

10-1-2018

## Competing with Noncompetes: Increasing Restrictions on the Use of Employment Noncompetition Agreements in New York

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### Recommended Citation

Michael A. Neville, *Competing with Noncompetes: Increasing Restrictions on the Use of Employment Noncompetition Agreements in New York*, 13 Brook. J. Corp. Fin. & Com. L. (2018).

Available at: <https://brooklynworks.brooklaw.edu/bjcfcl/vol13/iss1/13>

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# COMPETING WITH NONCOMPETES: INCREASING RESTRICTIONS ON THE USE OF EMPLOYMENT NONCOMPETITION AGREEMENTS IN NEW YORK

## ABSTRACT

*The New York City Council and the former New York State Attorney General recently proposed legislation restricting the use of noncompetition agreements by employers with low-wage employees. While this proposed legislation demonstrates a step following other progressive states that have already restricted the use of noncompetition agreements, recent federal litigation has revealed the loopholes that New York employers may unfairly utilize, such as garden leave provisions, if restrictions are not placed on both employers of low-wage and high-wage employees. This Note recommends that pending legislation be passed only after a thorough revision that focuses on both low-wage and high-wage employees to maximize employee flexibility and establish and maintain a fair employment standard throughout the entire state of New York.*

## INTRODUCTION

New York State, while not as progressive as California and other states, has begun following the trend in considering and enforcing greater restrictions on noncompetition agreements (or “noncompetes”).<sup>1</sup> This Note will discuss the increased restrictions, in force and proposed, by New York courts and legislatures over the past few years as both the federal government and state legislatures collectively begin further restricting noncompetition agreements throughout the country.

Restrictive covenants in employment agreements, especially noncompetition agreements, can be critical to a company’s “bottom line.”<sup>2</sup> Noncompetition agreements are written contracts that employers often use to stop employees from working for a competing employer for a certain period of time after leaving employment.<sup>3</sup> Although employers cannot require prospective employees to sign noncompetes, an employer may

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1. Eve Klein, *United States: New York Developments Continue Trend Against Non-Competition and Non-Solicitation Agreements*, MONDAQ (Aug. 31, 2017), <http://www.mondaq.com/unitedstates/x/625152/Contract+of+Employment/New+York+Developments+Continue+Trend+Against+NonCompetition+And+NonSolicitation+Agreements>.

2. Braden Campbell, *5 New Noncompete Developments Attys Should Know About*, LAW360 (Aug. 11, 2016, 3:32 PM), <https://www.law360.com/articles/953214/5-new-noncompete-developments-attys-should-know-about>.

3. Ryan Burke, *What You Need to Know About Non-Compete Agreements, and How States are Responding*, OBAMA WHITE HOUSE (May 5, 2016, 11:16 AM), <https://obamawhitehouse.archives.gov/blog/2016/05/05/what-you-need-know-about-non-compete-agreements-and-how-states-are-responding>.

terminate or not hire a prospective employee who declines to comply.<sup>4</sup> Such restrictive covenants are most frequently incorporated into employment agreements that are provided by an employer and executed by an employee at the outset of the employment relationship.<sup>5</sup> The rationale behind using noncompetes is to “encourage innovation” by preventing employees, who may have access to trade secrets, from taking information and intellectual property owned by an employer and bringing it and/or using it for a rival business.<sup>6</sup> Noncompetes are often given little attention, if at all, during the initial stage of an employment relationship, and if they are, employers typically consider them to be “inviolable” while employees consider them to be “unenforceable.”<sup>7</sup> Due to this limited attention, noncompetes often become a major obstacle during departure negotiations at the end of an employment relationship and are increasingly becoming a subject of litigation.<sup>8</sup> Since 2000, noncompete and trade secret lawsuits have nearly tripled.<sup>9</sup>

The recent federal case, *In re Document Technologies Litigation*, shows the latest restrictions on noncompetition agreements in New York State.<sup>10</sup> In this case, the United States District Court for the Southern District of New York held that employees of a business may prepare to compete with another business during the term of a noncompete.<sup>11</sup> The rationale behind the district court’s decision in this case paralleled similar outcomes in recent investigations of employers by the former New York Attorney General, as well as proposed legislation by both New York State and New York City. However, the district court in *In re Document Technologies Litigation* should have tightened restrictions on noncompetition agreements even further if it wished to pave the way for increased restrictions on all noncompetition agreements throughout the state rather than allow for such agreements to still be enforced upon high-wage employees. Additionally, if and when New York State and New York City adopt proposed legislation regarding noncompetition agreements, the legislatures should include restrictions on noncompetition agreements for high-wage employees to further the state’s policy of maximizing employment flexibility and

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4. See *Your Rights Non-Compete Agreements*, WORKPLACE FAIRNESS, <https://www.workplacefairness.org/non-compete-agreements> (last visited Oct. 16, 2017).

5. Sheryl B. Galler, *Restrictive Covenants: Limits and Enforcement*, N.Y. STATE BAR ASS’N 2 (Mar. 10, 2013), [https://www.nysba.org/Sections/Labor\\_and\\_Employment/Labor\\_PDFs/LaborMeetingsAssets/Galler.html](https://www.nysba.org/Sections/Labor_and_Employment/Labor_PDFs/LaborMeetingsAssets/Galler.html).

6. Burke, *supra* note 3.

7. Galler, *supra* note 5, at 2.

8. *Id.*

9. Conor Dougherty, *How Noncompete Clauses Keep Workers Locked In*, N. Y. TIMES (May 13, 2017), <https://www.nytimes.com/2017/05/13/business/noncompete-clauses.html>.

10. See generally *In re Document Techs. Litig.*, 275 F. Supp. 3d 454 (S.D.N.Y. 2017) (holding that an employee “may prepare to compete during the term of a noncompete provision”) (internal citation omitted).

11. Klein, *supra* note 1.

eliminating the need to use loopholes to leave an employee, such as taking a “garden leave”<sup>12</sup> and receiving payment incentives, both of which were present and allowed in *In re Document Technologies Litigation*.<sup>13</sup> Not all employees are able to receive such options, and many smaller businesses are unable to provide for such incentives when seeking new employees with potential noncompetition restrictions. As a result, an employee’s ability to leave an employer for a better opportunity elsewhere relies on factors beyond the employee’s control.

Part I of this Note discusses the background of recent enforcement history of noncompetition agreements throughout the United States. Part II explores New York State and New York City law governing noncompetition agreements and recent updates pertaining to the use of such agreements in New York. Part III presents the recent case, *In re Document Technologies Litigation*, which further develops New York law governing noncompetition agreements. Part IV analyzes the implications of the district court’s decision in *In re Document Technologies Litigation* on the future of noncompetition law in New York. Part V presents a solution, through a stronger regulatory framework than currently proposed, to close the loophole for high-wage employees sustained by the *In Re Documents Technologies Litigation* decision. Part VI offers recommended practices in anticipation of proposed legislation.

## I. ENFORCEMENT OF NONCOMPETITION AGREEMENTS THROUGHOUT THE UNITED STATES

### A. WHITE HOUSE AND U.S. TREASURY ATTITUDES TOWARDS NONCOMPETES

In 2016, nearly forty percent of Americans had signed noncompetition agreements.<sup>14</sup> Within this percentage, low-wage employees are increasingly subject to restrictive noncompetes as more low-wage employers adopt noncompete agreements during the hiring process.<sup>15</sup> As a result of this growth, noncompetition agreements are currently facing greater scrutiny by

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12. A garden leave refers to a period in which an employee is no longer employed by his or her previous employer, who may continue to make payments to the employee, but is restrained from working for a competing employer. Galler, *supra* note 5, at 5; See *infra* notes 74–82 and accompanying text.

13. *In re Document Techs. Litig.*, 275 F. Supp. 3d at 459.

14. Duarte Geraldino, *What You Should Know About Noncompete Agreements*, PBS (July 14, 2016, 6:11 PM), <http://www.pbs.org/newshour/making-sense/know-non-compete-agreements/>.

15. Press Release, Attorney General Eric T. Schneiderman, A.G. Schneiderman Proposes Nation’s Most Comprehensive Bill To Curb Widespread Misuse Of Non-Compete Agreements (Oct. 25, 2016).

both federal and local governments across the board.<sup>16</sup> In the same year, both the White House—under the Obama administration—and the U.S. Treasury issued separate reports expressing skepticism of the use of noncompetition agreements and offered recommendations to limit their use.<sup>17</sup> In its report, the White House found that while noncompetition agreements may be beneficial when used in a limited fashion, they can also “reduce the welfare of workers and hamper the efficiency of the economy as a whole by depressing wages, limiting mobility and inhibiting motivation.”<sup>18</sup> This finding is based upon the premise that the bargaining power of employees is significantly reduced when a noncompete agreement is signed.<sup>19</sup> When an employee signs such an agreement, it legally prevents the employee from accepting a competitor’s offer, decreasing the employee’s leverage during wage negotiations and limits the employee’s opportunities for career development with other potential employers.<sup>20</sup> Additionally, the White House’s report emphasizes that broad geographic and time scope limitations of noncompete agreements harm both employees and “the overall efficiency of labor markets” because low-wage employees may ultimately lack necessary skills in applying for other jobs if they are prevented from seeking related employment for a certain amount of time.<sup>21</sup> This deficiency of essential skills would also weaken such employees’ “labor force attachment,” or an employee’s desire and ability to remain an active participant in the labor market,<sup>22</sup> and consequently the country’s labor market altogether.<sup>23</sup>

The U.S. Treasury expressed similar sentiments in its report, finding that trade secret protection does not necessarily justify a widespread use of noncompete clauses.<sup>24</sup> The report also found that noncompetes are less likely to produce social benefits since they are often used by employers in a “non-transparent” way and that noncompetes are common among employees who have a lower rate of actually possessing trade secrets.<sup>25</sup> To support its skepticism of noncompete agreements, the U.S. Treasury cited

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16. David S. Almeling & Tony Beasley, *The Shifting Junction Of Trade Secret Law And Noncompetes*, LAW360 (Aug. 17, 2016, 11:36 AM), <https://www.law360.com/articles/828395/the-shifting-junction-of-trade-secret-law-and-noncompetes>.

17. *Id.*

18. OBAMA WHITE HOUSE, NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGE, POTENTIAL ISSUES, AND STATE RESPONSES 5 (2016), [https://obamawhitehouse.archives.gov/sites/default/files/non-competes\\_report\\_final2.pdf](https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf).

19. *Id.* at 6.

20. *Id.*

21. *Id.* at 7.

22. U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, HOW THE GOVERNMENT MEASURES UNEMPLOYMENT 5 (2014), [https://www.bls.gov/cps/cps\\_htgm.pdf](https://www.bls.gov/cps/cps_htgm.pdf).

23. OBAMA WHITE HOUSE, *supra* note 18, at 7.

24. U.S. DEP’T OF THE TREAS., OFF. OF ECON. POL’Y, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 11 (2016), <https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf>.

25. *Id.* at 4.

an experiment showing that when Michigan made noncompetes enforceable in 1985, the state faced an eight percent decrease in job mobility.<sup>26</sup> The report suggests that there is a correlation between stricter enforcement of noncompetes and both lower wage growth and lower initial wages, finding that “a standard deviation in noncompete enforcement reduces wages by about 1.4 percent.”<sup>27</sup> In conclusion, the report offers policy-making recommendations to prevent such halts in wage growth and to encourage job mobility, including “requiring employers to highlight the implications of noncompetes on future mobility for workers at the outset of the relationship,” “encouraging employers to use noncompetes that are enforceable and requiring states to make the conditions of enforceability as explicit as possible,” and “requiring employers to provide additional consideration to employees subject to noncompetes.”<sup>28</sup>

## B. STATE ATTITUDES TOWARDS NONCOMPETES

In recent years, several states have enacted legislation that restricts the enforceability of noncompetition agreements within their respective boundaries.<sup>29</sup> However, these states remain as the minority that have increased restrictions toward noncompetition agreements.<sup>30</sup> For example, Section 1660 of the California Business and Professions Code has remained substantially the same as it was in 1872<sup>31</sup> and now prevents, with few exceptions, “[e]very contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind.”<sup>32</sup> In 2015, Hawaii enacted a law banning noncompetition agreements mostly relating to “technology businesses.”<sup>33</sup> In April 2016, Utah enacted a law in which noncompetes may not apply for longer than one year.<sup>34</sup> The law explicitly excludes “reasonable severance agreement[s]” in its list of potentially voidable restrictive covenants affecting post-employment.<sup>35</sup> Oregon, in January 2016, revised its statutes to provide that noncompetition agreements are voidable unless an employer has a “protectable interest,” such as when an employee has access to trade secrets or to “competitively sensitive confidential business or professional information that otherwise

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26. Almeling & Beasley, *supra* note 16.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. CAL. BUS. & PROF. CODE § 16600 (Deering 1941).

33. HAW. REV. STAT. § 480-4 (2015).

34. UTAH CODE ANN. § 34-51-201 (LexisNexis 2016).

35. *Id.* In 2018, Utah amended § 34-51-201, which no longer excludes “reasonable severance agreement[s].” However, the law now has specific restrictions on post-employment restrictive covenants between a broadcasting company and a broadcasting employee. UTAH CODE ANN. § 34-51-201 (LexisNexis 2018).

would not qualify as a trade secret, including product development plans, product launch plans, marketing strategy or sales plans.”<sup>36</sup> The revised statute also places an eighteen-month cap on the noncompete period following an employee’s termination.<sup>37</sup> Also in January 2016, Alabama narrowed its previous laws on noncompetition agreements.<sup>38</sup> The amended law now provides that “[e]very contract by which anyone is restrained from exercising a lawful profession, trade or business of any kind otherwise than is provided by this section is to that extent void.”<sup>39</sup> Of course, there are exceptions including that “reasonable restraints on time and place” may be placed on the ability of an employee to work for another “similar business” in a “specified geographic area.”<sup>40</sup> Most recently in August 2018, the Massachusetts legislature passed the Massachusetts Noncompetition Agreement Act (the “Act”) regulating the use and enforcement of noncompetes in the private sector.<sup>41</sup> The Act requires the payment of garden leave pay or “other mutually agreed upon consideration,” advance notice of noncompetes to employees, and additional consideration for noncompetes entered into after the commencement of employment.<sup>42</sup> Additionally, the Act holds that noncompetes are unenforceable against employees eighteen years old and under, undergraduate or graduate students employed as interns, employees terminated without cause, and employees that are non-exempt under the Fair Labor Standards Act.<sup>43</sup>

Despite such legislative responses, a majority of states openly enforce noncompetition agreements for employees of all income brackets, and many lack restrictions regarding geographic or time-related limitations of such agreements.<sup>44</sup> Idaho was recognized in 2016 as one of the most difficult places in the country for an employee to leave an employer for a better opportunity elsewhere.<sup>45</sup> In 2016, Idaho passed legislation that strengthened noncompetition agreements in favor of employers.<sup>46</sup> Under the law, if a court found that a “key employee” or “key independent contractor” breached a noncompetition agreement with his or her employer, it was

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36. OR. REV. STAT. § 653.295 (2016).

37. *Id.*

38. Almeling & Beasley, *supra* note 16.

39. ALA. CODE § 8-1-190 (LexisNexis 2016).

40. *Id.*

41. Erik J. Winton & Colin A. Thakkar, *Massachusetts Legislature (Finally) Passes Non-Compete Law*, JACKSON LEWIS P.C. (Aug. 1, 2018), <https://www.jacksonlewis.com/publication/massachusetts-legislature-finally-passes-non-compete-law>.

42. MASS. GEN. LAWS ANN. ch. 149, § 24L (West 2018).

43. *Id.*

44. Burke, *supra* note 3.

45. See Conor Dougherty, *Noncompete Pacts, Under Siege, Find Haven in Idaho*, N. Y. TIMES (July 14, 2017), <https://www.nytimes.com/2017/07/14/business/economy/boise-idaho-noncompete-law.html>.

46. The new law is particularly strict because it now places a burden on employees to prove that they will not harm their former employer by taking a new job. See IDAHO CODE ANN. § 44-2704 (West 2018).

presumed that the employee's departure would cause "irreparable harm" to that employer.<sup>47</sup> In order to argue against this presumption, the employee would have had to "show that the key employee or key independent contractor ha[d] no ability to adversely affect the employer's legitimate business interests."<sup>48</sup> Fortunately in 2018, Idaho repealed the rebuttable presumption of irreparable harm for departures of "key employees," shifting the burden of establishing the likelihood of irreparable harm for all former employees back on the employer.<sup>49</sup> Florida is another state where noncompetition agreements are freely enforced under statutory and case law.<sup>50</sup> Generally, noncompetition agreements in Florida will be enforced "so long as such contracts are reasonable in time, area, and line of business."<sup>51</sup>

Compared to other areas of labor and employment law, law directed at noncompete agreements has remained relatively static with most changes resulting from court decisions concerning specific circumstances.<sup>52</sup> There is no federal law governing noncompetition agreements, and each state in the country has its own governing law on these agreements.<sup>53</sup> While noncompetition agreements may be of high interest to federal government contractors that repeatedly compete against the same businesses, all noncompetition agreements remain subject to individual state employment laws.<sup>54</sup> As previously noted, many state legislatures have recently begun to focus their attention on how noncompetition agreements are utilized and enforced.<sup>55</sup> Due to this increased skepticism, employers face greater challenges in drafting enforceable noncompetition agreements.<sup>56</sup> It is crucial that employers remain informed of this changing area of law to ensure that employment contracts are updated to adapt to new developments.<sup>57</sup> Inability to enforce noncompete agreements can be devastating and costly to companies as employers.<sup>58</sup> Of course, New York

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47. *Id.*

48. *Id.*

49. Kevin Burns & Brian Ellixson, *The Latest on State-Level Noncompete Reform*, LAW360 (June 11, 2018, 12:19 PM), <https://www.law360.com/articles/1050708/the-latest-on-state-level-noncompete-reform>.

50. J.J. Prescott et al., *Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*, 2016 MICH. ST. L. REV. 369, 370, 459 (2016).

51. See FLA. STAT. § 542.335 (2017).

52. James Hammerschmidt & Jack Blum, *Noncompete Agreements Under Siege At The State Level*, LAW360 (May 25, 2017, 12:17 PM), <https://www.law360.com/articles/926364/noncompete-agreements-under-siege-at-the-state-level>.

53. Geraldino, *supra* note 14.

54. 2 Henry L. Goldberg, Fed. Contract Mgmt. (MB) ¶ 10.13 (2018).

55. See Hammerschmidt & Blum, *supra* note 52.

56. Jyotin Hamid & Tricia Sherno, *Restrictive Covenants Under New York Law: The Court of Appeals Weights in on Choice of Law Provisions and Partial Enforcement*, 33 HOFSTRA LAB. & EMP. L.J. 275, 275 (2016).

57. Hammerschmidt & Blum, *supra* note 52.

58. *Id.*

has its own take on restrictions to and the enforceability of noncompetition agreements.

## II. NEW YORK NONCOMPETE LAW AND RECENT ACTIVITY

In New York, there is no state statutory authority that generally governs noncompetition agreements in employment.<sup>59</sup> Use of noncompetition agreements within specific industries and sectors in New York is governed by industry-related statutes or regulations.<sup>60</sup> For example the legal industry is governed by Rule 5.6 of the New York Rules of Professional Conduct, the financial industry is governed by Financial Industry Regulatory Authority (“FINRA”) Rules 2140 and 11870, and the broadcasting industry is governed by Section 202-k of the New York Labor Law.<sup>61</sup>

Overall, New York tends to disfavor noncompetition agreements as unreasonable restraints on trade.<sup>62</sup> As a general rule, restrictive agreements entered into voluntarily will be enforced when it is “reasonable in time and area, necessary to protect an employer’s legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee.”<sup>63</sup> Of course, determination of the enforceability of a restrictive agreement is a “case-specific inquiry.”<sup>64</sup> As part of this inquiry, courts may consider the “standard restrictive covenants in the applicable industry, the rate of developments and changes in the technology of that industry, and the geographic reach of the employer.”<sup>65</sup> Additionally, New York courts can and will “blue pencil” an agreement if it finds provisions to be unenforceable.<sup>66</sup> Blue penciling enables a court to remove such provisions from a noncompete while allowing remaining provisions to be enforced.<sup>67</sup>

During employment, employees in New York cannot compete with their employer because they have a “duty of loyalty” to their employer.<sup>68</sup>

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59. SCOTT J. WENNER, NON-COMPETE LAWS: NEW YORK, PRACTICAL LAW STATE Q&A, RESOURCE ID 5-504-6806, PRACTICAL LAW LABOR & EMPLOYMENT, at 2 (database updated July 6, 2018).

60. *Id.* at 2–3.

61. *Id.* at 3. Attorneys cannot offer or make agreements that restrict them from practicing law after terminating an employment relationship, except for agreements regarding retirement benefits. *Id.* at 2. Under FINRA, a noncompete is not enforceable if it would prevent a customer from continuing use of services of its registered representative if such representative terminates employment of one FINRA member firm to join another. *Id.* at 3; An employer in the broadcasting industry cannot require, as an employment condition, that an employee enter into a post-employment noncompete agreement prohibiting the employee from working “in a specific geographic area . . . for a specified period of time . . . with a particular employer or industry,” although a noncompete provision will be enforced if it only covers the contract term. *Id.*

62. *See* Reed, Roberts Assocs., Inc. v. Strauman, 40 N.Y.2d 303, 307 (1976).

63. *Id.*

64. *See* USI Ins. Servs. LLC v. Miner, 801 F. Supp. 2d 175, 188–89 (S.D.N.Y. 2011).

65. Galler, *supra* note 5, at 3.

66. *See* BDO Seidman v. Hirschberg, 93 N.Y.2d 382, 395 (1999).

67. Galler, *supra* note 5, at 3.

68. WENNER, *supra* note 59, at 10.

Under this duty, employees must “exercise the utmost good faith, loyalty and obedience during the employment term.”<sup>69</sup> This duty ends when the employment relationship ends, but employees are still required to keep an employer’s trade secrets and classified information confidential.<sup>70</sup> Where an employee does not exercise good faith, such as when an employee removes an employer’s confidential information or trade secrets before leaving a company, a court may enforce a noncompetition provision to protect the employer’s interests.<sup>71</sup> An employer may invoke the “inevitable disclosure” doctrine when seeking an injunction to enforce a noncompete.<sup>72</sup> Under this doctrine, an employer can seek an injunction on the basis that a former employee, who is now working for a direct competitor that provides the same or very similar products or services, had access to trade secrets and “could not reasonably be expected to fulfill [his or her] new job responsibilities without utilizing the trade secrets of [his or her] former employer.”<sup>73</sup>

New York courts, in deciding whether a noncompetition agreement is enforceable, may also consider whether an employer will make payments to an employee for a period of “garden leave,” which is the period in which an employee is no longer employed by his or her previous employer but is restrained from working for a competing employer.<sup>74</sup> Courts are much less likely to find a noncompetition agreement to be enforceable if the restriction would leave the employee without compensation from his or her former employer and without the ability to receive compensation in his or her respective field.<sup>75</sup> Garden leaves, which originated in the United Kingdom, are mostly used for higher level employees in the financial services industry, but are increasingly being used in other sectors.<sup>76</sup> Garden leaves are typically provided in lieu of noncompetition agreements because they provide some of the same benefits of noncompetition agreements, without challenges that employers frequently face when enforcing noncompetition agreements.<sup>77</sup> With a garden leave, an employee continues to receive compensation while the employee “tends to his or her garden.”<sup>78</sup>

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69. *Duane Jones Co. v. Burke*, 117 N.E.2d 237, 245 (1954).

70. WENNER, *supra* note 59, at 10.

71. *See, e.g., Ayco Co. v. Frisch*, 795 F. Supp. 2d 193, 209–10 (N.D.N.Y. 2011); *Ayco Co. v. Feldman*, No. 1:10-CV-1213, 2010 WL 4286154, at \*10 (N.D.N.Y. Oct. 22, 2010).

72. *Galler*, *supra* note 5, at 4.

73. *EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299, 310 (S.D.N.Y. 1999), *aff’d*, 2000 WL 1093320 (2d Cir. May 18, 2000).

74. *Galler*, *supra* note 5, at 5.

75. *Id.*

76. Charles A. Sullivan, *Tending the Garden: Restricting Competition via “Garden Leave,”* 37 BERKELEY J. EMP. & LAB. L. 293, 294 (2016).

77. Jeffrey S. Klein & Nichols J. Pappas, ‘Garden Leave’ Clauses in Lieu of Non-Competes, 241 N.Y.L.J. 1 (2009).

78. CHRISTOPHER K. RAMSEY & SARAH ANDREWS, XPERTHR EMP. LAW MANUAL 2655, EMPLOYEE LEAVES, OTHER LEAVES (2015).

Throughout a garden leave, an employee is technically employed and is paid salary and benefits, but does not provide any services to the employer.<sup>79</sup> Unlike noncompetes, garden leaves are in force during the employment relationship rather than after the employment relationship ends.<sup>80</sup> Garden leaves are usually agreed upon and included as a clause in an employment agreement when an employee is first hired.<sup>81</sup> There are no federal or state laws that address garden leave; however, an employer must ensure that a garden leave policy is carefully drafted to avoid nullification as an unlawful noncompete agreement under applicable state law.<sup>82</sup>

New York courts may also consider the circumstances surrounding an employee's termination in analyzing the enforceability of a noncompetition agreement.<sup>83</sup> Under the employee choice doctrine, New York courts will consider a noncompetition agreement as a contract and will not inquire as to the reasonableness of the agreement where an employee voluntarily terminates employment and the employer conditions the employee's "receipt of postemployment benefits upon [the employee's] compliance" with the noncompetition agreement.<sup>84</sup> In this situation, the employee has a choice to either comply and receive benefits (e.g., severance, equity awards, or deferred compensation) or actually work for a competitor and forfeit the benefits.<sup>85</sup> The employee choice doctrine does not apply when an employee is involuntarily terminated without cause.<sup>86</sup> In such a scenario, a court must determine whether forfeiture is reasonable.<sup>87</sup>

#### A. RECENT CASE LAW

New York courts have employed these rules and standards in several recent cases.<sup>88</sup> In 2010, the Northern District of New York granted motions for preliminary injunctive relief to an employer who sought enforcement of noncompetition agreements against employees who allegedly took confidential information of the employer before departing from the

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79. *Id.*

80. *Id.*

81. Klein & Pappas, *supra* note 77.

82. RAMSEY & ANDREWS, *supra* note 78.

83. Galler, *supra* note 5, at 5.

84. Morris v. Schroder Capital Mgt. Int'l, 7 N.Y.3d 616, 620–21 (2006).

85. *Id.* at 621.

86. *Id.*

87. *Id.*

88. See, e.g., Morris v. Schroder Capital Mgt. Int'l, 7 N.Y.3d 616, 620–21 (2006) (recognizing the "employee choice" doctrine); Ayco Co. v. Frisch, 795 F. Supp. 2d 193, 210 (N.D.N.Y. 2011) (finding that "[a]bsent injunctive relief, [the employer was] threatened with imminent, irretrievable disclosure to competitors of confidential information"); Ayco Co. v. Feldman, No. 1:10-CV-1213, 2010 WL 4286154, at \*12 (N.D.N.Y. Oct. 22, 2010) (finding that the loss of confidential customer information resulted in irreparable harm to the employer); Int'l Bus. Machines Corp. v. Visentin, No. 11 Civ. 399, 2011 WL 672025, at \*21–22 (S.D.N.Y. Feb. 16, 2011) (recognizing that noncompetition agreements are enforceable to protect an employer's legitimate business interest, which includes trade secrets and confidential information).

company.<sup>89</sup> The court enjoined the employees from working for any competitor of the company for ninety days and from disclosing the confidential information that had been taken.<sup>90</sup> More recently, in 2011, the Southern District of New York denied a request made by IBM for a preliminary injunction to enforce a twelve-month noncompetition agreement against an executive manager who left to work for a competitor.<sup>91</sup> The court rejected IBM's contention that by signing the noncompete, the employee had agreed that his non-compliance with the agreement would cause irreparable harm to his employer.<sup>92</sup> The court further found that IBM's contention that court intervention was imperative to protect its information from disclosure was undermined by the fact that other employees who had access to some of the same information were not required to sign noncompetition agreements.<sup>93</sup> Since the employee's skills were neither "unique or extraordinary" and he did not possess any trade secrets or confidential information, the court ruled that the non-competition agreement was not imperative to protect a legitimate interest of the employer.<sup>94</sup> It certainly did not help IBM's case that its own witness even testified that the real purpose of the noncompetition agreement was to serve as an employee "retention device" rather than a tool to protect the company's trade secrets.<sup>95</sup> The court finally noted that undue hardship would be imposed on the employee if the noncompetition agreement was enforced because it was uncertain that the competitor's offer would be available at the end of the twelve-month restriction period, even though the employee would receive twelve months of salary from IBM.<sup>96</sup>

## B. RECENT LEGISLATIVE DEVELOPMENTS

Both New York State and New York City legislatures have recently followed the footsteps of other states in turning their attention further towards noncompetition agreements.<sup>97</sup> In July 2017, the New York City Council proposed legislation "prohibiting New York City employers from [using noncompetition agreements] with any low-wage employee."<sup>98</sup> The proposed legislation defines "low-wage employee" as "a clerical and other

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89. *Frisch*, 795 F. Supp. 2d at 210; *Feldman*, 2010 WL 4286154, at \*12.

90. *Frisch*, 795 F. Supp. 2d at 210; *Feldman*, 2010 WL 4286154, at \*12.

91. *Visentin*, 2011 WL 672025, at \*2–3.

92. *Id.* at \*7.

93. *Id.* at \*5, \*10.

94. *Id.* at \*21–22.

95. *Id.* at \*22.

96. *Id.* at \*23.

97. *See, e.g.*, Press Release, Attorney General Eric T. Schneiderman, *supra* note 15.

98. Klein, *supra* note 1.

worker as defined in subdivision 7 of section 190 of the labor law,”<sup>99</sup> which essentially means “any non-exempt employee, other than manual workers, railroad workers, or commission salespersons.”<sup>100</sup> To be an exempt employee under the New York Labor Law, the employee “must be employed in a bona fide executive, administrative, or professional capacity and receive earnings in excess of \$900 per week.”<sup>101</sup> If adopted, New York City employers would also be prohibited from requiring potential employees that are not “low-wage employees” to enter into noncompetition agreements unless the employer discloses, in writing, at the beginning of the hiring process that the prospective employee may be subject to such agreement.<sup>102</sup>

In October 2016, former New York Attorney General Eric T. Schneiderman announced that he would propose a bill in New York that closely mirrors the New York City proposed legislation.<sup>103</sup> The bill, which is slightly more restrictive than the New York City proposed legislation, would prohibit the use of noncompetition agreements for employees that sit below the salary line put in place by Labor Law Section 190(7) of \$900 per week, as well as agreements that are “broader than needed to protect [an] employer’s trade secrets or confidential information.”<sup>104</sup> Additionally, it would require employers to provide such agreements prior to extending an offer and to pay employees additional “consideration” if non-competition agreements are signed by the employee.<sup>105</sup> Finally, the bill would limit the allowable time duration for these agreements and create a “private right of action with remedies including liquidated damages for violations.”<sup>106</sup> Schneiderman stated that “workers should be able to get a new job and improve their lives without being afraid of being sued by their current or former employer . . . my proposed bill will protect workers’ rights to seek new and better opportunities, particularly low-wage workers who have been locked into minimum wage jobs due to non-competes. It will also ensure that businesses can hire the best workers for the job.”<sup>107</sup>

Former New York Attorney General Schneiderman’s proposed legislation results largely from several investigations performed in recent years into the use of noncompetition agreements of companies operating in New York, including investigations of the Jimmy John’s Franchise and

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99. N.Y. City Council, Int. No. 1663-2017 (introduced July 20, 2017), available at <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3106790&GUID=CF72C6E8-ED15-493A-85FF-AAE26C72EEE6> [hereinafter Int. No. 1663-2017].

100. Klein, *supra* note 1.

101. *Id.*

102. Int. No. 1663-2017, *supra* note 99.

103. Klein, *supra* note 1.

104. Press Release, Attorney General Eric T. Schneiderman, *supra* note 15.

105. *Id.*

106. *Id.*

107. *Id.*

Law360.<sup>108</sup> In late 2014, Schneiderman began his investigation into the use of noncompetition agreements by Jimmy John's Franchise in New York.<sup>109</sup> The agreements used by Jimmy John's prohibited employees during their employment and for two years post-employment from working for any other businesses that sell sandwiches within two miles of any Jimmy John's location in the United States.<sup>110</sup> Schneiderman announced in 2016 that Jimmy John's would not enforce such agreements signed by low-wage employees, explicitly stating that noncompetition agreements for low-wage workers are unlawful under New York law.<sup>111</sup> The Jimmy John's settlement was announced only days after Law360 agreed to stop using its own noncompetition agreements following Schneiderman's investigation therein.<sup>112</sup>

In late 2015, Schneiderman's office began an investigation into the use of noncompetition agreements by Law360.<sup>113</sup> The agreements used by Law360 barred editorial employees from working for any direct competitor in the legal news and data industry for one year after terminating employment with Law360.<sup>114</sup> Although Law360 claimed it took steps to enforce agreements in a narrow and "limited manner designed to protect its competitive interests," Schneiderman ultimately found the agreements overly broad and contrary to New York law, which allows employers to use noncompetition agreements only in very limited circumstances, such as to protect trade secrets or if such an agreement covers an employee with special skills.<sup>115</sup> The former New York Attorney General even went so far as to say that "unscrupulous noncompete agreements," such as those used by Law360, can serve as a "veiled threat" to prospective employers who may be hesitant to offer employment to prospective employees with existing noncompetition agreements.<sup>116</sup>

In July 2018, current New York Attorney General Barbara Underwood joined ten other attorneys general from California, the District of Columbia, Illinois, Massachusetts, Maryland, Minnesota, New Jersey, Oregon, Pennsylvania, and Rhode Island in sending a letter to eight fast-food franchises requesting the franchises to provide documents on noncompete

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108. *Id.*

109. Jessica Corso, *Jimmy John's Nixes NY Noncompetes In Agreement With AG*, LAW360 (June 22, 2016, 7:52 PM), <https://www.law360.com/articles/809676/jimmy-john-s-nixes-ny-noncompetes-in-agreement-with-ag>.

110. *Id.*

111. *Id.*

112. *Id.*

113. Vin Gurrieri, *Law360 Reaches Noncompete Settlement with NY AG*, LAW360 (June 15, 2016, 9:16 PM), <https://www.law360.com/articles/807290>.

114. *Id.*

115. *Id.*

116. *Id.*

clauses in their contracts.<sup>117</sup> The letter, which addressed fast-food giants Arby's, Burger King, Dunkin' Donuts, Five Guys Burgers and Fries, Little Caesars, Panera Bread, Popeyes Louisiana Kitchen, and Wendy's, cited to a study which found that 80% of fast food restaurants use noncompete clauses and raised the concerns of the attorneys general about fairness for low-wage employees.<sup>118</sup>

### III. IN RE DOCUMENT TECHNOLOGIES LITIGATION

In July 2017, the United States District Court for the Southern District of New York, in *In re Document Technologies Litigation*, denied an employer's motion for a preliminary injunction seeking enforcement of noncompetition and non-solicitation agreements against former employees.<sup>119</sup> In this case, Document Technologies, Inc. ("DTI") had acquired Epiq eDiscovery Solutions, Inc. ("Epiq") and continued operating Epiq as a wholly owned subsidiary.<sup>120</sup> As part of its employment procedure, Epiq had required employees to sign employment agreements that included a one-year noncompetition agreement.<sup>121</sup> One of the defendants in the case had been contacted by a recruiter pertaining to an employment opportunity at LDiscovery, LLC ("LDiscovery"), a competitor of Epiq.<sup>122</sup> The same defendant then shared this information with the rest of the defendants.<sup>123</sup> Following negotiations, defendants terminated their employment with Epiq and executed employment agreements with LDiscovery,<sup>124</sup> which stated that they would not work for LDiscovery for one year, but would be paid signing bonuses between \$1,200,000 and \$1,400,000 in return for this delay.<sup>125</sup> LDiscovery additionally agreed to indemnify the new employees for attorneys' fees and any damages relating to their transition from Epiq to LDiscovery.<sup>126</sup>

DTI argued that the defendants breached the terms of their noncompetition agreements by entering into employment agreements with LDiscovery<sup>127</sup> and discussing strategies once they were actively employed by LDiscovery.<sup>128</sup> The district court ultimately rejected this argument, holding that a "former employee may prepare to compete during the term of

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117. Mike Curley, *State AGs Take Aim At Fast Food Noncompete Clauses*, LAW360 (July 9, 2018 4:09 PM), <https://www.law360.com/articles/1061177/state-ags-take-aim-at-fast-food-noncompete-clauses>.

118. *Id.*

119. *In re Document Techs. Litig.*, 275 F. Supp. 3d 454, 470 (S.D.N.Y. 2017).

120. *Id.* at 458.

121. *Id.*

122. *Id.*

123. *Id.*

124. Klein, *supra* note 1.

125. *In re Document Techs. Litig.*, 275 F. Supp. 3d at 459.

126. *Id.*

127. Klein, *supra* note 1.

128. *In re Document Techs. Litig.*, 275 F. Supp. 3d at 464.

a non-competition provision . . . .”<sup>129</sup> The court found that legitimate preparatory acts include “incorporating a future competing business, constructing facilities, and filing and obtaining trademarks.”<sup>130</sup> The court explicitly stated that acts are no longer preparatory when they “detrimentally impact the former employer’s economic interests” during the period of the noncompetition agreement.<sup>131</sup> According to the court, the defendants did not detrimentally impact their former employer’s economic interests because their acts were merely preparatory.<sup>132</sup>

#### **IV. IMPLICATIONS OF *IN RE DOCUMENT TECHNOLOGIES* LITIGATION AND PROPOSED LEGISLATION IN NEW YORK**

##### **A. IMPLICATIONS OF *IN RE DOCUMENT TECHNOLOGIES* LITIGATION**

Prior to the proposed legislation in New York State and New York City, and the district court’s decision in *In re Document Technologies Litigation*, New York had stricter restrictions on the enforcement of noncompetition agreements than other states.<sup>133</sup> Nonetheless, *In re Document Technologies Litigation* demonstrates that New York courts are likely to scrutinize noncompetition agreements even closer.<sup>134</sup> However, it appears that New York courts will still find noncompetes to be valid in certain circumstances, such as when garden leave is provided to an employee, as was provided in *In re Document Technologies Litigation*.

Although it seems that New York is following in the footsteps of the minority of states increasing restrictions on employers’ use of non-competition agreements, the proposed legislation and the district court’s decision still allow for employers to enforce noncompetition agreements with high-wage employees. Since the legislation has not yet passed, it was ultimately up to the district court to make a move towards increasing restrictions on all noncompetition agreements in New York. In holding that preparatory acts of the former employees of Epiq did not violate their noncompetition agreement obligations, the district court in *In re Document Technologies Litigation* acted consistently with the goals of current New York noncompetition law and the proposed New York City and New York State legislation in maximizing the flexibility of employees generally. However, the district court, in finding that the employees did not violate their agreements by merely entering into employment with LDiscovery because their new employment relationships provided for a garden leave, lost its chance to further promote the goals of New York noncompete law.

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129. *Id.*

130. *Id.*

131. *In re Document Techs. Litig.*, 275 F. Supp. 3d at 465; Klein, *supra* note 1.

132. *In re Document Techs. Litig.*, 275 F. Supp. 3d at 465.

133. Klein, *supra* note 1.

134. *Id.*

The court incorrectly decided the case because the court allowed for the avoidance of noncompetition agreements for high-wage employees only through a major loophole: allowing employers to hire an employee with an existing noncompetition agreement and having such employee take a garden leave as to not violate the pre-existing agreement. Of course, this loophole is beneficial to employees that are able to find employers willing to provide such accommodations and to companies that have the funds to do so. Unfortunately, this loophole also creates unfair competition since the only way for a competing business to hire a high-wage employee with a pre-existing noncompetition agreement, without violating said agreement, is to provide incentives, such as a million-dollar sign-on bonus. While it may be likely that a company looking to hire a high-wage employee that is subject to an existing noncompetition agreement will have the funds to provide such incentives, not all companies will be able to do so.

In order to provide for garden leave, an employer must “incur real additional costs.”<sup>135</sup> As a result, when an employer offers such leave, employers expect advantages justifying these additional costs.<sup>136</sup> This means that an employer must have the ability, specifically the financial capital, to provide an employee subject to an existing noncompetition agreement with significant compensation in order to avoid violating such agreement during the hiring process. Additionally, these prospective employees will likely be held to higher standards and pressures by the new employer as a result of the risk that the employer is taking in providing garden leave and monetary incentive. Thus, employees may hesitate in seeking new employment or leaving their current employer because of this higher standard that may be imposed upon them, if they are even lucky enough to receive an offer with such monetary incentives. Due to these various costs, only certain types of employers can provide prospective high-wage employees with an escape plan out of an existing noncompetition agreement. While most employers that offer these incentives happen to be in the financial industry,<sup>137</sup> and thus have more resources than other businesses, this creates an unfair advantage for the limited number of businesses that have the ability to get around noncompetition agreements when hiring high-wage employees from competitors. Any business that lacks the capital to provide for incentives, which may include small businesses and “start-ups” that often employ certain high-wage employees to help the business grow, will be unable to avoid violations of noncompetition agreements because they are unable to provide for garden leaves during the limitation period of the existing agreements. If New York truly seeks to become a leading pioneer in restricting noncompetition

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135. Sullivan, *supra* note 76, at 303.

136. *Id.*

137. *Id.* at 294.

agreements like California, the district court in *In re Document Technologies Litigation* should have found that compelling an employee to take a garden leave to avoid noncompetition agreement violations is an unnecessary step in avoiding liability. Rather, the district court should have held that the noncompetition agreements were completely void. Even in the face of proposed legislation, the district judge would be safe from accusations of writing law because such a decision would still meet the legislature's goal of optimizing job mobility and protecting employees.

### B. LOST CHANCES TO CLARIFY NEW YORK RESTRICTIONS ON NONCOMPETES

The New York County Supreme Court almost had the chance to provide additional opinions on restrictions to noncompete agreements prior to the dismissal of a complaint by L'Oréal USA, Inc. ("L'Oréal") against Shiseido Americas Corp. ("Shiseido").<sup>138</sup> L'Oréal accused a cosmetics competitor, Shiseido, of stealing an executive along with confidential information and persuading him to disobey the noncompetition agreement he signed when he ended his employment relationship with L'Oréal.<sup>139</sup> In its complaint, L'Oréal claimed that a senior vice president who helped design the company's business plans resigned in June 2017 and agreed to wait until December 2017 to begin his employment, in a similar capacity, at Shiseido.<sup>140</sup> Although L'Oréal continued to pay the executive his salary during a garden leave, he informed L'Oréal that he would be traveling to Tokyo for a couple of weeks in October 2017 to discuss business plans with Shiseido.<sup>141</sup> This was months ahead of the agreed-upon December 2017 start date.<sup>142</sup> L'Oréal claimed that the executive backed out of the original agreement because he was prompted by Shiseido, which promised to provide him with legal advice and defend him from any suit resulting from the breach of said agreement.<sup>143</sup> Specifically, L'Oréal alleged that "Shiseido [was] facilitating, aiding and abetting [the executive's] breach of contract, interfering with [his] contractual obligations to L'Oréal, and ratifying and accepting the benefit of this wrongful conduct."<sup>144</sup> L'Oréal believed that the point of the executive's planned meetings in Tokyo was to start work on a "highly sensitive project" for Shiseido, in which Shiseido "hoped to regain

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138. Stipulation of Dismissal With Prejudice at 1–2, *L'Oréal USA, Inc. v. Shiseido Am. Corp.* et al., No. 656520-2017 (July 13, 2018).

139. Kat Greene, *L'Oréal Says Shiseido Prompted Ex-VP To Violate Noncompete*, LAW360 (Oct. 24, 2017, 10:33 PM), <https://www.law360.com/articles/978060/l-oreal-says-shiseido-prompted-ex-vp-to-violate-noncompete>.

140. Complaint at 2–6, *L'Oréal USA, Inc. v. Shiseido Am. Corp.* et al., No. 656520-2017 (Oct. 24, 2017).

141. *Id.* at 5–6.

142. *Id.*

143. *Id.* at 6.

144. *Id.*

commercial momentum that it lost to L'Oréal.”<sup>145</sup> L'Oréal emphasized that it had made “major investments” in what it promised to be a “major development” in the cosmetics industry, demonstrating the importance of the sensitive project.<sup>146</sup>

This would have been at least the second suit in two years against Shiseido accusing the company of poaching high-level executives in the beauty industry.<sup>147</sup> In 2016, Coty Inc. (“Coty”), a beauty products company, sued in New York County Supreme Court, claiming that two former senior vice presidents of Coty were induced by Shiseido to resign from the company with “full knowledge of and utter disregard” for the noncompetes included in their employment agreements.<sup>148</sup> Coty also believed that its former president, who is currently CEO of Shiseido, “masterminded a plan to poach Coty’s top executives in an attempt to disrupt its business and unfairly gain a competitive edge.”<sup>149</sup> Coty’s suit against Shiseido is also currently pending.<sup>150</sup> Coty also sued Shiseido in November 2015 for poaching its former chief financial officer, but the parties settled in February 2016.<sup>151</sup> It is unfortunate, at least for the purpose of clarifying noncompete restrictions, that L'Oréal’s suit was dismissed by stipulation of the parties since it appeared that the L'Oréal executive was provided with a garden leave, and he violated both that provision and the noncompete provisions of his departure agreement.

## V. SOLUTION

Since the district court allowed employees in *In re Document Technologies Litigation* to escape violations of their noncompetition agreements through use of a garden leave provided by their new employer, New York State and New York City legislatures must now review and revise the proposed legislation in order to fully maximize employee flexibility. Limiting enforcement of noncompetition agreements of low-wage employees is of particular importance because the number of low-wage jobs throughout the country is expected to grow the fastest through 2022.<sup>152</sup> However, legislatures need to include restrictions on the use of noncompetition agreements for low-wage *and* high-wage employees in

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145. *Id.*

146. *Id.*

147. See Greene, *supra* note 139.

148. *Id.*

149. *Id.*

150. Y. Peter Kang, *Coty Claims Beauty Products Rival Shiseido Poached Execs*, LAW360 (Apr. 6, 2016, 10:41 PM), <https://www.law360.com/articles/781523/coty-claims-beauty-products-rival-shiseido-poached-exec>.

151. *Id.*

152. See Aimee Picchi, *America’s Job Problem: Low-Wage Work is Growing Fastest*, CBS NEWS (Aug. 4, 2017, 5:00 AM), <https://www.cbsnews.com/news/americas-job-problem-low-wage-work-is-growing-fastest/>.

order to establish consistency and maintain a fair employment standard throughout the entire state and to keep a strong and stable labor market across the nation. The legislatures must also consider the consequences that this legislation may have on the work environment of New York and should pay attention to other states that have already implemented or are considering increased restrictions on the enforceability of noncompetition agreements or completely banning their use altogether.

While low-wage jobs are expected to increase, the fastest growing professions throughout the country are higher-paying jobs in science, technology, engineering, and math.<sup>153</sup> Startups, which frequently do business in these areas, are popping up increasingly in New York.<sup>154</sup> While California is known as one of the most popular states for startups, New York, in the first quarter of 2015, had more startup funding applications than California for the first time ever.<sup>155</sup> Further, New York City is number two in the amount of venture capital raised by local companies behind San Francisco.<sup>156</sup> New York is currently attempting to compete with California's technology sector.<sup>157</sup> In 2011, former Mayor of New York Michael Bloomberg invited top universities to bid on the construction of a new tech campus in New York City.<sup>158</sup> Bloomberg expressed New York City's goal of "becoming the global leader in technological innovation," and Senator Kirsten Gillibrand has echoed this sentiment, stating that "no other city is poised to lead in the high-tech economy of the future like New York City."<sup>159</sup> In September 2017, Cornell Tech, a new graduate school for technology on Roosevelt Island, opened its doors.<sup>160</sup> The school's opening marks the extension and progress of "Silicon Alley," New York's own version, and competitor, of Silicon Valley in California.<sup>161</sup> In its 2016 report, the U.S. Treasury found that in urban economics, regions are prone to "agglomeration effects," in which businesses, such as high-tech firms, tend to cluster in geographic locations rather than being randomly located.<sup>162</sup> Silicon Valley is a prime example of this phenomenon and is a

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153. *Id.*

154. Taylor Majewski, *How NYC Tech Growth is Outpacing Silicon Valley*, BUILT IN NYC (Dec. 11, 2015), <https://www.builtinnyc.com/2015/12/10/numbers-behind-new-york-techs-steady-growth>.

155. *Id.*

156. Peter Coy & Eric Gelman, *New York's Silicon Alley is (Still) No Match for Silicon Valley*, BLOOMBERG (Sept. 12, 2017, 3:50 PM), <https://www.bloomberg.com/news/articles/2017-09-12/new-york-s-silicon-alley-is-still-no-match-for-silicon-valley>.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. Rebecca Fannin, *Milestones from Silicon Valley to Silicon Alley, Does NY Have What it Takes?*, FORBES (June 18, 2017, 6:00 PM), <https://www.forbes.com/sites/rebeccafannin/2017/06/18/milestones-from-silicon-valley-to-silicon-alley-does-ny-have-what-it-takes/#7769e9e03b7e>.

162. U.S. DEP'T OF THE TREAS., *supra* note 24, at 22.

direct result of the “availability of a large, deep pool of workers with relevant skills, a more competitive market of suppliers, and information spillovers across workers and firms.”<sup>163</sup> Without the restriction of noncompete agreements, the clustering of firms allows for workers to share expertise much easier, providing an advantage to the larger economy and making the geographic cluster an attractive location to other businesses.<sup>164</sup> In order to fulfill its goal of competing with Silicon Valley and allow for the growth of its science, technology, engineering, and math markets, New York should increase restrictions on noncompetes, including those signed by high-wage employees, so that it may also become prone to the agglomeration effects that provide for a competitive edge, especially if it hopes to make Silicon Alley a viable competitor of Silicon Valley.

Although the New York City proposed legislation does in fact touch upon the enforceability of noncompetition agreements for high-wage employers, it states only that an employer who wishes to utilize such an agreement must disclose, in writing, that the prospective employee will be subject to a noncompetition agreement.<sup>165</sup> The New York City legislature should adopt language that other states have used in passing law on noncompetition agreements. While adopting similar language to California’s statute would be the most effective in restricting all “contract[s] by which anyone is restrained from engaging in a lawful profession, trade or business of any kind,”<sup>166</sup> New York City could also adopt less restrictive language and follow states such as Hawaii,<sup>167</sup> which would at least protect employees in the technology sector. The New York City legislature clearly has a reason for mentioning high-wage employees in its proposed legislation, but needs to explore the option of making the enforceability of noncompetes of high-wage employees just as difficult as the enforceability of agreements used with low-wage employees. Simply requiring a written disclosure to prospective high-wage employees is ineffective, and this provision must also be revised, especially since there is a risk that employees may feel pressured by employers to sign such disclosures in fear of losing employment opportunities.

The New York State proposed legislation should also heed this advice since it does not mention high-wage employees at all. If New York State passed law restricting noncompetition agreements for both low and high-wage employees, New York City would not need to pass its own law to restrict noncompete enforceability. Consistency between the New York City and State laws would nonetheless be of great value in order to equally maximize employee flexibility throughout New York State as a whole. In

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163. *Id.*

164. *Id.*

165. Int. No. 1663-2017, *supra* note 99.

166. CAL. BUS. & PROF. CODE § 16600 (Deering 1941).

167. HAW. REV. STAT. § 480-4 (2015).

the face of recent and increasing litigation with respect to alleged breaches of noncompete agreements by high-level executives, New York legislatures must address restrictions on high-wage employees.

Since garden leave provisions are technically separate agreements that differ from noncompetition agreements, New York State and New York City will also need to propose and implement separate legislation on the enforceability of these provisions. It is doubtful that New York State and New York City will want to restrict garden leave provisions until legislation is passed and enforced with respect to the enforceability of noncompetition agreements on low-wage (and hopefully high-wage) employees since they currently serve as a way to escape noncompetition agreements. Although at the same time, garden leave provisions serve only as escape routes for the fraction of high-wage employees who are offered such high monetary incentives. If the New York legislatures seek to fully protect low-wage employees, they should also look to restricting garden leave provisions since low-wage employees are currently at an unfair advantage as they do not have the option of receiving these benefits. It is likely, however, that New York will also be hesitant to restrict or even comment on garden leave provisions due to the fact that there are currently no other federal or state laws governing garden leaves.<sup>168</sup>

Of course, the easiest solution to creating consistent standards throughout the country is for the federal government to pass legislation restricting the enforceability of noncompetition agreements throughout the entire nation. This would likely cause much debate though, especially since the majority of states currently enforce noncompetition agreements openly.<sup>169</sup> However, both the White House and the Treasury Department have expressed clear disfavor of noncompetition agreements.<sup>170</sup> Perhaps federal law would in fact follow the trend that a minority of states have established, yet this may also depend on the current control of Congress since the expression of disfavor towards the use and enforcement of noncompetes was shared during the Obama administration.<sup>171</sup> The fact that President Trump has promised to create more blue-collar employment opportunities<sup>172</sup> may also influence the federal government to consider legislation, at a minimum, with respect to low-wage employees across the country.

New York employers in favor of noncompetition agreements may argue that a complete restriction on the use noncompetition agreements will inhibit the economy of New York, allowing competitors to poach employees and leave businesses suffering economic loss. This is especially

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168. RAMSEY & ANDREWS, *supra* note 78.

169. Burke, *supra* note 3.

170. Almeling & Beasley, *supra* note 16.

171. *Id.*

172. Dougherty, *supra* note 9.

important for smaller businesses, who may fear that employees, without noncompete restrictions, may leave for employment with much larger companies. However, this argument is less than compelling, especially when one looks at the success of a state like California, a leader in restricting noncompete agreements, which prohibits the enforcement of noncompetition agreements against the majority of the employees in the state.<sup>173</sup> California is one of three states that bans noncompetes outright, along with North Dakota and Oklahoma,<sup>174</sup> and its economy is currently the world's fifth largest economy, rivaling that of the United Kingdom.<sup>175</sup> Additionally, California's economy grew \$42.3 billion during the first three quarters of 2016, which is almost as much as New York, one of the next fastest-growing states in the country.<sup>176</sup> According to a U.S. News Ranking, California also sits as the twenty-ninth best state for employment, while New York sits at number forty.<sup>177</sup>

## VI. PRACTICES IN ANTICIPATION OF RESTRICTIONS

In anticipation of legislation that may increase restrictions on the enforceability of noncompetition agreements in New York, employees must still carefully prepare to depart from employment, whether they are subject to an enforceable noncompetition agreement or not. Even in a state like California, where the employment landscape is supposedly "laissez-faire," employees that do not carefully manage career moves can end up in legal trouble.<sup>178</sup> Regardless of how New York legislatures and courts proceed, employees must fully read what they actually signed at the beginning of their employment relationships and comply with what they have signed, at least initially.<sup>179</sup> Even without the consultation of an attorney, which is not always feasible especially for low-wage employees, it is important for an employee to remain mindful of how his or her conduct will look if he or she is ever brought into court by an employer due to allegations of a breached noncompete agreement.<sup>180</sup> It is very likely that an employer, upon learning that an employee is planning to leave or has left to work for a competitor,

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173. Hammerschmidt & Blum, *supra* note 52.

174. Gregory Korte, *USA Today White House Launches Crackdown on Non-Compete Clauses*, USA TODAY (Oct. 25, 2016, 4:38 PM), <https://www.usatoday.com/story/news/politics/2016/10/25/white-house-launches-crackdown-non-compete-clauses/92730536/>.

175. Matthew A. Winkler, *California Leads U.S. Economy, Away from Trump*, BLOOMBERG (May 10, 2017, 5:00 AM), <https://www.bloomberg.com/view/articles/2017-05-10/california-leads-u-s-economy-away-from-trump>.

176. *Id.*

177. *Employment Rankings*, U.S. NEWS REPORT, <https://www.usnews.com/news/best-states/rankings/economy/employment> (last visited Sept. 23, 2018).

178. Nancy Shilepsky et al., *Advising Departing Employees On How To Keep Future Jobs*, LAW360 (Sept. 7, 2017, 12:00 PM), <https://www.law360.com/articles/960039/advising-departing-employees-on-how-to-keep-future-jobs>.

179. *Id.*

180. *Id.*

will take steps to review the employee's pre-departure records, including emails and computer/printer usage, thus an employee should refrain from any inappropriate actions with respect to his or her departure and new employment.<sup>181</sup> Additionally, employees should be careful in publicizing any new employment with a competing business, as any public information about new employment may trigger concerns of an employee's former employer.<sup>182</sup> If any issues arise after departing with an employer to work for a competing business, of course an employee should contact an attorney immediately, as ignoring the issue or implementing self-help remedies can prove to be even more harmful.<sup>183</sup> In the face of a suit for breaching a noncompete agreement, an employee may be able to "invalidate or reduce the agreement's impact."<sup>184</sup> One possible tactic is for an employee to report his or her employer to the New York State Attorney General, who may initiate an investigation into the employer (as was done with Jimmy John's and Law360).<sup>185</sup> If an employee does not have highly unique skills acquired during employment or access to trade secrets, an employee will likely not be bound by a noncompete agreement and an employer attempting to enforce such an agreement could be prosecuted for trying to restrict the employee's ability to work for another employer.<sup>186</sup> An employee should also make sure that the employer actually has a copy of the noncompete agreement—if the company does not have a copy, then it cannot enforce a noncompete agreement.<sup>187</sup> If the company does have a copy, an employer should confirm that the employer has itself not breached the employment agreement in which the noncompete provision is provided.<sup>188</sup> If an employer has in fact breached any of its obligations to the employee under the employment agreement, a court will be less inclined to enforce a noncompete agreement.<sup>189</sup> If an employee's employment relationship was terminated involuntarily, an employer may also lack the ability to enforce a noncompete clause if the employee was fired without cause, as courts enforce noncompetes only if they are "necessary to protect legitimate business interests."<sup>190</sup> Firing an employee and enforcing a noncompete agreement may also be found to impose "undue hardship" on an employee and will likely weigh in favor finding a noncompete unenforceable in

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181. *Id.*

182. *Id.*

183. *Id.*

184. *Five Ways to Defeat New York Non Compete Agreements*, OTTINGER EMP'T LAW., <https://ottingerlaw.com/blog/defeating-non-competition-agreements> (last visited Oct. 13, 2018).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

court.<sup>191</sup> As a final tactic, an employee should also support a claim that a noncompete is unenforceable by arguing there is no competition between his or her new and former employers.<sup>192</sup> If an employee's new employer provides completely different products or services or sits in a totally different market than his or her previous employer, a noncompete agreement will likely be found unenforceable by a court.<sup>193</sup> Of course, the employee will have the burden to show that the new employer does in fact not compete with his or her previous employer.<sup>194</sup> Once the prospective legislation is passed, hopefully such lengthy procedures will be unnecessary for employees in fear of violating noncompetes.

Businesses, on the other hand, must also proceed cautiously in drafting noncompete agreements, especially in the face of increased restrictions on noncompete enforceability. When drafting noncompete agreements, a business should consider its desire to restrict employees' ability to compete with respect to its legitimate business needs as an employer.<sup>195</sup> Because courts are most likely to enforce a noncompete agreement that is tailored to "balance both the business interests of an employer and an employee's interests in earning a livelihood in his or her chosen profession," it is more important than ever for a business to be extremely specific and reasonable in drafting a noncompete agreement, especially for low-wage employees.<sup>196</sup> Employers must also be prepared for a court to either nullify or modify any noncompete agreements it finds unenforceable, as a New York court can and will delete any provisions that it finds to violate New York employment law through its power to blue pencil.<sup>197</sup> Ultimately, employers and businesses in New York should begin to move away from incorporating noncompetes in employment agreements and, at a minimum, cease completely from using them when hiring low-wage employees. If, however, the new legislature remains silent with respect to high-wage employees, businesses should still remain hesitant in utilizing noncompetes but may still use garden leaves to avoid violating such agreements, even if they are quite an unfair advantage, provided that such an employee is of high value to the business and the business has the funds to supply these considerable benefits.

## CONCLUSION

As noncompete agreements are increasingly a subject of litigation, New York State and New York City legislatures must revise their proposed

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191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. Galler, *supra* note 5, at 12.

196. *Id.*

197. BDO Seidman v. Hirschberg, 93 N.Y.2d 382, 391-93 (1999).

legislation to include restrictions on the use of noncompetition agreements with respect to both low-wage and high-wage employees. If New York wishes to truly maximize employment flexibility and compete with other progressive states such as California, this is the most efficient method to fulfill this goal. Without such revision, the legislation, if passed, would allow for high-wage employees subject to a noncompete to leave an employer only through loopholes such as garden leave, as was allowed in *In re Document Technologies* and for which there are no federal or state laws. In anticipation of the legislation, employees must remain careful in preparing for departure from an employer and employers must pay special attention when drafting noncompetition agreements.

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\* B.A., Boston College, 2014; J.D. Candidate, Brooklyn Law School, 2019. Thank you to the dedicated staff and editorial board of the Brooklyn Journal of Corporate, Financial & Commercial Law for their hard work and diligence in perfecting this Note for publication.