

A State Policymaker's Guide to  
**Non-Compete Reform**

# Executive Summary

Non-compete agreements are restrictive employment covenants that limit a worker's ability to switch jobs or start a new business. They are estimated to cover anywhere from **20 percent to 40 percent of today's workforce**, with negative impacts on wages, mobility, and entrepreneurship.

This guide is intended for state lawmakers who wish to take action against the use and abuse of non-compete agreements in their communities. By following these guidelines, state lawmakers can make important strides in curbing the negative economic effects of non-competes, unleashing their state's entrepreneurial talent, and empowering workers to enjoy the full benefits of free and fair competition for their labor.

Reforms should rest on the following eight principles:

- 1. Limit the share of the workforce that may be covered by a non-compete agreement.**
- 2. Exempt certain classes of workers entirely from non-compete agreements.**
- 3. Allow for private action and public enforcement against employers who misuse non-compete agreements with real penalties.**
- 4. Make clear that courts should throw out rather than revise non-compliant non-compete agreements.**
- 5. Require employers to provide workers with adequate time and resources to review a non-compete agreement.**
- 6. Restrict the length of time and the geographic scope that a valid non-compete agreement is enforceable.**
- 7. Require "garden leave" provisions in which employers must adequately compensate workers while an agreement is being enforced.**
- 8. Prohibit employers from requiring workers to sign invalid agreements.**

# Introduction

Non-compete agreements are increasingly prevalent provisions of employment contracts that limit a worker's ability to switch jobs or start a new business in the same industry as their employer for a period of time in a given area. Estimates suggest that anywhere between 20 percent to 40 percent of the private sector workforce is covered by a non-compete.<sup>i</sup> Covered employees range from interns and sandwich-makers to engineers and executives.

Non-compete agreements are an urgent policy issue because of their documented negative impacts on worker well-being and the broader economic dynamism of the communities in which they are enforced. For example, a burgeoning new field of academic research has established that curtailing the use of non-competes can significantly boost worker wages, especially for those with less education, women, and minorities.<sup>ii</sup> By freeing more workers to join high-growth firms or to start their own new ventures, non-compete reform can provide much needed boosts to local entrepreneurship and innovation, too.<sup>iii</sup> New, fast-growing firms are the primary source of net job creation nationwide; non-compete agreements directly obstruct that pipeline.

Curtailing the use of non-competes can significantly boost worker wages, especially for those with less education, women, and minorities.

Non-compete agreements themselves are overly blunt tools that unduly restrict worker mobility even as they inflict collateral damage on the wider labor market. Their prevalence up and down the wage spectrum is difficult to justify when more narrowly scoped provisions, such as non-solicitation agreements, nondisclosure agreements, and trade secret protections, exist to protect legitimate employer interests without closing off opportunities for worker advancement and mobility outside the firm. Non-competes have long been unenforceable in California, North Dakota, and Oklahoma. Momentum is now building to challenge the status quo in conservative, progressive, and middle-of-the-road states alike. <sup>iv</sup>

In total, 23 states plus the District of Columbia have revised statutes or enacted new non-compete legislation in recent years. From Texas to New Hampshire, half of all states are considering legislation this year alone.<sup>v</sup> Federal lawmakers have taken notice as well, and a bipartisan, bicameral group of legislators led by Senators Todd Young (R-IN) and Chris Murphy (D-CT) and Representatives Scott Peters (D-CA) and Mike Gallagher (R-WI) recently reintroduced the [Workforce Mobility Act](#), which would prohibit the use of non-compete agreements in most circumstances at the federal level. Meanwhile, the Biden administration’s [July 2021 Executive Order](#) on competition policy squarely establishes action against the growing misuse of non-compete agreements as an enforcement priority for the Federal Trade Commission.

This guide is intended for state lawmakers who wish to take action against the use and abuse of non-compete agreements in their communities. By following these guidelines, state lawmakers can make important strides in curbing the negative economic effects of non-competes, unleashing their state’s entrepreneurial talent, and empowering workers to enjoy the full benefits of free and fair competition for their labor.

## Key policy parameters for reform

When designing state-level non-compete legislation, lawmakers will be faced with a multitude of choices regarding which parameters to include and how intensely to dial up or down facets of each. Even though non-compete agreements are “contrary to public policy,” as Maine’s statute asserts<sup>vi</sup>, in many cases, local politics may compel lawmakers to make compromises that result in reforms that fall short of near-complete bans on the use of non-competes akin to the one recently enacted by the District of Columbia. Principled attention to the details of each parameter, however, can ensure that reforms still make meaningful advances in freeing workers to pursue their careers and in keeping local economies dynamic and entrepreneurial. To help inform the various choices that lawmakers face, a few key principles can guide policymakers pertaining to:

- **Who may be covered by a non-compete agreement;**
- **How non-compete agreements should be enforced; and**
- **What provisions non-compete agreements should include.**

# Who may be covered by a non-compete agreement

## Principle 1: Limit the share of the workforce that may be covered by a non-compete agreement.

### Why it matters

Barring a near total ban on the use of non-compete agreements, state policymakers should aim to exclude as large a segment of the workforce as possible from being covered. This can be accomplished by setting an income threshold such that all workers making less than 150 percent of the state's mean annual income, for example, are ineligible to be covered by a non-compete agreement. When set adequately high, such an income threshold can curb the use of non-competes in most circumstances, including the most egregious cases of employer overreach. The benefits of setting the income threshold sufficiently high are two-fold:

- **Fairness:** Income thresholds help achieve the fairness imperatives of non-compete reform by protecting low-wage, vulnerable workers who have little power to negotiate, as well as middle-wage workers who live paycheck-to-paycheck and have little option but to sign a non-compete if it is a condition of employment.
- **Economic impact:** Higher income thresholds reach more workers, of course, but they also offer significant economic dividends by freeing managerial talent, knowledge-based workers, and others engaged in generally higher-paid innovation-related activities from non-competes, allowing them to start their own new enterprises or join other local growth companies.

In addition, states should be sure their reforms cover independent contractors, which furthers both goals of protecting vulnerable workers and unleashing entrepreneurial talent.

### Which state has done this well: [Washington](#)

Washington's newly amended law set the income threshold sufficiently high (i.e., \$100,000 for employees and \$250,000 for independent contractors) to exclude most of the state's workforce from non-competes.

“A noncompetition covenant is void and unenforceable against an employee... (b) Unless the employee’s earnings from the party seeking enforcement, when annualized, exceed [\$100,000] per year...A noncompetition covenant is void and unenforceable against an independent contractor unless the independent contractor’s earnings from the party seeking enforcement exceed [\$250,000] dollars per year.” (Revised Code of Washington Chapter 49.62)

## Principle 2: Exempt certain classes of workers entirely from non-compete agreements.

### Why it matters

Across the economy, non-compete agreements are now being presented to interns, summer camp counselors, and even volunteers; non-competes are also enforced against workers who were laid off or fired.<sup>vii</sup> In addition to a wage cap, states should consider making non-competes unenforceable against certain classes of workers, such as hourly employees (as Nevada did in 2021<sup>viii</sup>), employees who are not exempt from overtime regulations, part-time or temporary workers, students, and workers under a certain age (e.g., 25 years old). In addition, states can enumerate particular scenarios in which non-competes are unenforceable, including upon termination of an employee—an instance where the consideration to which a worker is entitled in exchange for having signed the non-compete disappears.

### Which state has done this well: [Massachusetts](#)

Massachusetts’ 2018 law enumerates a number of vulnerable classes of workers (e.g., young workers, students, workers terminated without cause, etc.) for whom a non-compete agreement will be unenforceable, even if all the other criteria are met.

“A noncompetition agreement shall not be enforceable against the following types of workers: (i) an employee who is classified as nonexempt under the Fair Labor Standards Act; (ii) undergraduate or graduate students that partake in an internship or otherwise enter a short-term employment relationship with an employer, whether paid or unpaid, while enrolled in a full-time or part-time undergraduate or graduate educational institution; (iii) employees that have been terminated without cause or laid off; or (iv) employees age 18 or younger.” (Massachusetts General Laws Chapter 149 Sec. 24L)

# How valid non-compete agreements should be enforced

## Principle 3: Allow for private action and public enforcement against employers who misuse non-compete agreements with real penalties.

### Why it matters

Absent penalties, many employers face very little downside in abusing non-compete agreements—for example by writing overly broad agreements or claiming agreements are valid longer than the state allows—to deter workers from leaving. To address this and create incentives for better employer behavior, state lawmakers should allow for both a private right of action and public enforcement against violations of the legitimate and legal use of non-competes.

- A private right of action, with attorneys' fees covered by the employer, allows individuals to find lawyers who can represent them in seeking relief from a non-compete.
- Public enforcement allows government agencies to address the harm caused by employers with broad violations, and to step in where private lawyers cannot (because of forced arbitration or if the worker seeking relief cannot afford counsel, for example).

In all cases, the burden of proof should be on the employer. Lawmakers should also ensure financial consequences for infringing employers, including monetary penalties for violations and damages to compensate affected workers. Together, these provisions can provide an effective deterrent for the abuse of non-competes.

### Which state has done this well: [Connecticut](#)

In a recently introduced (but not yet enacted) bill in Connecticut, employers found to have misused non-compete agreements would be held liable for meaningful financial penalties.

“The Attorney General, on behalf of a worker or workers, or any worker aggrieved by a violation of this section may bring a civil action in the Superior Court for any and all relief provided in this section. In such actions, the plaintiff shall carry the burden

of proof by a preponderance of the evidence. If a court or arbitrator determines that a covenant not to compete or an exclusivity agreement violates this section, the violator is liable for the greater of the aggrieved worker’s actual damages or a statutory penalty of five thousand dollars, in addition to reasonable attorney’s fees, expenses and court costs.” (SB 906)

## **Principle 4: Make clear that courts should throw out rather than revise non-compliant non-compete agreements (i.e. adopt the “red pencil doctrine”).**

### **Why it matters**

In many instances, a legal battle ensues when an employer seeks to enforce a non-compete agreement or a worker seeks relief from one. That battle usually begins with a judge determining whether the agreement is in fact valid. In practice, this can lead to three typical outcomes: (1) the agreement is deemed valid and thus enforced; (2) the agreement is deemed invalid and thus not enforced; or (3) the agreement is deemed invalid, but the court takes steps to revise the agreement to make it valid and enforces it accordingly.

Allowing the judicial modification of an unenforceable contract described in option #3 is known as “blue pencil doctrine,” and disallowing it is known as “red pencil doctrine.” As of 2018, 41 states allowed for some sort of judicial modification to enable enforcement of the agreement (option 3).<sup>ix</sup> The downside of allowing for this judicial modification (i.e., blue pencil doctrine) is that it stacks the deck in favor of employers by removing any disincentive to writing overly broad agreements, since most workers will assume whatever they signed is legally enforceable in its entirety. In contrast, red pencil doctrine discourages employer overreach. Employers will be far less likely to write overly broad, unenforceable agreements if those agreements risk being thrown out altogether by the courts—especially if coupled with the threat of penalties and enforcement actions described above.

### **Which state has done this well: [Wisconsin](#)**

The state of Wisconsin is one of very few states that currently practice the “red pencil doctrine” in which any invalid provision in a non-compete agreement automatically voids the entire agreement and does not allow for any reform through the judicial process.

“Any covenant, described in this section, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.” (Chapter 103 Sec. 465)



# What provisions non-compete agreements should include

## Principle 5: Require employers to provide workers with adequate time and resources to review a non-compete agreement.

### Why it matters

Many workers are presented with a non-compete agreement for the first time on their first day of a new job and are required to sign it that same day. Since they have likely already quit their previous job and/or declined other job offers, this level of same-day notice leaves workers with few real options to say “no” or adequately review the agreement. By requiring more notice and transparency in the process, lawmakers can balance the information power scales. Notice that a position is covered by a non-compete agreement should be provided when a job offer is extended, at the latest, not on the worker’s first day. Workers should also be given an express right to have counsel review the agreement at the employer’s cost. Combined, these provisions would ensure that workers have sufficient time and resources to hire a lawyer to inform them of the consequences of the document in front of them and are in a better position to negotiate terms. Requiring such transparency may dissuade employers from using non-competes in most circumstances, as well.

### Which state has done this well: [Oregon](#)

In their 2007 reform bill, Oregon stipulated that an employer seeking to use a valid non-compete agreement must notify prospective workers of the agreement in their employment offer letter, and it must be provided to the worker at least 2 weeks before their first day. By doing so, prospective employees have enough time to review the agreement and either decide to accept its terms or decline without losing their previous employment and/or other job offers.<sup>x</sup>

“A noncompetition agreement entered into between an employer and employee is voidable and may not be enforced by a court of this state unless: The employer informs the employee in a written employment offer received by the employee at least two weeks before the first day of the employee’s employment that a noncompetition agreement is required as a condition of employment.” (Oregon Revised Statutes Chapter 653 Sec. 295)

## **Principle 6: Restrict the length of time and the geographic scope that a valid non-compete agreement is enforceable.**

### **Why it matters**

The longer the time period and greater the geographic area that a non-compete agreement can be valid, the more deleterious its effect on workers who leave and the more discouraging it is for workers who stay. For instance, when a non-compete is enforced, covered workers who wish to leave their current employer for a new job in their community and industry must idle for the stipulated period of time, allowing their skills to atrophy and their talents to go unused. Rather than wait, such workers may switch industries altogether or move to a different region of the country. Neither outcome is likely to be optimal for the local economy, and such moves may involve significant out-of-pocket costs and potential long-term earnings loss for workers. Facing such prospects, many workers will instead stay in a job that is suboptimal for them, for the local economy, and, in all likelihood, for the employer (who would be better off with a better match), too. Narrowing the scope of agreements can mitigate these negative outcomes and redeploy workers productively, faster.

### **Which state has done this well: [Utah](#)**

Under current law, Utah limits non-compete agreements to a maximum restrictive period of one year.

“For a post-employment restrictive covenant entered into on or after May 10, 2016, an employer and an employee may not enter into a post-employment restrictive covenant for a period of more than one year from the day on which the employee is no longer employed by the employer. A post-employment restrictive covenant that violates this subsection is void.” (Utah Code Title 34 Chapter 5 Sec. 201).

## **Principle 7: Require “garden leave” provisions in which employers must adequately compensate workers while an agreement is being enforced.**

### **Why it matters**

“Garden leave” provisions in which employers must pay workers some or all of their salary while a non-compete agreement is in effect adds an important financial disincentive for employer overuse. Currently, many employers face no real costs in

requiring boilerplate non-compete agreements for all their workers, regardless of job duties or individual role within the organization. Forcing employers to pay garden leave would introduce such a cost and encourage more restraint. This parameter is also important for workers, who deserve compensation for being deprived of the right to work in their chosen field in their community. Without garden leave, covered workers may struggle to find a temporary job outside of their field that pays well enough to maintain their standard of living and remain financially secure. States should clearly stipulate a substantial minimum financial consideration that employers must provide to close any loopholes that might allow employers to offer only token compensation.

### **Which state has done this well: [Massachusetts](#)**

In Massachusetts, the employer is required to pay “garden leave” for the entirety of the restrictive period.

“The noncompetition agreement shall be supported by a garden leave clause or other mutually-agreed upon consideration between the employer and the employee, provided that such consideration is specified in the noncompetition agreement. To constitute a garden leave clause within the meaning of this section, the agreement must (i) provide for the payment...on a pro-rata basis during the entirety of the restricted period, of at least 50 percent of the employee's highest annualized base salary paid by the employer within the 2 years preceding the employee's termination.” (Massachusetts General Laws Chapter 149 Sec. 24L)

## **Principle 8: Prohibit employers from requiring workers to sign invalid agreements.**

### **Why it matters**

Even when a worker is ineligible, many employers will still request or require them to sign a non-compete as a condition of employment.<sup>xi</sup> Studies also reveal that many workers, lacking knowledge about local laws governing non-competes, assume that any non-compete agreement they signed is in fact valid.<sup>xii</sup> As a result, even entirely unenforceable agreements have powerful negative chilling effects on worker mobility and entrepreneurial activity. Policymakers should ensure that workers avoid this confusion by forbidding employers from using unenforceable non-compete agreements, with substantial monetary penalties for violations.

## Which state has done this well: [District of Columbia](#)

In their bill banning non-competes, D.C. not only made such agreements unenforceable, but it took the additional and essential step of prohibiting employers from requesting or requiring these agreements, and it included modest financial penalties for noncompliance.

“No employer may require or request that an employee sign an agreement that includes a non-compete provision.” (D.C. Act 23-563)



# Conclusion

Non-compete agreements limit worker wage growth and stymie career advancement. They prevent some startups from forming and deprive others of needed talent. They slow worker mobility and sap labor markets of their dynamism. Lawmakers interested in reforming how and when non-compete agreements are used in their states face no shortage of rationales for taking on the issue. This guide is meant to provide lawmakers an initial roadmap of the key parameters around which to craft legislation in order to ensure that reforms are effective in accomplishing their goals, from advancing worker's rights to ensuring free and fair competition in the labor market.

# Footnotes

i. Evan Starr, J.J. Prescott, and Norman Bishara, “[Noncompete Agreements in the U.S. Labor Force](#),” *Journal of Law and Economics* 64 (1) (2021). Alexander Colvin and Heidi Shierholz, “[Noncompete agreements: Ubiquitous, harmful to wages and to competition, and part of a growing trend of employers requiring workers to sign away their rights](#),” *Economic Policy Institute*, December 2019.

ii. Michael Lipsitz and Evan Starr, “[Low-Wage Workers and the Enforceability of Non-Compete Agreements](#),” *Academy of Management Proceedings* (2020). Evan Starr “[The Use, Abuse, and Enforceability of Non-compete and No-Poach Agreements: A Brief Review of the Theory, Evidence, and Recent Reform Efforts](#),” *Economic Innovation Group* (2019). Matthew Johnson, et al, “[The Labor Market Effects of Legal Restrictions on Worker Mobility](#),” Working Paper (2020).

iii. For example, recent research has found that stricter enforceability of non-competes reduces firm entry and spinout rates significantly in knowledge-intensive sectors, while firms that do start remain smaller and are less likely to survive. Other research finds that non-competes operate as a particular deterrent to female entrepreneurship. See, among others: Jessica Jeffers, “[The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship](#),” Working Paper. Evan Starr, et al., “[Screening Spinouts? Non-Compete Enforceability and the Creation, Growth, and Survival of New Firms](#),” *Management Science* 64 (2) (2018). Matt Marx, “[Punctuated Entrepreneurship \(Among Women\)](#)” U.S. Census Bureau Working Paper CES-18-26 (2018).

iv. John Lettieri, “[A Better Bargain: How Non-compete Reform Can Benefit Workers and Boost Economic Dynamism](#),” *American Enterprise Institute* (2020).

v. Beck Reed Riden, “[New Map of Recent Changes to State Non-compete Laws](#),” *Fair Competition Law*, June 8, 2021.

vi. Maine Revised Statutes, Title 26, Chapter 7, Section 599-A “[Noncompete agreements](#).”

vii. Evan Starr, J.J. Prescott, and Norman Bishara, “[Noncompete Agreements in the U.S. Labor Force](#),” *Journal of Law and Economics* 64 (1) (2021).

viii. Nevada Legislature [Assembly Bill No. 47](#): “A noncompetition covenant may not apply to an employee who is paid solely on an hourly wage basis, exclusive of any tips or gratuities.”

[ix.](#) Matt Marx, “[Reforming Non-competes to Support Workers](#),” *The Hamilton Project*, February 2018.

[x.](#) At the time of writing, seven states plus DC required employers to provide notice of any required noncompete agreement. An overview of their approaches is available at: Fair Competition Law, “[Keeping Up with Noncompete Notice Requirements](#),” June 27, 2021.

[xi.](#) Evan Starr, J.J. Prescott, and Norman Bishara, “[Noncompete Agreements in the U.S. Labor Force](#),” *Journal of Law and Economics* 64 (1) (2021).

[xii.](#) J.J. Prescott and Evan Starr, “[Subjective Beliefs about Contract Enforceability](#).” Working Paper.