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Repaving Route 128: How New Legislation in Massachusetts Impacts the Noncompete Debate

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REPAVING ROUTE 128: HOW NEW LEGISLATION IN MASSACHUSETTS IMPACTS THE NONCOMPETE DEBATE

Abstract: On October 1, 2018, new law governing the use of employee noncompetition agreements went into effect in the Commonwealth of Massachusetts. The updated rules, a compromise between those seeking to increase worker mobility and those intent on preserving certain intellectual property protections, were the culmination of many years of legislative debate. Before the passage of the new measures, Massachusetts exemplified the type of state that tended to honor employee covenants not to compete. One scholar famously identified Massachusetts's high enforcement of noncompetes as the primary cause of the Route 128 business district's relative downfall compared to Silicon Valley, where noncompetition agreements are generally void. Time will tell whether the new noncompete legal regime will help the Route 128 region catch up to Silicon Valley's explosive growth; in the interim, as the national dispute over the merits of noncompetition agreements rages on, other states will surely look to Massachusetts before choosing whether—and how—to rewrite their employee noncompete laws. This Note examines the recent Massachusetts legislation in the context of the region's history and the broader national discussion on noncompete laws, arguing that the new rules in Massachusetts set a useful example while leaving several issues—particularly surrounding the garden leave provision and government enforcement—unresolved.

INTRODUCTION

At the end of their session in the summer of 2018, Massachusetts lawmakers passed legislation designed to limit the use of noncompetition agreements, also known as noncompete agreements or noncompetes, in the Commonwealth.¹ For proponents of the new rules, these modifications to the em-

¹ Jon Chesto, *Wide-Ranging Bill Is Meant to Spur Economic Development*, BOS. GLOBE (Aug. 1, 2018), <https://www.bostonglobe.com/business/2018/08/01/lawmakers-authorize-millions-grants-credits-along-with-policy-changes-economic-bill/ZERfKuVDdwVSejwfrnCwFL/story.html> [<https://perma.cc/JRL8-6RXF>]. The changes to noncompetition agreements were passed in the early morning hours, just before the legislature concluded its sessions for the year. *Id.* They were included as part of a broad \$1.2 billion economic development bill. *Id.* The noncompete provisions went into effect on October 1, 2018 and apply to agreements entered on or after that date. Katie Lannan, *Noncompete-Agreement Laws Alterations Take Effect Monday*, LOWELL SUN (Sept. 27, 2018), http://www.lowellsun.com/business/ci_32166487/noncompete-agreement-laws-alterations-take-effect-Monday [<https://perma.cc/Q8C9-4SGB>]. Noncompetition agreements are also referred to by other names, including covenants not to compete, restrictive covenants, or noncompete covenants. *Covenant*, BLACK'S LAW DICTIONARY (11th ed. 2019). This Note uses “noncompetition agreement,” “covenant not to compete,” and “noncompete” interchangeably.

ployer-employee relationship were welcome changes.² Debate over the potential harms of noncompetition agreements in Massachusetts had persisted for nearly a decade, and several prior legislative sessions ended with failed attempts at similar reform.³

Massachusetts receives particular scrutiny for its approach to these agreements.⁴ Scholars argue that the regions' opposite legal approaches to employee mobility explains the divergent economic outcomes in Massachusetts's Route 128 business district and California's Silicon Valley.⁵ In Silicon Valley, where there was a long state history of refusing to enforce noncompetition

² See, e.g., Barb Darrow, *This High-Tech State May Make It Harder to Use Non-Compete Clauses*, FORTUNE (June 30, 2016), <http://fortune.com/2016/06/30/massachusetts-non-compete-passes> [<https://perma.cc/7GEV-C9FY>] (characterizing noncompete agreements as posing a pressing problem in Massachusetts); Marc C. McGovern, *We're Writing a New Law on Noncompetes—Let's Get It Right*, BOS. GLOBE (July 12, 2018), <https://www.bostonglobe.com/opinion/2018/07/11/mass-legislature-needs-refocus-bill-noncompetes/OGXaYqFHKpFRD6YYXoyPNN/story.html> [<https://perma.cc/7ZQ3-2JM3>] (advocating for the elimination of noncompetition agreements).

³ See Curt Nickisch, *Noncompete Reform Dropped as Mass. Lawmakers Reach Economic Development Deal*, WBUR (July 31, 2014), <https://www.wbur.org/news/2014/07/31/economic-development-noncompete-agreements> [<https://perma.cc/FEM8-2WDR>] (identifying a 2014 proposal for noncompetition law reform that was ultimately abandoned before a final economic development bill passed); Curt Woodward, *Noncompete Changes Founder at Legislature's Frantic End*, BOS. GLOBE (Aug. 1, 2016), <https://www.bostonglobe.com/business/2016/07/31/noncompete-changes-founder-legislature-frantic-end/W0rbVNV2Cqe0dCScOVD5SI/story.html> [<https://perma.cc/6QCG-2ZHM>] (characterizing noncompetes as one of the state's most heated issues after the failure of proposed legislation in 2016). Initial attempts at similar reform date back to 2008, when state representatives Lori Ehrlich and William Brownsberger introduced separate bills seeking to change noncompete laws. Elisabetta Ottoz & Franco Cugno, *Choosing the Scope of Trade Secret Law When Secrets Complement Patents*, 31 INT'L REV. L. & ECON. 219, 221 (2011); Kris Olson, *Marblehead State Rep Eyes Non-Compete Agreements*, WICKED LOCAL (Dec. 15, 2011), <http://www.wickedlocal.com/x1761814088/Marblehead-state-rep-eyes-non-compete-agreements> [<https://perma.cc/47LY-EP45>].

⁴ See, e.g., Norman D. Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants Not to Compete, Trends, and Implications for Employee Mobility Policy*, 13 U. PA. J. BUS. L. 751, 760 n.27 (2011) (identifying Massachusetts as the most notable state reconsidering its non-compete laws); see also Mark J. Garmaise, *Ties That Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment*, 27 J.L. ECON. & ORG. 376, 395 (2011) (naming Massachusetts specifically as a state in which noncompetition agreements have been enforced at a high rate).

⁵ See, e.g., 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, 578 (1999) (presenting this claim at the height of the dotcom era); see also ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING 68 (2013) (identifying Professor Ronald Gilson as the first to suggest that Silicon Valley's economic success was partially attributable to its refusal to enforce noncompetes). Gilson, a joint professor at Stanford and Columbia universities, found the comparison between the two regions to be particularly telling because both had considerable amounts of businesses in the technology sector but notably different frameworks of employment law. Gilson, *supra*, at 577–78. The analysis drew from Professor AnnaLee Saxenian's work comparing the two regions, which was the first to use Silicon Valley's growth and Route 128's decline as examples for a case study of what allows some businesses to succeed and what causes others to fail. *Id.* at 578; see ANNALEE SAXENIAN, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128, at 2 (1994). For a detailed discussion, see *infra* notes 77–99 and accompanying text.

agreements, economic development flourished.⁶ From 1986 to 1990, for example, the market value of Silicon Valley's large technology firms grew by twenty-five billion dollars.⁷ Conversely, in the Route 128 area, where the Massachusetts legal apparatus enforced noncompetition agreements, economic development withered.⁸ In that same timeframe, similarly defined companies in the Route 128 region grew by only one billion dollars.⁹ Those supporting the new legislation in Massachusetts sought to limit or eliminate the use of noncompetition agreements, thereby more closely aligning the state's noncompete legal regime with that of California.¹⁰

The new legislation in Massachusetts represents one data point in what has become a vastly fragmented national landscape.¹¹ Noncompetition laws vary dramatically from state to state, with some states considering the agreements void, some aggressively enforcing them, and others occupying a middle ground.¹² The policy considerations surrounding this debate span a wide range of issues, including broad socioeconomic matters, questions regarding the def-

⁶ Gilson, *supra* note 5, at 586–87. From 1965 through 1995, Silicon Valley rapidly outpaced Route 128 in technology employment growth and regional exporting. *Id.* at 587. Noncompetition agreements are generally void under California statute. *See, e.g.,* *Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 290 (Cal. 2008) (noting that section 16600 of the California Civil Code bars covenants not to compete, subject to certain exceptions).

⁷ SAXENIAN, *supra* note 5, at 2. This analysis focused on the one hundred largest technology companies in the United States launched after 1965. *Id.* Approximately one-third of those one hundred firms were based in Silicon Valley. *Id.*

⁸ Gilson, *supra* note 5, at 575; *see, e.g.,* *Ferrofluidics Corp. v. Advanced Vacuum Components, Inc.*, 968 F.2d 1463, 1468–69 (1st Cir. 1992) (construing Massachusetts law as permissive of reasonable noncompetes); *Novelty Bias Binding Co. v. Shevrin*, 175 N.E.2d 374, 375–76 (Mass. 1961) (“It has been long settled in this Commonwealth that a covenant inserted in a contract for personal service restricting trade or competition or freedom of employment is not invalid and may be enforced in equity provided it is necessary for the protection of the employer, is reasonably limited in time and space, and is consonant with the public interest.”).

⁹ SAXENIAN, *supra* note 5, at 2.

¹⁰ *See* Jon Chesto, *Noncompete Contracts in Massachusetts? Lawmakers Are Near a Deal*, BOS. GLOBE (Jan. 15, 2018), <https://www.bostonglobe.com/business/2018/01/15/compromise-may-near-restricting-noncompetes-mass/GWjyz1NOpnZbGA3YXCbWxL/story.html> [https://perma.cc/5YPG-P3ZX] (citing opinions of supporters of new legislation who identify the legal framework in California as a model).

¹¹ *See* On Amir & Orly Lobel, *Driving Performance: A Growth Theory of Noncompete Law*, 16 STAN. TECH. L. REV. 833, 841 (2013) (discussing the considerable variance in state treatment of noncompete agreements); Matt Marx et al., *Mobility, Skills, and the Michigan Non-Compete Experiment*, 55 MGMT. SCI. 875, 876 (2009) (noting that there are dramatic differences in the enforcement of noncompetes among states); Daniel P. O’Gorman, *Contract Theory and Some Realism About Employee Covenant Not to Compete Cases*, 65 SMU L. REV. 145, 148 (2012) (discussing the unpredictability from state to state as to whether the courts will enforce noncompetes).

¹² Bishara, *supra* note 4, at 780. Most states take a moderate approach to enforcing noncompetition agreements, though there are some states at either end of the spectrum. *Id.*

inition and ownership of property, due process concerns, and issues of workers' rights.¹³

This Note examines the new Massachusetts law in the context of the decades-old comparison of Route 128 and Silicon Valley.¹⁴ Part I explains the mechanics, philosophical motivations, and history of noncompetition agreements while also providing an overview of the historical contrast between Route 128 and Silicon Valley.¹⁵ Part II explains the new Massachusetts legislation in detail.¹⁶ Part III discusses the various perspectives on the modern noncompete landscape and initial reactions to the Massachusetts law.¹⁷ Part IV argues that although the new Massachusetts rules represent a vast improvement, bringing Route 128's legal landscape closer to that of Silicon Valley, several issues remain problematically unresolved.¹⁸ It further suggests that other states currently entrenched in the same debate might learn from Massachusetts by looking at both the ambition of the new legislation and its shortcomings.¹⁹

I. YOU CAN'T GET THERE FROM HERE: THE MECHANICS AND HISTORY OF NONCOMPETE LAWS

Noncompetition agreements have a profound impact on American society.²⁰ For employers, they serve as an effective and seemingly necessary method for protecting trade secrets and client relationships.²¹ For employees, they can act as barriers to departure, sources of intimidation, and salary depressants.²² A

¹³ See Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 409–14 (analyzing noncompetition agreements in connection with workers' rights); Sampsa Samila & Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth*, 57 MGMT. SCI. 425, 425 (2011) (examining the effects of noncompete enforcement on labor market growth and entrepreneurial activities). See generally Evan Starr, *Are Noncompetes Holding Down Wages?*, Conference Brief at Harvard Law School: Unrigging the Labor Market (June 13, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3223659 [<https://perma.cc/Z2T7-HSYK>] (analyzing the connection between enforcement of noncompete agreements and wages).

¹⁴ See *infra* notes 20–238 and accompanying text.

¹⁵ See *infra* notes 20–99 and accompanying text.

¹⁶ See *infra* notes 100–123 and accompanying text.

¹⁷ See *infra* notes 124–185 and accompanying text.

¹⁸ See *infra* notes 186–215 and accompanying text.

¹⁹ See *infra* notes 216–238 and accompanying text.

²⁰ See Amir & Lobel, *supra* note 11, at 836 (explaining the constraints faced by employees under noncompetes); Garmaise, *supra* note 4, at 376–77 (linking noncompetes to executive salaries and firm capital expenditures); Samila & Sorenson, *supra* note 13, at 425 (discussing the ubiquity of noncompetition agreements).

²¹ Samila & Sorenson, *supra* note 13, at 425. Without noncompetes, efforts to train employees and develop client relationships can leave firms vulnerable to theft of their intellectual capital by departing workers. *Id.* Limiting an employee's ability to leave for a competitor allows a company to protect these resources. *Id.*

²² Starr, *supra* note 13, at 5–6 (putting forth empirical evidence to explore the correlation between noncompete enforcement and decreased employee salaries and mobility). If an employee is bound by

comprehensive study using data from 2014 found that approximately eighteen percent of U.S. labor force participants are bound by noncompetes.²³ The significant presence of noncompetes helps to explain why the laws that govern these agreements are currently drawing increasing attention from legislators, employers, and workers.²⁴ Several recent and widely publicized disputes involving noncompetes have increased general awareness and fervor surrounding the debate.²⁵

a noncompete, he or she may be reluctant to explore other job opportunities; in this way, the employee may struggle to advance in the industry because he or she cannot take advantage of competition in the labor market. *Id.* at 3. An employee who is not compensated for signing a noncompete and misses out on the salary benefits of a competitive labor market bears the costs of a noncompete without reaping the benefits. *Id.*

²³ J.J. Prescott et al., *Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*, 2016 MICH. ST. L. REV. 369, 461. The survey included 11,505 participants and sought to establish an empirical understanding of the frequency and enforcement of noncompetition agreements. *Id.* at 372, 422 n.11. Notably, California has an estimated noncompete incidence of approximately 19% despite the fact that the state does not enforce such agreements. *Id.* at 461. Two other recent surveys estimated the total proportion of workers bound by noncompetition agreements at 15.5% and 18%, respectively. Starr, *supra* note 13, at 5 n.9.

²⁴ Bishara, *supra* note 4, at 753. Recent studies have indicated a rise in both the usage of noncompetes and their enforcement, with an estimated 37% of workers subject to a noncompete at some point in their careers. THE WHITE HOUSE, NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGE, POTENTIAL ISSUES, AND STATE RESPONSES 3 (2016), https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf [<https://perma.cc/FFQ9-D7FC>].

²⁵ Prescott et al., *supra* note 23, at 372 n.6. Perhaps the most notable example involved sandwich chain Jimmy John's, whose aggressive use of noncompetes received considerable media coverage. See, e.g., Samantha Bomkamp, *Illinois AG Sues Jimmy John's Over Noncompete Pacts; Chain 'Disappointed'*, CHI. TRIB. (June 9, 2016), <https://www.chicagotribune.com/business/ct-jimmy-johns-illinois-lawsuit-0609-biz-20160608-story.html> [<http://perma.cc/LMY4-544S>] (detailing one state's lawsuit against Jimmy John's for its use of noncompetes). Employment contracts at Jimmy John's restricted employees from working in any business that earned more than 10% of its revenue from "selling submarine, hero-type, deli-style, pita and/or wrapped or rolled sandwiches" and was within three miles of any Jimmy John's location. Dave Jamieson, *Jimmy John's Makes Low-Wage Workers Sign 'Oppressive' Noncompete Agreements*, HUFFINGTON POST (Oct. 13, 2014), https://www.huffingtonpost.com/2014/10/13/jimmy-johns-non-compete_n_5978180.html [<https://perma.cc/M4K3-KAJB>]. The story drew outrage because it highlighted the perceived unfairness of restricting low-wage workers by noncompetition agreements. See Sarah Whitten, *Jimmy John's Drops Noncompete Clauses Following Settlement*, CNBC (June 22, 2016), <https://www.cnbc.com/2016/06/22/jimmy-johns-drops-non-compete-clauses-following-settlement.html> [<https://perma.cc/GK6K-DV8N>] (discussing the New York Attorney General's motivations for opposing the enforcement of Jimmy John's noncompetition agreements). Similar stories have focused on the use of noncompetes for other low-wage employees, including custodians and warehouse workers. See Matt O'Brien, *Even Janitors Have Noncompetes Now. Nobody Is Safe.*, WASH. POST (Oct. 18, 2018), https://www.washingtonpost.com/business/2018/10/18/even-janitors-have-noncompetes-now-nobody-is-safe/?utm_term=.c202367855c7 [<https://perma.cc/4MXP-WGUY>] (detailing a lawsuit between real estate firm Cushman & Wakefield and a former janitor); Spencer Woodman, *Amazon Makes Even Temporary Warehouse Workers Sign 18-Month Non-Competes*, THE VERGE (Mar. 26, 2015), <https://www.theverge.com/2015/3/26/8280309/amazon-warehouse-jobs-exclusive-noncompete-contracts> [<https://perma.cc/G2R6-T36Y>] (outlining the highly restrictive noncompetes used for Amazon's warehouse workers).

This Part sets forth the context necessary for assessing the importance of the new Massachusetts legislation.²⁶ Section A provides a thorough explanation of noncompetition agreements and their underlying philosophical motivations.²⁷ Section B explains the history of the legal landscape of noncompete laws in the United States.²⁸ Section C details the comparison between Route 128 in Massachusetts and Silicon Valley in California in the context of noncompetes.²⁹

A. Understanding Noncompete Laws and Their Philosophical Underpinnings

A noncompetition agreement is a promise not to engage in certain types of business for a specified timeframe in a particular geography.³⁰ These agreements typically bar employees from doing work that competes with their employer's business while they are employed and for some period of time after they have departed.³¹ The purpose of the noncompete is to restrict a former employee from later engaging in unfair competition by exploiting relationships or information obtained during the employment period.³² These agreements enable employers to protect much of their intellectual capital without running afoul of the Thirteenth Amendment's prohibition on involuntary servitude.³³

The legal requirements concerning the mechanics of noncompetition agreements vary considerably.³⁴ Typically, noncompetes must be in writing;

²⁶ See *infra* notes 30–99 and accompanying text.

²⁷ See *infra* notes 30–49 and accompanying text.

²⁸ See *infra* notes 50–76 and accompanying text.

²⁹ See *infra* notes 77–99 and accompanying text.

³⁰ *Covenant*, *supra* note 1.

³¹ ALEXANDER I. POLTORAK & PAUL J. LERNER, *ESSENTIALS OF INTELLECTUAL PROPERTY: LAW, ECONOMICS, AND STRATEGY* 40 (2d ed. 2011). Courts tend not to have any reservations about enforcing noncompetition agreements during the employment relationship. *Noncompetition Agreement*, *supra* note 1. Enforcement of noncompetition agreements for departed employees varies dramatically from state to state. DONALD J. ASPELUND & JOAN E. BECKNER, *EMPLOYEE NONCOMPETITION LAW* § 1.1 (2018).

³² O'Gorman, *supra* note 11, at 177.

³³ POLTORAK & LERNER, *supra* note 31, at 40; see U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”); *Pollock v. Williams*, 322 U.S. 4, 17 (1944) (explaining that the goal of the Thirteenth Amendment is to “maintain a system of completely free and voluntary labor throughout the United States”). Courts have long refused to order parties to carry out employment contracts. LOBEL, *supra* note 5, at 52. Such an order seems too close to slavery or involuntary servitude, so courts strongly prefer damages over specific performance as a remedy for breach of an employment contract. *Id.*

³⁴ Norman D. Bishara & David Orozco, *Using the Resource-Based Theory to Determine Covenant Not to Compete Legitimacy*, 87 IND. L.J. 979, 987 (2012). Dynamics such as bargaining power, enforcement standards in the state, and interests of the parties all impact individual agreements. *Id.*

beyond the writing requirement, execution differs based on the situation.³⁵ Noncompetes are often implemented early in the employment relationship, but this is not always a requirement.³⁶ An employer might ask a worker to sign a noncompete after they have been employed for some time if, for example, management wants to share new confidential information or if they overlooked executing a noncompete when the employee was first hired.³⁷ The terms of each noncompete, such as duration, geography, and prohibited activities, will vary based on the circumstances.³⁸

Noncompetition agreements exist at the intersection of contract law, tort law, property law, and employment law.³⁹ They serve to provide additional protection for the property of companies beyond what can be achieved through the tort of misappropriation.⁴⁰ Noncompetes can determine an employee's ability to accept or decline employment; this notion of self-ownership has its roots in property law.⁴¹ From a contracts perspective, noncompetes are, of course,

³⁵ See Estlund, *supra* note 13, at 391 (giving background on noncompetes and the various ways they are used). A few states allow oral noncompete agreements, but the vast majority require such contracts to be written. *Id.* at 391 n.28. Washington state, for example, recently passed legislation designed to limit noncompetes that define a “noncompetition covenant” as a “written or *oral* covenant, agreement, or contract” restricting an individual’s ability to work. WASH. REV. CODE § 49.62.010 (West 2020) (emphasis added).

³⁶ Estlund, *supra* note 13, at 391.

³⁷ Bishara & Orozco, *supra* note 34, at 986. Similarly, a firm might ask an employee to sign a noncompete agreement right before that employee leaves the company for fear that the employee might take valuable information to a competitor. *Id.*

³⁸ *Id.* at 987; see *infra* notes 50–76 and accompanying text (tracing the historical development of noncompete restrictions).

³⁹ See POLTORAK & LERNER, *supra* note 31, at 40 (examining the connection between noncompete law and intellectual property); Estlund, *supra* note 13, at 380 (highlighting the importance of contract law and employment law relative to noncompetes); Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 578 (2001) (explaining how noncompete law overlaps with ideas from contract law and tort law).

⁴⁰ Estlund, *supra* note 13, at 416. An employer can protect trade secrets by suing for misappropriation even without a noncompete, but such a claim requires proof of the misappropriation. See *id.* (describing the challenge of showing misappropriation). The Uniform Trade Secrets Act, which has been adopted in some form by almost every state, allows for a misappropriation action where an individual has improperly obtained or shared trade secrets of a business. UNIF. TRADE SECRETS ACT (amended 1985), 14 U.L.A. 529 (2005); Michelle L. Evans, *Establishing Liability for Misappropriation of Trade Secrets*, 91 AM. JUR. PROOF FACTS 3d § 6 (2020). Suing for a violation of a noncompete merely requires a showing of the breach of contract rather than proof of misappropriation. See Estlund, *supra* note 13, at 416.

⁴¹ Estlund, *supra* note 13, at 386. The U.S. Constitution, state constitutions, and common law all establish baseline standards around this concept of self-ownership. *Id.*; see U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”); MASS. CONST. art. X (“Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property . . . no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people.”).

agreements; they are consensual in nature and made between parties able to act with free will.⁴² If an employee signs a contract with a covenant not to compete, this act suggests that he or she has consented to restrictions on post-employment activities.⁴³ This freedom of contract is not without limits; noncompetes are subject to restrictions imposed by law in the interest of public policy.⁴⁴

The use of noncompetes generates tension between a company's desire to protect its proprietary information and a departed employee's need to find new employment.⁴⁵ Many companies see covenants not to compete as crucial business tools, whereas employees often consider them to be unfair.⁴⁶ In theory, all companies might be better off if none of them had to rely on covenants not to compete; if every company knew that its competitors would not seek or use confidential information obtained from migrating employees, workers could move between firms more freely and companies would benefit from cost savings and increased idea flow.⁴⁷ Unable to ensure collective good faith among employers, companies opt to restrict and silence their employees as a means of protecting their individual interests.⁴⁸ As a result of this dynamic, employers have historically relied on noncompetition agreements.⁴⁹

⁴² Stone, *supra* note 39, at 578–79.

⁴³ *Id.* Scholars offer a variety of contract theories for why a covenant not to compete should be enforced, including reliance and restitution, will, consent, bargain, efficiency, fairness, and synthesis theories. See O’Gorman, *supra* note 11, at 157 (detailing the dominant scholarly arguments for holding parties to their contracts).

⁴⁴ Estlund, *supra* note 13, at 384–85. Employees are usually seen as having inferior bargaining power relative to employers and therefore in need of protection. O’Gorman, *supra* note 11, at 178. Employment contracts are often contracts of adhesion because in many circumstances prospective workers have little or no bargaining power. *Id.*

⁴⁵ Joan T.A. Gabel & Nancy R. Mansfield, *The Information Revolution and Its Impact on the Employment Relationship: An Analysis of the Cyberspace Workplace*, 40 AM. BUS. L.J. 301, 323 (2003). This pressure has increased dramatically with the rapid progression of new technology. See *id.* (describing the Internet’s role in dissolving market boundaries). For example, the global nature of modern industry often renders geographic employment restrictions useless. *Id.*

⁴⁶ Prescott et al., *supra* note 23, at 373.

⁴⁷ See LOBEL, *supra* note 5, at 225–26 (discussing the link between economic theory and fights over talent). The employer’s decision to restrict movement of employees through noncompetition agreements exemplifies the economic phenomenon known as the prisoner’s dilemma. *Id.* According to the theory, firms would benefit from lower costs of hiring, the free flow of usable information, and the resources freed up by not having to pursue enforcement of noncompete agreements. *Id.* Companies have no way of ensuring that their competitors do not try to obtain protected information from departing employees, however, and the fact that such cooperation is impossible to guarantee means that firms are in a worse-than-ideal position. *Id.*

⁴⁸ Amir & Lobel, *supra* note 11, at 864.

⁴⁹ See Marx et al., *supra* note 11, at 876 (describing the existence of noncompetes in worker contracts as “nearly universal” and detailing the history of these provisions).

B. A Brief History of Noncompetition Laws in the United States

Under English common law, noncompetition agreements were unenforceable because public policy disfavored restraints on trade.⁵⁰ The very first known case brought to enforce a restriction against one's trade took place in 1414, when a plaintiff sued to prevent one of his former clothes dyers from working locally for six months.⁵¹ Upon dismissing the case, the judge explained that such a restraint was contrary to the common law and famously chastised the plaintiff for bringing suit in the first place.⁵² This per se rule against restraints on trade held in English courts until the eighteenth century.⁵³

The modern approach to noncompetition agreements, which emphasizes the reasonableness of the restraint, emerged following the influential 1711 case of *Mitchel v. Reynolds*.⁵⁴ In *Mitchel*, the Court of the Queen's Bench declared that all constraints on trade were presumed to be invalid because of the damage they could cause to workers' livelihoods and their net harm to society as a whole.⁵⁵ That presumption could only be overcome if the restriction was limited in geographic scope and the limitation was reasonable; the court created a balancing test to weigh the social utility of the restriction against its private and public detriment.⁵⁶ Through the 1800s, English and American judges frequently looked to *Mitchel* when deciding matters involving restrictions on employees.⁵⁷

⁵⁰ LOBEL, *supra* note 5, at 52. Parties have fought over constraints in employment contracts since they first were implemented after the breakdown of England's guild system in the eighteenth century. Norman D. Bishara et al., *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 5 (2015).

⁵¹ *Dyer's Case*, YB 2 Hen. 5, fol. 5, pl. 26 (1414) (Eng.); Marx et al., *supra* note 11, at 876. The case came about shortly after much of Europe's labor force had been decimated by the Bubonic plague, perhaps contributing to the court's distaste for restraints on labor in this instance. Marx et al., *supra* note 11, at 876.

⁵² O'Gorman, *supra* note 11, at 179 n.258 (citing *Dyer's Case*, YB 2 Hen. 5, fol. 5, pl. 26).

⁵³ Maureen B. Callahan, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703, 708 (1985).

⁵⁴ Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 637 (1960) (citing *Mitchel v. Reynolds* (1711) 24 Eng. Rep. 347 (QB)). The case involved a baker who leased his bakery and agreed not to act as a competitor in the region during the lease term, or in the alternative, to pay a bond if he did compete. *Id.* at 629. The defendant violated the agreement but refused to pay the bond. *Id.* Although this case involved a covenant not to compete relating to the sale of a business and not relating to a departing employee, the underlying principals were cited extensively in subsequent noncompete cases of either type. *See id.* (explaining the influence of *Mitchel* on noncompetition law). Professor Blake's 1960 law review article synthesizing the origins of noncompetition agreements remains widely regarded as a top authority on the history of noncompetes. Bishara et al., *supra* note 50, at 5 n.3.

⁵⁵ 24 Eng. Rep. at 351.

⁵⁶ *Id.* at 350. The plaintiff was able to overcome the presumption that the noncompetition agreement was void; the court ruled that the agreement and the consideration supporting it were reasonable. *Id.* at 352.

⁵⁷ Blake, *supra* note 54, at 638–39. *Mitchel* was the most frequently cited case in the common law of noncompetition agreements for 250 years. *Id.* at 629.

This reasonableness test continued to develop during the next several centuries of American jurisprudence.⁵⁸ The first known case in the United States that dealt with a trade restraint, *Pierce v. Fuller*, decided in 1811, was—fittingly—a Massachusetts lawsuit.⁵⁹ In its opinion, the Supreme Judicial Court of Massachusetts began by noting that although restrictions on trade are generally disfavored because they harm the public by enabling monopolies, they may be enforceable if they are limited to a particular location for a particular time and supported by sufficient consideration.⁶⁰ Other early American cases showed a similarly constricted interpretation of *Mitchel*, including two New York cases holding that trade restraints spanning the whole state were per se invalid.⁶¹

Eventually, improvements in technology, the increased value of information, and the diminishing importance of local borders began to put pressure on American courts to allow noncompetes more broadly.⁶² The United States Supreme Court endorsed enforcement of a noncompetition agreement in *Oregon Steam Navigation Co. v. Winsor* in 1847, emphasizing in its opinion the shrinking commercial relevance of state barriers.⁶³ These changes coincided

⁵⁸ See LOBEL, *supra* note 5, at 53–57 (detailing examples of courts evaluating noncompetes based on reasonableness); O’Gorman, *supra* note 11, at 180–84 (tracing the development of the reasonableness standard through U.S. courts). In conducting analyses of reasonableness, American courts focused on shielding employees from unfair burdens. Blake, *supra* note 54, at 643–44. This contrasted with English law, which focused more on the terms of the contract. *Id.*

⁵⁹ 8 Mass. 223 (1811); Blake, *supra* note 54, at 626 n.3; see Charles E. Cantu & Jared Woodfill, *Upon Leaving a Firm: Tell the Truth or Hide the Ball*, 39 VILL. L. REV. 773, 780 n.30 (1994) (briefly summarizing the history of noncompete law in the United States). The case involved an agreement to refrain from running a stagecoach between Boston and Providence that the defendant allegedly breached. *Pierce*, 8 Mass. at 223.

⁶⁰ *Pierce*, 8 Mass. at 226. The court ultimately upheld the agreement, finding there was no harm to the public and that the consideration of one dollar was adequate based on the circumstances. *Id.* at 227–28.

⁶¹ Blake, *supra* note 54, at 644. In *Lawrence v. Kidder*, the court explained that contracts restraining trade through a whole state or country are “uniformly void,” while those restricting trade in only a town or district are “sometimes held valid.” 10 Barb. 641, 642 (N.Y. Sup. Ct. 1851). Similarly, in *Dunlop v. Gregory*, the court noted that any contracts preventing an employee from the statewide practice of his craft are void. 10 N.Y. 241 (1851).

⁶² See LOBEL, *supra* note 5, at 53 (describing the recent societal changes that impacted noncompete law).

⁶³ 87 U.S. (20 Wall.) 64, 67–68 (1873); Blake, *supra* note 54, at 644. The plaintiff in the lawsuit sought \$75,000 in damages after selling its steamer to the defendant for that amount, subject to a promise that the buyer would not run the steamer on any competing routes in California waters. *Winsor*, 87 U.S. (20 Wall.) at 65. The defendant breached the agreement. *Id.* In its analysis, the Court reasoned that the United States “is substantially one country, especially in all matters of trade and business” and found no public policy reason to invalidate the agreement. *Id.* at 67, 72.

with the evolution of employment-specific noncompete laws, which began to form their own subset of law, distinct from the wider restraints on trade.⁶⁴

By the end of the nineteenth century, reasonableness was the standard in the majority of states for determining whether a noncompetition agreement should be enforced.⁶⁵ This was true not only for cases involving the sale of a business but also for cases looking at restraints on employees.⁶⁶ The methodology that developed in Massachusetts was representative of such an approach.⁶⁷ Massachusetts would enforce a noncompetition agreement, but only if a case-specific inquiry showed the restraint was needed for legitimate business reasons, appropriate in its geographic and temporal limits, and in accord with the public interest.⁶⁸

Not all states chose to follow this formulation.⁶⁹ California has long been the most notable state that refuses to enforce noncompetition agreements altogether.⁷⁰ California's decision not to honor noncompetes was largely the product of happenstance.⁷¹ When deciding on their substantive laws in the middle of the nineteenth century, California legislators looked to the East Coast, particularly New York, for guidance.⁷² It just so happened that this was during a period when the New York legislature, led by David Dudley Field, was seeking to simplify state laws.⁷³ The resulting "Field Code" never became law in New

⁶⁴ Blake, *supra* note 54, at 639. While prior centuries featured many cases involving noncompetition agreements relating to sales of businesses, courts began hearing many employee restraint cases during this time. *Id.*

⁶⁵ O'Gorman, *supra* note 11, at 182. The test in the First Restatement of Contracts, which was published in 1932, defined a reasonable restraint as one that was not greater than required to protect the employer, imposed no undue burden on the worker, and did not harm the public. RESTATEMENT (FIRST) OF CONTRACTS § 515 (AM. LAW INST. 1932). As a subset of employment law, noncompetition agreements are governed by state law. Bishara, *supra* note 4, at 756.

⁶⁶ O'Gorman, *supra* note 11, at 181. The development of laws regarding covenants not to compete in the United States paralleled that in England post-*Mitchel*. *Id.* at 181–82.

⁶⁷ See Bishara, *supra* note 4, at 758 (explaining the typical application of the reasonableness test).

⁶⁸ See *id.* at 757–58 (comparing Massachusetts and other states to the "extreme outliers" of California and North Dakota, both of which refuse to enforce noncompetition agreements). The applicable North Dakota statute voids "[e]very contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind," with limited exceptions. N.D. CENT. CODE § 9-08-06 (2019).

⁶⁹ Bishara, *supra* note 4, at 757.

⁷⁰ See Marx et al., *supra* note 11, at 876 (comparing California's noncompete statute with English common law); Prescott et al., *supra* note 23, at 390 n.25 (characterizing California's noncompete law as being "at one extreme"). California's approach has drawn significant scrutiny due to the state's economic relevance. Bishara, *supra* note 4, at 757.

⁷¹ Gilson, *supra* note 5, at 613.

⁷² *Id.* at 613–14. After California was admitted to the Union in 1850, state legislators sought to bring order to the disorganized and disjointed collection of laws of the California territory. *Id.*

⁷³ *Id.* In 1847, David Dudley Field was appointed as one of three commissioners tasked with changing the laws of New York State, and he came to dominate the revision process. *Id.* Known for his work reforming and codifying the law, Field was among the most prominent attorneys of his time. HENRY M. FIELD, *THE LIFE OF DAVID DUDLEY FIELD* vii (1898).

York, but it gained relevance in the West—where laws were much less settled—and it was eventually adopted in California.⁷⁴ The Field Code generally barred noncompetes, and even as other states moved toward a rule of reasonableness, California's noncompete laws remained essentially unchanged.⁷⁵ This distinction between the approach of Massachusetts—more permissive toward noncompetes—and the more restrictive approach of California has since become the subject of considerable scholarship.⁷⁶

C. Route 128 and Silicon Valley

In 1999, Professor Ronald J. Gilson wrote a groundbreaking article that sought to explain the impact of a state's noncompetition regime on its economic development.⁷⁷ Gilson examined two particular regions—Route 128 in Massachusetts and Silicon Valley in California—as a compelling comparison of the impact of state noncompete laws on economic development.⁷⁸ Both economies boasted considerable developing technology during the mid-1900s.⁷⁹ In addition, both regions were built largely around prestigious universities.⁸⁰ The regions made for an interesting contrast because California had refused to enforce employee noncompetition agreements dating back to the 1870s, while Massachusetts courts had a history of honoring those contracts.⁸¹ Outcomes in the two regions were dramatically different; Route 128's growth largely stagnated, whereas Silicon Valley thrived.⁸²

⁷⁴ Gilson, *supra* note 5, at 614–15. Field's brother, Stephen Johnson Field, a member of the California legislature and later Chief Justice of the California Supreme Court, was highly influential in the decision to adopt the Code. *Id.* Stephen Johnson Field later became a U.S. Supreme Court justice. *Id.*

⁷⁵ *Id.* at 619. The relevant provision, Section 833, voided all contracts restraining someone from exercising a lawful trade or business, except for in the sale of a business or the dissolution of a partnership. *Id.* at 616–17.

⁷⁶ *See id.* at 578 (putting forth the theory that differences in noncompete regimes explain the different economic outcomes in Massachusetts and California); Samila & Sorenson, *supra* note 13, at 426–27 (discussing California and Massachusetts to highlight state-level differences in noncompete enforcement).

⁷⁷ *See* Gilson, *supra* note 5, at 577 (explaining the author's thesis).

⁷⁸ *Id.* at 578. Gilson relied in part on Professor AnnaLee Saxenian's research into the history of the two regions. *Id.* The latter argued that differences in organizational structure and culture explained the divergent economic outcomes in the two regions. SAXENIAN, *supra* note 5, at 2–3. Gilson contended that the reason for the opposite outcomes in the regions was instead the different rules around enforcement of noncompetition laws. Gilson, *supra* note 5, at 578.

⁷⁹ SAXENIAN, *supra* note 5, at 1–2. Route 128 traced its economic viability to World War II and Cold War defense spending. Gilson, *supra* note 5, at 588. Silicon Valley became a technology hub through the development of Stanford's engineering program after World War II. *Id.* at 588–89.

⁸⁰ Gilson, *supra* note 5, at 588. The Route 128 area is close to Harvard and the Massachusetts Institute of Technology, while Silicon Valley is home to Stanford University. *Id.*

⁸¹ *See id.* at 579 (tracing the history of California's prohibition on noncompetition agreements in employment contracts).

⁸² *Id.* at 575.

By Gilson's account, the Route 128 region had a substantial head start over Silicon Valley, with approximately three times as many employees as in Silicon Valley in 1965.⁸³ Over the next several decades, however, Silicon Valley saw significant labor market and export increases while Route 128's growth began to lag.⁸⁴ By 1990, Silicon Valley was exporting over \$11 billion in electronic products, far more than Route 128's total of \$4.6 billion.⁸⁵

According to Professor Gilson, these opposite fates are explained by the differences in the respective regions' employment dynamics.⁸⁶ Route 128 companies followed the more typical development of many large, vertically-integrated firms, meaning that workers tended to stay and progress within one company and knowledge was contained within that business.⁸⁷ Conversely, the environment in Silicon Valley was characterized by worker mobility.⁸⁸ Employees tended to move freely between companies and frequently founded their own ventures, something that was practically unheard of in the Route 128 region at the time.⁸⁹ This mobility of employees in Silicon Valley enabled substantial knowledge sharing within the region.⁹⁰

There is an inherent tension between employee mobility and the protection of intellectual property, and a region's legal approach to noncompetition agreements plays an important role in determining the balance between these competing factors.⁹¹ In Massachusetts, courts generally enforced any noncompetition agreement that was reasonable in scope and time, protected a legitimate business interest, and did not disserve public policy.⁹² The outcomes of

⁸³ *Id.* at 587. The workforces in the two regions were approximately the same size by 1975. SAXENIAN, *supra* note 5, at 2.

⁸⁴ Gilson, *supra* note 5, at 587. By 1980, for example, the semiconductor labor force in Silicon Valley had grown to sixty-four thousand employees, while the equivalent labor force in Route 128 had decreased to nineteen thousand employees. *Id.* at 587 n.36. Similarly, by 1995, Silicon Valley had a 22.6% share of U.S. venture capital investments, more than doubling the 9.9% share in the Boston area. Anil Gupta & Haiyan Wang, *The Reason Silicon Valley Beat Out Boston for VC Dominance*, HARV. BUS. REV. (Nov. 15, 2016), <https://hbr.org/2016/11/the-reason-silicon-valley-beat-out-boston-for-vc-dominance> [<https://perma.cc/M5YB-MVTB>].

⁸⁵ Gilson, *supra* note 5, at 587 n.37 (citing SAXENIAN, *supra* note 5, at 2).

⁸⁶ *Id.* at 577.

⁸⁷ *Id.* at 591–92. Because workers expected to stay and rise at the same firm, companies were incentivized to keep learning and innovation wholly internal. *Id.*

⁸⁸ *Id.* As some technology firms inevitably failed, those failed businesses directly or indirectly resulted in the formation of new businesses, a process known as “flexible re-cycling.” Homa Bahrami & Stuart Evans, *Flexible Re-cycling and High-Technology Entrepreneurship*, 37 CAL. MGMT. REV. 62, 63 (1995). In Silicon Valley, this process happened consistently and quickly. *Id.*

⁸⁹ Gilson, *supra* note 5, at 591–92. This meant that companies had access to more sources of knowledge and were more receptive to influencing factors from outside the firm. *Id.* at 591.

⁹⁰ *Id.*

⁹¹ Amir & Lobel, *supra* note 11, at 835–36.

⁹² See *Shevrin*, 175 N.E.2d at 375–76 (stating the Massachusetts Supreme Judicial Court's (SJC) test for the enforceability of noncompete agreements). *Shevrin* involved a manager who was fired after embezzling money from his company. *Id.* at 375. As part of a restitution agreement, the former

those cases that were litigated suggested that noncompetes in the region would likely be enforced.⁹³ Faced with knowledge that a noncompetition agreement would probably be upheld, an employee bound by such an agreement would likely plan his or her career accordingly.⁹⁴ According to Gilson, while this did not impact the initial development of the Route 128 region, the lack of employee mobility—and as a result, the lack of knowledge sharing—ultimately stunted its long-term growth.⁹⁵

Conversely, California statutorily bans most noncompetition agreements outright.⁹⁶ The history of case law within the state confirms that California's courts will typically void such contract provisions.⁹⁷ The result, by Gilson's account, is an employment market in which employees know they are free to leave and often do just that.⁹⁸ This has allowed for considerable knowledge

employee signed a noncompetition agreement barring him from working in twenty-eight states for three years. *Id.* The company sued after the former employee sought new employment with a competitor. *Id.* In upholding the validity of the agreement, the SJC explained that “[i]t has been long settled in this Commonwealth” that a contract restricting competition is not inherently void and may be enforced as long as it is “reasonably limited in time and space, and is consonant with the public interest.” *Id.* at 375–76. That inquiry depends on the specific facts of each case. *Id.* at 376. In more recent cases, the SJC has reiterated that “[c]ovenants not to compete are valid if they are reasonable in light of the facts in each case.” See *Boulanger v. Dunkin’ Donuts, Inc.*, 815 N.E.2d 572, 577 (Mass. 2004) (upholding a noncompete signed as part of a franchise agreement).

⁹³ Gilson, *supra* note 5, at 606.

⁹⁴ *Id.* Because of their poor prospects in litigation, employees who are considering changing jobs bear the additional risk of paying a settlement in states where noncompete agreements are generally allowed. *Id.*

⁹⁵ *Id.* Eventually, after the legal infrastructure took hold, cultures and systems developed to ensure that the lack of employee mobility was self-perpetuating. *Id.* The enforcement of noncompetes meant that firms with workers who were less inclined to leave became more vertically integrated and businesses were more reluctant to outsource work. See Orly Lobel, *Aggressive Talent Wars Are Good for Cities*, HARV. BUS. REV. (Oct. 4, 2013), <https://hbr.org/2013/10/aggressive-talent-wars-are-good-for-cities> [<https://perma.cc/R47A-LEYX>] (explaining the impact of noncompetes on the “ethos” of the Boston-area technology industry).

⁹⁶ Gilson, *supra* note 5, at 607. The California statute voids “every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind,” subject to certain exceptions such as the sale of a business. CAL. BUS. & PROF. CODE § 16600 (West 2020).

⁹⁷ Gilson, *supra* note 5, at 608. The California courts show a sincere commitment to the state's noncompete statute. See, e.g., *Edwards*, 189 P.3d at 291–92 (reiterating California's strong public policy against noncompetes and rejecting a narrow exception suggested by the Ninth Circuit); *Muggill v. Reuben H. Donnelley Corp.*, 398 P.2d 147, 149 (Cal. 1965) (rejecting a post-employment work restriction as against public policy); *Chamberlain v. Augustine*, 156 P. 479, 480 (Cal. 1916) (declaring *all* noncompetes void if they fall outside of the enumerated statutory exceptions). There are limits, however: for example, in some circumstances, a court may enforce a noncompete against a California resident where the contract includes a non-California choice of law provision, it is appropriate to apply out-of-state law, and the employee was adequately represented by counsel when signing the noncompete. See *NuVasive, Inc. v. Patrick Miles*, No. 2017-0720-SG, 2019 WL 4010814, at *2 (Del. Ch. Aug. 26, 2019) (referencing a statutory exception to California's ban on noncompetes).

⁹⁸ Gilson, *supra* note 5, at 608. One study suggested that, through the 1990s, employer-to-employer mobility in Silicon Valley was 40% higher than the national average. Bruce Fallick et al.,

sharing, which helped to bring long-term growth in the region beyond that which occurred during its initial phase of development.⁹⁹

II. CHANGING LANES: THE NEW MASSACHUSETTS NONCOMPETE LEGISLATION

In October 2018, nearly two decades after Gilson's influential account was published, new law changed the legal regime of noncompetition agreements in Massachusetts.¹⁰⁰ The legislation, titled the Massachusetts Noncompetition Agreement Act, represents a compromise that ended years of debate among lawmakers and included language not yet seen in American noncompete laws.¹⁰¹ This Part provides an overview of the new legislation.¹⁰²

Under the statute, a noncompetition agreement must meet a series of minimum requirements in order to be enforceable in Massachusetts.¹⁰³ All types of noncompetes in Massachusetts are now subject to certain broad restrictions, some of which were carried over from the state's previous legal regime.¹⁰⁴ Noncompetition agreements must be consistent with public policy.¹⁰⁵ Additionally, the statute requires that a noncompete be reasonable in geographic scope and reasonable with respect to the range of activities that are restricted.¹⁰⁶ A covenant not to compete can be "no broader than necessary" to safeguard a "legitimate business interest" such as trade secrets, other confidential

Job-Hopping in Silicon Valley: Some Evidence Concerning the Microfoundations of a High-Technology Cluster, 88 REV. ECON. & STAT. 472, 477 (2006).

⁹⁹ Gilson, *supra* note 5, at 608. The lack of noncompete enforcement is less relevant to the initial performance of Silicon Valley, but highly relevant to its growth trajectory. *See id.* (explaining the impact of labor turnover over time). This idea helps to explain why Route 128 could be so far behind Silicon Valley despite the former's head start. *Id.*

¹⁰⁰ Bob Salsberg, 'Garden' Clause in New Law Requires Pay During Noncompete, ASSOCIATED PRESS (Sept. 30, 2018), <https://www.apnews.com/34d7fc49684a4c80a16c7a20c1022533> [<https://perma.cc/6EGP-VY9S>].

¹⁰¹ *Id.* Legislation had stalled in previous years, but lawmakers were finally able to reach an agreement due largely to a compromise over the so-called garden leave provision, which requires payment to restricted employees in certain situations. *Id.*

¹⁰² *See infra* notes 103–123 and accompanying text.

¹⁰³ Massachusetts Noncompetition Agreement Act, MASS. GEN. LAWS ch. 149, § 24L (2020).

¹⁰⁴ *Compare id.* (requiring noncompetes to be reasonable in scope and geography), *with* Novelty Bias Binding Co. v. Shevrin, 175 N.E.2d 374, 375–76 (Mass. 1961) (holding that a noncompete may be enforced if it is reasonable in time and space). The minimum requirements for noncompetes are laid out in section (b), paragraphs (i) through (viii) of the statute. MASS. GEN. LAWS ch. 149, § 24L(b).

¹⁰⁵ MASS. GEN. LAWS ch. 149, § 24L(b)(viii).

¹⁰⁶ *Id.* § 24L(b)(v)–(vi). The statute defines a presumptively reasonable geography as that in which the employee provided services or was materially present within the last two years of employment. *Id.* § 24L(b)(v). Similarly, the statute defines presumptively reasonable activities as those services which the employee provided at any time during his or her final two years of employment. *Id.* § 24L(b)(vi).

information, or goodwill.¹⁰⁷ A noncompetition agreement is also now capped at one year in length, with limited exceptions.¹⁰⁸

Some of the statute's requirements vary depending on the timing and the nature of the noncompete.¹⁰⁹ Agreements executed before the start of a worker's employment must be given to the worker either on the date of a formal offer or ten days before the employee begins work, whichever is earlier.¹¹⁰ These agreements must be in writing and must be signed by both the employee and employer.¹¹¹ They must also say explicitly that the employee can consult an attorney prior to signing the agreement.¹¹² For noncompetition agreements executed after the employee has already started working, notice must be provided at least ten business days before an agreement is to go into effect.¹¹³ These noncompetes also must be in writing, must be signed by both the employee and employer, and must say explicitly that the employee can consult an attorney prior to signing.¹¹⁴

Under the Massachusetts Noncompetition Agreement Act, certain types of employees may not be subject to noncompetition agreements at all.¹¹⁵ Covenants not to compete are now unenforceable against any employee who qualifies as nonexempt under the Fair Labor Standards Act; they are also unenforceable against employees who have been laid off or terminated without cause.¹¹⁶ Employees aged eighteen or younger and full-time or part-time undergraduate or graduate students in an internship or other short-term employment, whether paid or unpaid, also may not be bound by a noncompete.¹¹⁷

¹⁰⁷ *Id.* § 24L(b)(iii). An agreement is presumed necessary when the business interest cannot be sufficiently guarded through a nonsolicitation agreement, a nondisclosure agreement, or another type of restrictive covenant. *Id.*

¹⁰⁸ *Id.* § 24L(b)(iv). If the employee has stolen property belonging to the employer or has otherwise breached a fiduciary duty, the agreement can last up to two years. *Id.*

¹⁰⁹ *See id.* § 24L(b)(i)–(ii).

¹¹⁰ *Id.* § 24L(b)(i).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* § 24L(b)(ii). This rule applies only where the agreement does not relate to the employee's separation from the company. *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* § 24L(c).

¹¹⁶ *Id.* § 24L(c)(i), (iii). The Fair Labor Standards Act is a federal labor law enacted as part of the New Deal. *See* 29 U.S.C. §§ 201–219 (2018). The Act defines exempt and nonexempt employees based on the type of work the employee performs, how much he or she is paid, and the manner in which he or she is paid. *Id.* § 213. Nonexempt employees are entitled to a federally mandated minimum wage and overtime pay. *Id.* §§ 206–207. In effect, the Massachusetts law bans the use of noncompetes for those hourly workers eligible to receive overtime. Aaron Nicodemus, *Massachusetts Noncompetes Get One-Year Cap, Higher Tab*, BLOOMBERG L. (Aug. 10, 2018), <https://news.bloomberglaw.com/daily-labor-report/massachusetts-noncompetes-get-one-year-cap-higher-tab> [<https://perma.cc/2QGG-EFDY>].

¹¹⁷ MASS. GEN. LAWS ch. 149, § 24L(ii), (iv). If a noncompete is held unenforceable under this section of the law, the remainder of the employment contract is not rendered void. *Id.* In employment law, this practice is known as blue-penciling. THE WHITE HOUSE, *supra* note 24, at 11.

For those employees who are eligible to consent to post-employment restrictions, such an agreement must be supported by “a garden leave clause or other mutually-agreed upon consideration” in order to be enforceable.¹¹⁸ The statute defines a garden leave clause as an agreement that provides for the employee to be paid, during the restricted period, at least fifty percent of their highest base salary during the last two years of his or her employment.¹¹⁹ The statute does not elaborate on what might constitute “other mutually-agreed upon consideration.”¹²⁰

These rules apply only to the types of contracts that the statute defines as noncompetition agreements.¹²¹ They do not govern several other types of restrictive covenants.¹²² Noncompetition agreements made in connection with the sale of a business, nonsolicitation agreements, and nondisclosure agreements are among those types of agreements that do not fall within the purview of the Massachusetts law.¹²³

¹¹⁸ MASS. GEN. LAWS ch. 149, § 24L(b)(vii). The concept of garden leave is borrowed from employment law in the United Kingdom and has drawn increasing attention in the United States. Charles A. Sullivan, *Tending the Garden: Restricting Competition Via “Garden Leave,”* 37 BERKELEY J. EMP. & LAB. L. 293, 294 (2016). Under English law, employees on garden leave technically remain employed but are not assigned any work, giving those workers time to tend to their proverbial gardens. *Id.* at 295. In early examples of garden leave in America, employers tended to formally terminate the employment relationship with those on leave, achieving some cost savings by taking away fringe benefits. *Id.* at 304. To date, the greatest use of garden leave provisions has been among upper-level roles in the financial sector, where employers view the arrangements as being worth the costs. *Id.* at 303.

¹¹⁹ MASS. GEN. LAWS ch. 149, § 24L(b)(vii). If an employee has breached a fiduciary duty or has stolen company property and the restricted period extends beyond one year, the employer does not have to make garden leave payments during the extended portion of the restricted period. *Id.*

¹²⁰ *See id.* This omission may prove problematic, as even recently a federal court in Massachusetts has reiterated the state’s view that continued employment serves as adequate consideration for a noncompete. *See American Well Corp. v. Obourn*, No. 15-12265-LTS, 2015 WL 7737328, at *1 (D. Mass. Dec. 1, 2015) (“Decades ago, [the Massachusetts SJC] held that a noncompetition agreement signed during employment ‘was not void for lack of consideration’ because it ‘contained a promise by the plaintiff thereafter to employ the defendant and by the defendant to work for the plaintiff.’” (quoting *Sherman v. Pfefferkorn*, 135 N.E. 568, 569 (1922))).

¹²¹ MASS. GEN. LAWS ch. 149, § 24L(a). The statute defines “noncompetition agreement” as “an agreement between an employer and an employee . . . under which the employee or expected employee agrees that he or she will not engage in certain specified activities competitive with his or her employer after the employment relationship has ended.” *Id.*

¹²² *Id.*

¹²³ *Id.* A nonsolicitation agreement is a promise to refrain from attempting to lure other employees or customers away from a company for a specified period of time. *Nonsolicitation Agreement*, BLACK’S LAW DICTIONARY (11th ed. 2019). A nondisclosure agreement is a promise not to share any information about trade secrets, internal processes, or other proprietary matters. *Nondisclosure Agreement*, BLACK’S LAW DICTIONARY (11th ed. 2019).

III. TWO-WAY TRAFFIC AHEAD: PERSPECTIVES IN THE NONCOMPETE DEBATE

The Massachusetts Noncompetition Agreement Act occupies a middle ground in the broader landscape of American noncompetition law.¹²⁴ The Act falls somewhere in between giving broad deference toward noncompetition agreements and prohibiting such agreements outright.¹²⁵ Section A of this Part discusses some of the arguments for operating at either end of this spectrum.¹²⁶ Section B examines the contentions for and against moving to Massachusetts's new middle ground.¹²⁷ Section C explores the questions that remain unanswered and the ambiguities that remain unresolved in light of this new legislation.¹²⁸

A. Criticism and Praise of Noncompete Enforcement

At one end of the spectrum of noncompete enforcement is the California-type approach of refusing to honor noncompetition agreements.¹²⁹ Only a few states follow this approach, but the number of states seeking to undermine the use of employee noncompetes is on the rise.¹³⁰ Proponents of this methodology cite a range of theories to explain why noncompetition agreements should be generally unenforceable.¹³¹ One argument against the enforcement of noncompetes is that they are damaging to the economy.¹³² According to some empirical and theoretical studies, honoring noncompetition agreements hinders market performance.¹³³ This is in part because constraining knowledge tends to suppress entrepreneurship and obstruct technological progress.¹³⁴ In addition, there can be more subtle ramifications that result from noncompete enforce-

¹²⁴ Salsberg, *supra* note 100.

¹²⁵ *Id.*

¹²⁶ See *infra* notes 129–153 and accompanying text.

¹²⁷ See *infra* notes 154–171 and accompanying text.

¹²⁸ See *infra* notes 172–185 and accompanying text.

¹²⁹ Amir & Lobel, *supra* note 11, at 837.

¹³⁰ *Id.* at 842. Colorado and Oregon are among those states that have also passed legislation severely limiting the use of noncompetes. *Id.*

¹³¹ See Viva R. Moffat, *Making Non-Competes Unenforceable*, 54 ARIZ. L. REV. 939, 984 (2012) (advocating for the elimination of employee noncompetes).

¹³² See Blake, *supra* note 54, at 650 (“Anything that impedes an employee’s freedom of access to a job in which his productivity (and wages) would be higher, involves a cost in terms of the economy’s welfare.”).

¹³³ See, e.g., Amir & Lobel, *supra* note 11, at 837 (hypothesizing that noncompetes may diminish worker performance and disincentive employees from working to improve their skills); Samila & Sorenson, *supra* note 13, at 436.

¹³⁴ Samila & Sorenson, *supra* note 13, at 436. One empirical study looked at data from urban areas from 1993 to 2002 and concluded that regions with lower enforcement of noncompetes tend to have higher employment figures and more innovation. *Id.* at 429, 436.

ment, including decreased employee engagement due to workers' perceptions that their opportunities are limited.¹³⁵

The argument against the enforcement of noncompetes has also been framed as one centered around workers' rights.¹³⁶ Under a workers' rights theory, the individual employee should own the product of his or her human capital; this notion runs counter to the concept of post-employment restrictions.¹³⁷ There may also be situations where an employee is unjustly fired from an at-will position but unable to take a new job in the same field due to the existence of a noncompete.¹³⁸ Ramifications with respect to workers' rights can often be undetectable; it is impossible to know how many employees did not start a venture or did not move to a preferred job for fear of legal retribution.¹³⁹

Another contention for why noncompetition agreements should generally not be enforceable is the sheer logistical challenge that enforcement poses.¹⁴⁰ Because companies tend to operate in multiple states and employees frequently change geographies, differences in state noncompete laws can lead to choice-of-law and conflict-of-laws issues.¹⁴¹ Scholars argue that a uniform system of non-enforcement would be the simplest way to eliminate these problems.¹⁴²

At the other extreme of the modern American noncompete landscape are those states that broadly tend to enforce noncompetition agreements.¹⁴³ This

¹³⁵ Amir & Lobel, *supra* note 11, at 837. Scholars emphasize the behavioral ramifications of noncompete enforcement, concluding that employees who are aware of their reduced market opportunities may be less motivated to perform or develop. *Id.* at 846.

¹³⁶ Bishara & Orozco, *supra* note 34, at 991.

¹³⁷ *Id.* A prospective employee tends to have significantly less bargaining power and sees the signing of a noncompete as a means to an end, so it is unlikely he or she will appreciate the consequences of the act at the time it is done. *Id.* As economic conditions deteriorate, a jobseeker's position and leverage worsen because he or she will likely overvalue a job opportunity and minimize the potential harm of a noncompete. *Id.*

¹³⁸ Stone, *supra* note 39, at 581–82.

¹³⁹ LOBEL, *supra* note 5, at 72. Many entrepreneurs lament that individuals pass up networking or job opportunities for fear of the appearance of impropriety. *Id.*

¹⁴⁰ Moffat, *supra* note 131, at 952.

¹⁴¹ *Id.* If the parties have not specified which state's law should govern their noncompetition agreement and a dispute arises, the employer and employee will likely be incentivized to get the case into a state court that is more favorable to their respective side. *Id.* at 957. Even if the parties have agreed that a particular state's law will govern, that state's rules may contradict the norms and public policy goals of the state in which the case is heard. *See id.* at 958 (detailing the outcome of a federal case in Illinois). In *Curtis 1000, Inc. v. Suess*, for example, the U.S. Court of Appeals for the Seventh Circuit affirmed the district court's refusal to apply Delaware law to a noncompete dispute despite a choice of law provision in the contract. 24 F.3d 941, 948 (7th Cir. 1994).

¹⁴² *See, e.g.,* Moffat, *supra* note 131, at 965.

¹⁴³ Amir & Lobel, *supra* note 11, at 837. Florida law, for example, explicitly provides for the enforcement of reasonable noncompetes. *See* FLA. STAT. ANN. § 542.335(1) (West 2020) (“[E]nforcement of contracts that restrict or prohibit competition during or after the term of restrictive covenants, so long as such contracts are reasonable in time, area, and line of business, is not prohibited.”). Similarly, reasonable and voluntary noncompetes are enforceable in Louisiana, though there are

type of legal regime, to which Massachusetts belonged until its recent legislation, backs noncompete agreements with the court system, subject only to the requirement of reasonableness.¹⁴⁴ Proponents of this approach cite their own list of economic benefits.¹⁴⁵ The enforcement of noncompetes helps employers preserve their intellectual property and client relationships, allowing companies to freely develop these assets and reduce fear that employees will leave and take that important property with them.¹⁴⁶ It also provides firms with an incentive to invest in human capital.¹⁴⁷

In addition to these economic explanations, proponents of noncompete enforcement also make a principle-based argument, citing freedom of contract as a reason to honor these agreements.¹⁴⁸ A default assumption of contract law is that private parties are free to contract with one another and in this way can protect their own interests.¹⁴⁹ Under this school of thought, a court nullifying an otherwise valid, consensual noncompetition agreement seems like an unwarranted or even hostile act.¹⁵⁰ Another justification for the enforcement of noncompetition agreements focuses on state sovereignty.¹⁵¹ Absent federal activity in an area, each state should be able to determine what is best for its citizens and legislate accordingly.¹⁵² Any system that mandated uniform non-enforcement would compromise this important principle of federalism.¹⁵³

specific carveouts, for example, restricting such agreements among car salespersons. *See* LA. STAT. ANN. § 23:921(A)(1), (I) (2019).

¹⁴⁴ Bishara, *supra* note 4, at 758.

¹⁴⁵ Blake, *supra* note 54, at 627.

¹⁴⁶ Samila & Sorenson, *supra* note 13, at 425. If employers can be sure that their efforts will not be used against them, they will be incentivized to invest in training and development. *Id.*

¹⁴⁷ Garmaise, *supra* note 4, at 376. An employer's investments in human capital include training, revealing trade secrets, and allowing participation in certain projects. *Id.* at 382. One study focusing on employees at the executive level suggested that increased enforcement of noncompetes leads to greater firm investment in managers' human capital because firms are more likely to retain employees and thus more likely to reap the benefits of those investments. *See id.* at 377–78, 414. The same heightened enforcement of noncompetes, however, disincentivizes managers from investing in their own development because, with less mobility, they are less likely to benefit from personal improvement. *See id.*

¹⁴⁸ *See, e.g.,* Ken Matheny & Marion Crain, *Disloyal Workers and the Un-American Labor Law*, 82 N.C. L. REV. 1705, 1743 (2004) (detailing American courts' eventual acceptance of noncompetes due to an emphasis on freedom of contract principles). The freedom of individuals to engage in employment relationships relies on that person's ability to choose to leave when the relationship is no longer beneficial. *Id.* at 1706–07.

¹⁴⁹ Edmund W. Kitch, *The Law and Economics of Rights in Valuable Information*, 9 J. LEGAL STUD. 683, 686 (1980). It is a basic assumption of our legal framework that individuals are generally free to enter contracts to safeguard their own interests. *Id.*

¹⁵⁰ *See id.* at 685.

¹⁵¹ *See* Polly J. Price, *Full Faith and Credit and the Equity Conflict*, 84 VA. L. REV. 747, 835–36 (1998) (exploring the issue of enforcing out-of-state noncompetes).

¹⁵² *See, e.g.,* *Advanced Bionics Corp. v. Medtronic, Inc.*, 59 P.3d 231, 237 (Cal. 2002) (holding that California's interest in protecting employees does not supersede sovereignty concerns between states). A medical device product specialist subject to a two-year covenant not to compete left his

*B. Somewhere in Between: Perspectives on the Massachusetts
Noncompetition Agreement Act*

The new Massachusetts legislation has drawn both praise and criticism from noncompete proponents and detractors alike.¹⁵⁴ As years of failed proposals indicate, substantial compromise was needed in order for the statute to be passed.¹⁵⁵ The result is a legal framework that occupies a middle ground: Massachusetts now places significantly more restrictions on noncompetition agreements but remains far from banning them outright.¹⁵⁶

Those against enforcing noncompetes and in favor of following California's example see the new legislation as a partial victory.¹⁵⁷ Generally, the changes make it more difficult for employers to rely on noncompetes.¹⁵⁸ By banning noncompetition agreements for employees who are nonexempt under the Fair Labor Standards Act, many of whom are in low-wage positions, the

position at Medtronic in Minnesota and joined a competitor in California. *Id.* at 233. Although the Supreme Court of California acknowledged that such a noncompete would likely be void under Section 16600, it reversed a temporary restraining order barring litigation in Minnesota due to concerns over state sovereignty. *Id.* at 237–38.

¹⁵³ See Scott Hovanyetz, Note, *Non-Compete Agreements and the Equity Conflict: Applying Baker v. General Motors Through the Lens of History*, 38 SETON HALL L. REV. 253, 270 (2008) (discussing sovereignty concerns in relation to noncompetes).

¹⁵⁴ See Nicodemus, *supra* note 116 (citing preliminary feedback from various stakeholders).

¹⁵⁵ Salsberg, *supra* note 100. The reform was a “decade-long effort” with prior rounds of unsuccessful negotiations. Katie Lannan, *Changes to Non-Compete Agreement Laws, Including ‘Garden Leave,’ Begin Monday*, WCVB (Sept. 25, 2018), <https://www.wcvb.com/article/changes-to-non-compete-agreement-laws-including-garden-leave-begin-monday/23461967> [<https://perma.cc/QD3Z-TUJC>]. For example, in 2009, state legislators were debating multiple proposed bills aimed at non-compete reform. *Advances: Week of July 19, 2009*, ST. HOUSE NEWS SERV. (July 17, 2009), <https://www.statehousenews.com/news/2009689> [<https://perma.cc/XB4B-XYCM>]. State representative William Brownsberger, with twenty-five co-sponsors, filed Bill H.R. 1794; state representative Lori Ehrlich, with seven co-sponsors, filed competing Bill H.R. 1799 one day later. *Id.* Representative Brownsberger’s proposal aimed to void all employment-related agreements that restricted or conditioned an individual’s ability to work as an employee or independent contractor after the employment relationship has ended. An Act to Prohibit Restrictive Employment Covenants, H.R. 1794, 186th Gen. Court (Mass. 2009). Representative Ehrlich’s proposal sought to codify many restrictions relating to reasonableness, limit the term of noncompetes to a two-year maximum, and exempt employees who earned under \$100,000 annually. An Act Relative to Non-Compete Agreements, H.R. 1799, 186th Gen. Court (Mass. 2009). Both proposed bills were referred to the committee on Labor and Workforce Development and informed the drafting of proposed bill H.R. 4607, which was drafted in April 2010 but stalled shortly thereafter. See An Act Relative to Noncompetition Agreements, H.R. 4607, 186th Gen. Court (Mass. 2010); *An Act Relative to Noncompetition Agreements*, MASS. LEGISLATURE, <https://malegislature.gov/Bills/186/H4607> [<https://perma.cc/2KHV-MNZB>] (listing the legislative history of the bill).

¹⁵⁶ Nicodemus, *supra* note 116.

¹⁵⁷ Callum Borchers, *Mass. Businesses Grapple with Uncertainty as Partial Ban on Noncompetes Takes Effect*, WBUR (Oct. 1, 2018), <https://www.wbur.org/bostonomix/2018/10/01/mass-businesses-grapple-with-uncertainty-as-partial-ban-on-noncompetes-takes-effect> [<https://perma.cc/B7AW-4A28>].

¹⁵⁸ Nicodemus, *supra* note 116 (noting the heightened restrictions on noncompetes in Massachusetts).

legislation also improves the situation for a vulnerable population.¹⁵⁹ In addition, the garden leave provision—the first such provision adopted by a U.S. state—makes noncompete agreements more expensive for employers and thus represents an important success for those seeking to limit their use.¹⁶⁰

The new law may also have significant economic benefits that allow the Massachusetts economy to better compete with less restrictive markets such as that of California.¹⁶¹ Lower numbers of valid noncompetes could potentially lead to an increase in entrepreneurship and innovation as individuals and ideas move more freely between companies.¹⁶² Similarly, the new rules may result in an increase in venture-backed businesses as the market landscape among local companies opens up to more competition.¹⁶³ There may also be other economic improvements, such as increases in wages.¹⁶⁴

For those who favor the enforcement of noncompetition agreements, the Massachusetts statute represents tolerable reform.¹⁶⁵ Though many policymakers sought to eliminate noncompetes altogether, employer advocacy groups were successful in maintaining the ability to use these agreements in some scenarios.¹⁶⁶ Additionally, even though the concept of a garden leave clause has been introduced, the compromise of allowing “other mutually-agreed upon consideration” creates a possible loophole that could allow employers to obey the garden leave requirement at a much lower cost than fifty percent of the employee’s salary.¹⁶⁷

¹⁵⁹ Borchers, *supra* note 157. With limited exceptions, an employee must earn less than \$455 per week (\$23,600 per year) to qualify as nonexempt. See *Crowe v. ExamWorks, Inc.*, 136 F. Supp. 3d 16, 27 (D. Mass. 2015) (explaining that an employee must earn at least \$455 per week to be considered exempt under the Fair Labor Standards Act).

¹⁶⁰ See Nicodemus, *supra* note 116 (explaining the added expense of garden leave). Providing “other mutually agreed upon consideration” may be a way for employers to get around the garden leave clause, but it is likely to meet resistance from employees. *Id.*

¹⁶¹ Jon Chesto, *A New Era for Noncompetes in Mass. Begins Oct. 1*, BOS. GLOBE (Sept. 24, 2018), <https://www.bostonglobe.com/business/talking-points/2018/09/24/new-era-begins-for-noncompetes-mass/PtoVtctQwOH0r6lofmKhK/story.html> [https://perma.cc/Y2PD-85AJ].

¹⁶² Peter Cohan, *Wall & Main: New Noncompete Law Makes Massachusetts More Startup-Friendly*, TELEGRAM.COM (Aug. 20, 2018), <https://www.telegram.com/news/20180820/wall-amp-main-new-noncompete-law-makes-massachusetts-more-startup-friendly> [https://perma.cc/ZD2Y-CNXX].

¹⁶³ Chesto, *supra* note 10.

¹⁶⁴ McGovern, *supra* note 2. On average, hourly wages are approximately 4% lower in states that readily enforce noncompetes. *Id.*

¹⁶⁵ Borchers, *supra* note 157.

¹⁶⁶ Nicodemus, *supra* note 116. Among those organizations fighting to preserve the use of noncompetes was Associated Industries of Massachusetts, a trade group that represents over four thousand employers in the state. Borchers, *supra* note 157.

¹⁶⁷ Jena McGregor, *Massachusetts Bill Would Require Employers to Pay Up When Enforcing Noncompetes—but There’s a Loophole*, WASH. POST (Aug. 2, 2018), https://www.washingtonpost.com/business/2018/08/02/massachusetts-bill-would-require-employers-pay-up-when-enforcing-noncompetes-theres-loophole/?utm_term=.70e3b20eadcb [https://perma.cc/G999-JWHW].

The legislation also leaves employers free to protect proprietary information through alternative methods.¹⁶⁸ Proponents of noncompetes point out that, under the new law, companies can rely on nondisclosure and nonsolicitation agreements to accomplish much of what they did under noncompetition agreements.¹⁶⁹ Nonsolicitation agreements are particularly helpful for ensuring that former employees do not bring customers with them to another company, while nondisclosure agreements are meant to prevent former employees from sharing confidential information.¹⁷⁰ Employers might look to restructure existing employment contracts in order to restrict employees through these permissible means.¹⁷¹

C. Uncertainties and Ambiguities in the Massachusetts Statute

Parties on both sides of the noncompete enforcement debate agree that the new Massachusetts statute presents ample ambiguity.¹⁷² The most notable uncertainty is how “other mutually-agreed upon consideration,” which is not defined under the terms of the garden leave clause, will ultimately be defined in the real world by employers and courts.¹⁷³ If employers are able to rely on consideration in its broadest sense, this clause has the potential to undermine the statute’s entire concept of garden leave because minimal compensation could qualify as mutually-agreed upon consideration.¹⁷⁴ It is currently unclear how this will play out, but interpretation of this portion of the law will likely be left to the courts.¹⁷⁵

¹⁶⁸ Nicodemus, *supra* note 116.

¹⁶⁹ *See id.* (discussing how employers might attempt to circumvent new restrictions).

¹⁷⁰ *See* Estlund, *supra* note 13, at 395. Nonsolicitation and nondisclosure agreements are seen as “less restrictive” ways of controlling employee knowledge of trade secrets and thus receive more favorable treatment from courts. *Id.*

¹⁷¹ *See* MASS. GEN. LAWS ch. 149, § 24L(a) (2020) (listing the types of agreements that are excluded from Massachusetts’s new legislation).

¹⁷² *See* Borchers, *supra* note 157 (outlining questions from lawyers in reaction to the law).

¹⁷³ *Id.* Companies utilizing this part of the statute have offered stock options, severance payouts, or higher salaries as consideration for garden leave clauses. *Id.*

¹⁷⁴ Salsberg, *supra* note 100. In theory, an employer could pay a nominal amount of a few dollars and meet the broadest legal definition of consideration. *Id.* Consideration is defined as any bargained-for act, forbearance, or return promise that motivates a person to partake in a legal act. *Consideration*, BLACK’S LAW DICTIONARY (11th ed. 2019). The Second Restatement of Contracts imposes no requirement that consideration be adequate, and courts do not typically inquire into the adequacy of the consideration except in situations that suggest fraud or duress. RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW INST. 1981). It is imperative, however, that consideration has been bargained for. Salsberg, *supra* note 100. Should an employer try to undermine the Massachusetts garden leave clause by providing minimal consideration, the company would run the risk of a court invalidating the contract for lack of consideration. McGregor, *supra* note 167.

¹⁷⁵ *See* Nicodemus, *supra* note 116 (noting the unresolved nature of the garden leave requirement); Salsberg, *supra* note 100.

Confusion is also likely to arise as to whether an employee is terminated with cause.¹⁷⁶ The statute offers no explanation of what “cause” might be.¹⁷⁷ An otherwise valid noncompete is unenforceable against an employee who is terminated without cause, so employers may seek to expand the definition of cause in their employment contracts.¹⁷⁸ It remains to be seen whether the contracting parties or the courts will be responsible for determining what does and does not constitute cause for termination.¹⁷⁹

In addition, there are ambiguities with respect to the relationship between parties.¹⁸⁰ The statute specifically governs the relationship between an employer and employee, but it is unclear whether the statute also covers hybrid situations where a worker is an employee but also a stakeholder in the business.¹⁸¹ This issue comes up for shareholders who are employees, partners in a partnership, and members of a limited liability company.¹⁸²

Furthermore, the law draws a hard line between employees who are exempt and nonexempt under the Fair Labor Standards Act—barring the use of noncompetes for the latter—but it can be challenging to correctly classify an employee.¹⁸³ An employer who sues to enforce a noncompetition agreement against a former nonexempt employee would likely be met with a countersuit alleging that the employee was misclassified.¹⁸⁴ There are also concerns that the prohibition of noncompetes for all hourly employees, even highly skilled ones, may ultimately lead employers to stop investing in their workers; it makes little sense for an employer to spend money on worker training if those employees can take what they have learned directly to a competitor.¹⁸⁵

¹⁷⁶ David S. Rubin, *Thorny Questions, Issues Emerging as Noncompete Act Takes Hold*, MASS. LAW. WKLY. (Oct. 25, 2018), <https://masslawyersweekly.com/2018/10/25/thorny-questions-issues-emerging-as-noncompete-act-takes-hold/> [<https://perma.cc/AEY4-K4QB>].

¹⁷⁷ *Id.* Terminating “for cause” refers to the “dismissal of a contract employee for a reason that the law or public policy has recognized as sufficient to warrant the employee’s removal.” *Dismissal*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹⁷⁸ Rubin, *supra* note 176. Some employment contracts include acts such as fraud, felony conviction, embezzlement, violation of policy, or insubordination as cause for termination. *Id.*

¹⁷⁹ *Id.* Massachusetts case law defines “cause” as “(1) a reasonable basis for employer dissatisfaction with a new employee, entertained in good faith . . . or (2) grounds for discharge reasonably related, in the employer’s honest judgment, to the needs of his business.” *G&M Employment Serv., Inc. v. Commonwealth*, 265 N.E.2d 476, 480 (Mass. 1970).

¹⁸⁰ Rubin, *supra* note 176.

¹⁸¹ *Id.*

¹⁸² *Id.* Under standard tax rules, members of limited liability companies and partners are considered “self-employed” and are not categorized as employees. *Frequently Asked Questions*, IRS, <https://www.irs.gov/faqs/small-business-self-employed-other-business/entities/entities-1> [<https://perma.cc/8JAA-9KMM>].

¹⁸³ Rubin, *supra* note 176.

¹⁸⁴ *Id.*

¹⁸⁵ Jack Garson, *Surviving the Noncompete Challenge: How Businesses Can Effectively Cope with New Employment Laws*, FORBES (Oct. 16, 2018), <https://www.forbes.com/sites/jackgarson/2018/10/16/survivor-the-noncompete-challenge/#fc8957ca24e5> [<http://perma.cc/HC2B-CET5>].

IV. ARE WE THERE YET? BROADER IMPLICATIONS OF THE MASSACHUSETTS LAW

The Massachusetts Noncompetition Agreement Act represents a distinct inflection point in the state's regulation of covenants not to compete.¹⁸⁶ The state has gone from a classic example of a jurisdiction that upholds reasonable noncompetes to a pioneer in statutory methods for limiting them.¹⁸⁷ Regardless of whether the legislation ultimately has a substantial impact on the state's economy and labor force, the law has already attracted attention as part of the national reexamination of noncompetes.¹⁸⁸

This Part contends that the change in Massachusetts is a beneficial one, but that the legal infrastructure around Route 128 remains quite distinct from the framework surrounding Silicon Valley.¹⁸⁹ It also argues that the ambition and omissions of the Massachusetts law should factor into the blueprints of states seeking to reform their own laws.¹⁹⁰ Section A looks at the immediate impacts of the Massachusetts statute and revisits the comparison between Route 128 and Silicon Valley in the context of the new law.¹⁹¹ Section B argues that Massachusetts set a useful example for other states looking to reform their noncompete laws.¹⁹²

A. Route 128 and Silicon Valley Today

Even without knowing how all aspects of the new statute will ultimately play out, the Massachusetts law seeks to make significant changes to the use of noncompetition agreements.¹⁹³ It is likely that many of these objectives will be achieved.¹⁹⁴ In particular, the law should be successful in reconfiguring which employees can and cannot be bound by a noncompete.¹⁹⁵

¹⁸⁶ See Chesto, *supra* note 161 (characterizing the post-effectiveness period starting on October 1, 2018 as a "new era").

¹⁸⁷ Compare Bishara, *supra* note 4, at 757 (characterizing Massachusetts, in 2011, as a typical example of a state where noncompetes are enforced), with Salsberg, *supra* note 100 (identifying Massachusetts as the first state to implement garden leave).

¹⁸⁸ See McGregor, *supra* note 167 (discussing the national focus on Massachusetts's legislation).

¹⁸⁹ See *infra* notes 193–215 and accompanying text.

¹⁹⁰ See *infra* notes 216–238 and accompanying text.

¹⁹¹ See *infra* notes 193–215 and accompanying text.

¹⁹² See *infra* notes 216–238 and accompanying text.

¹⁹³ See Chesto, *supra* note 161 (urging businesses to pay attention to the changing employment law landscape).

¹⁹⁴ See Nicodemus, *supra* note 116 (explaining that more extensive restrictions will take hold imminently).

¹⁹⁵ See Borchers, *supra* note 157 (highlighting the clear rules redefining who can and cannot be bound by a noncompete).

The law takes its hardest line with respect to certain subsets of workers, banning outright the enforcement of noncompetes against these groups.¹⁹⁶ Covenants not to compete targeted towards low-wage hourly workers have recently drawn considerable public criticism and the Massachusetts law makes a strong effort to abolish them.¹⁹⁷ Although the line between exempt and non-exempt employees under the Fair Labor Standards Act may not always be perfectly clear, the Massachusetts legislature made this portion of the law easier to implement by relying on that existing framework.¹⁹⁸ Employees should generally know—or easily be able to find out—whether or not they can be bound by a noncompetition agreement.¹⁹⁹ Eliminating enforcement of covenants not to compete against interns and minors is likewise a sound method of undercutting employer overreach.²⁰⁰

Another somewhat vulnerable subset of the workforce includes those employees who have been laid off or terminated without cause.²⁰¹ Even with the potential difficulty of defining “cause,” barring the enforcement of noncompetes against these workers seems quite logical and long overdue.²⁰² Employers should not be allowed to have their cake and eat it too, proverbially speaking, by first laying off an employee and then preventing that employee from working elsewhere in the industry.²⁰³ This is a workers’ rights issue that the Massachusetts legislation purports to solve.²⁰⁴

¹⁹⁶ See Chesto, *supra* note 161 (commenting that noncompetes are banned for sandwich shop workers and other lower-paid hourly employees).

¹⁹⁷ See *id.* (emphasizing the legislature’s focus on “entirely” eliminating noncompetes for low-wage workers).

¹⁹⁸ See 29 U.S.C. § 213 (2018) (detailing the FLSA’s exemption standards); MASS. GEN. LAWS ch. 149, § 24L (2020) (declaring noncompetes against nonexempt workers unenforceable); Borchers, *supra* note 157 (implying that the FLSA provides a clear delineation of workers). *But see* Rubin, *supra* note 176 (making note of some challenges in classifying employees, such as the gray area that can exist between exempt and nonexempt employees, or employers exploiting the system by misclassifying employees).

¹⁹⁹ See MASS. GEN. LAWS ch. 149, § 24L (outlining what rules apply to different types of workers); Rubin, *supra* note 176 (suggesting that employees might be misclassified as exempt or nonexempt).

²⁰⁰ See Borchers, *supra* note 157 (explaining one advocate’s opinion that freeing certain classes of workers from noncompetes is an important victory).

²⁰¹ See McGregor, *supra* note 167 (highlighting the legislation in Massachusetts as an example of a state response to the Obama administration’s push against apparent inequity).

²⁰² See Nicodemus, *supra* note 116 (identifying those laid off or fired without cause as protected groups); Rubin, *supra* note 176 (explaining the open questions regarding the Act’s definition of cause).

²⁰³ See Bishara & Orozco, *supra* note 34, at 991 (explaining the workers’ rights theory against enforcement of noncompetes); Estlund, *supra* note 13, at 409–14 (scrutinizing the tension between noncompetition agreements and workers’ rights); McGregor, *supra* note 167 (noting that a departed employee could effectively be shut out from working altogether).

²⁰⁴ See McGregor, *supra* note 167 (framing the Massachusetts bill as one that seeks to protect workers’ rights).

With respect to the other major changes, it is difficult to say whether they will have a measurable impact on employment dynamics in Massachusetts.²⁰⁵ It is very possible, for example, that the seemingly innovative garden leave provision becomes merely decorative.²⁰⁶ For a variety of reasons, employers are likely to offer “other mutually-agreed upon consideration” as a substitute for garden leave; the apparent compromise of allowing such open language in the statute may be an indication that some legislators saw other aspects of the bill as being more important.²⁰⁷ If the garden leave provision is rendered a nullity, the law may have a minimal impact on noncompetition agreements for those employees who remain eligible.²⁰⁸

In spite of all these changes, it is important to note that the fundamental noncompete dynamic—that Massachusetts enforces noncompetition agreements and California does not—remains intact.²⁰⁹ In that respect, Route 128 continues to be quite far from Silicon Valley.²¹⁰ A decade-long reform effort in which many sought to eliminate noncompetition agreements altogether ended with the permissibility of these agreements, at least in some forms, cemented into newly minted law.²¹¹

Massachusetts lawmakers have decided that the benefits of noncompetition agreements are worth maintaining, despite their often-cited drawbacks.²¹² Those who hoped to replicate California’s general prohibition on noncompetes got a very different result.²¹³ Indeed, much of the language in the Massachusetts Noncompetition Agreement Act tracks closely the historic reasonableness test developed in the state’s court system.²¹⁴ The new statute, for example, still emphasizes that a noncompetition agreement must be in harmony with public

²⁰⁵ See Chesto, *supra* note 161 (speculating on what might happen following the noncompete statute’s enactment).

²⁰⁶ See Salsberg, *supra* note 100 (theorizing that ten dollars might be adequate to constitute consideration under the statute).

²⁰⁷ See *id.* (predicting that most companies will end up relying on mutually agreeable consideration instead of the specified 50% of annual salary for garden leave).

²⁰⁸ See *id.* (explaining that the compromise over garden leave language may result in a large loophole).

²⁰⁹ See Gilson, *supra* note 5, at 578 (outlining the differences between Massachusetts and California with respect to noncompete enforcement).

²¹⁰ See *id.*

²¹¹ See Nicodemus, *supra* note 116 (noting that the new law makes it more difficult—but not impossible—for companies to make use of noncompetition agreements).

²¹² See *id.* (expecting employers to continue using noncompetes, albeit revised ones).

²¹³ See Chesto, *supra* note 10 (outlining perspectives of individuals who sought to emulate California’s noncompete regime).

²¹⁴ Compare MASS. GEN. LAWS ch. 149, § 24L (requiring reasonableness in scope and geography and harmony with public policy), with *Pierce v. Fuller*, 8 Mass. 223, 223 (1811) (requiring constraints on trade be limited to a particular geography and not excessively harmful to public policy).

policy, must be reasonable in scope and geography, and must be no broader than necessary.²¹⁵

B. Massachusetts: A Model or a Warning?

Several states are in the process of reevaluating laws that govern non-competition agreements, and they can look to the acts of the Massachusetts legislature as they proceed.²¹⁶ A crucial starting point is to decide where lawmakers want to be on the spectrum of noncompete enforcement: would the state benefit from a general prohibition on noncompetes, a Massachusetts-type middle ground, or broad enforcement?²¹⁷ That decision will hinge on a variety of considerations, including a state's main economic outputs, its socioeconomic dynamics, the strength of certain lobbying groups, and the demands of the working population.²¹⁸

For states looking to reign in the use of noncompetition agreements but still allow them in some situations, the Massachusetts law provides a useful template.²¹⁹ By relying on designations from the Fair Labor Standards Act, for example, the Massachusetts law offers a logistically accessible way to determine which workers should not be subjected to noncompetes.²²⁰ In addition, the law includes many safeguards designed to ensure that workers know what they are agreeing to when they sign a contract with a noncompetition clause.²²¹

States can also look to the shortcomings of the Massachusetts statute as a warning.²²² In particular, the protracted debate in Massachusetts over inclusion of a garden leave clause suggests that this may be a contentious issue where compromise is difficult.²²³ Other states now have the opportunity to see if the provision is of any use in modifying employment relationships.²²⁴ If another

²¹⁵ See MASS. GEN. LAWS ch. 149, § 24L.

²¹⁶ See Prescott et al., *supra* note 23, at 391–93 (providing a brief survey of states that have recently reconsidered their noncompete laws).

²¹⁷ See Amir & Lobel, *supra* note 11, at 837 (identifying the range of noncompete enforcement options from which a state can choose); Salsberg, *supra* note 100 (making note of different choices that a state has regarding its noncompete regulation).

²¹⁸ See Salsberg, *supra* note 100 (alluding to the different considerations required when changing a state's noncompete regime).

²¹⁹ See *id.* (characterizing the Massachusetts legislation as a middle ground that might be followed by other states).

²²⁰ See Borchers, *supra* note 157 (highlighting the functional clarity of this portion of the law).

²²¹ See MASS. GEN. LAWS ch. 149, § 24L (requiring noncompetition agreements to say explicitly that the employee can consult an attorney prior to signing).

²²² See Rubin, *supra* note 176 (outlining the many ambiguities of the Massachusetts Noncompetition Agreement Act).

²²³ See Borchers, *supra* note 157 (noting the contentiousness during several years of legislative debate, including lobbying on either side by groups such as the New England Venture Capital Association and Associated Industries of Massachusetts).

²²⁴ See McGregor, *supra* note 167 (calling attention to the possibility of other states emulating Massachusetts's garden leave provision).

state ultimately decides to include a garden leave clause in its statute, the language should be easier to interpret than that of the Massachusetts statute.²²⁵ If any such provision is to be included at all, it should not have the potential to be undermined by other aspects of the law.²²⁶

An obscured but important issue with the Massachusetts law—that other states should consider—is the lack of any real enforcement mechanism for companies that deliberately run afoul of the rules.²²⁷ The Massachusetts statute only suggests situations in which noncompetition agreements will not be enforceable.²²⁸ It contains no method for sanctioning companies that, for example, routinely include noncompetes in employment contracts in the hopes that a substantial portion of their employees are not aware of the law.²²⁹ Regardless of state enforcement practices, a covenant not to compete will achieve its goal if an employee believes that he or she is bound by it; this creates an incentive for employers to be overly aggressive with noncompetes and leave the burden of knowing the law on the employee.²³⁰

Importantly, states reconsidering their noncompete laws now have the benefit of watching what occurs in Massachusetts in the immediate future.²³¹ Some of these states may ultimately chose to emulate California’s example and eschew noncompetes altogether.²³² Although the opportunity for Route 128 to grow into Silicon Valley has long since passed, the decades of protracted debate and the significant lobbying on either side of the dispute seem to suggest the political climate in Massachusetts never would have tolerated eschewing noncompetition agreements altogether.²³³ Indeed, a noncompete is an im-

²²⁵ See Borchers, *supra* note 157 (explaining the extensive confusion in the legal community caused by the garden leave provision).

²²⁶ See *id.* (discussing the possible implications of allowing “other agreed-upon consideration” to substitute for garden leave) (citing MASS. GEN. LAWS ch. 149, § 24L).

²²⁷ See MASS. GEN. LAWS ch. 149, § 24L (declaring only that a noncompete will be unenforceable if it does not follow the mandates of the statute).

²²⁸ See *id.* (defining noncompetition agreements, listing their minimum requirements, and identifying situations in which they will not be enforced).

²²⁹ See *id.* (lacking any explanation of an enforcement mechanism). Understanding employee awareness of whether agreements can be enforced is a crucial factor in examining noncompete regimes because employees’ behaviors will change based upon their understanding of the legal system. Prescott et al., *supra* note 23, at 387.

²³⁰ See Prescott et al., *supra* note 23, at 464 (finding empirically that noncompetes tend to operate “outside the law’s shadow”). One study determined that there is no correlation between the incidence of noncompetes and a state’s enforcement regime. *Id.* One would expect noncompetes to be much rarer in states that did not enforce them, but data suggest that this is not the case. *Id.*

²³¹ See Salsberg, *supra* note 100 (suggesting that other state legislatures have the opportunity to follow the lead of Massachusetts lawmakers).

²³² See *id.* (noting California’s prohibition on noncompetes).

²³³ See LOBEL, *supra* note 5, at 67–68 (discussing the divergent fates of the two regions); Borchers, *supra* note 157 (chronicling debate in Massachusetts); see also *supra* note 3 and accompanying text (recounting recent instances of failed legislation and the contentiousness of political debate in Massachusetts).

portant economic tool, and it seems counter to the notion of freedom of contract to hold all such agreements as violative of public policy.²³⁴

Those states looking to maintain the use of noncompetes in some form would be well served to follow Massachusetts's example, which aims to carve out a middle ground that prevents abuses of noncompetes while maintaining their benefits.²³⁵ Massachusetts has taken a very important and positive step by explicitly banning noncompetes for certain types of workers—the most vulnerable—including hourly wage earners, student interns, and those fired without cause.²³⁶ As a matter of fairness, workers who are not likely to possess trade secrets or who have unjustifiably lost their jobs should not see subsequent job searches hindered by the existence of a noncompete, and states considering new noncompete laws would be well served to use this principle as a foundation for any proposed legislation.²³⁷ Whatever other states ultimately decide, the added data point of the new Massachusetts law and its subsequent implementation will allow this choice to be a better informed one.²³⁸

CONCLUSION

Noncompetition agreements have a storied history in the United States and the rules governing their enforcement vary significantly from state to state. Considerable scholarship has focused on this area; some of it has scrutinized Massachusetts, attributing slower growth in the region to the state's deference towards noncompetition agreements. Seeking to change the employment landscape, Massachusetts lawmakers passed noncompete legislation in 2018. The new Massachusetts statute, a product of compromise, strives to strike a balance between the interests of parties on either side of the debate. Massachusetts modified its legal infrastructure but largely retained its historic system in which reasonable noncompetition agreements will be enforced. In this way, the state's Route 128 business sector remains quite distinct from Silicon Valley in California, where noncompetition agreements are generally unenforceable when employees move between firms. It remains to be seen whether the modifications in Massachusetts will help promote economic growth in the region and to what extent it may impact workers' wages, turnover rates, and career trajectories. In the meantime, other states may look to Massachusetts as they

²³⁴ See Garmaise, *supra* note 4, at 376; Samila & Sorenson, *supra* note 13, at 425.

²³⁵ See Salsberg, *supra* note 100 (characterizing Massachusetts legislation as a compromise between divergent views).

²³⁶ See MASS. GEN. LAWS ch. 149, § 24L(c) (restricting significantly the use of noncompetes against vulnerable classes of workers); *supra* note 25 and accompanying text (detailing high-profile instances of noncompete abuse against vulnerable workers).

²³⁷ See THE WHITE HOUSE, *supra* note 24, at 2–3 (emphasizing the need to correct certain unjust aspects of noncompete law).

²³⁸ See Salsberg, *supra* note 100.

consider changing the laws surrounding enforcement of noncompetition agreements. Careful analysis of the ambitions and ambiguities of the Massachusetts statute will better position these states to make their own modifications that best serve their local needs and employment dynamics.

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