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Questioning the Employee Non-solicitation Covenant

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QUESTIONING THE EMPLOYEE NON-SOLICITATION COVENANT

*Charles Tait Graves**

Based on an in-depth review of the dubious justifications courts have offered when enforcing co-worker non-solicitation covenants, this Article proposes that courts have too strongly favored employers against their former employees in such disputes.

A co-worker non-solicitation covenant is a contract term that prohibits a departing employee, for some period of time, from inviting his or her former co-workers to join him or her at a new job—or from encouraging a former co-worker to leave the company for any other reason. Some are worded so broadly that one could breach the contract by advising a colleague to leave a hostile or harassing workplace, or to seek higher pay. These covenants are ubiquitous in private sector employment agreements, at all income levels and occupations. They are frequently litigated, often alongside trade secret misappropriation claims. Courts often find violations based on communications with former co-workers.

Despite that ubiquity, co-worker non-solicitation covenants receive scant attention. Court rulings see little in the way of sustained analysis. Notwithstanding the wave of academic and legislative attention paid to employee non-competition covenants in recent years, the co-worker non-solicitation clause remains an afterthought.

This should change. Courts and commentators have overlooked how employers use co-worker non-solicitation covenants as a means to avoid giving employees raises or promotions, and to avoid improving workplace conditions. Employers' litigation arguments that such covenants protect trade secrets, protect a company's goodwill with its customers, or protect a supposedly "stable" workforce do not withstand critical scrutiny. These covenants operate first and foremost as salary suppression devices, not as an adjunct to trade secret law.

* Partner, Wilson Sonsini Goodrich & Rosati, San Francisco, and adjunct faculty, UC Hastings Law. I am grateful for comments on drafts of this Article by Camilla Hrdy, Riana Pfefferkorn, Evan Penniman Starr, Elizabeth Tippet, and Deepa Varadarajan. This is the third in a three-part series addressing under-analyzed areas of intellectual property and employee mobility law, which impact creative employees when changing jobs. Departing employees can face a tangled body of contract, tort, and statutory claims brought by former employers. Academics and practitioners have provided little commentary about some such areas of law. This relative inattention is surprising given the important policy concerns so often at stake in mobility disputes.

To understand how these covenants came to exist, this Article explores the long history of restrictions on hiring employees. Rather than a contract term that arose in response to contemporary workplace needs, the co-worker non-solicitation covenant is instead an anachronistic remnant of the paternalistic workspaces of late medieval England and otherwise forgotten labor control mechanisms from long ago.

Next, this Article offers the first comprehensive review of nationwide case law in this area, critiquing four common arguments employers offer for enforceability. Then, building on the insights of a small number of courts that have pushed back against such justifications, this Article proposes that courts reframe their adjudication of co-worker non-solicitation covenants. Courts should reject efforts to view these covenants as a category of trade secret law, and should reject other threadbare justifications. They should instead ask why employees want to leave the company, including whether better pay was available elsewhere, and they should examine the company's attrition rates. By viewing disputes from the employee's perspective and not just the employer's perspective, and by considering broader empirical evidence of workplace conditions, courts can inject overdue skepticism.

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I. INTRODUCTION

Those who have practiced trade secret law, or any area of law touching on the terms of employment agreements, will have seen countless co-worker non-solicitation clauses. Many prohibit a departing employee not only from inviting former co-workers to join him or her at a new job, but also from doing anything that could cause an employee to leave the company:

For a period of one year immediately following the termination of my employment with the Company, I shall not, directly or indirectly, recruit, solicit, attempt to persuade, or assist in the recruitment or solicitation of, any employee of the Company who was an employee, officer or agent of the Company during the three month period immediately preceding the date of termination of my employment, for the purpose of employing him or her or obtaining his or her services or otherwise causing him or her to leave his or her employment with the Company.¹

Some such covenants go further, as seen in the above example, and prohibit departing employees from recruiting people who formerly worked for the same company but who have already left.² And some, the most extreme, make it unlawful for a former employee even to accept a job application unilaterally submitted by a former co-worker, without invitation.³

Put simply, these clauses block someone who has recently changed jobs from inviting former co-workers to join the new company (which may be the former employee's own start-up company, or an established company). They block people from urging former co-workers to leave due to poor or unfriendly working conditions, low pay, lack of promotion, or for any other reason. If the employer can

1. See *DigitalGlobe, Inc. v. Paladino*, 269 F. Supp. 3d 1112, 1128–29 (D. Colo. 2017) (denying motion for preliminary injunction against former executive where executive's text message to former co-workers complained about company suing him over a non-competition agreement and thus "coming after me and my family;" court disagreed with former employer's argument that the text was an "attempt to persuade his former colleagues to leave"); see also *Burke v. Cumulus Media, Inc.*, Nos. 16-cv-11220, 11221, 2016 WL 3855181, at *2 (E.D. Mich. July 15, 2016) (similar clause applying scope to "any person who is at the time or within the immediately preceding thirty (30) days was an employee of Employer.").

2. See *Williams v. Unum Grp.*, No. 17-cv-01814, 2017 WL 10756823, at *12 (D.S.C. Oct. 18, 2017) (six months back; finding clause enforceable under Delaware law).

3. *E.g., Zywave, Inc. v. Cates*, No. 18-CV-751, 2020 WL 1182286, at *2, *7 (E.D. Tex. Feb. 21, 2020) (enforcing covenant where former employee had accepted applications at his new job submitted by former co-workers from his old job).

prevent an employee from leaving in this manner, it thereby avoids the need to make a counter-offer (such as increased pay or a promotion) to keep the employee. It also avoids the possibility that a new replacement might command higher pay or other incentives.

The co-worker non-solicitation covenant is a commonplace in American employment agreements. Although there is no complete empirical study available for the broad American workforce and no way to know with certainty, available studies indicate that a significant percentage of private sector employees have such terms in their contracts.⁴

Despite this ubiquity, the co-worker non-solicitation is underexamined—by the courts called upon to enforce them (or not), by the attorneys who litigate them, and by scholars.⁵ Although the non-competition covenant—a contract clause prohibiting an employee from joining a competing business for his or her next job—has been the subject of sustained analysis for decades, the co-worker non-solicitation covenant has largely escaped scrutiny.

Co-worker non-solicitation covenants fall somewhere in the ill-defined field of employee mobility law, at the borderlines of intellectual property law and employment law, and thus outside the neat fields into which academics and practitioners often organize themselves. In

4. The author has reviewed many hundreds of employment agreements from around the country, mostly with technology and life sciences companies, in two decades of trade secret litigation, start-up formation advice, and deal diligence work. Until a California court ruled non-solicitation covenants unlawful in that state in 2018, it was rare to find any contract without such a clause. Outside California, that remains the case, at least for these market sectors. A recent empirical study based on thousands of survey responses in a variety of industries found that these covenants “cover all employees at 32.6% of firms and some employees at 24.2% of firms.” See Natarajan Balasubramanian et al., *Bundling Employment Restrictions and Value Capture from Employees 20* (Apr. 18, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3814403 [<https://perma.cc/PAU7-L7MW>]. Another study, using court filings in trade secret cases as a dataset, found such covenants in place in 84.2 percent of 532 cases sampled. See Christopher B. Seaman, *Noncompetes and Other Post-Employment Restraints on Competition: Empirical Evidence from Trade Secret Litigation*, 72 HASTINGS L.J. 1183, 1218 (2021) (noting that many studies of the prevalence of non-competition covenants do not include data on non-solicitation clauses). In turn, an empirical study of 874 CEO employment agreements at major, publicly-traded companies between 1996 and 2010 found that “75.6% of these contracts bar solicitation of the firms’ employees.” See Norman D. Bishara et al., *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 3–4 (2015). That percentage may be higher in recent years. On the general unavailability of company employment policies to ordinary job-seekers through public sources, including restrictive covenants, see Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 365–67 (2011) (“There remains a great deal of other information [beyond wages] about terms and conditions of employment that prospective employees might not otherwise have and that might affect their wage demands or their choice of jobs.”).

5. Some exceptions, most prominently the work of Orly Lobel, are discussed in Section II.B.

court, efforts to enforce co-worker non-solicitation covenants are often brought alongside more significant claims for trade secret misappropriation and breach of a non-competition covenant, pushing the former into the background of court rulings and attorney argument.

Still, the absence of critical attention is surprising, because the very notion that an employer could sue a former employee for hiring away a former co-worker, or encouraging a former co-worker to leave, seems strikingly inconsistent with the general context of provisional, at-will employment, which applies for so much of the American workforce.⁶ If an employer can terminate an employee at any moment for any reason—or for no reason at all—why does the law allow employers to encumber voluntary employee departures?

In court, employers offer a set of standardized arguments for enforceability. This Article's analysis of nationwide case law demonstrates that employers typically offer one or more of four common justifications. They virtually always do so through clichéd and evidence-free assertions that the covenant serves legitimate interests. The interests most often proffered are thin. Yet companies offer them with the assured conviction that rote repetition will carry the day. By contrast, courts rarely inquire about the employee's perspective (i.e., why he or she decided to leave), or about workplace conditions such as comparative salaries at the old job and the new job.

Before addressing these justifications and whether they have merit, this Article first examines where the co-worker non-solicitation covenant came from, and the ethos from which it arose. Section II.A probes that historical context, with antecedents in late medieval England and a centuries-old pattern of employer control over employee departures. It then explores how contractual restrictions on co-worker solicitation came to exist, through an overview of the archaic tort of enticement—which blocked others from hiring away one's employees. Today's restrictive covenant is but a remnant of that largely forgotten regime. This section also distinguishes the employee-centered non-solicitation covenant from a contract between two businesses not to hire from one another, commonly known as a “no-poach” or “no-hire” pact.

6. For a basic definition emphasizing the unstable nature of the at-will relationship, see *At-Will Employment*, CORNELL L. SCH.: LEGAL INFO. INST. (May 2021), https://www.law.cornell.edu/wex/at-will_employment [<https://perma.cc/YGU9-6JH8>] (“At-will employment is an employment arrangement in which the employee may quit at any time, and the employer may fire the employee for any reason and at any point, so long as the dismissal isn’t for an unlawful reason.”).

Next, Section II.B sets the context of today's disputes over co-worker non-solicitation covenants. A major problem in adjudicating them is that courts too readily accept the employer's invitation to focus solely on whether the former employee has engaged in forbidden acts of solicitation. A broader understanding of the workplace mobility context—the attrition at the company, the salaries employees are paid and are offered elsewhere, the company's own efforts to recruit from other companies, and more—all beg the question why employers should control whether co-workers can depart together.

Part III, the centerpiece of this Article, critically examines each of the four common justifications employers offer to enforce non-solicitation covenants in court and finds all of them lacking.⁷ First, the common assertion that the co-worker non-solicitation covenant operates to protect the company's trade secrets implicitly treats non-solicitation covenants as a category of intellectual property law. But this is implausible. Employment agreements already contain separate confidentiality clauses that bar the misuse of trade secrets, while the non-solicitation clause regulates distinct conduct. If the argument is meant to be that one employee who leaves is less likely to misappropriate a trade secret in the future than two employees who join together at a new job, employers do not pretend to offer empirical evidence to support that proposition, and there likely is none. Put simply, the covenant does not protect trade secrets because mobile employees, in and of themselves, are not an employer's intellectual property.

Second, some employers argue that enforcing the covenant protects the company's goodwill with its customers. The assertion seems premised on the notion that a hypothetical customer might be disappointed to see an employee leave, and that this outweighs the employee's own interest in bettering his or her career. If so, employers present no empirical evidence to support that speculation. Moreover, an employee can leave for any reason at any time, so the conjecture does not explain why a former co-worker extending an invitation for a new job should alone be subject to legal sanction on a loss-of-goodwill theory.

Third, some employers offer that non-solicitation covenants protect the employer's (supposed) investment in training employees.

7. There are too many repetitive cases involving co-worker non-solicitation covenants on databases like LEXIS to justify compiling all of them in string citations here. Instead, this Article examines a reasonable nationwide sample through the end of 2021, weighted towards more recent cases in trial courts, without regard to whether such cases are published or unpublished.

Again, employers are not required to empirically demonstrate the existence or value of any such training, or whether the employee arrived with significant experience. And again, anyone can leave for other reasons. Training does not guarantee a permanent workforce. Finally, some companies have argued that enforcement of the covenant helps maintain a stable workforce. But employers who select at-will status for their employees can hardly complain about workplace instability. If anyone can leave or be terminated, for any reason at any moment, there was no stable workforce to begin with.

The weakness of these arguments suggests that something rather different is afoot, something employers' attorneys would rather not say out loud in court. Part IV therefore moves to critique and reform. Rather than accepting the dubious justifications courts have accepted, this Article proposes a more rigorous analysis—one that identifies other interests at stake. What needs to be stated openly is that the co-worker non-solicitation covenant allows employers to avoid having to raise an employee's salary, or offer a promotion, or otherwise improve workplace conditions as a counter-offer when someone has invited that employee to leave for a better job elsewhere. Courts would benefit from viewing the co-worker non-solicitation covenant as a form of salary suppression device.⁸ The law should more critically question the paint-by-numbers rationales that employers bring to court, in order to expose the strong bias against employee interests they represent.

Inspired by a minority of courts that have resisted employers' arguments by pointing to empirical evidence such as high rates of workforce attrition, Part IV offers proposals for reform. I argue that courts should (1) be skeptical of rote justifications employers offer, whether trade secret protection, protection of customer goodwill, investments in employee training, or maintenance of a stable workforce, especially when such justifications are presented as evidence-free hypotheticals; (2) expand the frame of analysis from a narrow focus on the contract term and the accused employee to a broader analysis of workplace conditions and attrition rates; (3) ask whether the employer has hired

8. As such, co-worker non-solicitation covenants should be part of the increasing discussion about reasons for wage stagnation for middle- and low-income workers in recent decades. *See generally* LAWRENCE MISHEL & JOSH BIVENS, ECON. POL'Y INST., IDENTIFYING THE POLICY LEVERS GENERATING WAGE SUPPRESSION AND WAGE INEQUALITY 44–47 (May 13, 2021), <https://files.epi.org/uploads/215903.pdf> [<https://perma.cc/7WDF-7G5M>] (noting the proliferation of non-competition covenants and related restrictions on employee mobility as one of many explanatory factors where government inaction or complacency led to wage stagnation; identifying co-worker non-solicitation covenants in passing).

from other companies, and hires already-skilled employees; and (4) invite evidence of the departing employees' perspectives, in particular to ask why the departing employee(s) wanted to leave, including whether they were offered a higher salary elsewhere.

With a critical approach to these covenants, we can better understand how they operate and what purposes they serve, rather than accept the self-serving camouflage employers offer to defend and enforce them.

II. A SCHEMA OF THE CO-WORKER NON-SOLICITATION COVENANT

We begin with history. Like the employee non-competition covenant, the co-worker non-solicitation covenant is not a new feature of the contemporary employment environment. Rather, its tendrils drift backwards over the centuries, before the age when standardized contracts defined the terms of employment. It is not a response to the needs of today's workplace, but an artifact left over from a different age and a different conception of employer power over workers. Through this longer lens, we can better test whether rationales offered for enforceability today—such as protection of the employer's trade secrets—are really the measure of why employers seek to stop co-workers from leaving together for a new job.

A. The Disreputable History of an Under-Analyzed Restrictive Covenant

The employee non-solicitation covenant is one of the last remnants of a workplace ethos dating back many centuries, when an employer could sue (or even have prosecuted) those who hired away its employees. What was long embedded in tort and statutory law lives on today in boilerplate terms in standard-form employment agreements, its origins largely forgotten.

1. Hiring Restrictions—Origins in Medieval England

Restrictions on hiring away an employee arose in the late medieval English legal system, where the employer (the “master,” in the parlance of the day) had priority in determining whether someone (a “servant,” an “apprentice,” or other category) could leave a job. As one legal historian put it, “[f]or centuries in England, from at least the time of the Black Death, employers had dealt with the problem of labor scarcity by attempting to limit labor's mobility, by giving

employers authority to lock laborers in contractually, and by regulating their wages.”⁹ Specifically, the 1350 Ordinance and Statute of Laborers made it a crime to leave a job before completing the agreement to serve, and it was reinforced by the 1562–63 Statute of Artificers.¹⁰ Even if one’s term of service had been completed, a laborer would not depart without providing “one quarter’s warning,” and the Statute of Artificers “required servants who had lawfully completed their terms of service to carry with them testimonials to that effect before they could leave the place in which they had served.”¹¹

As an important corollary to these broader restrictions in that period, nobody could solicit a worker away during the term of their employment: “[t]hird parties might not retain another’s servant and were subject to punishment under the early statutes for failing to observe this injunction.”¹² In short, the notion that an employer could prohibit another party from hiring an employee away had its origins in a vastly different conception of the employee/employer relationship—a (literally) medieval framework of significant control over the lives of workers. These English prohibitions carried over into the American colonies to some extent; a 1662 Virginia statute required “servants” whose terms had expired to carry a “certificate” that would enable new employment, and anyone who “entertains” or “harbours” a runaway “hired ffreeman” before the expiration of a prior term could be penalized.¹³

2. The Rise and Fall of the Tort of Enticement

Over time, social views of labor mobility changed, and during the 1700s and early 1800s it fell out of fashion for American courts to compel laborers to complete their terms.¹⁴ Attitudes towards servitude shifted as well, especially in the North, such that the term “servant” became restricted to oppressed African-Americans.¹⁵ Thus, by the 1800s, employers facing new norms of labor mobility had fewer options, and could either offer higher pay or better conditions, or turn to

9. See ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE* 147, 169 (1991).

10. See *id.* at 22–23.

11. See *id.* at 32–33.

12. See *id.* at 33.

13. See *id.* at 47–48.

14. See *id.* at 50.

15. See *id.* at 126–38.

contract-based strategies and lawsuits “against those who sought to steal their workers.”¹⁶

In this new environment, the move to contract law to prevent solicitation seems to be an offshoot of the centuries-old tort action for enticement. Enticement was a theory under which it was unlawful for one employer to hire away an employee from another employer, even if the employee was at-will.¹⁷ In nineteenth century America, “the enticement action was an action for trespass with the employee treated as the property,” and some states made it a criminal act as well.¹⁸ As a result, “[a]n employer who offered higher wages and better working conditions to someone already under contract with another employer could be penalized more harshly than an employer who mistreated his or her workers.”¹⁹

As legal historian Karen Orren has shown, enticement first arose in England through the Statute of Labourers, enacted in the 1300s in the wake of the Black Death, which “provided for both civil and criminal proceedings against any person who knowingly enticed or persuaded a servant away from his employment by another master.”²⁰ As early as 1355, a civil action for damages was possible, and an early Massachusetts enticement lawsuit cited English case law “as far back as 1591.”²¹ In 1769, William Blackstone—a relatively conservative

16. *See id.* at 160–63 (describing fluid mobility in 1820s Massachusetts mill towns); *id.* at 169.

17. John Fabian Witt, *Rethinking the Nineteenth-Century Employment Contract, Again*, 18 L. & HIST. REV. 627, 633 (2000) (“The ‘enticement’ doctrine provided employers with a nonreciprocal right to sue for tortious interference with the employment contract. Employers could bring an action for damages against a party who interfered with their employees’ performance, but employees rarely had the reciprocal power to bring such an action against parties who interfered with the fulfillment of employers’ contractual obligations to their employees. Moreover, the nineteenth-century law of enticement allowed tortious interference claims by employers even where the employment relation was on an at-will basis rather than for a term.” (footnote omitted)).

18. Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 491 (1989); *see also* David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 TEX. L. REV. 781, 791 (1998) (“Also, by the end of Reconstruction, Alabama, Georgia, North Carolina, and Florida still had ‘enticement’ laws that made it a crime, rather than simply a tort, to hire a worker who was under contract with another employer.”).

19. Shirley Lung, *Criminalizing Work and Non-Work: The Disciplining of Immigrant and African American Workers*, 14 U. MASS. L. REV. 290, 332 (2019) (noting that such laws in the post-Civil War South disproportionately harmed Black workers and “created a right of security for employers in [B]lack workers as property, as well as a right of security in worker exploitation and oppression” (footnotes omitted)).

20. KAREN ORREN, *BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES* 105 (1991).

21. *Id.* (citing *Bos. Glass Manufactory v. Binney*, 21 Mass. (4 Pick.) 425 (1827)).

legal scholar whose work had an immense influence in the early United States legal system—described the action as follows:

Also if any person do hire or retain my servant, being in my service, for which the servant departeth from me and goeth to serve the other, I may have an action for damages against both the new master and the servant, or either of them: but if the new master did not know that he is my servant, no action lies; unless he afterwards refuse to restore him upon information and demand. The reason and foundation upon which all this doctrine is built, seem to be the property that every man has in the service of his domestics; acquired by the contract of hiring, and purchased by giving them wages.²²

As Orren notes, enticement lawsuits were filed in many industries in the U.S. by the late 1800s, even as to at-will employees, and became a tool used against labor unions.²³ And as Catherine Fisk has shown in an archival case study, in the nineteenth century the DuPont company brought enticement actions against those who hired its employees.²⁴ In particular, the use of enticement as a control mechanism was one of the tools Southern employers used to restrain the mobility of African-American workers in the years after the Civil War.²⁵

A late example demonstrates how the enticement tort was used as a means to prohibit union organizing. Its reasoning is worth quoting in depth because echoes of it still appear in today's case law. In 1917, the Supreme Court affirmed the notion that a West Virginia mine operator could include a term in its employment contracts prohibiting employees from joining a labor union, and it upheld the trial court's injunction, apparently on a claim for tortious interference, against a union for encouraging employees to join.²⁶ As the court put it,

22. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 417 (1765) (footnote omitted).

23. See ORREN, *supra* note 20, at 107, 122–28.

24. See Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property 1800–1920*, 52 HASTINGS L.J. 441, 470 (2001) (distinguishing enticement from the later-arising, knowledge-based trade secret claim; noting how DuPont moved away from enticement and towards contract and trade secret as a litigation approach by the twentieth century).

25. See Stephen Plass, *Dualism and Overlooked Class Consciousness in American Labor Laws*, 37 Hous. L. Rev. 823, 837, 840 (2000) (“The [B]lack worker’s services were also guaranteed by enticement laws, which made it illegal for another employer to solicit the services of an employee who was under contract to another.”).

26. See *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 233, 262 (1917).

Plaintiff, having in the exercise of its undoubted rights established a working agreement between it and its employees, with the free assent of the latter, is entitled to be protected in the enjoyment of the resulting status, as in any other legal right. That the employment was “at will,” and terminable by either party at any time, is of no consequence.²⁷

The court justified this result by contending that an employer owns a right of goodwill in its workforce:

In short, plaintiff was and is entitled to the good will of its employees, precisely as a merchant is entitled to the good will of his customers although they are under no obligation to continue to deal with him. The value of the relation lies in the reasonable probability that by properly treating its employees, and paying them fair wages, and avoiding reasonable grounds of complaint, it will be able to retain them in its employ, and to fill vacancies occurring from time to time by the employment of other men on the same terms. The pecuniary value of such reasonable probabilities is incalculably great, and is recognized by the law in a variety of relations.²⁸

Despite this anachronistic language, by the twentieth century enticement actions by one company against another company or person simply for hiring an at-will employee fell out of favor. An often-cited 1918 ruling by Learned Hand affirmed the rejection of an enticement-style claim:

Nobody has ever thought, so far as we can find, that in the absence of some monopolistic purpose every one has not the right to offer better terms to another’s employé, so long as the latter is free to leave. The result of the contrary would be intolerable, both to such employers as could use the employé more effectively and to such employés as might receive added pay. . . . That nobody in his own business may offer better terms to an employé, himself free to leave, is so extraordinary a doctrine, that we do not feel called upon to consider it at large.²⁹

27. *See id.* at 251.

28. *See id.* at 252.

29. *See Triangle Film Corp. v. Arcraft Pictures Corp.*, 250 F. 981, 982–83 (2d Cir. 1918); *see also Vincent Horwitz Co. v. Cooper*, 41 A.2d 870, 870 (Pa. 1945) (same outcome as *Triangle Film Corp.*).

As a 1969 summary explains, by then “[t]he general rule appears to be that the mere inducement of an employee to move to a competitor is not in itself actionable where the employment is terminable at will, but that such inducement is actionable if the party offering the inducement either has an unlawful or improper purpose or uses unlawful or improper means.”³⁰ Moreover, as seen in mid-century case law, rulings came out differently despite “very similar circumstances,” making them “difficult to reconcile” and leaving “no clear guidelines.”³¹

Contemporary enticement cases are rare, as the tort seems to have died away. A 1988 North Carolina case found that the concept “savors strongly of oppression.”³² California, a state that strongly protects employee mobility, formally did away with enticement (labeled as tortious interference in the case at issue) in 2004. The state supreme court ruled that hiring another company’s at-will employees is lawful, except in the narrow instance where the hiring party “engaged in an independently wrongful act—i.e., an act ‘proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal

30. See S. R. Shapiro, Annotation, *Liability for Inducing Employee Not Engaged for Definite Term to Move to Competitor*, 24 A.L.R. 3d 821, 823 (1969) (footnote omitted); see also 2 ROGER M. MILGRIM & ERIC E. BENSON, *MILGRIM ON LICENSING* § 8.69 (2015) (citing a few cases from 1957 to 1992 with differing outcomes and asserting that “[t]he privilege of fair competition protects multiple hirings of a competitor’s at-will employees if the second employer shows it did not employ wrongful means, did not intend thereby to create or continue an unlawful restraint of trade and its purpose was at least in part to advance its interest in competing with the other.”).

31. See Shapiro, *supra* note 30, at 823–24.

32. See *Peoples Sec. Life Ins. Co. v. Hooks*, 367 S.E.2d 647, 651 (N.C. 1988) (“To restrict an employer’s right to entice employees, bound only by terminable at will contracts, from their positions with a competitor or to restrict where those employees may be put to work savors strongly of oppression;” collecting cases mostly from the earlier twentieth century).

standard’ . . . that induced the at-will employee to leave the plaintiff.”³³ Idaho followed suit in 2010 with similar reasoning.³⁴

Evidencing the judicial distaste for enticement over the past century, some courts have discussed the working conditions of employees who were hired away, using their dissatisfaction as a basis for rejecting a tort claim against a different company for hiring them away. For example, a 1948 Tennessee court, called upon to decide an enticement-type request for injunctive relief, denied relief where the court not only found no evidence of inducement, but also that “[t]wo of the employees testified that they quit the complainants’ employ because they were dissatisfied with the conditions under which they worked.”³⁵

Similarly, a 2012 New Mexico court faced a tortious interference action, equivalent to enticement, where former employees were accused of soliciting former co-workers after their own non-solicitation covenants had expired.³⁶ Although the former employer accused them, as the court put it, of “predatory behavior by specifically targeting and soliciting [its] existing employees and customers,” the court noted that “[t]he evidence before the Court established that many of [plaintiff’s] employees were unhappy at the company due to inaccuracies in their paychecks, a perceived failure to award accurate and timely pay raises, [plaintiff’s] implementation of a new payroll practice, and the

33. See *Reeves v. Hanlon*, 95 P.3d 513, 514 (Cal. 2004) (quoting *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 954 (Cal. 2003)); see also *Coast Hematology-Oncology Assocs. Med. Grp. v. Long Beach Mem’l Med. Ctr.*, 58 Cal. App. 5th 748, 768 (2020) (following *Reeves* and affirming summary judgment on tortious interference claim aimed at hiring of two employees; “[Employees] left [plaintiff] because they did not want to work there anymore. These doctors saw greener pastures working for [plaintiff’s] competitor [defendant]. They wanted out. [Plaintiff’s] effort to chain them to their old jobs is doubly anticompetitive; [Plaintiff] seeks both to cut off the mobility of its at-will employees and to block a competing employer from giving them more attractive prospects. The law does not permit this restraint of trade.”); *Ahern Rentals, Inc. v. Equipmentshare.com, Inc.*, No. 19-cv-01788, 2020 WL 3511438, at *4–5 (E.D. Cal. June 26, 2020) (granting motion to dismiss where former employer claimed that list of employees was a trade secret; citing *Reeves* for proposition that “[m]ere solicitation of another company’s employees is not unlawful;” and also noting that “Plaintiff cannot simply characterize a roster of its employees as a trade secret in order to prevent, as [Plaintiff] seems to do here, any potential poaching of its employees”).

34. *E.g.*, *Quality Res. & Servs., Inc. v. Idaho Power Co.*, 706 F. Supp. 2d 1088, 1101–03 (D. Idaho 2010) (inducing at-will employees to leave their jobs not tortious interference with prospective economic advantage because the interference was not accomplished by means wrongful by some other measure, or for an improper purpose apart from business competition).

35. See *Barner v. Boggiano*, 222 S.W.2d 672, 676 (Tenn. Ct. App. 1948).

36. See *Todd v. RWI Acquisition LLC*, No. 12-CV-00114, 2012 WL 12882371, at *1 (D.N.M. June 1, 2012).

termination of certain employee benefits.”³⁷ The court denied a request for injunctive relief.³⁸

But as seen in Part III below, this willingness to investigate the reasons why employees chose to leave, and this incredulity towards lawsuits seeking to stop such departures, are largely absent when it comes to actions brought under a contract theory against former employees, as opposed to old-fashioned enticement theories brought against other companies.

3. The Special Case of the “No-Hire” Pact Between Businesses

Although enticement claims brought by one business against another for hiring an employee away are all but nonexistent today, that hardly means that machinations to stop employee departures came to an end. One striking example of present-day practices concerns agreements between two or more companies not to solicit, or not to hire, one another’s employees. These pacts are commonly known as “no-poach” agreements. At least two states have rejected such agreements as a matter of public policy,³⁹ and over the past decade the Department of Justice has fought them under federal antitrust law.⁴⁰

37. *See id.* at *8.

38. *See id.* at *10.

39. *See* Pittsburgh Logistics Sys., Inc. v. Beemac Trucking, LLC, 249 A.3d 918, 936 (Pa. 2021) (rejecting no-hire pact between two businesses based upon a survey of nationwide case law and recent Department of Justice actions; finding, among other things, that the clause “creates a likelihood of harm to the public” because “[t]he no-hire provision impairs the employment opportunities and job mobility of [plaintiff’s] employees, who are not parties to the contract, without their knowledge or consent and without providing consideration in exchange for this impairment”); Heyde Cos. v. Dove Healthcare, LLC, 654 N.W.2d 830, 838 (Wis. 2002) (finding that pact between company providing physical therapist services and nursing home operator that the latter would not hire the former’s therapists during their agreement or one year afterwards was illegal under Wisconsin’s statute governing restrictive covenants, in part because it constituted a “harsh and oppressive” “no-hire provision that restricts the employment opportunities of employees without their knowledge and consent”).

40. *See* Indictment at 7, United States v. Surgical Care Affiliates, LLC, No. 21-cr-00011 (N.D. Tex. Jan. 5, 2021), <https://www.justice.gov/opa/press-release/file/1351266/download> [<https://perma.cc/GCY5-UAPH>]. For example, in January 2021, the DOJ brought criminal charges against a company for violation of the Sherman Act for agreeing with two other companies not to solicit high-level employees. It then brought similar charges against other companies in March 2021 and July 2021. *See* Press Release, Dep’t of Just., Health Care Staffing Company and Executive Indicted for Colluding to Suppress Wages of School Nurses (Mar. 30, 2021), <https://www.justice.gov/opa/pr/health-care-staffing-company-and-executive-indicted-colluding-suppress-wages-school-nurses> [<https://perma.cc/8ARE-A9NJ>]; Press Release, Dep’t of Just., DaVita Inc. and Former CEO Indicted in Ongoing Investigation of Labor Market Collusion in Health Care Industry (July 15, 2021), <https://www.justice.gov/opa/pr/davita-inc-and-former-ceo-indicted-ongoing-investigation-labor-market-collusion-health-care> [<https://perma.cc/HD3D-NXZB>].

A fresh blow against these remnants of enticement came during the Obama years, when the Department of Justice sued Silicon Valley companies that had agreed not to hire from one another—so-called “no-poaching” agreements—and an employee class action lawsuit followed.⁴¹ The litigation ended in a settlement,⁴² and the DOJ published official guidance against such pacts.⁴³ Since then, employees in other industries—railway components, university medical schools, and fast food franchises—have also filed class action lawsuits alleging that businesses (or universities) entered into “no-poach” agreements to not hire from one another. The Department of Justice filed a “Statement of Interest” in each, arguing that such agreements should be per se illegal under federal antitrust law.⁴⁴ Spurred by these developments, there are signs that antitrust scholars may revive long-dormant,

41. See, e.g., *In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d 1167, 1172–73 (N.D. Cal. 2013) (granting motion for class certification; describing prior Department of Justice lawsuits and settlements and describing allegations that seven Silicon Valley companies with ties to Apple and its Board of Directors entered into “an interconnected web of express bilateral agreements . . . to abstain from actively soliciting each other’s employees,” with agreements via email and “Do Not Call” lists).

42. See generally Richard A. Bales & Katherine V.W. Stone, *The Invisible Web at Work: Artificial Intelligence and Electronic Surveillance in the Workplace*, 41 BERKELEY J. EMP. & LAB. L. 1, 41–43 (2020) (defining no-poaching agreements with a succinct summary of the DOJ crack-down and related civil litigation involving Apple, but expressing concern that increased use of AI in the workplace could lead to data-sharing between companies to give rise to implicit, more difficult-to-uncover no-poaching agreements).

43. See ANTITRUST DIV., U.S. DEP’T OF JUST. & FED. TRADE COMM’N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 2–3 (2016), <https://www.justice.gov/atr/file/903511/download> [<https://perma.cc/BN5Z-ZKB8>].

44. See Donald J. Polden, *Restraints of Workers’ Wages and Mobility: No-Poach Agreements and the Antitrust Laws*, 59 SANTA CLARA L. REV. 579, 587–98 (2020) (detailed summary of litigation over “no-poach” agreements, Department of Justice appearances, and courts’ reactions in the years following the Silicon Valley “no-poach” disputes; advocating that courts view such pacts as per se illegal under antitrust law); see also Gregory Day, *Anticompetitive Employment*, 57 AM. BUS. L.J. 487, 531 (2020) (also proposing per se illegality, rather than a rule of reason approach, for company-to-company “no-poach” agreements; advocating more broadly that antitrust law be more robustly applied in labor markets in order to combat wage suppression; “[L]abor cartels erode the purchasing power of workers as consumers. It therefore supports the argument that agreements among employers to forego poaching, soliciting, or hiring another’s employees should be per se illegal. Although workers are theoretically able to switch jobs in pursuit of higher wages, in practice they cannot effectively correct labor markets restrained by no-poaching or no-hire agreements.”); Amanda Triplett, Note, *“No More No-Poach”: An Antitrust Plaintiff’s Guide*, 26 WASH. & LEE J.C.R. & SOC. JUST. 381, 390–92 (2019) (similar proposal). For an article tracing earlier case law from the employers’ perspective, see David K. Haase & Darren M. Mungerson, *Agreements Between Employers Not to Hire Each Other’s Employees: When Are They Enforceable?*, 21 LAB. LAW. 277, 306 (2006) (review of antitrust restraints on no-hire pacts; “Careful consideration of these issues will maximize the likelihood of enforceability of no-switching agreements.”).

employee-centered antitrust approaches to attacking no-hire and no-poach restrictions.⁴⁵

4. Hiring Restrictions Today

What began centuries ago in an era of wholesale employer control is now largely if not entirely a matter of contract: the default context is at-will employment, and unless there is an enforceable non-competition contract with an employee, companies are free to recruit talent from one another. Enticement, if it exists at all, is banished to the margins of tort law, and the federal government attacks efforts to enter into no-hire pacts.

One exception to this retreat, of course, is the co-worker non-solicitation covenant. As we shall see, in this instance the ethos of employer control still reigns, disputes are viewed mostly if not entirely from the employer's perspective, and employers need only offer skimpy arguments that the covenants are legitimate to obtain what all too often appears to be rubber-stamp approval from the courts.

As best one can tell, the non-solicitation covenant seen in today's employment agreements arose in the context of the enticement tort and lived on, even as companies generally can no longer sue one other for hiring away each other's employees. I have been unable to find a specific origin point, or a point in time when such contract terms first became ubiquitous in employment agreements. There does not appear to be any historical repository of employment contracts, and there is no way to chase down the mass of private agreements that existed decades ago in hard copy form. Nonetheless, the employee non-solicitation concept clearly arose in the time of "master and servant" law, when workers had few rights.⁴⁶ It is not a stretch to say that today's co-worker non-solicitation covenant is an artifact of the age of the paternalistic employer and tethered servitude, a direct line back to an

45. See generally ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS 1, 5–6, 33, 55–59 (2021) (noting these recent developments as well as new research into the prevalence of non-competition covenants, including as to low-wage workers and proposing a revival of antitrust skepticism of monopsony—"the power of employers to suppress wages below the competitive rate"—in response); see also Eduardo Porter, *A New Legal Tactic to Protect Workers' Pay*, N.Y. TIMES (Apr. 14, 2022), <https://www.nytimes.com/2022/04/14/business/economy/wages-antitrust-law-us.html> [<https://perma.cc/ML9J-EFBU>] ("In a first, the Justice Department has brought a series of criminal cases against employers for colluding to suppress wages."). Such new antitrust attention would complement the approach this Article proposes regarding co-worker non-solicitation covenants, which is to skeptically critique the premises on which courts have allowed them, especially as a mechanism for purportedly trade secret protection.

46. See discussion *supra* Section II.A.1.

ethos of late medieval England. This unsavory origin should cause some degree of skepticism about the platitudes employers offer when seeking to enforce such covenants today.

B. *Defining the Object of Study*

Moving from the past to the present, we focus now on the specific covenant that is the subject of this critique and—equally important—its workplace context.⁴⁷

We must set this scene because scholarly commentary regarding the co-worker non-solicitation covenant has been scarce.⁴⁸ Perhaps the only full-length article to tackle the subject was one from 2011 that noted that cases had not fully enunciated tests to justify such covenants. In an aggressively pro-employer move, it advised attorneys working for employers to consider adding terms to employment agreements to require employees to turn themselves in, presumably to then be fired, “when they are talking to another company about employment opportunities.”⁴⁹ Other, narrower commentaries focus on the special problem of the interplay between social media contacts and co-

47. Focusing on the co-worker non-solicit here does not mean such covenants should always be studied in isolation. The cumulative negative effects of bundled restrictive covenants in employment agreements represent a magnification of post-employment encumbrances in totality that raise important questions about the nature of contract assent as well as antitrust concerns. See Orly Lobel, *Boilerplate Collusion: Clause Aggregation, Antitrust Law & Contract Governance*, 106 MINN. L. REV. 910 (forthcoming 2022) (manuscript at 7–8, 17–18, 26–27, 33–34) (on file with *Loyola of Los Angeles Law Review*) (exploring these themes and noting that co-worker non-solicitation covenants “essentially reduce the job opportunities of every coworker the former employee knew regardless of whether that coworker agreed to be part of a restrictive regime”). Still, isolating the covenant for purposes of this study helps underscore how flimsy the specific arguments made for its enforcement are, as lawsuits require a covenant-by-covenant focus in legal briefs.

48. Articles on general non-competition covenants often acknowledge co-worker non-solicitation covenants as a related issue, but in passing. E.g., Michael Selmi, *Trending and the Restatement of Employment Law’s Provisions on Employee Mobility*, 100 CORNELL L. REV. 1369, 1384 n.63 (2015) (noting these covenants and recent increase in litigation); Norman D. Bishara & Michelle Westermann-Behaylo, *The Law and Ethics of Restrictions on an Employee’s Post-Employment Mobility*, 49 AM. BUS. L.J. 1, 16 (2012) (noting that such covenants are often included in employment agreements). In-depth practitioner commentary is also scarce. E.g., Victoria A. Cundiff, *The Departing Employee Toolbox: How to Construct Contracts That Meet Real Business Needs*, 20 EMP. RELS. L.J. 481, 487–88 (1994) (noting usage of co-worker non-solicitation covenants among other types of contract clauses; “Imposing contractual restrictions on an employee’s ability to solicit other employees to join a new company for a period of time is usually a fairly straightforward exercise.”).

49. See Christine M. Westphal, *Restrictive Covenants in Employment Contracts: Regulating Employee Solicitation*, 37 J. LEGIS. 108, 116–17 (2011).

worker solicitation,⁵⁰ or how courts have struggled with precisely what types of communications constitute “solicitation.”⁵¹

As one notable exception, Orly Lobel has offered a trenchant critique when including co-worker non-solicitation clauses among many “[r]egulatory and contractual controls on human capital” that render “inputs” into the creative process “proprietary” to employer, not merely the “outputs” in the form of intellectual property.⁵² She notes that such covenants operate “by stripping former employees of their professional network.”⁵³

But without a background of prior studies to rely on, we must start from the ground up, and carefully define the co-worker non-solicitation covenant as it operates in today’s workplaces. To begin with, the context for these covenants is at-will employment, and not term contracts (i.e., where an employee agrees to provide services for a defined period of time, such as those common in the entertainment industry).⁵⁴ The context is also one where the employee signs a form agreement at the outset of employment, one typically drafted by law firms and provided in bulk to their clients and containing the maximum restrictive covenants permitted by the state law governing the agreement. In addition, the context is one where the targeted former employee is accused of making contact with a former co-worker after leaving the

50. E.g., James Patton Jr. & Tae Phillips, *Nonsolicitation Agreements in the Social Media Age*, LAW 360 (May 16, 2017, 10:32 AM), <https://www.law360.com/articles/921169/nonsolicitation-agreements-in-the-social-media-age> [<https://perma.cc/V5DC-EXUF>]; Erin Brendel Mathews, Note, *Forbidden Friending: A Framework for Assessing the Reasonableness of Nonsolicitation Agreements and Determining What Constitutes a Breach on Social Media*, 87 FORDHAM L. REV. 1217, 1238–49 (2018).

51. See David L. Johnson, *The Parameters of “Solicitation” in the Era of Non-Solicitation Covenants*, 28 ABA J. LAB. & EMP. L. 99, 121–25 (2012).

52. See Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 TEX. L. REV. 789, 790–91 (2015).

53. See *id.* at 830.

54. For a detailed exploration of how term agreements—or “personal service contracts”—arose in the nineteenth century, and in particular how they were applied to women (often stage performers), see Lea S. VanderVelde, *The Gendered Origins of the Lumley Doctrine: Binding Men’s Consciences and Women’s Fidelity*, 101 YALE L.J. 775, 783–825 (1992). For examples of early cases featuring such contracts, see *Bloom v. Bohemians, Inc.*, 223 Ill. App. 269, 275–76 (1921) (affirming enticement judgment against defendant for hiring a vaudeville performer subject to a term contract); *Bixby v. Dunlap*, 56 N.H. 456, 464–65 (Super. Ct. 1876) (enticement dispute over term agreement involving a servant); *Collins v. Hayte*, 50 Ill. 337, 339–40 (1869) (dispute stemming from hiring of employees “bound to work for plaintiffs” for a set period of time). For a more recent example of how lawsuits over hiring are possible where the employee is working under a term contract, see *CRST Van Expedited, Inc. v. Werner Ents., Inc.*, 479 F.3d 1099, 1105–11 (9th Cir. 2007) (where plaintiff accused defendant of soliciting two employees subject to one-year term agreements, court found that contract was not at-will and thus remanded in support of plaintiff’s tortious interference and statutory unfair competition claims).

company. Soliciting fellow employees to leave the company during the time when one is still employed is a different issue outside the scope of the present study, one that involves the employee's duty of loyalty or (for higher-ranking employees) fiduciary duty.⁵⁵

We also must disentangle the co-worker non-solicitation covenant from the equally ubiquitous non-competition covenant. The latter blocks a departing employee from joining a competing company for some period of time. The former, by contrast, is in some ways broader: it prevents a former employee from encouraging a current employee from leaving, even if both of them want to join non-competing firms.⁵⁶ As Lobel has noted, we must bear in mind that despite the manifold problems caused by the ordinary non-competition contract, restraints on free mobility take many forms, including the co-worker non-solicitation covenant.⁵⁷

Because one goal of this Article is to broaden the analysis beyond a narrow focus on the departing employees and the terms of their employment agreements, we also must consider the workplace context as well. First, the employer is free to hire employees away from other companies, including from competitors (except where non-competition agreements are enforceable). As discussed above, the historical tort of enticement, which limited the degree to which companies could hire from one another, has been eliminated or forgotten. Larger companies sometimes retain professional recruiters (either as employees or as outside contractors) to identify and contact talented employees elsewhere who might be a good fit.⁵⁸

In other words, the employer reserves to itself exactly what it forbids to its departing employees—a right to go out and solicit others for

55. For a discussion of how courts handle claims of in-term co-worker solicitation, see Charles Tait Graves, *Preparing to Quit: Employee Competition Versus Corporate Opportunity*, 41 *BERKELEY J. EMP. & LAB. L.* 333, 353–57 (2020).

56. A third type of restrictive covenant common in employment agreements is unrelated to the subject of this Article. The customer non-solicit—which bars former employees from contacting the former employer's customers for some period of time after leaving, even if information about them is not a trade secret—poses a different set of problems. It will be the focus of a future article.

57. See Orly Lobel, *Noncompetes, Human Capital Policy & Regional Competition*, 45 *J. CORP. L.* 931, 944 (2020) (“The externalities of non-competition should also be readily understood with regard to employee non-solicitation agreements—which essentially reduce the job opportunities of every co-worker that the former employee knew—regardless of whether that co-worker agreed to be part of a restrictive regime.”).

58. An online search for “executive search” firms shows many companies, such as Korn Ferry and Heidrick & Struggles, which specialize in helping companies locate and recruit high-level talent. Search results for “Executive Search.” GOOGLE, <https://www.google.com/search?q=executive+search> [https://perma.cc/5GCT-MKUA].

employment as it sees fit. By the same token, other companies may have recruiters contact the employer's employees and hire them away, so this is a two-way street. Perhaps less obvious, the employer may also have been the beneficiary of co-worker solicitation. It may have hired a person who then invited talented former co-workers to join.

Third, the employer probably experiences attrition as employees come and go—after all, they are at-will. Some may have been terminated or laid off, and some may have retired, but many simply seek employment elsewhere. Some of them may leave for a better salary or position elsewhere, a better career fit, for family reasons, or because the current workplace is unpleasant or hostile. Said differently, the employer's workforce is always in flux. A court encountering a mobility dispute cannot presume that the former employee has a never-changing, permanent group of employees or contractors.

Fourth, the employer may use salary incentives to lure talented employees from another company. Or, to induce an employee who has given a resignation notice to stay, the employer may counter-offer with a salary increase, a promotion, a move to a different department, or some other incentive.

Fifth, employees generally are permitted to discuss each other's wages and working conditions under federal law and the law of many states.⁵⁹ And, if conditions are poor—unpleasant management, harassment, low pay, and the like—it is inevitable that co-workers will find ways to talk about it.⁶⁰

59. State wage transparency statutes differ in degree, but generally prohibit employers from using employment contracts to prohibit employees from discussing and making inquiries about compensation. *See* CAL. LAB. CODE § 1197.5(k)(1) (West 2020); COLO. REV. STAT. § 24-34-402 (1)(i) (2022); DEL. CODE ANN. tit. 19, § 711(i) (2022); ME. REV. STAT. ANN. tit. 26, § 628 (2021) (but limited to cases where “the purpose of disclosure or inquiry is to enforce the rights granted by this section”); MINN. STAT. § 181.172 (2021); NEV. REV. STAT. §§ 613.330.2(c), 3(c) (2020); *see also* Exec. Order No. 13665, 79 Fed. Reg. 20,749 (Apr. 8, 2014), <https://www.govinfo.gov/content/pkg/FR-2014-04-11/pdf/2014-08426.pdf> [<https://perma.cc/33JG-3QFZ>] (providing that contractors for the federal government “will not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant to another employee or applicant”); *State Lawmakers Recently Passed a New Act About Wage Transparency. What Does This Mean for Connecticut Employees?*, GARRISON, LEVIN-EPSTEIN, FITZGERALD & PIRROTTI, P.C.: EMP. L. (June 17, 2021), <https://garrisonlaw.com/state-lawmakers-pass-act-about-wage-transparency-what-does-this-mean-for-connecticut-employees/> [<https://perma.cc/W75G-SAYA>] (discussing Connecticut's new wage transparency law).

60. Such discussions recently received legal protection in California. *See* CAL. GOV'T CODE § 12964.5(a)(1)(B)(ii) (West 2022) (“A nondisparagement or other contractual provision that restricts an employee's ability to disclose information related to conditions in the workplace shall include, in substantial form, the following language: ‘Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or

With this broader context in mind, we move to defining solicitation, encouragement, or merely conversation about changing jobs. To be sure, “solicitation”—however defined in the dictionary sense—may involve expansive allegations against departing employees stemming from a range of conduct: a former employee might (1) directly invite, or solicit, a former co-worker to join a competitive business; (2) directly invite, or solicit, a former co-worker to join a non-competitive business; (3) directly encourage a former co-worker to leave the job for an entirely different company, to go back to school, or to some uncertain destination—and that encouragement may come because the former co-worker is dissatisfied over salary or opportunities or, worse, has experienced sexual harassment, racial discrimination, bullying, or other ugly workplace conduct; (4) directly invite someone who has already left the same former employer, to quit whatever job he or she has taken in the interim to come join the same company; (5) be the recipient of an express or implicit request for a job from a former co-worker;⁶¹ (6) be the recipient of a formal job application, such as through a website application portal, from a former co-worker; or (7) merely announce his or her departure to co-workers, either before or after leaving.⁶²

Notably, salary is not only a concern for the employee who is being solicited to leave. If an employee departs, the employer may have to pay a higher salary to attract a replacement. Or, to convince a person who has given a notice of resignation to stay, the employer may also have to offer more.

discrimination or any other conduct that you have reason to believe is unlawful.”); *see also* Kari Paul, *California Bill Targets NDAs That Prevent Workers from Speaking About Discrimination*, THE GUARDIAN (Feb. 10, 2021, 6:00 AM), <https://www.theguardian.com/us-news/2021/feb/10/california-sb331-nda-harassment-discrimination> [<https://perma.cc/4N2B-WU64>].

61. As discussed below, the law varies from state to state as to whether a co-worker non-solicitation covenant can bar a former employee from simply receiving a former co-worker’s unilateral expression of interest. *See Hunter Grp., Inc. v. Smith*, 9 F. App’x 215, 219–20 (4th Cir. 2001) (affirming finding under Georgia law that former employee did not violate her co-worker non-solicitation covenant where former co-workers initiated contact with her regarding a job at the company where she worked); *Acuity Brands, Inc. v. Bickley*, No. 13-355, 2017 WL 1426800, at *23 (E.D. Ky. 2017) (finding that although Georgia law does not find liability where the former co-worker “is the one who initiated contact,” denying motion for summary judgment where defendant in one instance made attempts to solicit one person).

62. Announcements, whether to customers or co-workers, are permitted by at least some courts. *See generally* MAI Sys. Corp. v. Peak Comp., Inc., 991 F.2d 511, 521–22 (9th Cir. 1993) (in customer solicitation context, “[m]erely informing a former employer’s customers of a change of employment, without more, is not solicitation”).

But as we shall see, courts adjudicating disputes over co-worker non-solicitation covenants usually do not consider this broader context, and all too often accept without analysis the dubious arguments employers offer for enforcement.

III. CASE LAW: HOW DO COURTS ADDRESS, DEFINE, OR IGNORE THE INTERESTS AT STAKE?

A. *Many Courts Do Not Engage in Policy Analysis*

In court, employers tend to raise four common justifications to justify enforcement of the co-worker non-solicitation covenant: trade secret protection, maintenance of goodwill, protecting an investment in training, and maintenance of a stable workforce. We must observe, however, that many cases do not consider any justifications at all. Many avoid any doctrinal analysis, thereby treating the covenants as presumptively valid. Others turn on whether the covenant has meaningful temporal or geographic limits—elements often seen in cases involving other types of restrictive covenants, but not elements that speak to the specific interests at stake. Similarly, some reference the “legitimate business interests” test frequently used to evaluate non-competition agreements, but without specific analysis.

Indeed, a large number of courts enforce co-worker non-solicitation covenants without policy analysis.⁶³ As one example, in 2018 a

63. *E.g.*, *Material Handling Sys., Inc. v. Cabrera*, No. 21-cv-463, 2021 WL 5236875, at *12 (W.D. Ky. Nov. 11, 2021) (issuing preliminary injunction on grounds including breach of non-solicitation covenant; court examined enforceability of non-competition covenant only); *PeopleStrategy, Inc. v. Hearstone Advisors LLC*, No. 20-cv-01901, 2021 WL 1518621, at *6–9 (E.D. Pa. Apr. 16, 2021) (finding a partial violation of the covenant on summary judgment without analyzing basis for enforceability); *GMS Indus. Supply, Inc. v. G & S Supply, LLC*, 441 F. Supp. 3d 221, 227–28 (E.D. Va. 2020) (overruling magistrate’s finding that co-worker non-solicitation covenant was enforceable because other, adjacent clauses were unenforceable; finding that clause could be severed and enforced but not analyzing why it should be enforceable); *Omnimax Int’l, Inc. v. Dowd*, No. N16C-04-168, 2019 WL 3545848, at *3–4 (Del. Sup. Ct. July 17, 2019) (denying defense motion for summary judgment on disputed facts without analyzing enforceability of covenant); *USI Ins. Servs. Nat’l, Inc. v. Ogden*, 371 F. Supp. 3d 886, 898 (W.D. Wash. 2019) (finding clause requiring former employee to not “solicit, recruit or promote the solicitation or recruitment of” former co-workers to be “reasonable” for the industry without policy analysis; finding breach even where defendant did not initiate communications with others); *Bakotic v. Bako Pathology LP*, No. N17C-12-337, 2018 WL 6601172, at *2–4 (Del. Super. Ct. Dec. 10, 2018) (denying motion on the pleadings to dismiss non-solicitation covenant claim based on need to develop the evidentiary record; no analysis of interests at stake); *Kennedy v. Shave Barber Co.*, 822 S.E.2d 606, 614 (Ga. Ct. App. 2018) (affirming injunction where former employee “attempt[ed] to influence employees to leave;” no discussion of interest in enforcing the clause); *Williams-Sonoma Direct, Inc. v. Arhaus, LLC*, 109 F. Supp. 3d 1009, 1020, 1022 (W.D. Tenn. 2015) (granting motion for preliminary injunction to enforce covenant; no discussion of interests at stake other than a statement that

North Carolina court entered a preliminary injunction barring physicians from operating an opioid treatment clinic pursuant to a non-competition covenant, and also enforcing a co-worker non-solicitation covenant because they had solicited nurses to join their new clinic. The court explained the legal standard for the former, but did not analyze any legal standard for the latter.⁶⁴ A New Jersey court denied a motion to dismiss a tortious interference claim in 2019 where a new employer was accused of encouraging an employee to breach his non-solicit by attempting to hire a former co-worker, without justifying the covenant.⁶⁵ A federal court applying Texas law in 2016 affirmed the enforceability of a co-worker non-solicit that covered the employer's entire workforce, and it too did not venture into what interest was being protected or whether any such interest was valid.⁶⁶ And a 2001 Middle District of Pennsylvania ruling simply found "this restriction to be reasonable" because "[i]t is in the public interest to enforce contracts [and it] is not undue hardship to require [former employee] to refrain from hiring [company's] employees."⁶⁷

"[r]estraining [defendant] from violating his non-solicitation agreement would further the public interest in enforcing contracts"); *MSC Software Corp. v. Altair Eng'g, Inc.*, No. 07–CV–12807, 2010 WL 2740134, at *2–4 (E.D. Mich. Sept. 23, 2014) (affirming jury's damages verdict for violation of co-worker non-solicitation clause; rejecting former employees' argument that California law did not permit such covenants based on an incorrectly-decided and now superseded 1985 California case, but not analyzing any reason why such a covenant should be permitted); *Finkel v. Cashman Pro., Inc.*, 270 P.3d 1259, 1263 (Nev. 2012) (affirming trial court's preliminary injunction as to trade secret misappropriation and breach of non-competition, customer non-solicitation, non-disparagement, and co-worker non-solicitation covenants; as to the latter, defendant had temporarily employed two of plaintiff's employees for discrete tasks; court treated all of these contractual issues together as "the precise sort of conduct that could cause a business irreparable harm," without specific analysis); *Ayoub v. Softchoice, Inc.*, No. 11-cv-02745, 2012 WL 13009013, at *5–8 (N.D. Ga. Aug. 3, 2012) (accused former employees did not contest enforceability of clause, but argued it could not be severed from other, illegitimate clauses; court disagreed without analysis of why clause should be enforceable).

64. *See Morse Mgmt., Inc. v. Morse Clinic of Hillsborough, P.C.*, No. 17-CVS-12084, 2018 NBC LEXIS 158, at *30–33, *37–38 (N.C. Sup. Ct. Feb. 19, 2018).

65. *See LoanDepot.com v. CrossCountry Mortg., Inc.*, 399 F. Supp. 3d 226, 237 (D.N.J. 2019) (denying motion to dismiss; "An unsuccessful solicitation attempt, to be sure, is probably less injurious than a successful one. I cannot say at this early stage, however, that the injury from an unsuccessful solicitation attempt is zero as a matter of law.").

66. *See Everett Fin., Inc. v. Primary Residential Mort., Inc.*, No. 14-CV-1028, 2016 WL 7378937, at *7–9 (N.D. Tex. Dec. 20, 2016) ("The [former employees] have not identified an authority holding that it is unreasonable to restrain solicitation of all current employees at a company of [Plaintiff's] size.").

67. *See First Health Grp. Corp. v. Nat'l Prescription Admin., Inc.*, 155 F. Supp. 2d 194, 231 (M.D. Penn. 2001) (the court, however, denied a request for a preliminary injunction on this ground because the former employee's "conversation" with a "friend and former colleague" "was not a solicitation").

Other courts offer justifications that are hollow platitudes. One court applying Nebraska law, for example, found a co-worker non-solicitation covenant enforceable for reasons that included “the [plaintiff’s] employees were important in the operation of [its] business operations.”⁶⁸

In a 2020 case without sustained analysis, a Texas court enforced a strict no-hire covenant in finding that a former employee breached his contract—one that prohibited him from attempting to “recruit, lure or entice away, or in any other manner persuade an employee to terminate their employment.”⁶⁹ The court rejected the defendant’s argument that he had merely accepted applications for employment at his new job from former co-workers, asserting that “the Agreement does not include a limitation that the restriction ends when an individual *applies* for employment.”⁷⁰ It also found that because he took a job where he might participate in assessing such candidates, this “is an argument that [he] has been hired into a position with job responsibilities exceeding his capacity under the terms of the Agreement.”⁷¹ This case illustrates the dangers of unquestioning acceptance of the employer’s contract terms—what policy could justify a result where people cannot even apply for a new job at a former co-worker’s company?

More generally, many courts enforce or reject non-solicitation covenants only by examining factors commonly considered when examining restrictive covenants in general, such as whether they contain territorial restrictions, contain other problems with excessive scope, or involve defects in the contracting process.⁷² Some look to scope, like a Louisiana court that upheld a non-solicit as being only a narrow

68. See *Emilio v. Alexander & Alexander, Inc.*, No. 91-0143B, 1991 U.S. Dist. LEXIS 15922, at *23 (D.R.I. Sept. 17, 1991) (applying Nebraska’s three-part legitimate interests test to restrictive covenants including a co-worker non-solicitation clause and finding them valid together).

69. See *Zywave, Inc. v. Cates*, No. 18-CV-751, 2020 WL 1182286, at *4, *6 (E.D. Tex. Feb. 21, 2020).

70. *Id.* at *5.

71. See *id.* at *5, *7 (granting employer’s motion for summary judgment and setting damages argument for a jury trial).

72. See *All Am. Healthcare, LLC v. Dichiaro*, 263 So. 3d 922, 928–29 (La. Ct. App. 2018) (non-solicitation covenant unenforceable because terms that would define its scope were undefined, and because employer could not show that employee had consented to the restriction); *Specialty Med. Prods., Inc. v. Hall*, No. 14-cv-1152, 2015 WL 4716905, at *12–13 (M.D. Tenn. Aug. 3, 2015) (finding clause unenforceable under Georgia law because it lacked any territorial restriction); *Patient First Richmond Med. Grp., LLC v. Blanco*, 83 Va. Cir. 3, 10 (Cir. Ct. 2011) (finding clause overbroad because it was not limited to jobs and companies that were actually competitors of the former employer); *Zep, Inc. v. Brody Chem. Co.*, No. CV-09-0505, 2010 WL 1381896, at *5 (D. Ariz. Apr. 6, 2010) (clause enforceable under Arizona law because it covered all employees regardless of the former employee’s “relationship, if any, with that employee”).

restraint because the former employee was free to hire from other companies.⁷³ Georgia seems especially tolerant of such covenants, permitting them without geographical limits, and allowing their scope to extend to employees the departing employee did not know, and to simply encouraging someone to leave their job.⁷⁴

Some courts examine evidence of text messages and email communications and find that there is insufficient evidence of solicitation, without addressing whether the covenant at issue would be enforceable had solicitation occurred.⁷⁵

B. Employers Offer Dubious Justifications for Enforcement

Of greater interest for our purposes are courts that consider, or at least tally up, purported policy justifications for the co-worker non-solicitation covenant. But what we find is rote repetition of four standard memes or templates, and little in the way of rigorous analysis. This results in strong bias in the former employer's favor.

73. See *CDI Corp. v. Hough*, 9 So. 3d 282, 292 (La. Ct. App. 2009); see also *Arthur J. Gallagher & Co. v. Babcock*, No. 08-185, 2008 WL 11449219, at *11–12 (E.D. La. June 5, 2008) (finding a co-worker non-solicitation clause valid without analyzing reasons for validity, albeit where defendants did not contest enforceability); *Newsouth Commc'ns Corp. v. Universal Tel. Co.*, No. CIV.A. 02-2722, 2002 WL 31246558, at *22–24 (E.D. La. Oct. 4, 2002) (finding that under Louisiana law, co-worker non-solicit covenants are not subject to a state statute that imposes limits on customer non-solicit covenants; finding that former employees breached contract by appearing at an event for employees of their old company to explore jobs at their new company; and finding that plaintiff suffered damages because it lost a customer which apparently decided to move with the employees it had been working with).

74. See *S. Felt Co. v. Konesky*, No. CV 119-200, 2020 WL 5199269, at *4 (S.D. Ga. Aug. 31, 2020) (summarizing case law applying Georgia law); *Heartland Payment Sys., LLC v. Stockwell*, 446 F. Supp. 3d 1275, 1284–85 (N.D. Ga. 2020) (noting that such covenants are enforceable when not unduly vague, and when reasonably time-limited, and issuing injunction against former employee who had solicited former co-worker).

75. See *McGriff Ins. Servs., Inc. v. Littlestone*, No. 21-cv-480, 2021 WL 4272980, at *11–15 (M.D. Fla. Sept. 21, 2021) (denying motion for preliminary injunction for insufficient evidence of solicitation; former employees filed declarations denying that defendant solicited them to join his new company); *Virtual Radiologic Corp. v. Rabern*, No. 20-CV-0445, 2020 WL 1061465, at *1–3, 5 (D. Minn. Mar. 5, 2020) (denying request for preliminary injunction where content of “one very brief phone call” with former co-worker “was not itself an offer of employment”); *Accuform Mfg., Inc. v. Nat'l Marker Co.*, No. 19-cv-2220-T-33, 2020 WL 1674577, at *7 (M.D. Fla. Jan. 13, 2020) (“vague LinkedIn message” insufficient for injunctive relief); *Cramton v. Grabbagreen Franchising LLC*, No. CV-17-04663, 2019 WL 7048773, at *36–37 (D. Ariz. Dec. 23, 2019) (reviewing “12 short text messages” and denying summary judgment for former employer where evidence was “unclear” and did not show solicitation).

1. The Co-worker Non-solicitation Covenant Is Not a Category of Trade Secret Law

One common justification for enforcing a co-worker non-solicitation covenant is that doing so protects the former employer's trade secrets (or "confidential information," as some courts put it). The implicit proposition is that enforcing these covenants is a category of trade secret law, standing alongside federal and state trade secret statutes and nondisclosure agreements. But there is good reason to reject this argument—and there is some mystery why courts have not done so given its flimsiness. After all, trade secret law is encompassed not just by federal and state statutes, but by a separate clause in employment agreements—the confidentiality clause. More fundamentally, trade secret law protects nonpublic business information that has value to competitors. An employee is not a company's trade secret under any definition of trade secret law, and neither is his or her contacts with former co-workers.⁷⁶

There are many examples where the former employer or the court pointed to protection of trade secrets as such a justification. In 2020, a Texas employer asserted that it uses co-worker non-solicits to "safeguard [its] relationships with its employees, promote workforce stability, and maintain the confidentiality of" its information—and the court seemingly accepted those rationales in granting summary judgment against a former employee for accepting applications from his former co-workers at his next job.⁷⁷ A Massachusetts court cited "legitimate business interests—which include guarding against the

76. Indeed, an employee's skills and knowledge, in general, are not protectable as trade secrets. Camilla A. Hrdy, *The General Knowledge, Skill, and Experience Paradox*, 60 B.C. L. REV. 2409 (2019) (comprehensive study of this concept). As that is the case, there can be no serious contention that an employee's identity or personhood is something in which an employer holds an intellectual property interest, though courts sometimes have to remind employers of that fact. *See ProV Int'l, Inc. v. Lucca*, No. 19-cv-978-T-23AAS, 2019 WL 5578880, at *3 (M.D. Fla. Oct. 29, 2019) (granting motion to dismiss with leave to amend where employer claimed trade secrets in employee identities; "[T]he amended complaint alleges no facts suggesting that the plaintiffs concealed the identity of the plaintiffs' employees or that the plaintiffs prohibited employees from disclosing the company for whom the employees worked."); *Metro Traffic Control, Inc. v. Shadow Traffic Network*, 22 Cal. App. 4th 853, 862–63 (1994) (rejecting claims that employer owned trade secrets in characteristics of radio broadcasters; "A stable of trained and talented at-will employees does not constitute an employer's trade secret.").

77. *See Zywave, Inc. v. Cates*, No. 18-CV-751, 2020 WL 1182286, at *1, *4 (E.D. Tex. Feb. 21, 2020) (applying the legitimate business interest test common to all Texas non-competition covenants).

release or use of trade secrets or other confidential information, or harm to the employer's goodwill."⁷⁸

Another Texas case engaged in unusually lengthy—though questionable—analysis to justify such a covenant and affirm an injunction to enforce it. The court found that a former employer's interests in goodwill, trade secrets, customer information, or specialized training can suffice to justify non-solicitation clauses.⁷⁹

In another detailed ruling, a federal court in Ohio rested in part on an intellectual property protection rationale to enforce a co-worker non-solicitation covenant.⁸⁰ It upheld the clause because the former employer "was attempting to protect its legitimate interest in avoiding unfair competition due to the relationships built and information shared as part of the [group of independent contractors at issue]."⁸¹ While the court's reasoning is not entirely clear, this suggests that protecting "information shared" was a major part of its rationale.

New York courts hold that an employer's interest in protecting "its confidential and trade secret information" suffices as a basis for enforcement.⁸² Where the employer does not assert trade secret protection, however, merely seeking to stop competition is an insufficient interest.⁸³

All of these rulings are flimsy because none appear to question the former employer's assertion that there is some reasonable connection between trade secret protection and enforcement of a non-solicitation clause. The employer's implicit argument in such cases seems

78. See *Robert Half Int'l, Inc. v. Simon*, No. 2084CV00060BLS2, 2020 WL 1218988, at *4, *9 (Mass. Sup. Ct. Jan. 29, 2020) (although the court enforced a non-competition agreement in an injunctive order, it notably did not apply a co-worker non-solicitation covenant, not only because it did not find solicitation, but because merely protecting the plaintiff "against ordinary competition" was insufficient, and finding that the former employer did not demonstrate that the clause "protects against the misuse of confidential information or the loss of goodwill").

79. See *Smith v. Nerium Int'l, LLC*, No. 05-18-00617-CV, 2019 WL 3543583, at *5 (Tex. Ct. App. Aug. 5, 2019). The court's reasoning was contradictory, however, as it used trade secret protection as one basis to enforce the covenant but also noted that the purpose of the covenant was anticompetitive, and not to prevent the disclosure of confidential information. See *id.* at *6.

80. See *Horter Inv. Mgmt., LLC v. Cutter*, 257 F. Supp. 3d 892, 902, 907–08 (S.D. Ohio 2017) (granting and denying motions for summary judgment in part).

81. See *id.* at 909.

82. See *Gen. Elec. Co. v. Uptake Tech., Inc.*, 394 F. Supp. 3d 815, 825–26 (N.D. Ill. 2019) (describing and applying New York law in choice-of-law dispute).

83. See *In re Document Tech. Litig.*, 275 F. Supp. 3d 454, 466–68, 470 (S.D.N.Y. 2017) (denying request for preliminary injunction); cf. *Ikon Off. Sols., Inc. v. Usherwood Off. Tech., Inc.*, No. 9202–08, 2008 WL 5206291, at *17–18 (N.Y. Sup. Ct. Dec. 12, 2008) (issuing preliminary injunction to enforce covenant as to several former employees; relying on standard New York justification for restrictive covenants in general).

to be—perhaps—that if two or more former co-workers work together again at the next job, there is a marginal net increase in some (unquantified) risk that trade secrets will be misappropriated compared to the instance where the same individuals leave for different positions at different companies. Or, perhaps the argument is that if one former employee leaves but another is stymied from leaving, there is a net decrease in the risk of trade secret misappropriation. Either way, companies do not offer empirical evidence that two or more employees leaving together via one’s solicitation of the other has any impact on relative rates of trade secret misappropriation—and indeed, no such study appears to exist. For that matter, courts also do not ask, empirically, if the plaintiff-employer has ever hired two or more people from the same company itself. If so, that would tend to discredit the speculation on offer.

More cynically, it is possible that the trade secret protection argument is offered to courts without such underlying theories in mind at all. Perhaps nobody actually believes that misappropriation will increase if one co-worker hires another. Perhaps the argument is a calculated nod towards some more important area of law—intellectual property—with the assumption that courts will not notice that two distinct things are being blended together, one used to buttress the other.

Whether cynicism or sincere belief, none of these employers in the cases cited here offered empirical facts about the particular employees in question, or their new employer. That is, the supposed risk of trade secret misappropriation is offered as a hypothesis, not as evidence. It is a version of the so-called “inevitable disclosure” theory, where a former employer clairvoyantly guarantees that should a departing employee start work at a new, competing position elsewhere, he or she will unavoidably misappropriate trade secrets.⁸⁴ But in the context of the co-worker non-solicitation covenant, the argument is made only implicitly, and is offered whether or not the employee’s new job is competitive. The argument is speculative to an extreme degree.

Courts should reject this justification. The co-worker non-solicitation covenant should not be treated as some sort of adjunct to trade secret law. There are good reasons to reject the trade secret protection

84. For a nationwide survey of the “inevitable disclosure” concept since its apparent origin in 1919, see Charles Tait Graves, *Is There an Empirical Basis for Predictions of Inevitable Disclosure?*, 18 WAKE FOREST J. BUS. & INTELL. PROP. L. 190, 193 (2018).

rationale for enforcing these covenants. First, everyone's employment contract includes a separate and distinct confidentiality clause, which invariably bars the employee from using or disclosing the former employer's trade secrets after leaving. The co-worker non-solicitation clause, by contrast, says nothing about confidential information and in and of itself does nothing to enforce a confidentiality obligation. If an employer neglected to include a confidentiality clause in the agreement, the non-solicit covenant would hardly operate as a substitute.⁸⁵

Second, state and federal trade secret laws already exist to regulate trade secret protection.⁸⁶ Trade secret law operates in exactly the same way whether or not an employment agreement contains a co-worker non-solicitation covenant. The non-solicit covenant adds nothing that statutory law does not separately provide to an employer, provided that the employer actually has a valid trade secret claim and can support it with evidence.⁸⁷

In summary, the co-worker non-solicitation covenant is not a category of trade secret law and it should not be permitted to take shelter under the rubric of a stronger, better-articulated legal doctrine. Whether the employer has any identifiable interest in restraining co-worker solicitation must rest on some other ground, with some closer

85. The 2019 *Nerium* case discussed above is the only ruling I have located where a defendant pointed out that a non-solicitation clause is not the same thing as a confidentiality clause. This proved unavailing, as the court floundered in contradictory reasoning to justify enforcing the covenant. *See Smith v. Nerium Int'l, LLC*, No. 05-18-00617-CV, 2019 WL 3543583, at *6–8 (Tex. Ct. App. Aug. 5, 2019). The court's poor logic demonstrates the disconnect between the rhetoric used to justify such clauses and any well-reasoned theory of intellectual property protection.

86. *See, e.g.*, 18 U.S.C. § 1832 (2018) (Defend Trade Secrets Act). State law generally means the version of the Uniform Trade Secrets Act (UTSA) and New York's common law version of trade secret law. *E.g.*, CAL. CIV. CODE §§ 3426.1–3426.11 (West 2016) (California's version of the UTSA); N.H. REV. STAT. ANN. §§ 350-B-1 to -9 (2009); *Ashland Mgmt. v. Janien*, 624 N.E.2d 1007, 1012 (N.Y. 1993) (following the Restatement of Torts' definition of trade secrets).

87. The distinction between trade secret law and the co-worker non-solicitation covenant does not prevent confusion from both directions. In one case, an employer tried to use trade secret law to prevent co-worker solicitation where it did not have contractual covenants to support the claim. *See ProV Int'l, Inc. v. Lucca*, No. 19-cv-978-T-23AAS, 2019 WL 5578880, at *1, *5 (M.D. Fla. Oct. 29, 2019) (noting that former employer, "apparently frustrated by the absence of a non-solicitation clause . . . claims that [former employees] both engaged in 'deceptive and unfair trade practices' and misappropriated 'trade secrets' by disclosing to [new employer] the identity of [former employer's] employees and clients;" denying request for preliminary injunction because there was no plausible suggestion that the identities of employees were the company's trade secrets). In any event, the availability of these covenants and the ability to urge intellectual property-based justifications for them should be added to the list of the many ways that employment contracts can overflow the boundaries of trade secret protection to grant greater power to employers. *See Deepa Varadarajan, The Trade Secret-Contract Interface*, 103 IOWA L. REV. 1543, 1563–73 (2018) (analyzing the "evasive role of contracts in trade secret law" to expand trade secret subject matter and "eliminate" defenses such as reverse engineering).

nexus to the act of someone offering a former co-worker a job. As we shall see, however, justifications not tethered to an intellectual property rationale fare no better.

2. The Customer Goodwill Justification Is Also Unconvincing

Another common argument employers pose in favor of the co-worker non-solicit is that enforcement protects the “goodwill” of the business. Like the trade secret justification, this argument appears hollow, as employers do not explain how two or more employees leaving together has a meaningful connection to business goodwill, much less one that would override their choice of new employment.

Some courts offer goodwill as a sort of empty signifier—a fill-in-the-blanks exercise to name a justification for enforcement without a logical explanation. For example, a Maryland court found the purpose of employee non-solicitation clauses is to prevent employees from “trading on the goodwill they generated during their former employment.”⁸⁸ This is unclear at best. What sort of “goodwill” did the court have in mind, and why would one former employee inviting a co-worker to leave “trade” on it? Did the court mean to suggest that merely meeting one another at a job was some “goodwill” in which the employer had controlling stake? Another court similarly applied Maryland law to find a protectable interest in employees’ “customer goodwill they helped create for the employer.”⁸⁹

In the *Nerium* case discussed above, where a Texas court cited the trade secret justification, it also ruled that goodwill in employees and their identities was supposedly another basis for enforcement.⁹⁰ In doing so, the court quoted a legal dictionary definition of “goodwill” that described factors that would matter to external consumers or other commercial parties—“reputation, patronage, and other intangible assets that are considered when appraising the business.”⁹¹ That definition does not explain why employees constitute part of the employer’s

88. See *Allegis Grp., Inc. v. Jordan*, No. GLR-12-2535, 2014 WL 2612604, at *9 (D. Md. June 10, 2014) (finding clause unenforceable because it was defined to include two other companies, affiliates of the plaintiff, to which the employee had no connection).

89. See *EASi, LLC v. Gaffar*, No. 20-CV-1235, 2020 WL 3868394, at *3 (C.D. Ill. July 9, 2020) (granting temporary restraining order in part).

90. *Smith v. Nerium Int’l, LLC*, No. 05-18-00617-CV, 2019 WL 3543583, at *11 (Tex. Ct. App. Aug. 5, 2019).

91. See *id.* at *5; *EASi, LLC*, 2020 WL 3868394, at *13 (quoting *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 778 (Tex. 2011)); *Goodwill*, BLACK’S LAW DICTIONARY (7th ed. 1999). Notably, *Marsh USA* concerned non-compete agreements, not co-worker non-solicitation covenants.

business goodwill, especially when they are at-will and can leave whenever they want to. Customers do understand and accept, after all, that a business's workforce will change over time.

In another example, Delaware's Court of Chancery enforced a covenant barring both solicitation and hiring under New Jersey law in 2007.⁹² It enjoined a former employee, required him to pay back his severance, and required him to pay attorneys' fees.⁹³ The former employee argued that he had not solicited the six former co-workers he hired.⁹⁴ The court found the clause enforceable (specifically, the no-hire portion) because it supposedly protected two of the employer's interests, the first of which was a goodwill theory: "the goodwill created by its sales representatives, which is vulnerable to misappropriation if the employer's former employees are allowed to solicit its customers shortly after changing jobs."⁹⁵ The court appeared to treat employees' skills and talents as a property interest of the employer, and did not question why they left and whether the employer could replace them. And again, the court did not acknowledge that the at-will employees could leave at any time. The court also conflated two issues—customer solicitation and co-worker solicitation—together, suggesting the flimsiness of justifications for the latter alone.

To be sure, goodwill is a long-recognized justification for non-competition agreements in the discrete context where someone sells a business—the sale would have little meaning if the seller could set up essentially the same business soon thereafter to attract the same customers. Thus, it is not surprising that the goodwill rationale has been employed to affirm a co-worker non-solicitation covenant against a seller who has sold the business.⁹⁶

But outside that narrow, sale-of-business context—after all, the average employee hardly has an entire business to sell, and is merely leaving for another job—the goodwill argument appears empty. In the first place, it is not clear what the former employer proposes. Is it that

92. *Weichert Co. v. Young*, No. 2223, 2007 WL 4372823, at *1, *5 (Del. Ch. Dec. 7, 2007).

93. *Id.* at *4, *6. The court also based its ruling on an employee training rationale, namely that the employer spent "considerable resources training its employees and helping them to obtain the appropriate licenses," setting up a "school" to prep for "licensing exams." *Id.* at *4.

94. *Id.* at *5.

95. *See id.* at *4.

96. *See Capstone Logistics Holdings, Inc. v. Navarrete*, No. 17-cv-4819, 2018 WL 6786338, at *14–17, *34–35 (S.D.N.Y. Oct. 25, 2018) (issuing preliminary injunction under Delaware law where, among other things, there were negative facts against departing employees on destruction of evidence; former employees had sold their business but then solicited many former co-workers to form a new, competing business).

one or more customers will view the company less favorably if two or more employees end up at the same next job? This assumes customers would notice, as opposed to (perhaps) simply noticing that certain employees are not there anymore. If two people leave for two different jobs, or retire, what is the marginal difference, if any, between such contexts and two people joining the next job together? Or, perhaps the implied argument is that the customer will see the former employees working together at a competitor—but that requires among other things that the competitor have comparable goods, prices, and services on offer to potentially attract the customer—where the customer’s own interests seem strongest. And what if the new hires are better, or if other current employees can provide the same services just as well? Courts do not inquire.

Whatever it is that the goodwill argument means to propose, employers offer no empirical evidence to support a hypothetical about what transpires in customers’ minds, and that turns on the smallest shades of difference about what customers might know, think about, and make decisions upon. It is entirely conjecture. Like the trade secret justification, the goodwill argument comes across in the case law as an artificial placeholder, not an argument that rests on a considered basis supported by evidence.

3. The Training Justification Is Also Dubious

A third justification employers offer when seeking to enforce a co-worker non-solicitation covenant is that the restraints protect an investment in employee training.⁹⁷

As with the other justifications under scrutiny, courts do not press employers to provide support for this argument. For example, courts do not appear to require a showing that training was actually provided, that it cost much, that it was anything more than routine, that the employees at issue needed it, or—most important—that the employer has

97. *See, e.g.*, *Superior Performers, Inc. v. Thornton*, No. 20-cv-00123, 2021 WL 2156960, at *9 (M.D.N.C. May 27, 2021) (in entering permanent injunction against former employee as to covenant on a default judgment, finding that the employer’s “investment in” solicited employees was an “intangible” interest for which monetary damages would not suffice); *Accuform Mfg., Inc. v. Nat’l Marker Co.*, No. 19-cv-2220-T-33, 2020 WL 1674577, at *7 (M.D. Fla. Jan. 13, 2020) (former employer cited “its substantial investment in its employees’ specialized training regarding its industry, product lines, and sales practices” as legitimate interest in bid to obtain injunction; it also cited customer goodwill and “valuable confidential business information” as supposed legitimate interests); *Smith v. Nerium Int’l, LLC*, No. 05-18-00617-CV, 2019 WL 3543583, at *5 (Tex. Ct. App. Aug. 5, 2019) (listing training among other justifications); *Manitowoc Co. v. Lanning*, 906 N.W.2d 130, 142 (Wis. 2018) (employer asserted training as one of several justifications).

not already recouped whatever time or effort went into training through the employees' efforts. Thus, at an empirical level, courts implicitly accept the training argument as a hypothetical—not as evidence. What, after all, would the departing employee have to say about the training he or she was supposedly given? What if he or she instead brought important skills to the table upon being hired, such as experience gained from graduate school or a prior job?⁹⁸

More important, courts do not appear to question what connection the provision with training has with one co-worker hiring another for a new job. Because employees are at-will and—despite non-competition agreements—can quit at any time, the provision of training is largely a sunk cost.⁹⁹ If the employer wanted to require employees to stay for some period of time related to training, it can negotiate (and pay for) term agreements.¹⁰⁰

4. The Incoherent “Stable Workforce” Justification

A fourth justification some employers offer in favor of the co-worker non-solicitation covenant—clearly the weakest—is that such clauses help the employer maintain a stable workforce. In an era of at-will employment, where the employer can fire any employee for almost any reason on a moment's notice, offering this justification takes some degree of chutzpah.

Perhaps for that reason, courts have been less sympathetic to this argument. That said, courts have reserved their sharpest criticisms for direct-sales schemes, not for ordinary employers. For example, a federal court in Illinois declined to enforce an employee non-solicitation

98. It is well established that employees can transport general skills, knowledge, and experience from job to job, and that such information is not a protectable trade secret. For the most trenchant study on the topic, see Hrды, *supra* note 76, at 2440–72.

99. For a comprehensive treatment of how some employers attempt to attach contractual restrictions to their provision of employee training and a proposal for how to determine when such restrictions should be deemed unconscionable, see Jonathan F. Harris, *Unconscionability in Contracting for Worker Training*, 72 ALA. L. REV. 723 (2021).

100. The employee training justification is not unique to case law regarding the co-worker non-solicitation covenant. It also occasionally crops up in disputes over general non-competition covenants. For a critique of this approach in view of the scholarly literature and case law on that issue, see Charles Tait Graves, *Analyzing the Non-Competition Covenant of Intellectual Property Regulation*, 3 HASTINGS SCI. & TECH. L.J. 69, 83 (2011) (“Commentators working under this framework often pose an unrealistic view of the power imbalance between the employer and employee, and operate with a model that imagines employers and employees sitting down to calculate their respective marginal gains and losses from future activities should they enter the covenant.”). Commentators defending the theory have sometimes argued for a repayment remedy. *E.g.*, Brandon S. Long, Note, *Protecting Employer Investment in Training: Noncompetes vs. Repayment Agreements*, 54 DUKE L.J. 1295, 1302 (2005).

covenant after undertaking an unusually detailed review of Illinois law, albeit on an extreme fact pattern. In *Pampered Chef v. Alexanian*,¹⁰¹ the plaintiff was a direct marketing company that enlisted ordinary people to peddle kitchenware to friends and relatives.¹⁰² It classified its vast workforce of tens of thousands as independent contractors.¹⁰³ The turnover rate sometimes hit 100 percent per year.¹⁰⁴ Successful salespeople became “Directors,” and had to sign a co-worker non-solicitation covenant.¹⁰⁵ When the employer changed its rules to lower the income of such Directors, several of them left.¹⁰⁶ The company promptly sued them for violating a co-worker non-solicitation covenant.¹⁰⁷

Pampered Chef mounted an aggressive attack with no shortage of hubris. Demanding injunctive relief, it declared a purported need to maintain a “stable workforce” as a factor legitimizing its restrictive covenants.¹⁰⁸ It hired an expert who proposed (without empirical support) that the departure of “Directors” would cause “fractured belief, broken trust, and broken relationships,” supposedly lowering the morale of remaining salespeople.¹⁰⁹ To be sure, pointing to a supposed need to maintain a “stable workforce” was not an original move, because a prior Illinois decision had relied on that justification to satisfy a “legitimate interests” test to enforce such a covenant.¹¹⁰

The court, however, denied Pampered Chef’s request for injunctive relief and declined to enforce the covenant. At the same time, its review of Illinois law highlighted how traditional types of companies can easily enforce them: the court noted that protection of trade secrets, restricting departures of employees with rare skill sets, and holding onto long-time employees all provide interests justifying enforcement.¹¹¹ Although the court skewered Pampered Chef and its purported expert with evident glee—“[o]bviously,” maintaining a stable work force “requires a work force that is stable in the first instance or at least one whose stability will likely result from the restrictive

101. 804 F. Supp. 2d 765 (N.D. Ill. 2011).

102. See *Pampered Chef*, 804 F. Supp. 2d at 771.

103. *Id.*

104. *Id.* at 788.

105. See *id.* at 772, 792–93 (rejecting expert testimony as baseless)

106. *Id.* at 771.

107. See *id.* at 765–66.

108. *Id.* at 781.

109. *Id.* at 773.

110. See *Arpac Corp. v. Murray*, 589 N.E.2d 640, 649–50 (Ill. Ct. App. 1992).

111. See *Pampered Chef*, 804 F. Supp. 2d at 782–85 (collecting cases).

covenant”¹¹²—the result was merely to chastise an outlier, not to question the manner in which virtually every other business in the jurisdiction could enforce such covenants.

At least one other case, following *Pampered Chef*, analyzed the employee attrition rates over a four-year period of the plaintiff—an employee staffing company—finding that 77 percent of its employees had left since the defendants left. On that basis, it rejected the employer’s claim that the non-solicit clause protected its interest in a stable workforce.¹¹³

Other courts, however, sometimes rely on such justifications for enforcement. A Tennessee court found that an employer had a “protectable interest in maintaining its current employees,” and found that a former employee violated the covenant simply by placing a help-wanted ad in the newspapers “and then conducting interviews of potential candidates” who were former co-workers and who had applied for the job.¹¹⁴

Courts should reject the “stable workforce” argument when employers opt for at-will employment. Companies that can drop employees for any reason, at any time, do not have standing—so to speak—to claim that a desire for a locked-in, unshifting workforce is some greater interest than employees’ desire to leave together and work together. At-will employment is inherently unstable. Moreover, since individual employees can come and go as they wish (that is, absent co-worker solicitation) the premise is a fiction, not an empirical fact. Courts can undercut such arguments by requiring employers to submit attrition data as to annual turnover, and inquire about layoffs as well.

5. Some Courts Are Skeptical of These Traditional Justifications

That employers blanket the courts with cookie-cutter justifications for their lawsuits against former employees does not mean that every court accepts such arguments. As the major exception, California rejects co-worker non-solicitation covenants as a matter of public policy, in line with its longstanding protection of employee mobility

112. *See id.* at 787–88.

113. *See* Instant Tech., LLC v. DeFazio, 40 F. Supp. 3d 989, 1013–14 (N.D. Ill. 2014) (finding covenants “unreasonable and unenforceable,” also due to overbroad scope).

114. *See* Int’l Sec. Mgmt. Grp., Inc. v. Sawyer, No. 06CV0456, 2006 WL 1638537, at *17–18 (M.D. Tenn. June 6, 2006) (issuing preliminary injunction even though nobody was hired; consulting dictionary definitions of “solicit”).

against employer overreach.¹¹⁵ Alabama too restricts such covenants, at least to some degree, via changes to its controlling statute in 2016.¹¹⁶ Hawaii has an industry-specific ban forbidding co-worker non-solicits as to “any employment contract relating to an employee of a technology business.”¹¹⁷ And, as of 2022, Illinois requires either two years of “continuous employment” or some “professional or financial benefits” for enforcement, and forbids the covenants for lower-wage workers.¹¹⁸

Even where there is no limiting statute, some courts have reacted negatively when confronted with overbearing lawsuits by employers. One zealous former employer, a farming company in Washington, sued “a low-level agricultural worker” “who cannot read or write in English” and claimed that he had violated a non-solicitation covenant not by soliciting anyone, but because, as the court put it, “his decision to terminate his at-will employment may have inspired the other

115. *See* *AMN Healthcare, Inc. v. Aya Healthcare, Inc.*, 28 Cal. App. 5th 923, 936 (2018); *see also* *Six Dimensions, Inc. v. Perficient, Inc.*, 969 F.3d 219, 228–29 (5th Cir. 2020) (applying California law, following *AMN*, reversing jury verdict in part, and voiding a co-worker non-solicitation clause); *Barker v. Insight Glob., LLC*, No. 16-cv-07186, 2019 WL 176260, at *3 (N.D. Cal. Jan. 11, 2019) (voiding co-worker non-solicitation clause); *WeRide Corp. v. Huang*, 379 F. Supp. 3d 834, 851–52 (N.D. Cal. 2019) (voiding co-worker non-solicitation clause); *Nuvasive, Inc. v. Miles*, No. 2017-0720, 2019 WL 4010814, at *7 (Del. Ch. Aug. 26, 2019) (finding that California law controlled and prohibits employee non-solicitation covenants, granting partial summary judgment for former employee on that basis); *Bakemark, LLC v. Navarro*, No. LA CV21-02499, 2021 WL 2497934, at *13 (C.D. Cal. Apr. 24, 2021) (citing *AMN* and other recent cases to note that covenant “may be found invalid” but not deciding issue on application for injunctive relief in trade secret case); *Gen. Elec. Co. v. Uptake Tech., Inc.*, 394 F. Supp. 3d 815, 827 (N.D. Ill. 2019) (finding *AMN* and other recent cases “persuasive” under California law but finding that New York law instead governed contracts); *cf.* *Aramark Mgmt. v. Borgquist*, No. 18-cv-01888, 2021 WL 3932258, at *9 (C.D. Cal. July 8, 2021) (incorrectly interpreting California law to hold that a non-solicitation covenant was valid because it was only a partial restraint on trade, without considering contrary California authority; finding a breach because defendant encouraged a former co-worker to resign).

116. Alabama’s statute is written in the negative, but the gist is that it prohibits no-hire and non-solicitation covenants except as to people who are deemed to hold “a position uniquely essential to the management, organization, or service” of the company. *See* ALA. CODE § 8-1-190(b)(1) (2021) (“[T]he following contracts are allowed to preserve a protectable interest: (1) A contract between two or more persons or businesses or a person and a business limiting their ability to hire or employ the agent, servant, or employees of a party to the contract where the agent, servant, or employee holds a position uniquely essential to the management, organization, or service of the business.”). There does not appear to yet be case law construing whether this is to be interpreted broadly or negatively.

117. *See* HAW. REV. STAT. § 480-4(d) (2021). A technology business is defined as “a trade or business that derives the majority of its gross income from the sale or license of products or services resulting from its software development or information technology development, or both,” but excludes telecommunications and broadcasting businesses. *See id.*

118. *See* S.B. 672, 102d Gen. Assemb., 1st Reg. Sess., Pub. Act 102-0358 (Ill. 2021) (enacted). The income threshold is \$45,000 and will increase over time. *Id.*

defendants with the courage to quit as well.”¹¹⁹ Although the court unsurprisingly rejected the claim on a summary judgment motion,¹²⁰ the very existence of such a lawsuit demonstrates that employers feel bullish about their prospects in attacking former employees over such covenants.

Some courts carefully parse the evidence with clear skepticism of non-solicitation covenants, albeit without substantive legal analysis of why they exist or why they have been justified over the years. For example, in a 2020 case from the District of Kansas, a former employee had signed a one-year co-worker non-solicitation covenant under which he would not “personally participate or be materially involved in any manner in the hiring or attempt to hire” a former co-worker.¹²¹ Although the court did not examine any legal basis for enforcing the covenant—and thus implicitly found it enforceable—it noted that although the attorneys had not raised the issue, the clause seemed dubious because it encompassed solicitation to a non-competitive job.¹²² As the court put it, “this provision would seem to prevent hiring [plaintiff’s] employee to do construction work, clean a house, or perform some entirely unrelated type of work.”¹²³ The court then denied a request for a preliminary injunction on equivocal evidence that where a former employee had communicated with a current employee, it seemed that the latter had initiated interest in leaving the company.¹²⁴

In 2017, a Minnesota federal court declined to enter a temporary restraining order against a former employee for allegedly breaching a co-worker non-solicitation clause where he informed one former co-worker that his new employer “bought him a new truck” and informed another that the new employer “would pay him better than” his former employer. The court found that “such actions do not rise to the level of solicitation.”¹²⁵ Similarly, a Wisconsin court denied a former

119. *See* Genex Coop., Inc. v. Contreras, No. 2:13-cv-03008, 2014 WL 4959404, at *7 (E.D. Wash. Oct. 3, 2014) (the defendants were also sued for violating non-competition covenants and for related claims).

120. *Id.* at *12.

121. *See* Biomin Am., Inc. v. Lesaffre Yeast Corp., No. 2:20-cv-02109, 2020 WL 1503475, at *2–3 (D. Kan. Mar. 20, 2020).

122. *See id.* at *11 n.8.

123. *See id.*

124. *See id.* at *7–8, *11.

125. *See* Mid-Am. Bus. Sys. v. Sanderson, No. 17-3876, 2017 WL 4480107, at *6 (D. Minn. Oct. 6, 2017) (the court did not examine any legal basis for enforcing such agreements, and instead ruled only on the facts).

employer's request for injunctive relief as to such a covenant where—in contrast to the arguments made to justify a customer non-solicitation clause—the plaintiff did “not clearly develop[] any argument as to why the *employee*-solicitation clause is valid.”¹²⁶

The Wisconsin Supreme Court held in 2018 that co-worker non-solicitation covenants are subject to the state's statute governing non-competition clauses, and its five-element test for reasonableness (essentially, the employer must show a protectable interest, the clause cannot be “harsh or oppressive to the employee,” and it must have reasonable time and territorial limits).¹²⁷ The employer in that case contended that its interest was protecting itself from “the loss of the employee(s) it trained and invested time and capital in, and the institutional understanding, experience, and intellectual capital they possess.”¹²⁸ Notably, the court held that the clause—which barred solicitation of any of the company's 13,000 employees worldwide, regardless of their position or whether the former employee knew them, “flouts” the general rule that the law does not prevent raiding of employees, in and of itself.¹²⁹

Thus, outside of California, we can find a few cases expressing skepticism towards co-worker non-solicitation clauses. But these rulings are few and far between. They lack an overarching, common structure or theory courts can use to pick apart employers' flimsy arguments in a sustained manner. That raises the question of whether such a structure is possible. Is there a readily transposable battery of tests or analyses that courts can use to better identify employees' needs and interests, and better highlight the unspoken motives driving employers' arguments, in these disputes?

126. *See* Share Corp. v. Momar Inc., No. 10-CV-109, 2010 WL 933897, at *4 (E.D. Wisc. Mar. 22, 2010) (denying overall request for injunctive relief on all causes of action).

127. *See* Manitowoc Co. v. Lanning, 906 N.W.2d 130, 140 (Wis. 2018) (interpreting section 103.465 of the Wisconsin Statutes).

128. *See id.* at 141.

129. *See id.* at 142.

IV. REFORM: QUESTIONING THE CO-WORKER NON-SOLICITATION COVENANT

A. *Viewing the Employee Non-solicitation Clause as a Salary Suppression Tactic*

It can be difficult to picture reform in an area of law that so often features hackneyed arguments and paint-by-numbers rulings. Few practitioners or judges are asking fresh questions. Making careful reasoning less likely, many rulings take place in the context of rushed applications for injunctive relief where defense counsel may have only days (or less) to prepare an opposition. But it is time to give the co-worker non-solicitation covenant a new and more skeptical examination.

So what is really going on when an employer uses contract terms to prevent a former employee from inviting his or her former co-workers to leave?

This Article proposes that using and enforcing non-solicitation covenants serves the employer's goal of avoiding salary increases to the extent possible under current law.¹³⁰ If someone is leaving for another job, and if that person was invited by someone who previously left, the employer may fear that others too will be invited. If the new job pays more or offers better conditions or promotions, the employer would be forced to bargain with employees to retain them (or to lure potential replacements) if it cannot use the law to stop them from leaving. Using contract terms to inhibit one type of employee departure helps the employer avoid such consequences.¹³¹

As we know, employees in general can leave when they see fit, and other companies can cold call them for employment since the tort

130. To be sure, a company must pay attorneys' fees to enforce such covenants. But there is no incremental cost to using employment agreements that contain co-worker non-solicitation covenants; they are part of standard off-the-shelf contracts that law firms provide for companies and need not be drafted specially for each client.

131. A recent empirical study based on survey data reached a consistent conclusion from a different perspective. It found that when co-worker non-solicits are bundled with other restrictive covenants in employment agreements, companies can "suppress[] wage growth" and also that "employees bound by all four restrictions have on average 5.4% lower annual earnings than employees with only [a confidentiality agreement]." See Balasubramanian et al., *supra* note 4, at 3, 22. As Professor Starr noted in a comment to the author, "the key issue related to employee non-solicits is that they impose a direct externality on other coworkers. That is, you going to a certain employer forecloses on a job opportunity for me, because of a contract that *you* agreed to." This observation is also consistent with the conclusion that such covenants operate as a salary suppression device.

of enticement no longer exists. All of that is beyond the employer's control. But if using co-worker non-solicitation covenants—a vestige of the medieval system of employer control—marginally helps avoid paying a higher salary to a replacement, employers will seize that opportunity. Put differently, if an employer can block at least some of the job offers made to its employees, it reduces at least that much pressure to increase wages and to improve working conditions.

B. Is Reform or Abolition of the Co-worker Non-solicitation Covenant Possible?

1. Legislative or Bold Court Action May Be Premature

In the long run, we may hope for legislative action to prohibit or at least weaken the power of the co-worker non-solicitation covenant. State legislatures' checkered approaches to the non-competition covenant, however, give pause that such action could be imminent. On one hand, several state legislatures in recent years have weakened the power of employee non-competition covenants, and in July 2021 the Biden Administration ordered the Federal Trade Commission “to exercise the FTC's statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.”¹³² For example, in 2020 Rhode Island banned non-competes for low-wage workers, Washington prohibited non-competes for middle-income workers as well, and in 2021 the District of Columbia banned non-competition agreements.¹³³ In 2015, Hawaii largely banned non-competition agreements and non-solicitation agreements for “employee[s] of a technology business.”¹³⁴

But these partial solutions came only after years of academic commentary and debate, and still for the most part offer only partial reform. In some cases, changes to state non-competition laws left co-worker non-solicitation covenants intact. For example, when Utah enacted a statute to impose a maximum time limit on employee non-competition covenants, it exempted non-solicitation covenants from

132. See Exec. Order No. 14036, 86 Fed. Reg. 36,987, 36,992 (July 9, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-07-14/pdf/2021-15069.pdf> [<https://perma.cc/ESP3-576Z>].

133. See 28 R.I. GEN. LAWS ANN. § 28-59-3 (West 2021); WASH. REV. CODE § 49.62.020(1)(b) (2019); Ban on Non-Compete Agreements Amendment Act of 2020 (D.C. Act 23-563), 68 D.C. Reg. 000782, 000782 (Jan. 15, 2021), <https://www.dcregs.dc.gov/Common/NoticeDetail.aspx?NoticeId=N102934> [<https://perma.cc/2M3V-4ZZ9>].

134. See HAW. REV. STAT. §§ 480-4(a), (d) (2021).

that restriction.¹³⁵ Rhode Island’s new statute exempts “covenants not to solicit or hire employees of the employer.”¹³⁶ That is not always the case: when Illinois altered its non-compete laws in June 2021 to ban such covenants for mid-to-lower income workers, it also banned co-worker non-solicitation covenants for a lower-income tier of workers.¹³⁷ But given this inconsistent recent history, lobbying a state legislature can be risky, especially when there is not yet any sustained discussion about the nature and real-world effects of the co-worker non-solicitation covenant.

Rather than sweeping legislation, a more realistic short-term possibility is that courts become more skeptical of the dubious rationales offered to block co-worker solicitation. To be sure, there are also risks with court-created limitations. For example, in 2000 a Missouri appellate court rejected co-worker non-solicitation covenants in a thoroughgoing ruling.¹³⁸ In applying the existing test that a Missouri restrictive covenant must protect trade secrets or customer information and contain reasonable “time and place” limits, the court found a co-worker non-solicitation covenant unenforceable because it did not serve to protect those interests.¹³⁹ The court instead found that “an employer does not have a proprietary interest in its employees at will or in their skills,” and ruled that the covenant

[C]an be used to restrict the employee’s post-employment ability to solicit employees for himself, his new employer, or anyone else. It restricts the flow of competitive information about the labor market, including the availability of opportunities and offers of employment to an employer’s at-will workforce. It thus has the effect of reducing competition in the labor market.¹⁴⁰

135. See UTAH CODE ANN. § 34-51-102(2)(b) (LexisNexis 2021). Oregon is a similar example. See OR. REV. STAT. § 653.295 (2021); Erin E. Gould, Comment, *Read the Fine Print: A Critical Look at Oregon’s Noncompete and Nonsolicitation Agreement Laws*, 88 OR. L. REV. 515, 517–18 (2009) (noting that a recent Oregon statute which placed some limits on non-competition covenants “exempts nonsolicitation agreements from all statutory regulations governing noncompete agreements”; “It is perplexing that a legislature would tightly regulate one and completely free the other.”).

136. See 28 R.I. GEN. LAWS ANN. § 28-59-2(8)(i) (West 2021).

137. See S.B. 672, 102d Gen. Assemb., 1st Reg. Sess. (Ill. 2021) (as amended by H. Comm., May 24, 2021).

138. See *Schmersahl, Treloar & Co., P.C. v. McHugh*, 28 S.W.3d 345, 349–51 (Mo. Ct. App. 2000).

139. *Id.*

140. See *id.*

However, the Missouri legislature reversed the decision a year later by statute, thus legitimizing non-solicitation covenants in that jurisdiction.¹⁴¹

The challenge for reform efforts is to first build out arguments against co-worker non-solicitation covenants, and to link them to existing debates over non-competition covenants and, more broadly, efforts to increase wages for workers in general. Change is difficult in this area where employers use adhesion contracts that leave every employee at a disadvantage from the outset. Those interested in reform need to first increase discussion among scholars and practitioners.

2. Courts Should Require Empirical Evidence and Consider the Departing Employees' Viewpoints

Courts need not wait for legislative reform efforts to start questioning the flimsy justifications employers offer when trying to stop a former employee from offering a co-worker a job. In many cases, these arguments would collapse under even mild scrutiny. A complete, California-style rejection of these covenants may not be possible in states that lack a tradition of protecting employees' mobility rights. But courts nonetheless have discretion to reject weak, evidence-free, and hypocritical arguments brought by employers.

There are several steps courts in any state can take towards something of a presumption of invalidity. First, courts should reject all four of the employers' justifications discussed above. All are mere hypotheticals unmoored to evidence. All are logically deficient. If a court asked counsel during a hearing to explain what these justifications mean, and what empirical evidence supports any of them, the response would likely consist of changing the subject, speaking in circles, and other such dissembling. Without evidence, there is no reason to accept dubious speculation.

Second, courts should take into account the inherent instability of the workplace. Employees come and go. The company itself hires employees away from other companies. If an employee wants to leave, why does the employer have an entitlement to interfere in the case where a former employee extends an invitation?

Third, courts should broaden the perspective of the dispute. Rather than training a narrow lens on the former employee, the alleged

141. See MO. ANN. STAT. § 431.202(l) (West 2021); see also *Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15, 28 n.7 (Mo. Ct. App. 2008) (noting legislative enactment).

act of solicitation, and the contract term at issue, courts should widen the view to include workplace conditions. This could mean allowing discovery into such issues before hearing a request for injunctive relief, or requiring employers to provide a much more robust threshold showing, rather than just lawyer-written affidavits filled with unverifiable generalizations about protecting trade secrets or the importance of goodwill.

Such discovery or submissions might include (1) whether the employer has hired two or more employees from any other company, which would tend to discredit the employer's contentions that such hiring leads to trade secret misuse or otherwise is wrongful; (2) the employer's annual attrition in the department(s) at issue; and (3) whether there has been a spike in employee departures, or layoffs.

Most importantly, however, courts might consider (4) the relative salaries at the former employer, and whether the departing employees(s) felt underpaid—or worse, bullied or harassed; (5) whether the new job offered something better: better pay, a promotion, or better working conditions; and (6) whether the former employer had counter-offered or not.

In short, courts should require discovery, and facts, to expose the salary suppression motive that very likely lies behind the non-solicitation covenant. Stripped of cover—such as the assertion that these covenants are somehow part of trade secret law—employers may find themselves hard-pressed to justify enforcement. This could have a salutary effect by refocusing the dispute away from unverifiable hypotheticals to real-world facts. And if the departing employees received something better at the next job such as better compensation, the former employer should have no ability to interfere with that better outcome. This result would incentivize counter-offers, higher pay, and better working conditions.

V. CONCLUSION

Skepticism is warranted when an employer seeks to use a restrictive covenant to stop someone from hiring their former co-workers. During such disputes, courts might profit from the observation that perhaps nobody in the courtroom during a dispute sincerely believes that co-worker non-solicitation covenants are sound policy. The company filing suit may have hired multiple employees who worked at the same companies in the past, and would gladly do so again if it had the

opportunity. The law firms that send cease and desist letters and file lawsuits to enforce non-solicitation covenants may have hired lateral partners from other law firms, who in turn solicited their favored associates to join them—the attorneys in court may have been among them. The same may be true of the presiding judge when he or she was in private practice.

In short, the company seeking enforcement is taking situational advantage of a remnant of the medieval legal system for a tactical advantage, not out of deeply held conviction. By doing away with this charade, and focusing on the empirical facts surrounding each dispute, courts can prevent companies from using non-solicitation covenants as a salary suppression device.