MODEL LEGISLATION

AMERICAN ECONOMIC LIBERTIES PROJECT

Better Wages and Working Conditions:

How States Should Tackle Noncompete Agreements, "TRAPs," and Other Restraints On Worker Mobility

June 2024

INTRODUCTION

The purpose of this memorandum is to provide model legislation and relevant context for state lawmakers seeking to protect workers, small businesses, and consumers from the harmful effects of noncompete agreements. Over the course of this memorandum, we describe what noncompete agreements are — including agreements that function as noncompetes — and describe best practices for banning them outright.

On April 23, 2024, the Federal Trade Commission adopted a final rule banning noncompete agreements between employers and workers.[1] The following week, three separate challenges were filed in federal court to block the rule. Amid these developments and the political and legal uncertainty facing the FTC's new rule, we find several reasons for state lawmakers to promptly introduce legislation that protects workers, consumers, and small businesses.

1. **State laws can be more broadly applicable than the federal rule**. The federal rule establishes a regulatory floor, and state laws that apply more broadly than the federal rule are not preempted. While the FTC rule broadly applies to all workers under its jurisdiction, that jurisdiction does not extend to

1 Federal Trade Commission, "Non-Compete Clause Rule," Federal Register, May 7, 2024, *https://www.federalregister.gov/documents/2024/05/07/2024-09171/non-compete-clause-rule*.

certain entities outside of the FTC's jurisdiction under the FTC Act, including certain nonprofit entities.[2]

2. **State laws are more durable against potential challenge or revocation**. In recent years, activist judges have proven willing and eager to block federal rules, even where there is a clear delegation of rulemaking authority. Federal rules are also vulnerable to revocation by future administrations. State laws are less vulnerable to these same challenges and more difficult to repeal.

3. **State laws can be more broadly enforceable**. Unlike the federal rule, which is enforceable primarily by the Federal Trade Commission, state laws can also be enforced by state attorneys general, state agencies, and members of the public via a private right of action. State laws can also include penalties that provide a greater deterrent effect than the penalties available under enforcement of the federal rule.

NONCOMPETE AGREEMENTS RESULT IN LOWER PAY AND WORSE WORKING CONDITIONS

An economy that prevents workers from seeking better pay and improved working conditions is not a fair economy. Yet, 1 in 5 American workers — approximately 30 million people — are bound by a clause in their employment agreement that bars them from working for any competing business or from starting a business of their own after the termination of their employment.

These kinds of clauses, called "noncompete clauses," restrict workers from seeking better wages and working conditions in their chosen line of work. Noncompete clauses also remove the incentive for employers to retain workers with better wages and improved working conditions, thereby diminishing both. Recently, the Federal Trade Commission

2 Id., at II.E. ("Whether an entity falls under the Commission's jurisdiction can be a fact-specific determination," but the FTC Act generally exempts banks, common carriers, air carriers, entities subject to the Packers and Stockyards Act, certain state and local government entities when engaged in activity protected by the state action doctrine, and certain nonprofit entities that are "not organized to carry on business for [their] own profit or that of its members.")

(FTC) estimated that noncompete clauses deprive American workers of between $250 billion and $296 billion in income per year.[3]

Noncompete clauses also restrain new business formation by preventing workers subject to noncompete clauses from starting their own businesses. Firms are more willing to enter markets in which they know there are potential sources of skilled and experienced labor, unhampered by noncompete clauses. One study showed that when the use of noncompete clauses increases, the entry rate of new firms decreases by 10%.[4]

But noncompete clauses are not the only tool used by employers to restrict workers' ability to seek better pay and improved working conditions. For example, training repayment agreement provisions (or "TRAPs") can subject workers to thousands of dollars in debt for basic on-the-job training if they quit their jobs. Other employment-driven debt agreements can impose costs for maintaining professional licensures or visa-related costs, ordinary expenses that employers directly benefit from. No-poach agreements or wage-fixing agreements can also limit worker mobility and wages, as can over-broad trade secret or nondisclosure agreements (NDAs).

As noncompete clauses face greater regulatory scrutiny, employers will increasingly rely on other provisions that serve the same purpose of restricting workers from negotiating for better pay and improved working conditions at their current place of employment, or from seeking it elsewhere.

FEDERAL REGULATORY EFFORTS

In furtherance of President Biden's Executive Order on Promoting Competition in the American Economy,[5] several federal agencies have taken steps to regulate noncompete agreements, TRAPs, and other restraints on worker mobility.

On April 23, 2024, the FTC adopted a final rule to ban noncompete clauses and other restraints on post-employment worker mobility, following introduction of the proposed

3 Federal Trade Commission, Non-Compete Clause Rule, Sec. VII.A, "Overview of the Effects of the Proposed Rule," *https://www.federalregister.gov/d/2023-00414/p-847*.

4 Jessica Jeffers, "The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship," April 2023, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3040393*.

5 The White House, Executive Order on Promoting Competition in the American Economy, July 9, 2021, *https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/*.

rule in January 2023.[6] The proposed rule elicited over 26,000 public comments, over 25,000 of which were in support of the rule. The final rule is based on extensive study of the scope and effect of noncompetes[7] and surging interest in regulating noncompete clauses among state lawmakers.[8] Anticipating the potential for abuse of a narrow definition of noncompete clauses, the FTC rule also prohibits any employment provision that "prohibits" a worker from, "penalizes" a worker for, or "functions to prevent" a worker from seeking alternative employment or operating a business after the conclusion of their employment. These functional noncompete clauses can include over-broad nondisclosure agreements, non-solicitation agreements, liquidated damages provisions, debt repayment agreements or "TRAPs," and other types of restrictive employment covenants.

On May 30, 2023, National Labor Relations Board (NLRB) General Counsel Jennifer Abruzzo issued a memorandum finding that, in the general counsel's view, noncompete clauses generally tend to violate the National Labor Relations Act because, "they reasonably tend to chill employees in the exercise of Section 7 rights."[9] The NLRB has also entered into a Memorandum of Understanding with the Consumer Financial Protection Bureau (CFPB) "to better root out financial practices that harm workers."[10] On September 7, 2023, Region 9 of the NLRB issued a complaint against an employer alleging that its TRAP is unlawful under Section 7 of the National Labor Relations Act.[11]

Following a yearlong public inquiry into practices that leave workers indebted to employers,[12] the CFPB on July 20, 2023, issued a report on "consumer risks posed by employer-driven debt."[13] The CFPB's report highlights the risk that employees may be rushed into signing agreements that hide the details of the debt workers are agreeing to. The report highlights a striking increase in the use of TRAPs in the health care industry

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6 "FTC Announces Rule Banning Noncompetes," Federal Trade Commission, April 23, 2024, ***https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes***.

7 Evan Starr, J.J. Prescott, and Norman D. Bishara, "Noncompete Agreements in the U.S. Labor Force," Journal of Law and Economics, October 2020, ***https://ssrn.com/abstract=2625714***.

8 Over the past decade, numerous states have passed partial bans on noncompete clauses, typically restricted by industry or income level. See, e.g., Haw.'i Rev. Stat. 480-4(d) (prohibiting noncompete agreements in the tech industry); Maine, Me. Rev. Stat. Ann. tit. 26, sec. 599-A(4) (prohibiting noncompete clauses for workers earning less than 400% of federal poverty level); Mass. ALM GL Ch. 149, § 24L (prohibiting noncompete agreements, unless to satisfy a legitimate business interest and subject to severance pay); Illinois 820 ILCS 90 (prohibiting noncompete agreements for low-wage workers only); and Wash. D.C. Code § 32-581.02 (prohibiting noncompete agreements for employees making under $150,000 per year, and for medical specialists making less than $250,000 per year).

9 National Labor Relations Board, Office of General Counsel, "Non-Compete Agreements that Violate the National Labor Relations Act," Memorandum GC 23-08, May 30, 2023, ***https://www.nlrb.gov/guidance/memos-research/general-counsel-memos***.

10 Memorandum of Understanding Between the Consumer Financial Protection Bureau and the National Labor Relations Board, March 7, 2023, ***https://files.consumerfinance.gov/f/documents/cfpb_mou-nlrb_2023-03.pdf***.

11 ***https://www.nlrb.gov/news-outreach/region-09-cincinnati/region-9-cincinnati-issues-complaint-alleging-unlawful-non***

12 Consumer Financial Protection Bureau, "CFPB Launches Inquiry into Practices that Leave Workers Indebted to Employers," June 9, 2022, ***https://www.consumerfinance.gov/about-us/newsroom/cfpb-launches-inquiry-into-practices-that-leave-workers-indebted-to-employers/***.

13 CFPB, "Consumer risks posed by employer-driven debt," July 20, 2023, ***https://www.consumerfinance.gov/data-research/research-reports/issue-spotlight-consumer-risks-posed-by-employer-driven-debt/full-report/***.

and notes their prevalence across industries ranging from transportation to retail, airlines, and banking.

On December 4, 2023, a coalition of groups including the Student Borrower Protection Center, Governing for Impact, American Economic Liberties Project and Towards Justice released memos outlining the broad range of executive actions that federal agencies can take to curb harmful "stay-or-pay" employment contracts.[14]

THE NEED FOR HOLISTIC REFORM AT THE STATE LEVEL

Noncompete clauses have been void and unenforceable in California since 1872,[15] in North Dakota since 1877,[16] and in Oklahoma since 1890.[17] Although unenforceable in those states, employers still include noncompete clauses in employment contracts, and the clauses serve as effective restraints against workers who are not aware of their rights.[18] Absent laws explicitly regulating noncompete clauses, some state courts have independently voided noncompete agreements where they lack a legitimate government purpose or impose undue hardship on the subject employee,[19] or where the noncompete agreement was entered into after the start of employment.[20] But forcing workers to challenge the legality of noncompete agreements in court places an unfair burden on under-resourced workers to proactively assert their rights.

Since the FTC's proposed rule on noncompete clauses, at least 17 state legislatures have introduced bills to regulate or prohibit noncompete clauses. In 2023, California adopted Assembly Bill 1076, expanding on the state's existing approach to deeming noncompetes "void and unenforceable" by providing that it is illegal for employers to insert noncompete clauses in employment contracts at all.[21] By and large, these new bills adopt the piecemeal

14 *https://protectborrowers.org/experts-release-policy-roadmap-and-gather-with-enforcement-officials-at-convening-on-traps-and-other-employer-driven-debt/*

15 Cal. B&P Code Sec. 16600.

16 N.D. Cent. Code, § 9-08-06.

17 15 Okl. St. Sec. 219A.

18 "Attorney General Bonta Reminds Employers and Workers That Noncompete Agreements Are Not Enforceable Under California Law," March 15, 2022,

https://oag.ca.gov/news/press-releases/attorney-general-bonta-reminds-employers-and-workers-noncompete-agreements-are.

19 *Prudential Locations, LLC v. Gagnon*, No. SCWC-16-0000890, 2022 WL 482601 (Haw. Feb. 17, 2022).

20 *Rullex Co. v. Tel-Stream, Inc.,* No. 27 EAP 2019 (Pa. 2020).

21 CA AB 1076 (2023-2024) .

approach of past state efforts, which often allow employers to intimidate employees with the threat of lawsuits. Most legislative efforts stop short of prohibiting a broader category of "contracts that restrict worker mobility" or de facto noncompete agreements — including TRAPs, no-poach agreements, wage-fixing agreements, and over-broad nondisclosure and trade secrets provisions — leaving loopholes that employers can drive a truck through.

At best, industry-specific bans on noncompete clauses highlight the cross-industry scope of harm to workers across otherwise disparate industries, including health care,[22] restaurants and retail,[23] and print and broadcast news.[24] But these industry-specific efforts fail to address the harm of noncompete agreements to workers outside of those industries.

Similarly, efforts to prohibit noncompete agreements only for low-wage employees ignore the harm to workers at higher wage levels who are cut off from alternate employment opportunities. Noncompete clauses can also restrict competition and new market entry. One study of CEOs, for instance, showed that noncompete clauses foreclose the ability of competitors to access talent by effectively forcing them to make inefficiently high buyout payments.[25]

States have a critical role to play in establishing strong regulatory standards that, in turn, support strong federal standards.

BEST PRACTICES FOR STATE NONCOMPETE LEGISLATION

Noncompete clauses, TRAPs, and other employer-imposed contracts that restrict worker mobility should be prohibited outright via clear rules without loopholes. These prohibitions should cover workers of all professional levels, industries, and employment statuses, and be backed up with strong enforcement mechanisms.

Legislation to prohibit noncompete clauses, TRAPs, and other restraints on worker mobility (often referred to as "de facto noncompete clauses") will take different forms from state to state, depending on an assessment of existing regulations. Effective legislation

22 Arkansas ***House Bill 1130***, Indiana ***Senate Bill 7***, Missouri ***House Bill 1394***, Rhode Island ***Senate Bill 279*** and ***House Bill 5284***.

23 Hawaii ***Senate Bill 1054***.

24 Hawaii ***Senate Bill 1054***, Pennsylvania ***Senate Bill 172***.

25 Liyan Shi, "*Optimal Regulation of Noncompete Contracts*," *Econometrica*, March 2023, ***https://doi.org/10.3982/ECTA18128.***

may amend state antitrust laws, business and professions codes, or labor codes. The most comprehensive efforts will characterize prohibited agreements as "contracts that restrain competition" or "contracts that restrain a person from engaging in a lawful profession." Narrower efforts to regulate "stay-or-pay" contracts or TRAPs — which may make more sense where noncompete clauses are already prohibited — may seek to prohibit "employment promissory notes."[26]

Regardless, effective legislation will prioritize strong, multipronged enforcement. That will, in turn, encourage compliance with the law, reducing both the cost of enforcement and the risk of underenforcement.

The below best practices should guide state lawmakers in their efforts to ban all restraints on worker mobility.

PROHIBIT ALL FORMS OF NONCOMPETE AGREEMENTS, TRAPS, AND OTHER CONTRACTS THAT RESTRAIN WORKER MOBILITY

- **Ban all contracts that restrict anyone from engaging in a lawful profession, trade, or business of any kind**. Legislation should prohibit employers from presenting, entering into, or seeking to enforce contracts that restrict their workers from engaging in their chosen line of work. Defined terms like "noncompete agreement" and/or "contract in restraint of trade" should be construed broadly and should specifically include provisions that "function as" noncompete clauses and other provisions that seek to impose debt obligations on employees if they choose to seek alternate employment.

- **Prohibit training repayment agreement provisions (TRAPs)**. Training repayment agreement provisions, or TRAPs, require employees to repay the cost of training received on the job and other "employment-related costs," even if that training was of little use in or outside of a given workplace, or if those costs were necessary expenditures incurred by workers while discharging their duties. For workers seeking better pay and working conditions, TRAPs

26 *See, e.g.*, New York A6819 (the Trapped at Work Act, pending 2023-2024), *https://legiscan.com/NY/text/A06819/id/2812635*.

and other debt for employment-related costs quite literally trap workers, disproportionately low- to middle-wage workers and people of color, in substandard working conditions.[27]

Model legislation should define "employment-related cost" as a necessary expenditure or loss incurred by a person while discharging their duties at work, including costs incurred for any training, residency, orientation, or competency evaluation. Model legislation should prohibit an employer from seeking repayment of debt from an employee at the termination of their employment. Exceptions, if necessary to address credible concerns, should be limited in scope and crafted in consultation with worker representatives and other experts who have been involved in the yearslong effort to regulate these agreements.

- **Prohibit the imposition of any fees at termination of employment**. Employee debt obligations often include various costs outside of training-related costs. Model legislation should prohibit employer-driven debt agreements that require repayment of any penalty, fee, or cost for terminating the employment relationship, such as replacement hire fees, retraining fees, reimbursement for immigration- or visa-related costs, liquidated damages, lost goodwill, or lost profit.

- **Resist exemptions for trade secrets or nondisclosure agreements**. Employers often broadly construe agreements to restrict the disclosure of trade secrets or other sensitive information, with the ulterior motive of preventing workers from applying their personal knowledge and skills in an alternate place of employment. Employers acting in bad faith will exploit these exemptions to restrict workers who are less likely to negotiate or pursue legal relief and ambiguity will likely be enforced to the benefit of employers or used to coerce employees into not understanding their rights under the law. Model legislation should avoid any such exemptions and associated ambiguity.

27 Jonathan Harris, "The New Non-Compete: The Training Repayment Agreement Provision (TRAP) As A Scheme to Retain Workers Through Debt," Student Borrower Protection Center, November 9, 2022, *https://protectborrowers.org/the-new-non-compete-the-training-repayment-agreement-provision-trap-as-a-scheme-to-retain-workers-through-debt/*.

PROTECT THE FULL RANGE OF HARMED WORKERS, REGARDLESS OF INDUSTRY OR INCOME LEVEL

- **The ban should cover all industries, lines of work, and income levels**. Ample evidence suggests that noncompete clauses harm workers across industries, from health care to broadcast news, retail, restaurants, tech, hair salons, professional sports, and beyond. Attempts to limit the prohibition to low-wage workers ignore the harm incumbent to higher-wage workers as well, including restraints on new business formation.

- **Include part-time employees and independent contractors**. States should adopt an expansive definition of "employee" and "employer" for noncompete prohibitions to avoid any debate over the applicability of the law based on a worker's formal legal classification under other areas of state labor law. The bill language should focus on the relevant relationship between employer and worker rather than employment status. Legislation regulating noncompetes should focus on this structural relationship, potential power imbalance, and resulting harm. New York state's Senate Bill S3100 (2023) is a model.

ESTABLISH CLEAR AND ROBUST ENFORCEMENT PROVISIONS

- **Reject vague standards and loopholes**. Existing laws often include vague carve-outs to allow noncompetes under certain circumstances (e.g., allowing for "reasonably tailored" agreements, or where the agreement is in furtherance of a "legitimate business interest"). Exemptions like this create loopholes that threaten to swallow the law's purpose and intent. Employers will seek to construe these exemptions broadly, and employees will be unlikely to seek clarification in court. Legislation should not include such loopholes.

- **Establish liability with a clear bright-line rule, with no further burden to prove harm**. For an employer to be liable for violating the noncompete ban, there should be no additional burden to prove harm when a worker has been subject to a noncompete clause, even if the clause has not been enforced yet, as the mere existence of a noncompete can restrain worker mobility. Not only

is that burden redundant of the per se harm of noncompete clauses, but such requirements also serve as an unpredictable barrier to relief in a court of law.

- **Allow enforcement by private right of action, state attorney general, and any relevant labor authority**. Allowing private and public enforcement would enhance the enforceability of the law by creating multiple paths to relief. Workers themselves can bring suit, state regulators can seek relief for workers through their own administrative proceedings, and the state attorney general also has independent authority to bring suit on behalf of an impacted worker. Any of these enforcement methods should be available when a noncompete clause is present, and not merely as a defense by a worker or to recuperate funds that the employer has taken.

- **Require recovery of attorney's fees in successful cases brought by employees**. For the most part, employees who are subject to noncompete clauses or de facto noncompete clauses are unlikely to have the resources to hire an attorney to challenge unlawful provisions in their employment contracts. Mandatory fee-shifting provisions give teeth to enforcement by allowing attorneys to take cases based on contingency and to recover fees if they prevail in litigation, off-setting prohibitory upfront costs and without relying on judicial discretion.

- **Require employers to notify employees that their noncompete is no longer valid or enforceable**. The inclusion of noncompetes in employment contracts, even if unenforceable, creates an effective restraint against workers who are unaware or incapable of asserting their legal rights. In these situations, the threat of enforcement by the employer can restrict worker mobility in the same way as if the noncompete clause were enforceable. To eliminate the harmful effects of these noncompetes, a ban should require employers to notify all current and past employees who signed a noncompete agreement that the noncompete is no longer valid or enforceable. The FTC's proposed rule includes such a "rescindment" clause.

- **Prohibit employers from moving claims to other states**. This standard clause prevents any potential attempt by an employer to deprive an employee of the substantive protection of one state's law with respect to a controversy arising in that state.

- **Penalize lawyers who draft or seek to enforce a noncompete agreement or TRAP**. Employment agreements are private contracts not subject to public oversight or transparency. As a result, bans on noncompete clauses are more

challenging to enforce. States can address this by subjecting the lawyers who knowingly draft or enforce illegal noncompete agreements to penalties themselves — namely, possible suspension or disbarment — thereby reinforcing the prohibition.

MODEL LEGISLATION

SECTION 1. FINDINGS.

Workers' ability to freely change jobs is critical to their economic liberty as well as to creating a thriving and innovative economy.

Additionally, a tenet of worker protection and empowerment is that the cost of any training required by an employer to perform a job should be borne by the employer, who ultimately stands to financially benefit from a well-trained workforce.

Employment provisions that have the effect of binding workers in low-wage jobs or jobs with poor working conditions, or of indebting workers to their former employers upon separation for the cost of training, have the effect of reducing those workers' professional mobility, creating obstacles toward financial security and chilling the state economy.

It is in the interest of individual workers and of the state to protect workers from noncompete agreements, employment-based debts, and other restraints on worker mobility, and to align the costs of operating a business with its financial benefits by ensuring employers maintain expenses for training they require for their workers.

SECTION 2. DEFINED TERMS.

"Consumer financial law" means a federal or state law that directly and specifically regulates the manner, content, or terms and conditions of any financial transaction, or any account, product, or service related thereto, with respect to a consumer.

"Contract" includes a promise, undertaking, contract, contract clause, or agreement, whether written or oral, express or implied.

"Debt" means money, property, or their equivalent that is due or owing or alleged to be due or owing from a natural person to another person, including, but not limited to, for employment-related costs, education-related costs, or a consumer financial product or service.

"Debtor" means a natural person who is or may become liable to pay an employer, a prospective employer, a third-party entity, or other business entity for all or part of an employment-related cost, education-related cost, or other debt.

"Education-related cost" means a cost associated with enrollment or attendance at an educational program or training and related expenses, including, but not limited to, tuition, fees, books, supplies, student loans, examinations, and equipment required for enrollment or attendance in an educational, training, or residency program.

"Employee" includes, but is not limited to, a full-time or part-time employee, independent contractor, extern, intern, volunteer, apprentice, sole proprietor who provides a service or services to an employer or to a client or customer of an employer on behalf of such employer, and an individual who provides service through a business or nonprofit entity or association.

"Employer" means any person or entity that employs, hires, or contracts with employees or independent contractors or any parent company, subsidiary, division, affiliate, contractor, or third-party agent of an employer.

"Employment promissory note" means any instrument, agreement, or contract provision that requires a worker to pay the employer, or his or her agent or assignee, a sum of money if the worker leaves such employment before the passage of a stated period of time. "Employment promissory note" includes any such instrument, agreement, or contract provision which states such payment of moneys constitutes reimbursement for training provided to the worker by the employer or by a third party.

"Employment-related cost" means a necessary expenditure or loss incurred by a person in direct consequence of the discharge of their duties at work or of their obedience to a direction of their employer, including, but not limited to, equipment or a training, residency, orientation, or competency validation required either by an employer or to practice in a specific employee classification.

"Noncompete clause" means any contract between an employer and an employee that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the employee's employment with the employer.

"Person" means a natural person or an entity, including, but not limited to, a corporation, partnership, association, trust, limited liability company, cooperative, or other organization.

SECTION 2. PROHIBITED CONDUCT.

a. Every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void and against public policy. This section shall be read broadly to void the application of any noncompete agreement in an employment context, or any noncompete clause in an employment contract, no matter how narrowly tailored.

b. It is unlawful for an employer to enter into, attempt to enter into, present to an employee or prospective employee as a term of employment, or attempt to enforce a contract that restrains an employee from engaging in a lawful profession, trade, or business of any kind, including but not limited to:

    1. a noncomplete clause;

    2. a term that requires a debtor to pay for a debt if the debtor's employment or work relationship with the employer is terminated; or

    3. any term that imposes any penalty, fee, or cost on an employee or independent contractor for terminating the employment relationship, including, but not limited to, a replacement hire fee, a retraining fee, reimbursement for immigration or visa-related costs, bondage fees, liquidated damages, lost goodwill, or lost profit.

c. For current employees, and for former employees who were employed after [DATE PRECEDING ENACTMENT], whose employment contract includes a provision described in (a) of this section, the employer shall, by [DATE FOLLOWING ENACTMENT], notify the employee that the clause or agreement is void.

d. 1. This section applies to a contract or contractual term regardless of whether the debt is certain, contingent, or incurred voluntarily.

    2. This section applies to a contract or contractual term in which a person promises to pay or forgive a debt, defers liability of a debt, or holds a debt in forbearance.

3. This section does not prevent a person or governmental entity from paying or forgiving a debt or from providing other benefits to a debtor or other natural person after the debtor or natural person completes a specified time period of employment or work relationship with an employer or other business entity.

4. Nothing in this section shall be construed to limit or prohibit any loan repayment assistance program or loan forgiveness program provided by a federal, state, or local governmental agency.

SECTION 3. ENFORCEMENT

a. 1. A person, including a local government or an employee or perspective employee or representative, seeking to establish liability against an employer for a violation of this chapter may bring a civil action on behalf of the person, other persons similarly situated, or both, in any court of competent jurisdiction for actual damages, punitive damages of up to five thousand dollars ($5,000), and injunctive relief. In the event of a successful action by such person, the court shall award reasonable costs, including reasonable attorney's fees, as part of the costs.

2. A. The Attorney General shall receive and investigate complaints from persons alleging a violation of this section. If, after examining a complaint and the evidence, the Attorney General believes a violation has occurred, the Attorney General may bring an action to enforce this section.

B. The Labor Commissioner shall receive and investigate complaints alleging a violation of this section.

b. The Attorney General and the Labor Commissioner shall coordinate responsibility with respect to enforcement of this section, according to the following:

1. The Attorney General and Labor Commissioner may enter into an agreement with respect to civil actions by each agency.

2. Any regulation or order made under the authority of this subdivision or any agreement under this subdivision shall not do any of the following:

A. Limit the powers or authorities of the Attorney General or Labor Commissioner, including, but not limited to, the Attorney General's ability to prosecute violations of civil or criminal law and the Labor Commissioner's ability to prosecute violations of the Labor Code.

B. Limit the rights of any person, or the obligations of any covered person, under this chapter, the [Unfair Competition Law], the [False Advertising Law], or a consumer financial law.

C. Limit the rights of any employee under the Labor Code.

3. The Attorney General shall notify the Labor Commissioner of any complaint regarding a contract or contract term that may constitute a violation of this section.

SECTION 4. CHOICE OF LAW

a. An employer shall not require an employee who primarily resides and works in [STATE], as a condition of employment, to agree to a provision that would do either of the following:

1. Require the employee to adjudicate outside of [STATE] a claim arising in [STATE].

2. Deprive the employee of the substantive protection of [STATE] law with respect to a controversy arising in [STATE].

b. Any provision of a contract that violates subdivision (a) is void and the matter shall be adjudicated in [STATE] and [STATE] law shall govern the dispute.

c. 1. This section shall not apply to a contract with an employee who is individually represented by legal counsel in negotiating the terms of that contract and, at the option of the employee, designates either the venue or forum in which a controversy arising from the employment contract may be adjudicated or the choice of law to be applied. For purposes of this subdivision, an employee is not considered individually represented by legal counsel if the counsel is paid for by, or was selected based upon the suggestion of, the employee's employer.

2. The amendments made by the act adding this paragraph shall apply to a contract entered into, modified, or extended on or after [DATE FOLLOWING ENACTMENT].

For questions regarding best practices for state lawmakers seeking to ban noncompete clauses and other constraints on worker mobility, or for an assessment of your state's existing law, contact Lee Hepner, Legal Counsel at the American Economic Liberties Project, at lhepner@economicliberties.us.

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