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Testimony of
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Gerald A. Rosenthal Chair in Labor & Employment Law
University of Florida, Levin College of Law
Before the House Judiciary Committee, Denver, CO
April 6, 2022

Testifying in support of
HB 22-1317

A BILL FOR AN ACT CONCERNING RESTRICTIVE EMPLOYMENT AGREEMENTS

My name is Rachel Arnow-Richman and I am the Rosenthal Chair in Labor and Employment Law at the University of Florida. Prior to assuming my current position in August 2020, I was a Professor of Law and Director of the Workplace Law Program at the University of Denver Sturm College of Law in Denver, CO, where I continue to reside. I have been a professor of law for over twenty years (more than fifteen in the State of Colorado), and have taught, researched, and written extensively about the law of noncompete enforceability. Prior to entering academica I was a management-side attorney, representing business clients in labor and employment law. I support HB 22-1317.

Colorado is a state that prizes innovation and personal autonomy. Noncompetes are an enemy to both. In this testimony, I will first explain the harms of noncompetes and the historical foundation for current law. I will then describe how HB 22-1317 addresses several of the problems associated with the overuse of noncompetes. Finally I will describe how HB 22-1317 preserves employers' ability to use noncompetes strategically and can benefit Colorado business interests in the long run.

1. Employers overuse noncompetes causing adverse effects to the economy.

Noncompetes impose three harms: (1) they impede the mobility of the restrained worker; (2) they limit competitor firms' access to necessary labor; and (3) they deprive the public of the benefit of the restrained worker's services. For this reason, noncompetes were once voided outright. Current state law, however, permits so-called "reasonable" noncompetes. The historical basis for this exception was the belief that noncompetes were used only in exceptional situations involving high-level employees with unique access to proprietary information. It was thought they were too rare to have measurible impact on the economy.

These assumptions, however, have been debunked by empirical research, revealing that noncompetes are ubiquitous and have demonstrable negative effects. Data shows that forty percent of workers have signed a noncompete at some point, including many who do not hold a college degree and are unlikely to have access to proprietary information. Noncompetes

depress wages, both for those who sign and in the broader labor market. They cause "brain drain" as restrained workers leave the state or their fields. They deter would-be entrepreneurs and stifle firm entry. The result of these and other empirically demonstrated effects is a reduction in innovation and regional economic growth.

2. Legislation is necessary to define the permissible bounds of noncompete use and penalize abuse.

This new research demands revision to existing law. Current law ostensibly will not enforce noncompetes that do not further a legitimate business interest or are overbroad in scope. But current law does nothing to prevent employers from imposing unnecessary or overbroad noncompetes *that are unlikely to ever be tested in court*.

Most workers have limited knowledge of the law and are risk averse. Few can take the chance of leaving their job only to be sued by their former employer and potentially enjoined from working in their field. This means workers will decline outside offers and/or limit their own job search behavior out of fear of enforcement *even if their noncompetes are legally unenforceable*. Meanwhile other companies are reluctant to hire workers who have signed a noncompete due to the possibility of litigation by the former employer. The outcome of such litigation is highly uncertain due to the unpredictability of the common law's vague and fact-dependent "reasonableness" standard. Even if the court ultimately declines enforcement, the litigation will be costly and delay the hiring company's ability to fill its open position.

HB 22-1317 addresses these problems by clarifying existing law, providing meaningful access to the courts for restrained workers, and appropriately penalizing noncompete abuse. Specifically, the bill:

(a) Limits noncompete use to high-income workers. HB 22-1317 creates a minimum salary threshold. Rank-and-file workers, and especially low-wage workers, are unlikely to have access to the type of proprietary information that might justify a noncompete. They are also more likely to lack knowledge of their rights, the bargaining power to refuse to sign a noncompete, and the resources to risk a lawsuit. The bill eliminates these noncompetes, while preserving companies' ability to impose them with their highest earners.

(b) Eliminates the confusing category of executive/management employee noncompetes. HB 22-1317 eliminates the idiosyncratic provision of Colorado law that permits noncompetes for an indeterminate class of "executive and management" employees and their "professional staff." Despite decades of caselaw on C.R.S § 8-2-113, courts have failed to meaningfully define these terms. HB 22-1317 makes clear that the lawfulness of a noncompete depends on employees' access to proprietary information, not their job title.

(c) Requires employers to provide advance notice of noncompete agreements. Currently employers can require employees to sign noncompetes at any time without any warning. They can recruit employees without having to disclose that a noncompete will be required, only to force them to sign one once they have quit their job and begun employment. Employers can place noncompete provisions in personnel materials and HR forms that employees are unlikely to scrutinize. HB 22-1317 prevents these deceptive practices by requiring employers

to provide noncompetes in advance, in a distinct document, using clear and conspicuous language.

(d) Encourages employers to use noncompetes appropriately and penalizes abuse. Employers currently incur *no consequence* for imposing an unenforceable or overboard noncompete. Employers can benefit from the deterrent effects of these agreements on employees who are unlikely to question or challenge their use. HB 22-1317 deters this practice by authorizing government actors to bring suit against overreaching employers and by imposing criminal and civil penalties on those who violate the law.

(e) Grants restrained workers meaningful access to the courts. Currently a worker who is bound by a noncompete faces all of the risks and costs of possible litigation. If the worker takes a chance and is sued, the worker will still incur attorneys' fees and likely lose out on the career opportunity that prompted his or her departure in the first place. HB 22-1317 redresses this by granting the aggrieved worker a private right of action and the ability to recoup compensation for these losses.

(f) Ensures that Colorado law applies to noncompetes that affect the State and its workers. Currently out-of-state businesses can override Colorado law by including choice-of-law and related clauses in their noncompetes. This allows them to subject workers in Colorado to the harsher laws of other states, and in some cases, to litigation in other states. HB 22-1317 ensures that Colorado employees are not forced to relinquish the protection of Colorado law and that Colorado courts can apply and enforce the law and policy of the State.

3. HB 22-1317 strikes the right balance between individual business interests, worker protection, and free competition.

Despite these changes, HB 22-1317 recognizes that companies may legitimately need to restrict competition. It does not impose a total ban on noncompetes as some states have proposed. The bill also leaves intact other methods currently available to employers for protecting information and retaining employees:

(a) The bill permits reasonable noncompetes. The bill preserves employers' ability to use noncompetes in nearly all of the same circumstances permitted by existing law. Companies are still able to use noncompetes with mid- and high-level employees who meet the bill's salary threshold if the scope of the agreement is narrowly tailored to protect proprietary information.

(b) Other restrictive covenants are expressly preserved. The bill affects only noncompetes and allows employers to continue using other types of restrictive covenants, including nondisclosure and training repayment agreements.

(c) Trade secret law remedies employee abuse of proprietary information. Employers can continue to pursue relief for any misappropriation of trade secrets under state and federal statutory law. Trade secret law directly prohibits a worker from using proprietary information without preventing that worker from competing with a prior employer and provides employers meaningful remedies for violations.

(d) Employers can protect their human capital by offering competitive terms of employment. Even under current law, noncompetes may not be used merely to retain workers, but only to protect proprietary business interests. Employers can continue to fairly compete for and retain talent by offering attractive wages and benefits, opportunities for training and advancement, and other desireable terms and conditions of employment that will attract and keep quality employees.

Finally, limiting noncompetes is not a pure loss for business. The bill *positively* impacts business in several ways:

(a) Freedom to hire. Noncompetes remove talented workers from the labor pool, making it difficult for employers, particularly new and developing businesses, to find qualified workers. This is especially true in the tight labor market of today. By reigning in noncompetes, HB 22-1317 gives employers greater flexibility to recruit and hire the best workers for their business.

(b) Predictability. Confusion about the scope of existing noncompete law imposes administrative costs on businesses and can lead to unnecessary and even duplicative litigation (as where out-of-state law may apply). HB 22-1317 gives employers greater certainty about the validity of their own noncompetes, while also providing a pathway to challenge and clarify the enforceability of noncompetes signed by their potential hires.

(c) Economic growth. Limiting noncompetes encourages economic growth, increases firm entry, and promotes innovation, among other economic benefits. While a particular employer may have incentives to restrain its own employees, the economy as a whole is better off when employees and information can move freely between companies.

In sum, HB 22-1317 will help protect Colorado employees from unlawful noncompetes, assist Colorado employers in hiring the best workers for their business, and support the economic growth and development of the State. For all of these reasons, I urge the adoption of HB 22-1317.

Testimony of Najah Farley

National Employment Law Project

In Support of HB 22-1217
A Bill for an Act Concerning Restrictive Employment Agreements

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Hearing before the Colorado General Assembly

House Judiciary Committee

April 6, 2022

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Thank you to the members of the House Judiciary Committee for the opportunity to submit testimony. My name is Najah Farley and I am a senior staff attorney at the National Employment Law Project (NELP). The National Employment Law Project is a non-profit, non-partisan research and advocacy organization specializing in employment policy. We regularly partner with federal, state and local lawmakers on a wide range of issues to promote workers' rights and labor standards enforcement.

I testify today in support of House Bill 22-1317, which would amend the existing noncompete law in the State of Colorado, providing needed updates and improving its utility for Colorado workers. I first came to this issue when I was an Assistant Attorney General at the New York State Office of the Attorney General while working under Terri Gerstein, who is also testifying today. While there the office uncovered multiple usages of these agreements and investigated across many industries and throughout the state, including complaints from phlebotomists, IT professionals, security guards, bike messengers, school cafeteria workers, and house cleaners amongst others. Since joining NELP, I have continued advocating against the proliferation of these agreements, having seen firsthand their deleterious effect on workers.

Noncompete agreements are imposed by employers on employees, often as a condition of getting a job, or receiving a promotion and they bar an employee or independent contractor from going to a competing employer or related business for a period following the end of an employment relationship or contract. Sometimes they are bound by either industry or geography, but some are very broad, implicating entire regions of the United States. Some may even list rival specific competitor companies that employees may not join after leaving their previous employer. Research suggests that nearly 1 in 5 workers in the United States are currently bound by a noncompete.[1] Employers' stated reasons for using noncompetes are typically to protect trade secrets, screen for employees that intend to stay with the company and protect investment in employee training.[2]

Noncompete provisions are usually presented by employers in a 'take it or leave it' fashion and most employees do not negotiate their implementation. Studies have shown that workers rarely negotiate on the issue of noncompetes, largely because many receive the noncompete as a condition of a job offer or after accepting the job offer and lack the power to do so.[3] Some workers have reported that they are forced to sign or forego the job opportunity, contract or

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[1] Starr, Evan and Prescott, J.J. and Bishara, Norman, *Noncompetes in the U.S. Labor Force* (December 24, 2017), https://ssrn.com/abstract=2625714.

[2] U.S. Department of Treasury Office of Economic Policy, *Non-compete Contracts: Economic Effects and Policy Implications* (2016), https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Econimic_Effects_and_Policy_Implications_MAR2016.pdf

[3] Two studies have shown that 30-40% of workers received the non-compete after they have accepted the job offer. Starr, Evan, J.J. Prescott, and Norman Bishara, *Noncompetes in the U.S. Labor Force*, University of Michigan Law & Econ Research Paper No. 18-013, 2019 and Marx, Matt, *The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals*, American Sociological Review, vol. 76, no. 5, 2011, pp. 695-712.

promotion. Of those who received the noncompete before the job offer, only 10 percent bargained over the noncompete.[4]

We support HB 22-1317 because it would help to mitigate the coercive nature of these agreements, firstly by addressing coercion specifically. Section 8-1-113 provides that it is unlawful to use threats or intimidation to prevent someone from engaging in a lawful occupation. The amendments also clarify that noncompetes are for the protection of trade secrets and are to be "narrowly tailored to protect the employer's legitimate interests…" These provisions are key to disrupting the coercive nature of the noncompetes as they are currently used because they provide clear limits for the usage and implementation of noncompetes for employees above the wage threshold. These additions will also help with the proliferation of noncompetes for workers who do not have access to trade secrets. An explicit provision of this nature is necessary because recently more employers have sought to apply these agreements across all workers in their businesses to protect trade secrets and proprietary information, even when the employees in question did not possess this information.

Setting the wage threshold at an amount designated for "highly compensated employees" is another great improvement to the existing law. This addition will exclude workers in low wage industries entirely. This wage threshold is a great addition to the law and will ensure that many workers without the means to challenge a noncompete are excluded. Also, the elimination of the "executive and management personnel" exemption will streamline the existing law and allow for greater transparency. Workers when faced with exemptions that require referral to legal definitions, such as "executive and management personnel" will often not be sure if they are receiving a lawful noncompete. These amendments will ensure that more workers know if they are covered by eliminating this distinction and instituting a wage threshold along with easily understandable exclusions.

One possible improvement to this amendment would be raising the highly compensated threshold to exclude even more workers. Aside from the total bans in Oklahoma, California and North Dakota recently Washington D.C. passed a noncompete ban excluding all workers from noncompetes other than healthcare workers making less than $250k.[5] With a higher threshold like this or even a complete ban, this bill could be improved even further to ensure that most of the workers in Colorado are exempt from noncompete restrictions.

Including both government enforcement and a private right of action is another key component of this update. When it comes to noncompetes many workers are bound by unlawful agreements or coerced because of the information gap and the power differential between workers and employers. Because most noncompetes are presented in a 'take it or leave it' fashion many employers are not open to negotiations on the terms of these waivers. By allowing an employee or worker to seek a declaratory judgment or to go directly to the Attorney General or the

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[4] Starr, Evan and Prescott, J.J. and Bishara, Norman, *Noncompetes in the U.S. Labor Force* (December 24, 2017), SSRN: https://ssrn.com/abstract=2625714.

[5] D.C. Law 23-209. Ban on Non-Compete Agreements Amendment Act of 2020, https://code.dccouncil.us/us/dc/council/laws/23-209.

Division of Labor Standards, any employee or worker who is confronted with a seemingly unlawful noncompete will be able to challenge the noncompete without waiting for the employer to attempt to enforce the agreement and also possibly receive damages for the harm caused. A worker or employee by seeking a declaratory judgment may also eliminate the usage of "soft measures" to enforce the agreements, such as threats, sending a cease-and-desist letter to the employee, or to the employee's new job. A private right of action also allows employees to challenge the waivers and ensure that they are nullified before moving on to other employment and without the risk that they could be fired from their new job considering the previously signed noncompete.

Noncompetes have been shown to depress wages by reducing competition.[6] Given the deleterious effects that noncompetes have on workers' wages, limiting them substantially is yet another tool to promote a just recovery for workers. Economists have also found correlations between states with strict noncompete enforcement and those with lower wage growth and lower initial wages.[7] Prohibiting their wide usage in Colorado, particularly in the wake of the economic recovery from Covid-19 pandemic, could only serve to make the state of Colorado a better place for workers. For these reasons, NELP therefore urges the passage of HB22-1317. Thank you for this opportunity to submit testimony.

[6] Marshall Steinbaum, *How widespread is Labor Monopsony? Some New Results Suggest its Pervasive*, ROOSEVELT INSTITUTE, December 18, 2017; Greg Robb, *Wage growth is soft due to declining worker bargaining power, former Obama economist says*, MARKETWATCH, August 24, 2018.

[7] Starr, Evan, *The Use, Abuse and Enforceability of Non-Compete and No-Poach Agreements: A Brief Review of the Theory, Evidence and Recent Reform Efforts*, February 2019 Issue Brief, p. 10, available at: https://eig.org/wp-content/uploads/2019/02/Non-Competes-Brief.pdf

Testimony Before the Colorado House Judiciary Committee
Regarding HB 22-1317
April 6, 2022

Terri Gerstein
Director, State and Local Enforcement Project, Harvard Labor and Worklife Program
Senior Fellow, Economic Policy Institute

To the members of the Judiciary Committee:

Thank you for the opportunity to provide testimony regarding HB 22-1317. I provide this testimony in my personal capacity. I am the Director of the State and Local Enforcement Project at the Harvard Labor & Worklife Program,[1] and a Senior Fellow at the Economic Policy Institute.[2]

From 1999 through early 2017, I enforced workplace laws in New York, including as a Deputy Commissioner overseeing wage and hour enforcement in the New York State Department of Labor, and later as Labor Bureau Chief in the New York State Office of the Attorney General (OAG). I became familiar with non-compete agreements ("non-competes") through several OAG investigations, and I have researched and written about them since leaving government.[3]

Our OAG non-compete cases involved employers in a range of industries, including the Jimmy John's sandwich chain,[4] Law 360[5] (the legal news website), and Examination Management Services, Inc. (EMSI),[6] a national medical information services company. After I left the office, the OAG handled more non-compete cases, including one involving a payment processing firm[7] and a joint case (with the Illinois Attorney General's Office) involving the shared work-space company WeWork.[8]

Economists have documented: employers' extensive use of non-competes even where they're unenforceable; the lack of bargaining that typically precedes employees signing; and non-competes' adverse impact on job mobility and wages. Many harmful effects of non-competes are less readily calculable. Numbers don't convey what it means for a newly-minted journalist or a hard-working janitor to be stuck in a job they don't like, only because they fear they'll be sued if they get a new job. And we don't know how many workers continue to experience workplace violations, like discrimination, harassment, or wage theft, because a non-compete makes them feel they can't leave. By allowing someone's boss to stop them from getting a new and better job in their field, non-competes can have a profound impact on a person's life. For example, the worker in our EMSI case was a phlebotomist who traveled throughout the state drawing blood for prospective insurance policyholders. Her employer used her non-compete to try to block her from a new job requiring far less travel, allowing more time at home.

In over two decades of enforcing and studying workplace laws, I have repeatedly seen the stark disparity of bargaining power that leads workers to sign non-compete agreements, whether

they're fair or enforceable or not. And during the current Covid-19 pandemic, when so many workers have lost their jobs, it is important to eliminate barriers to people getting new positions.

HB 22-1317 will curb the most harmful use of non-competes. Five key features include:

1) **HB 22-1317 prohibits unnecessary and inappropriate non-competes**, rather than merely rendering them unenforceable. If disallowed non-competes are merely unenforceable, employers have little disincentive for including them. The employer's worst-case scenario is that a court doesn't uphold the non-compete; meanwhile, the employer has benefitted from the non-compete's chilling effect on employees. Moreover, most employers want to follow the law. Making coercive and inappropriate non-competes *prohibited* rather than just *unenforceable* conveys a normative signal and provides clear guidance that overreach should not be attempted.

2) **HB 22-1317 protects the workers who need it most.** Many people in our country who are not minimum wage workers still live paycheck to paycheck; they are not high earners with strong bargaining power at work and still need protection. HB 22-1317 covers those earning up to the threshold amount for highly compensated employees under Colorado law. The harmful impact of non-competes affects far more than just low-wage workers, and there should be a high bar for letting companies prevent working people from earning a livelihood in their field.

3) **HB 22-1317 contains meaningful vehicles for enforcement,** by giving authority to the attorney general and to the Director of the Division of Labor Standards and Statistics (within the Department of Labor and Employment) to bring an action for injunctive relief and penalties, as well as creating a private right of action for current or prospective employees. The proposal also ensures that workers will not be forced to litigate in a far-flung or unfair venue. One suggested change: to ensure that workers can find lawyers to represent them (necessary in light of limited government resources), the bill should be amended to include attorneys' fees and costs for workers who prevail in court.

4) **HB 22-1317 increases fairness in relation to those non-competes that are permitted** by, for example, requiring advance notice to workers and permitting non-competes only in extremely limited situations, such as to protect trade secrets and even then, provisions must be narrowly tailored to protect the employer's legitimate interest.

5) **HB 22-1317creates penalties for violations**, which are critical for deterring violations.

Overall, HB 22-1317 would greatly protect the workers of Colorado from the harms caused by non-compete agreements and would enhance workers' freedom to change jobs. It would significantly diminish abusive use of such covenants. This bill, if passed, would make Colorado a leader among states in curbing the misuse of non-compete agreements.

[1] https://lwp.law.harvard.edu/

[2] https://www.epi.org/
[3] https://www.nbcnews.com/think/opinion/noncompete-agreements-allow-bosses-chain-workers-their-jobs-we-need-ncna1114031; https://www.epi.org/blog/welcome-developments-on-limiting-non-compete-agreements-a-growing-consensus-leads-to-new-state-laws-a-possible-ftc-rule-making-and-a-strong-bipartisan-senate-bill/; *"Sign on the Dotted Line": How Coercive Employment Contracts Are Bringing Back the Lochner Era and What We Can Do About It*, (co-author Jane Flanagan), University of San Francisco Law Review, 54 U.S.F. L. Rev. 441 (2020).
[4] https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-settlement-jimmy-johns-stop-including-non-compete
[5] https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-settlement-major-legal-news-website-law360-stop-using
[6] https://ag.ny.gov/press-release/2016/ag-schneiderman-agreement-ends-non-compete-agreements-employees-national-medical
[7] https://ag.ny.gov/press-release/2018/ag-underwood-announces-settlement-payment-processing-firm-end-use-non-compete
[8] https://ag.ny.gov/press-release/2018/ag-underwood-announces-settlement-wework-end-use-overly-broad-non-competes

Testimony of Sandeep Vaheesan, Open Markets Institute
Applauding House Bill 22-1317
April 6, 2022

My name is Sandeep Vaheesan. I am the Legal Director at the Open Markets Institute, an anti-monopoly research and advocacy group based in Washington, D.C. As part of a labor and public interest coalition, the Open Markets Institute petitioned the Federal Trade Commission in 2019 to categorically ban worker non-compete clauses through rulemaking.[1] My colleagues and I have written extensively on the evils of these contracts.[2]

While we believe the Colorado General Assembly should enact a full ban on non-compete clauses and functionally similar contracts, HB 22-1317 is an important step in the right direction. It generally prohibits non-compete clauses for employees earning up to the threshold for highly compensated employees (estimated to be a little over $100,000 in 2022). Importantly, as opposed to only preventing employers from enforcing these contracts in court, HB 22-1317 outlaws non-competes for employees making up to the threshold amount and establishes public and private enforcement of this prohibition. Making non-competes illegal—and backing this rule with effective legal sanctions—is essential for deterring employers from using these contracts and thereby protecting workers' freedom to switch jobs or to start their own businesses.

Non-competes reduce labor market mobility and generally depress wages, wage growth, and small business formation.[3] Research has found that non-competes discourage workers from leaving, even when employers cannot legally enforce them in court.[4] In states where non-competes are *unenforceable*, nearly 40% of workers reported turning down a job offer due to a non-compete clause.[5] The existence of non-competes—regardless of whether employers can, or seek to, enforce them—is enough to harm workers. Employers recognize this fact and use non-competes even when they cannot enforce them through litigation. For example, although

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[1] Open Markets Institute, et al., Petition for Rulemaking to Prohibit Worker Non-Compete Clauses, https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5eaa04862ff52116d1dd04c1/1588200595775/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf. *See also* Josh Eidelson, *Labor Groups Petition U.S. FTC to Ban Non-Compete Clauses*, BLOOMBERG, Mar. 20, 2019, https://www.bloomberg.com/news/articles/2019-03-20/labor-groups-petition-u-s-ftc-to-prohibit-non-compete-clauses.

[2] *See, e.g.*, Sandeep Vaheesan, *Doctors, Nurses and Patients Could Suffer If Congress Doesn't Outlaw These Contracts*, CNN, July 6, 2020, https://www.cnn.com/2020/07/06/perspectives/non-compete-clauses-health-care/index.html; Amanda Jaret & Sandeep Vaheesan, *Non-Compete Clauses Are Suffocating American Workers*, TIME, Dec. 19, 2019, https://time.com/5753078/non-compete-clauses-american-workers/; Sally Hubbard & Sandeep Vaheesan, *Noncompete Clauses Trap #MeToo Victims in Abusive Workplaces. The FTC Should Ban Them.*, USA TODAY, May 14, 2019, https://www.usatoday.com/story/opinion/2019/05/14/sexually-harassed-women-trapped-noncompetes-abusive-workplaces-column/1184622001/.

[3] *See, e.g.*, U.S. Dep't of Treasury, Non-Compete Contracts: Economic Effects and Policy Implications 20 (2016), https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Econimic_Effects_and_Policy_Implications_MAR2016.pdf; Evan Starr, Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete 17 (2018); Toby E. Stuart & Olav Sorenson, *Liquidity Events and the Geographic Distribution of Entrepreneurial Activity*, 48 ADMIN. SCI. Q. 175, 197 (2003).

[4] Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes and Employee Mobility* 3 (2019).

[5] *Id.* at 42.

California law has prohibited judicial enforcement of non-competes since the 1870s (without making these contracts illegal),[6] approximately 45% of workplaces impose non-compete clauses on at least some of their employees and nearly 30% require *all* workers to assent to these restraints.[7]

Whereas the harms from non-competes are real and well documented, the justification for these contracts does not withstand scrutiny. Employers and their representatives assert that non-competes are necessary for protecting trade secrets, customer lists, and other business information. According to this theory, restricting worker departure is necessary to prevent the appropriation of knowhow by rivals or workers who want to start competing businesses. To the extent employers do need to safeguard proprietary information, they have several less restrictive alternatives for preventing unauthorized disclosures. They can use copyright and trade secret law and targeted non-solicitation agreements to ensure that their information is protected.

If employers believe that retaining workers is the only way to protect their business information, they once again have other methods. To ensure a loyal workforce, employers can offer regular raises and promotions and provide fair treatment on the job,[8] as well as bonuses tied to length of tenure. For high-level workers with regular access to sensitive business information, employers can also opt out of the default rule of at-will employment through fixed-term employment contracts that commit both parties (employer and employee) to the relationship for a period.[9] Such contracts characterize professional sports in the United States today.

In contrast to these methods of protecting proprietary information, non-competes are, in the words of University of Denver law professor Viva Moffat, "the wrong tool for the job."[10] They are overbroad. Non-competes restrain worker mobility with the purported aim of protecting business information even if it is dated or trivial. For instance, a worker who has been with an employer for ten years and generated substantial revenues and profits for the company can be locked into place by a non-compete because the employer wants to guard job training materials provided to the worker years earlier. At the same time, non-competes are too narrow. For example, they do not prevent the unauthorized, covert disclosure of trade secrets to competitors. They are poorly targeted for their ostensible purpose.[11]

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[6] *See Edwards v. Arthur Andersen LLP*, 44 Cal.4th 937, 945 (2008) (citations omitted) ("[I]n 1872 California settled public policy in favor of open competition, and rejected the common law 'rule of reasonableness,' when the Legislature enacted the Civil Code. Today in California, covenants not to compete are void[.]").

[7] Alexander J.S. Colvin & Heidi Shierholz, Noncompete Agreements 5-6 (2019), https://files.epi.org/pdf/179414.pdf.

[8] Janet Yellen, *Efficiency Wage Models of Unemployment*, *in* ESSENTIAL READINGS IN ECONOMICS 280 (Saul Estrin & Alan Marin eds., 1995)

[9] Nickens v. Labor Agency of Metropolitan Washington, 600 A.2d 813, 816 (D.C. 1991).

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

[11] Sandeep Vaheesan, *The Bogus Justification for Worker Non-Compete Clauses*, ONLABOR, Apr. 24, 2019, https://onlabor.org/the-bogus-justification-for-worker-non-compete-clauses/.

Given their documented harms to workers and unpersuasive justification, non-competes should be prohibited for all workers. While HB 22-1317 does not enact a blanket ban, it protects a substantial fraction of the Colorado labor force from non-compete clauses and is a step in the right direction. We urge your Committee to work toward a ban that protects all workers from these coercive contracts.

Thank you for the opportunity to testify on this matter.