functionality. By way of example, a comprehensive noncompetition agreement, incorporating all of these restrictions, might generally read:

> For a period of two years after the termination of this Agreement, Employee agrees that she will not, directly or indirectly, own, operate, control, or provide Competing Services to any Competing Business Line, as defined below. Employee understands that the restrictions in this clause apply no matter whether her employment is terminated by her or by the Company and no matter whether that termination is voluntary or involuntary. The above restrictions shall not apply to passive investments of less than 10% ownership interest in any entity.
>
> Employee understands that the term "Competing Business Line" used in this Agreement means any business that is in competition with any business engaged in by the Company with respect to which the Employee provided services during her employment.
>
> Employee understands that she will be deemed to be providing "Competing Services" if the nature of such services are sufficiently similar in scope to any position held by her during the last two years of her employment with the Company, such that she engaging in such services on behalf of a Competing Business Line may pose competitive or economic harm to the Company.
>
> During the term of Employee's employment with the Company and for a period of two years from the vol-

19. Kenneth J. Vanko, *"You're Fired! And Don't Forget Your Non-Compete . . .": The Enforceability of Restrictive Covenants in Involuntary Discharge Cases*, 1 DEPAUL BUS. & COM. L.J. 1, 2 (2002).

untary or involuntary termination of this Agreement, Employee shall not, either on her own account or for any person, firm, partnership, corporation, or other entity take any action designed to, or in fact call upon, compete for, solicit, divert, or take away, or attempt to divert or take away, any of the customers, suppliers, endorsers or advertisers of the Company whom the Employee knew to be customers, suppliers, endorsers, or advertisers of the Company.

The Employee acknowledges that her employment position with the Company is one of trust and confidence. The Employee further understands and acknowledges that, during the course of the Employee's employment, she will be entrusted with access to certain confidential information, specialized knowledge, and trade secrets which belong to the Company, including, but not limited to, its methods of operation and developing customer base, its manner of cultivating customer relations, its practices and preferences, its current and future market strategies, its formulas, patterns, patents, devices, secret inventions, processes, compilations of information, records, and customer lists, and which the Employee acknowledges have been developed by the Company through the expenditure of substantial sums of money, time, and effort (hereinafter "Trade Secrets"). The Employee covenants and agrees to use her best efforts and utmost diligence to protect those Trade Secrets from disclosure to third parties. The Employee agrees and covenants that during the period of the Employee's employment and for two years immediately following the termination of such employment, the Employee will not disclose or reveal any Trade Secret to any person, firm, or corporation other than in connection with the business of the Company.

Employee further agrees that, during the term of this Agreement and at all times thereafter, she will keep confidential and not disclose or reveal to any person, firm, or corporation any information received by her during the course of her employment with regard to

> the financial, business, or other affairs of the Company or its respective officers, directors, customers, or suppliers which is not publicly available.
>
> Employee acknowledges and agrees that solely as a result of employment with the Company, she has and will come into contact with and acquire Trade Secrets regarding the Company's other employees. Accordingly, during Employee's employment with the Company and during the two-year period following the termination of this Agreement, whether voluntarily or involuntarily and for any reason, Employee will not, without the express written consent of the Company, directly or indirectly, solicit, or endeavor to cause any employee of the Company to leave employment of the Company.

The ways that such clauses benefit employers are obvious. Less obvious, but equally important, is that they discourage employee turnover by making it more difficult for employees to find relevant work. During the recruiting process, sophisticated competitors will typically inquire whether potential recruits are governed by noncompetition clauses. If the answer is affirmative, that competitor might be frightened from making an offer, since the employee would "be forced to the sidelines" for the duration of their noncompete period, unable to begin work immediately.[20] Further, the specter of litigation may stop employees from even attempting a move.[21]

It is worth recognizing that there are no explicit benefits of noncompetition agreements for the employees who sign them. The implicit value, of course, is to manifest a commitment to the potential employer. Making such a promise demonstrates loyalty, thereby inducing an employer to make an offer of employment. A sharp and marketable employee may use

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20. Pivateau, *supra* note 7, at 489.

21. Scholars and practitioners have found that the fear of litigation affects both competitor employers and the employees, restraining worker mobility. *See* Ann C. Hodges & Porcher L. Taylor, III, *The Business Fallout from the Rapid Obsolescence and Planned Obsolescence of High-Tech Products: Downsizing of Noncompetition Agreements*, 6 COLUM. SCI. & TECH. L. REV. 3, 3 (2005) ("[T]he lack of predictability in interpreting noncompete agreements allows employers to draft overly-lengthy noncompetes, encourages enforcement litigation, and curtails employees from changing jobs because of the fear of litigation.").

the opportunity to negotiate, offering a broader noncompetition agreement in exchange for greater compensation or other benefits.

These clauses are not new. Scholars have traced the use of noncompetition agreements back to the 1600s.[22] The popularity of such agreements has greatly increased in recent years. One recent empirical study "confirm[ed] widely held assumptions in the academic literature and from practitioners that noncompetes are being used more often in recent years." Examining S&P 500 companies between 2006 and 2010, the authors found that about 80% of CEO contracts contained some form of noncompetition agreement.[23] That number rises to 85.9% for contracts with terms longer than one year.[24]

While noncompetes have long been common for executives and high-level employees, "use of these agreements has [recently] expanded to other members of organizations."[25] Even lower-level workers who may come into contact with confidential information, customer lists, or other sensitive data are often asked to sign noncompetition agreements as a condition of employment.[26] A 2016 report by the U.S. Department of Treasury found that 18% of all American workers—nearly thirty million people—are covered by such agreements.[27] Moreover, about 15% of workers without four-year college degrees and approximately 14% of workers earning $40,000 or less annually are covered by noncompete agreements even though these workers are less than half as likely to have access to trade secret information as their coworkers with degrees or higher annual earnings.[28] The Treasury Report posits that

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22. Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 626 (1960) (analyzing cases from English courts in the early modern era).

23. Norman D. Bishara, Kenneth J. Martin & Randall S. Thomas, *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 49 (2015) (summarizing findings of empirical study on noncompetition clauses).

24. *Id.* at 33.

25. Pivateau, *supra* note 7, at 489.

26. Lobel, *supra* note 9.

27. OFF. OF ECON. POL'Y, U.S. DEP'T OF TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 3 (Mar. 2016), https://www.treasury.gov/resource-center/economic-policy/documents/ust%20non-competes%20report.pdf.

28. *Id.* at 4.

many workers "do not realize when they accept a job that they have signed a non-compete, or . . . understand its implications."[29] As scholars have cautioned, these agreements "depart fairly radically from the neoclassical model of contracting: they are the product of vastly unequal bargaining power, the terms generally favor the drafter, in many circumstances there is slim possibility of opting out, and they are, as a practical matter, never negotiated."[30] Most employees are relatively unlikely to read these contract terms, much less try to bargain them. Like many take-it-or-leave-it adhesive contracts, employment agreements with noncompetition clauses remain enforceable (at least in friendly jurisdictions) regardless of whether the employee actually reads, understands, or negotiates the provision.[31]

In short, noncompetition agreements are increasingly common across job categories and industries. Employers view them as valuable tools for reducing employee turnover, preventing poaching by competitors, and maintaining confidential information such as trade secrets, business strategy, and client data.

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29. *Id. See generally* ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING 49–73 (2013) (discussing the overall expansion in the use of noncompetition agreements across categories of workers and industries).

30. Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements*, 52 WM. & MARY L. REV. 873, 882 (2010).

31. Just because an employment agreement may be considered a "contract of adhesion" does not mean that it becomes unconscionable or unenforceable. *See, e.g.*, Jensen v. Fisher Commc'ns, Inc., No. 3:14-cv-00137-AC 2014 WL 6851952, at *6 (D. Or. Dec. 3, 2014) (enforcing employment agreement and noting that "[i]n nearly any contractual relationship, some imbalance of bargaining power exists. An unwillingness to negotiate some portions of a contract does not render the bargaining process oppressive and does not render an otherwise-enforceable contract unconscionable"); Beachum v. Phillips, No. 2:09-cv-00378 2009 WL 3269047, at *4 (S.D.W. Va. Oct. 8, 2009) (rejecting employee's argument that arbitration clause should be unenforceable because he "had no choice" on the "take it or leave it" employment agreement); Cooper v. MRM Inv. Co., 367 F.3d 493, 503–05 (6th Cir. 2004) (employment agreement was not unconscionable under Tennessee law, and thus arbitration clause therein was enforceable even if agreement was contract of adhesion).

B. *Limitations on Noncompetition Agreements*

Despite their ubiquity, the enforceability of noncompetition agreements is another matter. This is not surprising, given that such agreements are controversial among legislators, courts, and economists. From a social perspective, many have argued that they place unfair restrictions on employee mobility and reduce employee bargaining power.[32] From a macroeconomic perspective, many have argued that jurisdictions that decline to enforce noncompetition agreements are more innovative and prosperous, since talent can move freely among competing firms. Silicon Valley, home to many of the world's leading technology companies, is the centerpiece of that argument.[33]

There are both statutory and common law limitations on their enforcement.[34] Statutory bans are the most clear-cut. While all courts view noncompetition clauses with skepti-

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32. Stewart E. Sterk, *Restraints on the Alienation of Human Capital*, 79 VA. L. REV. 383, 411 (1993) (discussing the potential undesirable restriction on an employee's individual freedom of contract with respect to her own human capital).

33. *See* LOBEL, *supra* note 29; Bruce Fallick, Charles A. Fleischman & James B. Rebitzer, *Job-Hopping in Silicon Valley: Some Evidence Concerning the Microfoundations of a High-Technology Cluster*, 88 REV. ECON. & STAT. 472 (2006) (arguing that labor mobility is higher in Silicon Valley than other geographic clusters of technology companies); Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 577 (1999) (arguing that California's ban on employee noncompetes and the resulting ease of employee mobility is part of an advantageous legal framework that has made Silicon Valley's economy and high levels of technological innovation possible).

34. DONALD J. ASPELUND, EMPLOYEE NONCOMPETITION LAW § 1:1, at 2 (2002) ("The law generally frowns on agreements that restrict competition, so noncompetition agreements are construed narrowly."). *See, e.g.*, Vermont Microsystems, Inc. v. Autodesk, Inc., 88 F.3d 142, 149 (2d Cir. 1996) ("Noncompetition agreements generally are construed narrowly by courts, and must contain time, geographic and/or industry limitations."); Midwest Sports Mktg, Inc. v. Hillerich & Bradsby of Canada, Ltd., 552 N.W.2d 254, 265 (Minn. Ct. App. 1996) ("Minnesota courts do not favor noncompetition agreements because they are partial restraints on trade."); Emergency Med. Care, Inc. v. Marion Mem'l Hosp., 94 F.3d 1059, 1061 (7th Cir. 1996) ("[B]ecause Illinois courts favor fair competition and disfavor restraints on trade, we must strictly construe noncompetition agreements against the party seeking restriction.").

cism,[35] some states have adopted statutes that explicitly reject them. For example:

> **California:** "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."[36]
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> **North Dakota:** "Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void, except: (1) One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part of either, so long as the buyer or any person deriving title to the goodwill from the buyer carries on a like business therein; (2) Partners, upon or in anticipation of a dissolution of the partnership, may agree that all or any number of them will not carry on a similar business within the same city where the partnership business has been transacted, or within a specified part thereof."[37]
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> **Oklahoma:** "Every contract by which any one is restrained from exercising a lawful profession, trade or business of any kind . . . is to that extent void . . . . A person who makes an agreement with an employer, whether in writing or verbally, not to compete with the employer after the employment relationship has been terminated, shall be permitted to engage in the same business as that conducted by the former em-

35. *See, e.g.*, Applied Micro, Inc. v. SJI Fulfillment, Inc., 941 F. Supp. 750, 753 (N.D. Ill. 1996) ("The validity of a restrictive covenant is a question of law, and more particularly, of state law."); Rena Mara Samole, *Real Employees: Cognitive Psychology and the Adjudication of Non-Competition Agreements*, 4 Wash. U. J.L. & Pol'y 289, 295 (2000) ("Some states view the prevention of trade restraints as the single overriding policy concern in their treatment of non-competition agreements, while some states balance prevention of trade restraint against other policy concerns.").

36. Cal. Bus. & Prof. Code § 16600; *see also* Edwards v. Arthur Andersen LLP, 189 P.3d 285, 296 (Cal. 2008) (reaffirming the strong California rule).

37. N.D. Cent. Code Ann. § 9-08-06; *see also* Osborne v. Brown & Saenger, Inc., 904 N.W.2d 34, 38 (interpreting the statute and holding that "we have consistently held covenants-not-to-compete to be unenforceable").

> ployer or in a similar business as that conducted by the former employer as long as the former employee does not directly solicit the sale of goods, services or a combination of goods and services from the established customers of the former employer . . . . Any provision in a contract between an employer and an employee in conflict with the provisions of this section shall be void and unenforceable."[38]

Some states have more specific statutory limitations on noncompetition agreements. In 2015, Hawaii enacted a restriction on the use of noncompetition clauses in employment agreements specifically in a "technology business," which the statute defines as "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."[39] Further, it states that "it shall be prohibited to include a noncompete clause or a nonsolicit clause in any employment contract relating to an employee of a technology business. The clause shall be void and of no force and effect."[40]

In 2016, Utah enacted a prohibition on noncompetition agreements that extend for more than one year after an employee's employment concludes:

> In addition to any requirements imposed under common law, for a post-employment restrictive covenant entered into on or after May 10, 2016, an employer and an employee may not enter into a post-employment restrictive covenant for a period of more than one year from the day on which the employee is no longer employed by the employer. A post-employ-

38. OKLA. STAT. ANN. tit. 15, §§ 217–219A; *see also* Neil v. Pennsylvania Life Ins. Co., 474 P.2d 961, 963 ("Undoubtedly this section of the statute was adopted for the protection of individuals engaged in lawful professions, trades, and business, and for the benefit of the public.").

39. HAW. REV. STAT. ANN. § 480-4(d).

40. *Id.*; *see also* Barranco v. 3D Sys. Corp., No. 13-00412, 2017 WL 1900970, at *5 (D. Haw. May 9, 2017) (noting that courts must "determine as a matter of law whether a restrictive covenant" is enforceable under the new provision of state law).

> ment restrictive covenant that violates this section is void.[41]

The Illinois Freedom to Work Act, which took effect on January 1, 2017, specifically voids such agreements with respect to low-wage workers:

> No employer shall enter into a covenant not to compete with any low-wage employee of the employer [defined as "an employee who earns the greater of (1) the hourly rate equal to the minimum wage required by the applicable federal, State, or local minimum wage law or (2) $13.00 per hour"] . . . . A covenant not to compete entered into between an employer and a low-wage employee is illegal and void.[42]

Not all states have legislation limiting noncompetition agreements. But even in these relatively friendly jurisdictions without explicit prohibitions, judges enforce noncompetition clauses with skepticism and an eye towards public policy.[43]

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41. UTAH CODE ANN. § 34-51-201. To date, there has not been reported litigation on this provision or any judicial interpretation.

42. 820 ILL. COMP. STAT. ANN. 90/10. Like the new Utah statute, there has not yet been reported litigation on this provision. However, other courts around the country have essentially taken a common law approach to decline to enforce noncompetition agreements against low-wage or low-skilled employees. *See, e.g.*, Entex Info. Servs., Inc. v. Behrens, No. CV-99-0593692, 2000 WL 347802, at *3 (Conn. Super. Ct. Mar. 17, 2000) (rejecting injunction of noncompetition agreement against "employees [who] were of an extremely low skill level"); Genex Coop., Inc. v. Contreras, No. 2:13-cv-03008-SAB, 2014 WL 4959404, at *6 (E.D. Wash. Oct. 3, 2014) (finding restrictive covenant to be unreasonable applied against worker who had no unique skills "because it goes beyond what is necessary for the protection of [plaintiff's] business or goodwill"); BHB Inv. Holdings, L.L.C. v. Ogg, No. 330045, 2017 WL 723789, at *2 (Mich. Ct. App. Feb. 21, 2017) (affirming lower court decision rejecting enforcement of noncompetition agreement against low-level employee). This case law from other jurisdictions suggests that Illinois courts are likely to uphold the state's new statute.

43. *See, e.g.*, Tarr v. Timberwood Park Owners Ass'n, Inc., 556 S.W.3d 274, 281 (Tex. 2018), *reh'g denied* (Oct. 5, 2018) (noting that "the courts in Texas have approached . . . restrictive covenants with some skepticism") (internal citations omitted); Bos. v. Indep. Tooling Sols., LLC, No. 340982, 2018 WL 6070431, at *4 (Mich. Ct. App. Nov. 20, 2018) ("[Michigan] public policy required judicial scrutiny of the [noncompetition] agreement's reasonableness notwithstanding the fact that the parties had contractually agreed that the agreement was reasonable"); Land Lake Emp't Grp. of Akron v. Columber, 804 N.E.2d 27, 30 (Ohio 2004) ("[Ohio] courts look upon noncompetition agreements with some skepticism and have cautiously con-

These common law limitations are based, in part, on the concerns that economists have expressed about imposing harsh restrictions on worker mobility. Many economists argue that overall social good is maximized when talent is matched with employer need.[44] In various ways, noncompetition agreements impede the free movement of workers. When considering whether to enforce a noncompetition agreement, judges will consider a variety of factors, including the agreement's (i) geographic, (ii) chronological, and (iii) substantive scope.[45]

An example illuminates these considerations. Imagine a baker who is hired in a cake shop. As a condition of employment, the baker signs an employment agreement with a noncompetition clause that reads: "Employee agrees that, for a period of five years after the termination of employment, with or without cause, Employee will not work in the food industry." Most courts would view such a clause as dramatically overbroad, even if no specific state statue prohibits noncompetition agreements. The clause imposes a long chronological limit (five years) on the employee, with no geographic or substantive limitation. Moreover, the clause restricts the employee from working in the "food industry"—a phrase that could cover job titles from waiter to pastry chef to restaurateur.

As a general matter, a court would look more favorably on a clause that is narrowly tailored: "Employee agrees that, for a period of three months after the termination of employment, with or without cause, Employee will not work as a baker in a bakery or restaurant within 10 miles of Employer's headquar-

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sidered and carefully scrutinized them."); Insulation Corp. of Am. v. Brobston, 667 A.2d 729, 735 (Pa. Super. Ct. 1995) (noting that Pennsylvania precedent regarding restrictive covenants "requires the facts and circumstances of each case to be evaluated with heightened scrutiny"); Marshall & Sterling, Inc. v. Southard, 50 N.Y.S.3d 420, 422 (N.Y. App. Div. 2017) (noting that noncompetition clauses "are carefully scrutinized by [New York] courts").

44. *See generally* Charles Tait Graves & James A. DiBoise, *Do Strict Trade Secret and Non-Competition Laws Obstruct Innovation?*, 1 ENTREPRENEURIAL BUS. L.J. 323 (2007) (surveying the views of economists on whether non-competition covenants and overbroad trade secret laws restrict innovation and impede the growth); Gilson, *supra* note 33, at 594–619 (attributing Silicon Valley's success to a statutory regime that emphasizes employee mobility).

45. *See, e.g.*, Vermont Microsystems, Inc. v. Autodesk, Inc., 88 F.3d 142, 149 (2d Cir. 1996) ("Noncompetition agreements generally are construed narrowly by courts, and must contain time, geographic and/or industry limitations.").

ters." Here, the length of the agreement is merely a single fiscal quarter. There is clarity around the specific job functionality that is prohibited. And the employee is still entitled to work in another town or state and utilize his or her culinary talents.

A brief exploration of these common law factors that judges consider helps to set the stage for understanding the potential implications of sending these disputes to private arbitration.

1. *Geographic Limitations*

A properly drafted noncompetition agreement must be reasonable with respect to the territory it covers. Preventing an employee from competing in a particular town, city, or county might be reasonable. But preventing an employee from working in her chosen trade in a larger radius—the state, coast, or country—is less reasonable.

There is no specific mileage that is universally enforceable. In some situations, 100 miles was considered reasonable to protect the employer; but in others, that same distance was considered unreasonable.[46] A noncompetition clause with no geographic limitations at all will usually be held unenforceable.[47]

Interesting questions emerge in the age of the Internet. An employee who does digital, multimedia, software, or web-based work could compete against a former employer regardless of physical proximity. That is, if your company's web developer leaves to work for a competing web developer 300 miles

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46. *See generally* RUDOLF CALLMANN, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS, AND MONOPOLIES § 16:30 (4th ed. 2003). *Compare* Availability, Inc. v. Riley, 336 So. 2d 668, 670 (Fla. Dist. Ct. App. 1976) (noting 100 miles is reasonable under the circumstances), *with* R.J. Carbone Co. v. Regan, 582 F. Supp. 2d 220, 226 (D.R.I. 2008) (noting that "the geographic scope is overbroad because the 100-mile radius needlessly includes potential customers" that the employer had no relationship to).

47. *See, e.g.*, Nat'l Motor Club of Mo., Inc. v. Noe, 475 S.W.2d 16, 22 (Mo. 1972) (holding that the non-competition clause was invalid because it was not geographically limited); Dryvit Sys., Inc. v. Rushing, 477 N.E.2d 35 (1st Dist. 1985) (holding that geographically unlimited restraints on future work was unreasonable); Manpower of Guilford Cty., Inc. v. Hedgecock, 257 S.E.2d 109, 115 (N.C. Ct. App. 1979) ("A restriction as to territory is reasonable only to the extent it protects the legitimate interests of the employer in maintaining his customers. This restriction [is unreasonable because it] potentially covers a 25-mile radius of any city in the country.").

away, that employee is still directly competing against your core business. While this remains an open question, most courts find that noncompetition agreements related to web services without geographic limitation are reasonable, given the nature of the Internet.[48] However, these courts may pay closer attentions to other limitations on the agreement, such as duration.

2. *Chronological Limitations*

An employer cannot enforce a noncompetition agreement forever.[49] Such agreements must be limited to a reasonable duration. Preventing an employee from doing certain work for a period of three months might be reasonable in most contexts; preventing that same employee from doing certain work for a period of three years might not be.

Like with geographic limitations, there is no established time limitation that courts will universally enforce or strike down; durations of one to five years are the most commonly enforced.[50] However, courts realize that even one-year periods can be unreasonable in certain industries, like technology, where the pace moves rapidly.[51]

3. *Substantive Limitations*

Employers cannot prevent employees from using all of their skills in the market. Doing so would essentially require the employee to be unemployed or underemployed, which creates both economic waste and undue hardship. If a hospital could prevent a doctor from practicing medicine after termi-

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48. *See* Nat'l Bus. Serv., Inc. v. Wright, 2 F. Supp. 2d 701, 708 (E.D. Pa. 1998) (holding a one-year, national non-compete provision to be reasonable); Credentials Plus, LLC v. Calderone, 230 F. Supp. 2d 890, 897 (N.D. Ind. 2002) (upholding a non-compete provision that did not contain any geographic limitations).

49. *See, e.g.*, Primarque Prods. Co. Inc. v. Williams West & Witts Prods. Co., 303 F. Supp. 3d 188, 206 (D. Mass. 2018) (declining to enforce "*indefinite* duration of the non-compete period"); Hanson v. Loparex, Inc., 809 F. Supp. 2d 972, 980 n.5 (D. Minn. 2011) ("And any such open-ended, indefinite term of a post-employment restriction would almost surely be deemed invalid as an excessive restraint.").

50. *See generally* CALLMANN, *supra* note 46, § 16:29.

51. EarthWeb, Inc. v. Schlack, 71 F. Supp. 2d 299, 313 (S.D.N.Y. 1999) ("[T]his Court finds that the one-year duration of EarthWeb's restrictive covenant is too long given the dynamic nature of this industry.").

nation, both society and the doctor would suffer. If a web developer could prevent a coder from working for any competing company, technological growth would be impeded, and the developer could not profit from her unique talents.

Scholars generally agree that an employee's "accumulated training, knowledge, and skills . . . are not, in themselves, legitimate interests to be protected by the employer, even where the training and knowledge were acquired or increased through experience during the employment."[52] An employer cannot prevent an employee from using the skills gained during employment in any and all future jobs. Courts hesitate to prevent employees from using their skills, whether they are the result of extensive education or the result of their practice of the trade, such as surgery or coding. Still, courts view customer lists, trade secrets, and other proprietary employer information as legitimately protectable.

4. *Forum Selection Clauses*

A lawyer might assume that a simple forum selection clause in an employment agreement would mitigate any *statutory* limitations placed on noncompetition clauses—even if the common law factors may still weigh on judges' minds. A forum selection clause can dictate both the physical place where litigation must be brought, and the substantive state law that must be applied. These clauses are common in commercial contracts and usually upheld by courts.[53] Scholars have noted that they serve "a number of laudable interests":

> The clause provides certainty and predictability as to the place of litigation. By designating a certain forum, parties will be able to choose a court which is both convenient and expert. Additionally, the clause brings economic advantages to the contractual par-

52. *See generally* CALLMANN, *supra* note 46, § 16:32 (describing the types of "protectable interests" that courts will allow employers to enforce).

53. The Supreme Court has offered strong support for forum selection clauses. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 590 (1991) (enforcing forum selection clause that was deemed reasonable and noting their ubiquity); *see also* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972) (enforcing a forum selection clause and noting a national policy in their favor, since "[t]he argument that such clauses are improper because they tend to 'oust' a court of jurisdiction is hardly more than a vestigial legal fiction").

> ties and the courts. Parties know where their recourse lies should a disagreement arise and, therefore, are able to take into consideration the cost of prospective litigation when negotiating the value of the contract . . . . [B]y giving effect to forum agreements, a court is spared the burden of pretrial motions to determine the correct forum, thereby conserving judicial resources.[54]

It is true that forum selection clauses are beneficial in many situations. However, in practice, some courts have refused to apply substantive law that would result in a conflict with their own state's public policy on noncompetition agreements.

For example, *Bunker Hill International, Ltd. v. Nationsbuilder Insurance Services, Inc.* considered an employment agreement with a noncompetition provision and an Illinois forum selection clause. After an employee left his employer for a directly competing company, the employee sought a declaratory judgment in Georgia to invalidate the noncompetition agreement. The employer claimed that the case should be adjudicated in Illinois, given the forum selection clause. The Georgia Court of Appeals held that the employee could escape the forum selection clause if he could show that "at least one of the covenants violate Georgia public policy and . . . such a covenant would likely be enforced against him by an Illinois court."[55] Examining Illinois precedent, the Court indeed determined that the state was likely to enforce the noncompetition clause. It therefore decided to instead apply Georgia law instead: "the agreement's forum-selection provision [which would have sent the case to Illinois] is void because its application would likely result in the enforcement by an Illinois court of at least one covenant in violation of Georgia public policy."[56]

Moreover, even seemingly "friendly" jurisdictions may not remain so forever. Recent legislative efforts like those in Ha-

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54. Michael Mousa Karayanni, *The Public Policy Exception to the Enforcement of Forum Selection Clauses*, 34 DUQ. L. REV. 1009, 1009–10 (1996).

55. Bunker Hill Int'l, Ltd. v. Nationsbuilder Ins. Servs., Inc., 710 S.E.2d 662, 666 (Ga. Ct. App. 2011).

56. *Id.* at 667.

waii, Utah, and Illinois are likely to continue.[57] This is unsurprising, given that "states are interested in promoting knowledge-based industries impacted by [noncompetition] policy"[58] and "[n]o state governor or legislature wants to be accused of losing its innovative edge by failing to update its non-compete laws."[59] The consequence will be even less predictability about the enforcement of restrictive covenants.

Thus, while a forum selection clause naming a less hostile state cannot hurt, this clause alone will not guarantee a court's enforcement of the noncompetition agreement.

II.
Arbitration in the United States

Arbitration is a dispute resolution process in which the parties submit their dispute to a third-party neutral, who then issues a binding award.[60] A frequent choice for many commercial parties, arbitration is particularly common in cases involv-

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57. As an example, a ban was recently introduced in the Washington State—once known as a relatively friendly jurisdiction—in 2015. *See* H.B. 1926, 64th Leg., Reg. Sess. (Wash. 2015) (restricting noncompetition agreements). Though that bill has not been enacted, it was reintroduced in 2016, with somewhat modified versions in 2017, 2018, and 2019. *See Washington State Lawmakers Seek to Partially Ban Non-Competes, Trading Secrets*, Seyfarth Shaw LLP (Mar. 15, 2019), https://www.tradesecretslaw.com/2019/03/articles/noncompete-enforceability/washington-state-lawmakers-seek-to-partially-ban-non-competes/. Similar legislation was introduced in Massachusetts in 2017, though again, it did not pass. S.B. 988 (Mass. 2017); H.B. 2366 (Mass. 2017). *See also Massachusetts Legislature Schedules Hearing on Non-Compete Reform, Trading Secrets*, Seyfarth Shaw LLP (Oct. 3, 2017), https://www.tradesecretslaw.com/2017/10/articles/legislation-2/massachusetts-legislature-schedules-hearing-on-non-compete-reform/.

58. Norman D. Bishara, *Covenants Not to Compete in a Knowledge Economy: Balancing Innovation from Employee Mobility Against Legal Protection for Human Capital Investment*, 27 Berkeley J. Emp. & Lab. L. 287, 297 (2006).

59. Robert W. Gomulkiewicz, *Leaky Covenants-Not-to-Compete as the Legal Infrastructure for Innovation*, 49 U.C. Davis L. Rev. 251, 255 (2015).

60. Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 Nev. L.J. 427, 435–36 (2007) (listing four defining elements of arbitration as (i) a process to settle disputes between parties; (ii) a neutral third party; (iii) an opportunity for the parties to be heard; and (iv) a final, binding decision by the third party).

ing labor and employment disputes.[61] Arbitration offers a number of potential benefits when compared to litigation.[62]

Speed is usually first on that list. The arbitration process can move significantly faster than litigation. Unlike an action filed in a court system, an arbitration proceeding does not share space on a crowded docket. Neutrals are paid directly by the parties often through an intermediary provider like the American Arbitration Association ("AAA") or JAMS. Consequently, that neutral gives their full attention—sometimes days or weeks in a row—to the parties' dispute. While courts may take many months to issue lengthy decisions, arbitrators' decisions can come quickly and are often quite short.[63] Because arbitration awards are non-precedential, there is no need for the arbitrator to explain her reasoning with detailed citations unless the parties request a longer "reasoned" award. As a result, the overall time period from the filing of a claim to the final award can be far quicker than the resolution of a civil lawsuit. One study by the AAA found that the average arbitration proceeding takes approximately 7.9 months from beginning to end, compared to approximately twenty-seven months for non-jury civil cases in federal court (and 30.7 months for jury cases).[64]

Second, parties value the privacy that arbitration affords. Arbitration is not a public process. Claims, proceedings, and

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61. *See, e.g.*, Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 OHIO ST. J. ON DISP. RESOL. 1 (2017) (describing recent trends in labor and employment arbitration cases).

62. *See supra* notes 2–4 and accompanying text. Many argue that arbitration is also significantly less expensive than litigation. However, this advantage is not universal, and scholars have noted that arbitration proceedings, too, can be costly. Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, 25 AM. REV. INT'L ARB. 297, 341–43 (2014) (describing the increased cost of modern arbitration).

63. Christine L. Newhall, *The AAA's War on Time and Cost — The Campaign to Restore Arbitration's Benefits*, 67 DISP. RESOL. J. 20 (2012) (describing programs and training initiatives at the AAA to ensure that arbitrations are conducted efficiently).

64. Edna Sussman, *Why Arbitrate? The Benefits and Savings*, N.Y. ST. B. ASS'N J., Oct. 2009, at 20, 21 (reviewing a 2008 study by the AAA on the median lengths of their business-to-business cases in which awards were rendered compared to the median lengths of trials in the U.S. District Court for the Southern District of New York).

awards are not filed openly, in contrast to civil litigation where lawsuits are often available online once they are filed. This can help parties to avoid embarrassing disclosures that would otherwise appear on public court dockets. Importantly, "[a]rbitration is private but not confidential" unless the parties also sign confidentiality agreements prior to the process, as many do.[65] The private atmosphere, supplemented by confidentiality agreements, can be particularly helpful in the employment context, when the messy details of an employee's behavior or an employer's misconduct can harm both parties' reputations outside of the arbitration room.[66]

Third, arbitration allows parties to choose their neutral.[67] This choice stands in contrast to litigation, where a judge is randomly assigned to each case. A carefully selected arbitrator can provide a more thorough evaluation of evidence without the distraction of a crowded docket.[68] Arbitrators can also

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65. Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1211 (2006) (describing the distinctions between privacy and confidentiality in domestic arbitration).

66. While finding definitive data is difficult, given the confidentiality of the process, some research suggests that the likelihood of an employee having a successful claim in arbitration is roughly equal to that same employee's chances in litigation. *See, e.g.*, Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. DISP. RESOL. 559, 564 (2001) (examining employment claims and finding that "claimants" win–loss ratios are at least as high in arbitration, and some evidence suggests that claimants win more cases in arbitration than they do in court); Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. DISP. RESOL. 777, 824 (2003) (summarizing empirical research and concluding that "AAA employment arbitration offers affordable, substantial, measurable due process to employees arbitrating pursuant to mandatory arbitration agreements and to middle- and lower-income employees").

67. In some contracts, including employment contracts, the arbitration clause will provide that the arbitrator will be chosen from a particular roster, such as one maintained by the AAA. However, parties to an arbitration agreement are free to mutually agree upon any neutral they like.

68. *See, e.g.*, Wayne D. Brazil, *When "Getting It Right" Is What Matters Most, Arbitrations Are Better Than Trials*, 18 CARDOZO J. CONFLICT RESOL. 277 (2017) (perspective of a JAMS arbitrator and former federal judge, finding that "arbitrations conducted by conscientious arbitrators are likely to yield higher quality decisions than trials conducted by conscientious judges . . . [and] decisions in which the findings of fact are better supported by the evidence and in which the conclusions of law are informed by reasoning about the

bring relevant subject matter expertise. In a dispute over a complex software patent, the parties could select an arbitrator with a legal background, a coding background, or both. In a dispute over a building's construction, the parties could select a panel of arbitrators that includes an architect, a contractor, and an engineer. The possibilities are endless, given the depth of neutrals who work with organizations like the AAA and JAMS.

Arbitration proceedings themselves are typically governed by the administering organizations' rules, which can be specific to the type of dispute (e.g., commercial, employment, consumer, etc.).[69] Beyond those administering rules, various federal and state laws create a judicial 'backstop' to arbitration to ensure that the private process is enforceable and effective.

A. *The Federal Arbitration Act*

Arbitration has a long history as a method of dispute resolution, with roots that trace to ancient Mediterranean societies.[70] In the United States, it has been used since the colonial era.[71] But in early America, courts viewed arbitration with suspicion and did not consistently enforce arbitration agreements or awards.[72] Consequently, businesses could not confidently rely on arbitration to resolve their disputes.

This changed rapidly with the passage of the Federal Arbitration Act ("FAA") in 1925. The FAA mandated that arbitration agreements between parties "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in

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dynamic between evidence and law that is deeper, more disciplined, and more subtle").

69. *See AAA Rules, Forms & Fees*, AM. ARBITRATION ASS'N, https://www.adr.org/Rules (last visited May 14, 2019); *JAMS Comprehensive Arbitration Rules & Procedures*, JAMS (July 1, 2014), https://www.jamsadr.com/rules-comprehensive-arbitration/.

70. *See, e.g.*, Henry T. King, Jr. & Marc A. LeForestier, *Arbitration in Ancient Greece*, DISP. RESOL. J., Sept. 1994, at 38.

71. *See, e.g.*, Joseph L. Daly, *Arbitration: The Basics*, 5 J. AM. ARB. 1 (2006) (providing an overview of the development of arbitration in the United States).

72. Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 523 (2011) (discussing the history of American courts finding that arbitration "ousted" them of their jurisdiction, and were thus void against public policy).

equity for the revocation of any contract."[73] In other words, Congress directed courts to enforce arbitration agreements and awards with consistency, absent a few exceptions. The Supreme Court, interpreting the FAA, has pronounced that "[i]n enacting [the FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[74]

The FAA established a clear procedural framework for arbitration in which the courts became a backstop to the otherwise private process. Through the FAA, parties can move to compel arbitration if a valid arbitration agreement exists,[75] ask a court to appoint an arbitrator if the parties cannot choose one,[76] confirm an arbitration award,[77] or vacate an arbitration award.[78] Simply put, the FAA has made arbitration a meaningful and reliable alternative to the public courts for many types of disputes.

B. *Arbitration Trends*

While this brief section cannot summarize all trends in American arbitration law since the FAA's enactment, nor all of the Supreme Court's arbitration decisions, it does aim to explore several trends that have deeply affected arbitration and its intersection with federal and state courts. Each of these trends bears on the ability of arbitration to resolve noncompetition disputes.

First, arbitration legislation has become increasingly nationalized. Originally, arbitration was entirely a creature of state contract law.[79] This changed, of course, with the passage of the FAA in 1925. But even then, states became more attentive to creating and modeling their own arbitration statutes on the FAA and on one another. The 1955 Uniform Arbitration Act ("UAA"), promulgated by the National Conference of Commissioners on Uniform State Laws, was adopted in 35

73. 9 U.S.C. § 2 (1947).
74. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).
75. 9 U.S.C. § 4.
76. *Id.* § 5.
77. *Id.* § 9.
78. *Id.* § 10.
79. E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 194 (3d Cir. 2001).

states, with 14 others adopting substantially similar arbitration laws.[80] The UAA's goal was to create consistency across jurisdictions and ensure that each state's arbitration framework covered substantially the same issues. The Revised Uniform Arbitration Act ("RUAA") was promulgated in 2000, updating and modernizing the UAA.[81] The RUAA is somewhat newer than the UAA, but it has already been adopted in 21 states and the District of Columbia.[82]

Second, a supportive legal culture has further aided the nationalization of arbitration. The American Bar Association ("ABA") launched its Section of Dispute Resolution in 1993, and now boasts over 11,000 members.[83] Through publications and educational initiatives, the Section is a forum for lawyers to discuss arbitration issues across state lines. Leading law schools—including Cardozo, Harvard, Ohio State, the University of Oregon, and Pepperdine—have created dispute resolution centers that play similar roles, hosting regular conferences and offering regular arbitration coursework.[84] To the extent that arbitration once existed entirely "outside" of the traditional legal culture, that is no longer the case. Taken together, the law and culture around arbitration has become increasingly nationalized.

A third notable trend has been the rise of federal preemption of state arbitration laws.[85] The Supreme Court repeatedly

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80. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM ARBITRATION ACT (1955).

81. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM ARBITRATION ACT (2000).

82. *See Arbitration Act*, NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, https://www.uniformlaws.org/committees/community-home?CommunityKey=aA0ad71d6-085f-4648-857a-e9e893ae2736 (last visited May 3, 2019).

83. Am. Bar Ass'n Section of Dispute Resolution, *About Us*, AM. BAR ASS'N, http://www.americanbar.org/groups/dispute_resolution/about_us.html (last visited Apr. 3, 2019).

84. Lela P. Love & Brian Farkas, *Silver Linings: Reimagining the Role of ADR Education in the Wake of the Great Recession*, 6 NE. U. L.J. 221, 252 (2013) (discussing adoption of dispute resolution programs in various law schools); Michael Moffitt, *Islands, Vitamins, Salt, Germs: Four Visions of the Future of ADR in Law Schools (and a Data-Driven Snapshot of the Field Today)*, 25 OHIO ST. J. ON DISP. RESOL. 25 (2010) (same).

85. *See generally* Brian Farkas, *The Continuing Voice of Dissent: Justice Thomas and the Federal Arbitration Act*, 22 HARV. NEGOT. L. REV. 33, 37–43 (2016) (outlining the history of federal preemption of state statutes under the FAA).

invalidates state laws that conflict with the FAA, or that otherwise impede the national policy favoring arbitration. Under the Constitution's Supremacy Clause, state law must yield to conflicting federal law.[86] Since at least the early 1980s, the Court has stressed that "the FAA's primary purpose was reversing judicial hostility to arbitration and enforcing contractual commitments to arbitrate."[87] States have frequently passed laws aimed at regulating arbitration—for example, forcing arbitration clauses to be printed on the front of a contract in big letters.[88] When the Court has viewed these local laws as being hostile to arbitration, it voids them, citing the "national policy favoring arbitration and [placing] arbitration agreements on equal footing with all other contracts."[89] This has been particularly true for state-based employment laws. In a comprehensive study of the effect of federal preemption on these laws, Professor E. Gary Spitko concludes that the "Supreme Court's recent FAA jurisprudence makes clear . . . that a state's public policy reasons for regulating employment arbitration are irrelevant to FAA preemption analysis."[90] In sum, federal preemption of conflicting state laws has made it extremely difficult for states to curtail or regulate arbitration in meaningful ways, including in the employment context.

Fourth, the Supreme Court has interpreted the FAA broadly to allow the enforcement of arbitration clauses contained in consumer and employment contracts, even if they are contracts of adhesion. For example, the Court has held that arbitration clauses that ban class actions, and instead com-

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86. U.S. CONST. art. VI, cl. 2. *See* Kristen M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Act Preemption*, 67 FLA. L. REV. 711, 715 (2015) ("Under all preemption theories, state regulation must yield to the U.S. Constitution, as well as federal laws and regulations governing the same subject. The Constitution's Supremacy Clause dictates preemption.").

87. Lawrence A. Cunningham, *Rhetoric Versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, LAW & CONTEMP. PROBS., 129, 130 (2012).

88. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687–89 (1996) (invalidating Montana statute that required special notice of arbitration agreement, since the statute treated arbitration with greater suspicion than other contracts, and thereby conflicted with the FAA).

89. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006).

90. E. Gary Spitko, *Federal Arbitration Act Preemption of State Public-Policy-Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight*, 20 HARV. NEGOT. L. REV. 1, 59 (2015).

pel individual arbitration with claimants, are enforceable.[91] The willingness of courts to enforce such clauses has concerned consumer and employee advocates. In the consumer context, many buyers "are unable to preserve their right to sue in court because firms refuse to sell goods or services unless such rights are relinquished" through an arbitration clause.[92] Similarly, in the employment context, many workers "must waive their right to litigate violations of employment law, including . . . discrimination."[93] While arbitration has not traditionally received much public attention, that is beginning to change. In 2015, for example, *The New York Times* published a three-part investigative series on forced arbitration clauses in various contexts, describing small business owners, students, nursing home patients, and others who waived their rights to litigate.[94] Critics charge that employee and consumer arbitration is slanted heavily in favor of large corporations, given that the signatories generally lack bargaining power or an understanding of the process.[95] The #MeToo movement has generated further attention from journalists, scholars, and legislators on the arbitration of sexual harassment claims.[96] Overall,

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91. *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013) (holding that the FAA requires the enforcement of arbitration provisions as written, including class action waivers, even when the cost of individually proving an individual claim in arbitration will exceed the potential recovery).

92. Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 270 (2015).

93. *Id.* at 270–71.

94. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere: Stacking the Deck of Justice*, N.Y. TIMES, (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html; Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES (Nov. 1, 2015), http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html; Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture is the Rule of Law*, N.Y. TIMES (Nov. 2, 2015), http://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html.

95. Steven C. Bennett & Dean A. Calloway, *A Closer Look at the Raging Consumer Arbitration Debate*, 65 J. DISP. RESOL. 28, 31–32 (2010) (summarizing views of mandatory arbitration critics).

96. *See generally* Lesley Wexler Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 59 (2019) (discussing the use of arbitration to resolve claims of harassment and discrimination in private settings, and noting that the arbitration process could be detrimental to the goals of the #MeToo Movement).

however, there is no sign that courts are reversing their strong presumption in favor of the enforceability of arbitration agreements and awards—quite the opposite.[97]

Taken together, these four trends show that, over the past half-century, arbitration has become both normalized and nationalized. Statutory schemes, courts, and legal institutions have created an environment that is highly supportive of arbitration. Despite criticisms, courts regularly enforce arbitration agreements and awards pursuant to the FAA.[98]

III.
Arbitrability of Noncompetition Agreements

The preceding discussion leaves us with a paradox. On one hand, both noncompetition clauses and arbitration clauses are becoming increasingly popular in employment contracts. But on the other hand, the reliability of arbitration clauses is strong, while the reliability of noncompetition clauses is weak. Arbitration is national and predictable, while noncompetition clauses are subject to the policy whims of particular states. Indeed, there is an obvious tension between the uncertain enforcement of noncompetition agreements and the relatively certain enforcement of arbitration agreements.

This paradox reveals its own solution: contract language requiring the arbitration of noncompetition disputes pursuant to a specific state's laws. By sending disputes to arbitration, employers can bypass court hostility to noncompetition clauses. Arbitration thus provides employers with a greater degree of certainty that their noncompetition clauses will be found enforceable.

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97. Two percent of U.S. Supreme Court decisions reveal the extent to which arbitration remains strongly enforceable, particularly in the employment law context. *See, e.g.*, Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 526 (2019) (where there is a written agreement to arbitrate, which also contains a delegation clause, the issue of arbitrability must be decided by the arbitrator); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1618 (2018) (neither the National Labor Relations Act nor the FAA render unenforceable provisions in employment contracts that barred employees from pursuing class actions).

98. Criticisms of mandatory arbitration provisions abound among many scholars and politicians. For a useful summary of some of those critiques, see Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. Ill. L. Rev. 371 (2016).

The interpretation of contracts is generally a matter of state law. This includes employment contracts. As we have seen, many states have specific legislation or policy that is hostile towards noncompetition clauses. As courts in these jurisdictions interpret their enforceability, they will be guided by the policies of their state's legislation. In arbitration, however, the arbitration clause can dictate the substantive state law that governs.[99] Because arbitrators themselves are often selected because of their expertise in a particular field, they are more likely to be familiar with the competitive norms of a particular industry than judges. And further, an arbitration clause eliminates the possibility of a jurisdictional battle, with the employer filing suit in one jurisdiction and the employee filing suit in another; most courts would recognize the validity of the agreement and compel arbitration. At the time of contracting, an employer would likely seek a jurisdiction like Delaware, New York, or Texas. An employee—at least one with bargaining power—might push for the arbitration clause to instead apply the law of California, Oklahoma, or North Dakota.

Like judges, arbitrators usually have authority to issue broad injunctive relief. For example, the AAA's Commercial Arbitration Rules provide: "[t]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract."[100] Such injunctive relief might take the form of preventing an employee from taking a new job, or allowing her to utilize certain proprietary information in a new venture. Money damages could also be part of the award for breach of an employment agreement. Because courts are very likely to confirm arbitral awards, all of this relief would likely be enforceable.[101]

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99. *See* AM. ARBITRATION ASS'N, DRAFTING DISPUTE RESOLUTION CLAUSES: A PRACTICAL GUIDE, SECTION E, GOVERNING LAW (2013) ("It is common for parties to specify the law that will govern the contract and/or the arbitration proceedings.").

100. AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES 28 (2016), https://www.adr.org/sites/default/files/Commercial%20Rules.pdf.

101. *See, e.g.*, Michael H. LeRoy, *Crowning the New King: The Statutory Arbitrator and the Demise of Judicial Review*, 2009 J. DISP. RESOL. 1 (2009) (describing a study of approximately 300 challenges to arbitration awards and noting that only 4.3% were vacated).

A. *Developing Case Law*

Sure enough, the Supreme Court has recently made it clear that arbitration clauses might serve as an avenue around state laws that are hostile towards noncompetition agreements. In *Nitro-Lift Technologies, LLC v. Howard*, the Court overturned the decision of the Oklahoma Supreme Court, which had invalidated a noncompetition agreement that contained a binding arbitration clause.[102]

Nitro-Lift is in the oil, gas, and chemical business. It required employees to sign a "Confidentiality/Non-Compete Agreement" that includes a broad arbitration clause:

> Any dispute, difference or unresolved question between Nitro-Lift and the Employee (collectively the "Disputing Parties") shall be settled by arbitration by a single arbitrator mutually agreeable to the Disputing Parties in an arbitration proceeding conducted in Houston, Texas in accordance with the rules existing at the date hereof of the American Arbitration Association.[103]

Given the confidential nature of Nitro-Lift's chemical processes, the employment agreement also contained a strict noncompetition clause:

> In consideration of the receipt of Confidential Information during employment . . . . Employee hereby covenants and agrees that for two years from the date of separation from employment with Nitro-Lift, regardless of the reason or cause for separation, he will not directly or indirectly; own, manage, operate, join, control or participate in or be connected with (whether as a director, officer, employee, agent, representative, partner, consultant or otherwise), or loan money to or sell or lease equipment to, any business or Person, which wholly or in any significant part, engages in Nitrogen Generation . . . . The parties agree and acknowledge that the limitations as to time, geographical area and scope of activity to be restrained as set forth [in this section] are reasonable and do not impose any greater restraint than is necessary to

102. Nitro-Lift Technologies, LLC v. Howard, 568 U.S. 17 (2012).
103. *Id.* at 18.

> protect the legitimate business interests of Nitro-Lift.[104]

After working for Nitro-Lift in Oklahoma, Texas, and Arkansas, two employees—Eddie Lee Howard and Shane Schneider—quit and began working for a competitor. Claiming that they had breached their noncompetition agreements, Nitro-Lift filed a demand for arbitration pursuant to the arbitration clause. The employees immediately filed suit in an Oklahoma state court, asking the court to void the noncompetition agreement and enjoin its enforcement. The lower court dismissed the complaint, finding the arbitration clause to be valid.

The Oklahoma Supreme Court reversed, finding that "the existence of an arbitration agreement in an employment contract does not prohibit judicial review of the underlying agreement."[105] That court reasoned that an arbitration clause in an employment contract could not prohibit judicial review of the underlying agreement if that agreement violated substantive state law. It then applied Oklahoma's traditional scrutiny to the noncompetition clause, which the court described as the state's public policy.[106]

In a unanimous *per curiam* decision, the Supreme Court reversed the Oklahoma Supreme Court, finding that it had disregarded the FAA. The court cites to its earlier decision in *Buckeye Check Cashing, Inc. v. Cardegna* for the proposition that an arbitration clause's validity is subject to initial court determination, but the validity of the totality of the contract is for the arbitrator alone.[107] Because the Oklahoma Supreme Court

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104. *Id.* at 25.

105. Howard v. Nitro-Lift Techs., L.L.C., 273 P.3d 20, *cert. granted*, *vacated*, 568 U.S. 17 (2012).

106. Oklahoma's statutory prohibition on non-competition clauses is described *supra* note 38.

107. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006) (affirming the separability doctrine in ruling that arbitrators decide fraud challenges to the validity of a contract, and holding that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance"); *see also* Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 301 (2010) (noting that, in *Buckeye Check Cashing,* the Court "simply applied the requirement in § 2 of the FAA that courts treat an arbitration clause as severable from the contract in which it appears and enforce it according to its terms *unless* the party resisting arbitration specifically challenges the enforceability of the arbitration clause itself . . . ." (emphasis added)).

had not found invalidity with regard to the arbitration clause, its consideration of the validity of the noncompete clauses assumed the arbitrator should not have had a role. The Court noted that "[t]here is no . . . exception to the Supremacy Clause . . . . [W]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."[108] Thus, the Court held that "it is for the arbitrator to decide in the first instance whether the covenants not to compete are valid."[109]

Nitro-Lift is one of many recent Supreme Court cases to enforce arbitration agreements, even in the face of conflicting state law.[110] For those drafting and negotiating noncompetition clauses, *Nitro-Lift* suggests that an arbitration clause can effectively circumvent the law of a hostile state.[111] One should consider the lessons that *Nitro-Lift* offers to ensure the enforceability of restrictive covenants.

B. *Strategies to Ensure Enforceability*

Mandatory arbitration clauses provide a potential solution for employers seeking to combat the suspicion with which many judges view noncompetition agreements. How should such a clause be drafted to maximize the chances of enforcement?

1. *Choice of Law Provision*

By now, it is apparent that some jurisdictions are friendlier towards noncompetition agreements than others. Employment agreements should explicitly establish the substantive state law that will govern the contract both within an independent forum selection clause and within the arbitration clause. The arbitration clause should specifically provide the city and state where the arbitration must occur—preferably a jurisdiction that is both friendly to noncompetition clauses and has some substantive connection to the dispute (i.e., considering

108. *Nitro-Lift*, 568 U.S. at 22.
109. *Id.*
110. Farkas, *supra* note 85, at 47.
111. *Nitro-Lift*, 568 U.S. at 22; *see also* Frye v. Wild Bird Ctrs. of Am., Inc., 714 F. App'x 211, 212 (4th Cir. 2017) (affirming arbitrator's application of Maryland law, as required by the agreement, to enforce noncompetition clause with two-year employment prohibition).

the location of witnesses, documents, and the parties themselves).

The independent forum selection clause is standard in most contracts, stating the substantive law and venue where any lawsuit would be brought. For example:

> **MANDATORY FORUM SELECTION.** The parties agree that (i) any claim of whatever character arising under this Employment Agreement or relating in any way, directly or indirectly, to the dealings between the Company and the Employee shall be brought exclusively in a state court of competent jurisdiction in New York, New York applying the law of the state of New York; (ii) any such claim that is filed in any other court shall be conclusively deemed as violating the expressed intent of the parties in this mandatory forum selection clause; and (iii) any challenge to the filing of any such claim in a forum designated in this clause shall be deemed waived.

Separate and apart from the broad forum selection clause, the substantive law and jurisdiction should be reiterated in the arbitration clause itself. For example:

> **ARBITRATION.** Any controversy or claim arising out of or relating to this Employment Agreement, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Employment Arbitration Rules and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The arbitration must occur in New York, New York and apply the law of the State of New York.

Such repetition provides further comfort to a judge or arbitrator as to the nature and intent of the parties' agreement. Almost all ambiguity—perhaps the parties agreed that New York law would govern litigations, but did not agree upon the substantive law to govern in an arbitration proceeding—is eliminated.[112]

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112. Again, this governing law selection is already common within many arbitration clauses. *See* AM. ARBITRATION ASS'N, *supra* note 99, at 25.

2. *Emergency Relief Provision*

By their very nature, competition disputes arise quickly and sometimes unexpectedly. An employee may get a competing job offer on Thursday, quit on Friday, and join the competing firm on Monday. Either the employer will rapidly file a motion seeking an injunctive order to prevent the employee from doing so, or the employee will seek a declaratory order to nullify the noncompetition provision.

Strangely, however, arbitration and noncompetition clauses are seldom drafted with attention to the fact that these sorts of disputes often emerge so rapidly. The two clauses are rarely considered in conjunction.

A properly drafted arbitration clause should explicitly state that the tribunal has the authority to grant equitable, injunctive, and provisional relief to enforce the terms of the noncompetition agreement. The clause could also make specific reference to institutional provider rules that contain a process for emergency relief. For example, Rule 38 of the AAA Commercial Arbitration Rules incorporate Emergency Measures of Protection into the parties' agreement, creating a process why which they can seek interim relief prior to a full arbitral hearing.[113] Under that Rule, a party can seek emergency relief by notifying the AAA and other parties to the arbitration. The AAA will appoint an emergency arbitrator upon one day's notice. Within two days of the arbitrator's appointment, the arbitrator will set a schedule for briefings or hearings, which can be telephonic or through videoconference. The petitioner—whether the employer or the employee—would need to show immediate or irreparable harm in the absence of the requested relief. The interim relief can then be granted, maintaining the status quo until there can be a full hearing on the merits. Once a full panel is appointed, it can review, and re-

113. *See* AM. ARBITRATION ASS'N, *supra* note 100, at 24–25 (R-38 "Emergency Measures of Protection"). Prior to a revision of the AAA Rules in October 2013, parties who had not agreed to the so-called "Optional Rules of Emergency Measures" would usually need to file a state or federal court action to obtain immediate injunctive relief on a non-competition agreement. Obviously, once the courts are called upon to evaluate a non-competition clause, there is a risk that the state's public policy might be hostile to the clause's enforcement.

verse, the emergency arbitrator's provisional award.[114] This emergency process contrasts with the normal process of filing an arbitration demand, in which assembling the arbitral panel can take several weeks.[115] Other institutional providers have similar emergency relief procedures, including JAMS[116] and the International Chamber of Commerce.[117]

An example of a clause in an employment agreement that would provide for emergency relief from an arbitrator might read:

> **EMERGENCY PROVISIONAL INJUNCTIVE RELIEF.** Any party may apply to the arbitrator for a temporary restraining order, preliminary injunction, or any other provisional or interim relief available under New York law, if in that party's sole judgment the action is necessary to avoid irreparable damage or to preserve the status quo. The arbitrator has the power to issue interim relief to the same extent as a New York court in a civil action. The arbitrator shall follow the AAA Rule for Emergency Measures of Protection. The parties agree that there is no adequate remedy at law for breach of any order for interim relief granted by the arbitrator under this Agreement. In case of such a breach by either party, the other party may bring an action to seek specific enforcement of the arbitrator's order in the Supreme Court of New York, New York

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114. *See generally* Mari Tomunen, *Injunctive Relief Pending Arbitration*, 72 DISP. RES. J. 1, 9–17 (2017) (analyzing ability of parties to seek emergency relief prior to formal arbitral hearings); Bruce E. Meyerson, *Interim Relief in Arbitration: What Does the Case Law Teach Us?*, 34 ALT. TO HIGH COST LITIG. 131, 131 (2016) (same).

115. W. RYAN SNOW, *Successfully Managing Government Contract Disputes: Key Considerations*, *in* LITIGATION STRATEGIES FOR GOVERNMENT CONTRACTS 7 (2012) ("[F]inding a date with a panel of arbitrators willing to accommodate the schedules of all parties and witnesses, including the arbitrators themselves, can take months.").

116. *See* JAMS, JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES 7–8 (2014), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2014.pdf (Rule 2 "Party Self-Determination and Emergency Relief Procedures").

117. INT'L CHAMBER OF COMMERCE, ARBITRATION RULES art. 29, at 33 (Mar. 1, 2007), https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf ("Emergency Arbitrator").

> County, which shall have exclusive jurisdiction of the action. The law of the State of New York shall apply to any proceeding under this clause.

Arbitrators are often cognizant of Section 10 of the FAA, which lists the four independent grounds for vacating an arbitration award. One of those grounds provides: "the United States court in and for the district wherein the award was made may make an order vacating the award . . . (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."[118] In other words, if an arbitrator issues an award beyond the scope of the parties' arbitration agreement, that award is subject to vacatur by a court. In the context of an employment dispute, an arbitration clause that is silent regarding provisional or injunctive relief could raise a question about the scope of the parties' intent to allow an arbitrator to resolve those issues.

A clause like the one above, however, leaves little room for debate that an arbitrator does, in fact, have full authority to issue emergency injunctive relief. Such a clause would give the arbitrator confidence in her ability to issue a temporary order enforcing, or blocking, the noncompetition provision. In practical terms, this could mean that the arbitrator could order that the employee not begin a new job for an additional few weeks until there can be hearings or briefings on the dispute.

3. *The Importance of Clarity*

The suggested clauses above do not involve any particularly complex language or "magic" legal jargon. To the contrary, the language is short and crisp. Non-lawyers could easily understand the meaning. This is no accident. To ensure that arbitration and noncompetition clauses will be enforceable—both separately and together—the language of the employment agreement should be unambiguous to avoid any potential argument that the employee did not understand its terms.

Despite the strong national policy favoring arbitration, some judges may be skeptical of enforcing arbitration provisions that are buried in the fine print of contracts.[119] For ex-

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118. 9 U.S.C. § 10(a)(4) (2002).

119. *See* Dean v. Harvestime Tabernacle United Pentecostal Church Int'l, 913 N.Y.S.2d 707, 708 (N.Y. App. Div. 2010) (declining to enforce an arbitra-

ample, a California court held an arbitration clause to be procedurally unconscionable when it was contained in the thirty-sixth paragraph of "11 single-spaced pages of small-font print riddled with complex legal terminology."[120] Indeed, courts will sometimes consider, in some detail, whether the arbitration clause was printed in an appropriately bold typeface or readable font size.[121] In all fifty states, there is a common law presumption that ambiguous contract language should be con-

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tion provision that was "so unclear and equivocal"); Baker v. Tognazzini Family, Inc., 2013 WL 6159167 (Cal. Ct. App. Nov. 25, 2013) (finding the arbitration agreement too vague to be enforceable and also unconscionable as against public policy because it required prospective waiver of suits under state Private Attorneys General Act); Hudyka v. Sunoco, Inc., 474 F. Supp. 2d 712 (E.D. Pa. 2007) (noting that a waiver of judicial forum must be clear and unmistakable under state law, which employer failed to prove here since alternative dispute policy with vague terms was distributed by email that failed to state policy was mandatory); Parris v. Keystone Foods, LLC, 959 F. Supp. 2d 1291 (N.D. Ala. 2013) (finding that arbitration clause of former employee's collective bargaining agreement was vague as to what types of claims were covered under its provisions that it was unenforceable as to employee's sex discrimination claims); Souza-Bastos v. Fed. Auto Brokers, Inc., 2016 WL 3199488, at *2 (N.J. Super. Ct. App. Div. June 10, 2016) ("A consumer, poring through the fine print of defendant's conflicting arbitration clauses, would have no idea what essential terms he or she was agreeing to. A consumer would not understand how to file a demand for arbitration, within what time frame, where to file, or what it would cost. 'In sum, the cumulative effect of the many inconsistencies and unclear passages in the arbitration terms within the [three documents] compel us to declare them unenforceable for lack of mutual assent.'" (internal citations omitted)); Diggs v. Lingo, 2014 Tenn. App. LEXIS 869, at *8 (Tenn. Ct. App. Dec. 30, 2014) ("[A]mbiguities [in arbitration agreement] lead the Court to conclude that the arbitration clause is so unclear as to render that clause unenforceable. It is not appropriate for the Court to essentially create a workable arbitration procedure when the settlor failed to do so himself.").

120. Samaniego v. Empire Today LLC, 140 Cal. Rptr. 3d 492, 495 (Cal. Ct. App. 2012).

121. *See* Davis v. Fenton, 26 F. Supp. 3d 727, 738 (N.D. Ill. 2014) (noting that an arbitration clause ("needs to be conspicuous"); Janda v. T-Mobile, USA, Inc., No. C 05-03729 JSW, 2006 WL 708936, at *2 (N.D. Cal. Mar. 17, 2006), aff'd, 267 F. App'x 727 (9th Cir. 2008) (noting that an arbitration agreement's font size was potentially suspect as being procedurally unconscionable, and was "significantly smaller than the 12 point font used in this Order"); Sutton Steel & Supply, Inc. v. BellSouth Mobility, Inc., 971 So. 2d 1257, 1266 (La. Ct. App 2007) (noting that the size of an arbitration clause was "decidedly unreasonable . . . [and] virtually unreadable"), *cert. denied*, 2008 La. LEXIS 620 (La. Mar. 14, 2008).

strued against the contract's drafter.[122] In the employment context, the employer is almost always the sole drafter of the contract.

Because of this scrutiny, there is little benefit to "hiding" an arbitration clause in an employment contract. Rather, if the employer wants to ensure that a court will allow the arbitration to proceed and decide any noncompetition dispute, clarity is the better course. An employer will want to compel arbitration by marching into a court and showing the judge just how clearly drafted the clause was; just how explicit the arbitration provision was written; and just how big and bold the clause was rendered. Surely, the employer will want to argue, the parties understood the dispute resolution provision at the time the contract was made.

Employers would be wise to ensure that the arbitration clause is stated in clear terms (without unnecessary legalese), in a normal (or even bold) typeface, and placed in a section of the contract that the employee is likely to read (e.g., the first or last page).[123]

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122. *See generally* 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 32:12 (4th ed. 2018) ("Ambiguity—the possibility that a word or phrase in a contract might reasonably and plausibly be subject to more than one meaning—frequently occurs in the language used by the parties to express their meaning. Since the language is presumptively within the control of the party drafting the agreement, it is a generally accepted principle that any ambiguity in that language will be interpreted against the drafter.").

123. Courts will sometimes focus on such stylistic matters in their refusal to enforce a vague or 'hidden' arbitration clause. *See, e.g.*, E. Ford, Inc. v. Taylor, 826 So. 2d 709 (Miss. 2002) (holding that arbitration provision was procedurally unconscionable where the clause appeared less than one-third of the size of many other terms in the contract); Duhon v. Activelaf, LLC, No. 2016-CC-0818, 2016 La. LEXIS 2089 (La. Oct. 19, 2016) (refusing to enforce arbitration clause because "the lack of distinguishing features and the specific placement of the arbitration clause serve to conceal the arbitration language"); Morgan v. Sanford Brown Inst., 137 A.3d 1168, 1181 (N.J. 2016) (refusing to enforce arbitration clause where "[t]he body of the [agreement] is in nine-point font, including the more than 750-word arbitration clause set forth in thirty-five unbroken lines . . . . The best that can be said about the arbitration provision is that it is as difficult to read as other parts of the . . . agreement"); Kernahan v. Home Warranty Adm'r of Fla., Inc., 199 A.3d 766, 774 (N.J. 2019) (recognizing font size as relevant in analysis for New Jersey's conspicuousness test for arbitration clauses). Sidestepping this pitfall to enforcement by curing these aesthetic issues should not be difficult for drafters.

Some drafters also insist that employees separately sign or initial the arbitration and noncompetition clauses, giving an extra signal that they agree to those terms. These additional initials would highlight the importance of the two clauses not only to the judge or arbitrator who might examine the employment agreement, but also to the employee at the moment she considers accepting or negotiating the details of the job offer. Such "information forcing" could eliminate conflict or misunderstanding down the road.[124]

CONCLUSION

Employers have realized the importance of including both noncompetition clauses and arbitration clauses in their employment agreements. But they do not always see them symbiotically. As these two clauses have been employed with increasing frequency, courts and arbitral tribunals have been called upon to explore their interrelationship.

To a certain extent, noncompetition agreements are gambles. Some courts may enforce them, while others may curtail them. Some states have enacted total or partial prohibitions on such agreements. Even in the absence of such prohibitive legislation, courts will weigh the reasonableness of particular clauses under the circumstances, considering the chronological, geographic, and substantive scope of the restrictive covenant. One judge might uphold the clause as a duly executed bilateral agreement between two sophisticated parties; another judge might interpret the same clause as wrongly impinging on an employee's livelihood. The result? Both parties are uncertain of their legal rights.

Arbitration agreements, by contrast, are far safer bets. The FAA demands a strong national policy favoring the enforcement of arbitration agreements and awards. Although there had been a long history of judges showing skepticism towards arbitration, that skepticism has been largely overcome by unequivocal direction from Congress and the Supreme Court. Arbitration gives parties the ability to choose neutrals with industry-specific expertise, and the ability to establish the governing arbitral rules and substantive state law that will ap-

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124. J.H. Verkerke, *Legal Ignorance and Information-Forcing Rules*, 56 WM. & MARY L. REV. 899, 904 (2015) (discussing the contract law theory that "express contract terms could inform unsophisticated parties about the law").

ply to the proceedings. While none of this suggests that the employer or employee will ultimately prevail in the arbitration, it will surely reduce uncertainty. No surprises.

Consequently, these two seemingly unrelated clauses have become strange bedfellows. Drafters can temper the uncertainty of restrictive covenants with the relative strength of arbitration clauses. Arbitration can tame and federalize the unpredictable, tempestuous landscape of noncompetition agreements.