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Don't Lose the Remote: An Employer's Guide to Remote Employee and Trade Secret Retention Without Non-Competes

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Kayla Lya Pfeifer*

I. INTRODUCTION

As a young girl and aspiring baker, Bre Baguette came across a line from a Julia Child cookbook reading, "You are the boss of that dough."[1] Inspired by her idol's encouraging words, Bre spent hours in the kitchen hoping to bake a world-changing baguette. After years of kneading her dreams into the dough, Bre finally pulled that world-changing baguette out of the oven on her eighteenth birthday. Instead of going to college, Bre opened her own local bakery, BossBread, to sell her delicious baguettes to everyone who wandered in off the streets. To meet customer demands, Bre hired a team of employees, teaching them everything they needed to know to bake the perfect baguette—including her top-secret baguette recipe, with ingredients too secret for this Comment to disclose. With the help of her team, her top-secret recipe, and a viral TikTok video showcasing her delicious baguettes to the world, BossBread began raking in the "dough."

In 2020, however, the COVID-19 pandemic (COVID-19) hit. While Bre had spent years preparing to professionally bake her world-changing baguettes, she was completely unprepared to navigate the challenges of

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1. JULIA CHILD, FROM JULIA CHILD'S KITCHEN 461 (Alfred A. Knopf 1995).

running a bakery during a world-changing pandemic. Due to this pandemic, BossBread, like many other businesses, was forced to temporarily close its doors to ensure the safety of its customers and employees. When the government lifted the COVID-19 lockdown restrictions several months later, Bre was thrilled to return to work. Her employees, on the other hand, were not quite as ready to swap their sweatsuits and pajamas for their BossBread baking aprons.

Recognizing BossBread's survival depended on the continued employment of her specially-trained employees, Bre allowed her employees to begin baking baguette orders from home to keep employee morale and baguette sales up. However, after a few months of at-home baking, Bre began to receive resignations from her employees. To Bre's dismay, three of her employees began working for another local bakery. One employee opened their own local artisan bread shop down the street from BossBread, and another employee went to work for the corporate team of GlobalBread. Slowly but surely, BossBread replicas began to surface around the country. With her top-secret recipe now in the hands of former employees and competitors, Bre's baguette sales began to crumble.

After watching each of her employees abandon BossBread for better opportunities in the bread market, Bre vowed to never hire another employee again. In Bre's eyes, she had not just lost the loyalty of her employees; she had also lost the value of her top-secret baguette recipe. Her once-loyal customers were now free to enjoy the taste of BossBread baguettes elsewhere. Unable to compete with larger competitors as a team of one, Bre contemplated shutting off the ovens and closing BossBread's doors for good.

Bre Baguette is not a real person, and BossBread is—unfortunately for baguette lovers everywhere—not a real bakery. Nevertheless, this fictional tale illustrates the nuanced challenges real businesses face as they compete for customers, and consequently, employees in the real world.

The competitive markets for profits and labor are intersectional.[2] To conceptualize the intersectional nature of business competition, imagine

2. *See* Heather Boushey & Helen Knudsen, *The Importance of Competition for the American Economy*, WHITE HOUSE (July 9, 2021), https://www.whitehouse.gov/cea/written-materials/2021/07/09/the-importance-of-competition-for-the-american-economy/ [https://perma.cc/X4TP-ARU4] ("Competition is critical not only in product markets, but also in labor markets."). For example, in 2018, the National Association of Convenient Stores (NACS) reported that the "top quartile stores had 75 percent turnover of associates per year, while the overall average was 115 percent." Bill Conerly, *New Evidence That Low Employee Turnover Correlates With High Profits*, FORBES (Apr. 19, 2018), https://www.forbes.com/sites/billconerly/2018/04/19/new-evidence-that-low-employee-turnover-

each competitive market as a pie. If businesses want larger pieces of the pie, they must carefully consider the *ingredients* that comprise the pie, including skilled work and innovation. Just as bakers must consider the costs of stand mixers and baking sheets, businesses must also consider the *tools* used to bring the pie ingredients together, including employee retention and trade secret protection. To generate profits in competitive markets, businesses must compete for skilled employees.[3] Skilled employees are essential for developing and innovating the best products, services, and market reputation.[4] To *remain* profitable, businesses must strive to retain skilled employees as custodians of trade secrets.[5]

All pies—no matter how delicious they taste—will grow stale or spoil over time, creating consumer demand for a freshly-baked pie. While some components of the baking process may remain the same, a pie recipe is always subject to the use of new ingredients, tools, and even bakers. COVID-19 not only altered the population's tastebuds, it lit the entire kitchen on fire.[6] The economic devastation caused by COVID-19 intensified market competition for profits and labor, providing many employees with increased leverage to negotiate their compensation and working conditions with employers.[7] Left with a scorched pie creating a

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correlates-with-high-profits/?sh=221fb5db138e [https://perma.cc/Z739-JNSL]. Post COVID-19 NACS data showed that despite positive industry-wide financial performances, store operating expenses increased as a direct result of employee turnover increase. *See U.S. Convenience Store Sales, Performance at Pre-Pandemic Levels*, NACS (Apr. 13, 2022), https://www.convenience.org/Media/Press-Releases/2022-Press-Releases/US-Convenience-Store-Sales-Performance-at-Pre-Pand [https://perma.cc/KN6R-Y7G2].

3. "[D]epriving new businesses of access to skilled works can thwart competition . . . . [N]on competes lock[] up highly specialized workers, tending to impede the entry and expansion of rivals by depriving them of access to qualified employees." *Non-Compete Clause Rule*, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

4. *See id.*

5. "The ability of companies to acquire knowledge and employees, and therefore become 'disruptors' in the market sense of the word, is directly related to their willingness to employ and deploy trade secrecy." David S. Levine & Christopher B. Seaman, *The DTSA at One: An Empirical Study of the First Year of Litigation Under the Defend Trade Secrets Act*, 53 WAKE FOREST L. REV. 105, 122 (2018).

6. *See generally* Alison Aughinbaugh & Donna S. Rothstein, *How Did Employment Change During the COVID-19Pandemic? Evidence from a New BLS Survey Supplement*, U.S. BUREAU OF LAB. STATS. (Jan. 4, 2022), https://www.bls.gov/opub/btn/volume-11/how-did-employment-change-during-the-covid-19-pandemic.htm [https://perma.cc/Q2KR-QGK9].

7. Vincent Amanor-Boadu, *Empirical Evidence for the "Great Resignation*, U.S. BUREAU OF LAB. STATS. (Nov. 2022), https://www.bls.gov/opub/mlr/2022/article/empirical-evidence-for-the-great-resignation.htm#:~:text=The%20article%20empirically%20confirms%20the%20%E2%80%9CGreat%20Resignation%E2%80%9D%20phenomenon%2C,increasing%20hourly%20earnings%2C%20thereby%20increasing%20employees%E2%80%99%20switching%20costs [https://perma.cc/DM42-V5XG].

bitter taste in consumer and employee mouths, businesses everywhere had to start "from scratch" to revise their old recipes and bake a new pie.

In response to the heightened preference among employees for remote work opportunities following COVID-19, many employers are vying for talent by offering remote work options.[8] While remote work creates potential security, liability, and human resource issues for employers, many employers might have to bear these risks to retain and grow their talent pools.[9] As an additional or alternative retention method, many employers also subject their employees to non-compete agreements (non-competes).[10] Whichever retention method employers decide to use, they must cautiously follow the post-COVID-19 "pie" recipe. After all, an excess of any "ingredient" or an overly-aggressive "cooking technique" can lead to disaster.

Seeking to stimulate economic growth and employee mobility after COVID-19, the Biden Administration has set its focus on targeting anti-competitive behavior.[11] In response to Biden's Executive Order, the Federal Trade Commission (FTC) recently proposed to ban non-competes in the United States.[12] Though it is unclear whether the FTC's non-compete ban will pass in 2024, current legal trends implicate a hostile attitude toward the enforceability of non-competes by legal authorities across the country.[13] As the employment market and the law continue to evolve, businesses can adapt by adding more quality "ingredients" and learning new techniques to enhance the "pie's" flavor.

This Comment discusses potential employer solutions to the intersectional challenges of balancing trade secret protection and employee retention in a post-COVID-19 remote employment market. First, this Comment provides an overview of the FTC's proposed rule to ban non-competes, as well as the political context and history behind the

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8. Orly Lobel, *Remote Law: The Great Resignation, Great Gigification, Portable Benefits, and the Overdue Reshuffling of Work Policy*, 63 SANTA CLARA L. REV. 1, 15–17 (2022).

9. *See* Margo E. K. Reder & Christine Neylon O'Brien, *Managing the Risk of Trade Secret Loss Due to Job Mobility in an Innovation Economy with the Theory of Inevitable Disclosure, 12* J. HIGH TECH. L. 373, 376–77 (2012).

10. *See* Tyler Boesch et al., *New Data on Non-Compete Contracts and What They Mean for Workers*, FED. RSRV. BANK OF MINNEAPOLIS (June 21, 2023), https://www.minneapolisfed.org/article/2023/new-data-on-non-compete-contracts-and-what-they-mean-for-workers [https://perma.cc/SN6E-Y82K].

11. Exec. Order No. 14,036, 86 Fed. Reg. 36987 (July 14, 2021).

12. Non-Compete Clause Rule, 88 Fed. Reg. at 3482.

13. *See generally* Christopher Caiaccio et al., *A Comprehensive Update on Recent Federal and State Efforts to Limit the Use of Employee Non-Compete Agreements*, JDSUPRA (Feb.21, 2024), https://www.jdsupra.com/legalnews/a-comprehensive-update-on-recent-8977470/ [https://perma.cc/Q4GJ-RTJL].

FTC's enhanced focus on policing anti-competitive business behaviors. Additionally, this Comment explains the utility behind non-competes and contextualizes the ban's potential effects through a legal survey of non-compete enforceability in the U.S. To illustrate the steep challenge of trade secret protection in the modern employment market, this Comment separately analyzes the rise of post-COVID-19 remote work and the unique challenges that remote work raises for trade secret protection and remote employee retention. Finally, this Comment offers potential solutions to the intersectional challenges of remote work trade secret protection under a potential non-compete ban by (1) discussing the benefits of pre-Industrial Revolution apprenticeship models and (2) advocating for employers to use ongoing professional development and holistic mentorship to enhance employee retention and trade secret protection.

II. BACKGROUND AND HISTORY

A. The FTC's Proposal to Ban Non-Competes

On January 5, 2023, the FTC unveiled a proposal to universally ban non-competes.[14] If passed, the new rule would categorize non-competes as an "unfair method of competition" under a new subchapter to Title 16 of the Code of Federal Regulations.[15] The proposal broadly defines a "non-compete clause" as "a contractual term between an employer and a worker that typically blocks the worker from working for a competing employer, or starting a competing business, within a certain geographic area and period of time after the worker's employment ends."[16] A universal prohibition on non-compete clauses would effectively invalidate past and present non-compete clauses and outlaw future attempts by employers to enter non-competes with employees.[17] The FTC's proposed prohibition would have a wide-reaching impact, as it includes a broad definition of "worker," without making distinctions across certain industries, positions, or income levels.[18]

The FTC justifies the federal non-compete ban by claiming that these agreements harm workers and stifle market competition.[19] If passed, the proposed rule would release approximately thirty million employees from the legal grips of their non-compete restrictions, leaving employees free

14. Non-Compete Clause Rule, 88 Fed. Reg. at 3482.
15. *Id.*
16. *Id.*
17. *Id.* at 3483.
18. *Id.* at 3482–83.
19. *Id.* at 3501.

to pursue employment with competitors or compete with their employers directly by forming their own businesses.[20] The FTC boldly estimates that the proposed rule would increase worker earnings by almost $300 billion per year and double the number of companies founded by a former worker in the same industry.[21]

According to the FTC, the universal ban would promote fair competition and innovation in the market by reducing unfair employment practices that harm both the trade market and employees.[22] On the other hand, critics believe the proposed rule is outside the FTC's jurisdiction and is unsupported by the Commerce Clause,[23] arguing that non-competes are primarily local matters that are best left to the states.[24] If passed, employers, business organizations, trade associations, and state or local governments will likely challenge the rule's constitutionality and the FTC's authority.

B. The FTC's Re-Awakened Section 5 Powers

The FTC derives its authority from the Federal Trade Commission Act (FTCA).[25] Under Section 5(a) of the FTCA, "[u]nfair methods of competition in or affecting commerce" and "unfair or deceptive acts or practices in or affecting commerce" are unlawful.[26] Section 5 explicitly "direct[s]" the FTC to "prevent persons, partnerships, or corporations" from using "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[27] To carry out this directive, the FTC has statutory powers to conduct investigations, demand and publish compliance reports, and readjust and classify organizations to promote fair trade and compliance with antitrust statutes.[28]

For many years, the FTC brought cases against organizations under its Section 5 powers for invitations to collude, price discrimination, *de facto* bundling, tying, exclusive dealing, and various other

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20. *Id.* at 3485.

21. *Id.* at 3537.

22. *Id.* at 3482.

23. U.S. CONST. art. I, § 8.

24. *See generally* Dawn Mertineit, *Non-Competes Should Be Left to the States, Not the FTC*, BLOOMBERG L. (Feb. 3, 2023), https://news.bloomberglaw.com/us-law-week/non-compete-regulation-should-be-left-to-the-states-not-the-ftc [https://perma.cc/4H8Q-M3CB].

25. 15 U.S.C. §§ 41–58 (1914).

26. 15 U.S.C. § 45(a)(1) (1914). Note that the "Section 5" powers are codified under 15 U.S.C. § 45(a), however they are still broadly referred to as "Section 5" powers.

27. 15 U.S.C. § 45(a)(2).

28. 15 U.S.C. § 45(b) (1914).

anti-competitive practices.[29] However, after the FTC lost a string of cases in the 1980s, the FTC became more hesitant to bring anti-competition cases if the factual or evidentiary burden could yield uncertain legal results.[30] In 2015, the FTC released a policy statement to announce that it would interpret Section 5 "under a framework similar to the rule of reason."[31] The "rule of reason" assesses whether anti-competitive activity has a substantial anti-competitive effect on the market and whether any pro-competitive efficiencies outweigh that effect.[32]

The 2015 statement rendered the FTC's Section 5 powers "essentially coterminous with the Sherman Act,"[33] making the Sherman Act the precursory focus of anti-competition suits moving forward.[34] The Sherman Act is a federal law that prohibits businesses from conspiring to "restrai[n] trade or commerce" in the U.S.[35] To prove Sherman Act violations under the rule of reason, there must be a showing of actual anti-competitive market effect by the defendant's conduct.[36] By approaching its Section 5 authority conterminously with the Sherman Act, the FTC surrendered the opportunity to challenge other potential non-competitive behaviors that did not require proof of "actual restraint" or conspiracy under the Sherman Act.[37]

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29. *Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya on the Adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition Under Section 5 of the FTC Act*, FED. TRADE COMM'N (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Section5PolicyStmt KhanSlaughterBedoyaStmt.pdf [https://perma.cc/6AVZ-Q824].

30. *Id.* at 3; *see* Off. Airline Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980); Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980); E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984).

31. Donald S. Clark, *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act*, FED. TRADE COMM'N (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf [https://perma.cc/6AVZ-Q824].

32. Janet D. Steiger, *Health Care Antitrust Enforcement Issues,* FED. TRADE COMM'N (Nov. 9, 1995), https://www.ftc.gov/news-events/news/speeches/health-care-antitrust-enforcement-issues#:~:text=The%20%22rule%20of%20reason%22%20measures%20whether%20the%20anticompetitive,based%20on%20its%20own%20particular%20facts%20and%20circumstances.

33. 15 U.S.C. §§ 1–38 (2004).

34. *See* Federal Trade Commission, *supra* note 29, at 3.

35. 15 U.S.C.S. § 1 (2004).

36. Hand v. Cent. Transp., Inc., 779 F.2d 8, 11 (6th Cir. 1985).

37. "It is true that the Commission's Clayton Act proceeding required proof only of a potential anticompetitive effect while the Sherman Act carries the more onerous burden of proof of an actual restraint." Minn. Mining & Mfg. Co. v. N.J. Wood Finishing Co., 381 U.S. 311, 323 (1965) (citing 15 U.S.C. § 16(a) (2004)).

1. Biden's Executive Order on Promoting Competition in the American Economy

The FTC's conservative approach to anti-competition prosecution ended in 2021 after President Biden issued an Executive Order on Promoting Competition in the American Economy (the Executive Order).[38] President Biden issued the Executive Order to announce his Administration's objective "to enforce the antitrust laws" against large companies and, in particular, the owners of dominant internet platforms.[39]

Section 1 of the Executive Order delineates a strong policy on promoting a "competitive marketplace" that emphasizes "more high-quality jobs and the economic freedom for workers to switch jobs or negotiate a higher wage."[40] The Executive Order specifically identifies corporate consolidation as an obstacle to workers' bargaining power in the employment market.[41] According to the Executive Order, as "[p]owerful companies" merge, they limit employment options for workers by "requir[ing] workers to sign non-compete agreements that restrict their ability to change jobs."[42]

The Biden Administration urged the FTC to fairly and vigorously combat anti-competitive behavior in the market and specifically, "meet the challenges posed by new industries and technologies."[43] Regarding non-competes, the Executive Order called upon the FTC to "exercise the FTC's statutory rulemaking authority under the [FTCA] to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."[44] Invigorated by the Biden Administration's blessing, the FTC voted to rescind the 2015 policy statement and reawaken its Section 5 powers.[45] In November 2022, FTC Chair Lina M. Khan solidified the FTC's enforcement policy by stating that that it no longer intended to allow its Section 5 powers to "lay dormant."[46]

38. Executive Order, *supra* note 11.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 36988.
44. *Id.* at 36992.
45. Fed. Trade. Comm'n, *supra* note 29, at 3.
46. *Id.* at 1.

2. The FTC's Statement on the Authority Scope of the Non-Compete Ban

This policy decision was met with resistance from critics who believed that broad use of Section 5 powers would lead to political abuse, giving the FTC too much authority to outlaw conduct "subject to the whims and political agendas of sitting Commissioners."[47] In March 2023, the FTC published an executive summary of the Economic Policy Institute's interview with Elizabeth Wilkins, Director of the Office of Planning and Chief of Staff to the FTC chair.[48] During the interview, a member of the public asked Wilkins if the FTC's proposed rule banning non-competes "overreach" the role of state law.[49] Wilkins confirmed that the rule would cover "all industries the FTC has jurisdiction over across the country," and added that there is still "room" under the proposed rule for state policymaking that the FTC cannot regulate.[50]

In a separate interview at Harvard Law School, Director Wilkins acknowledged that the FTC is "traditionally focused on competition, not labor and employment law."[51] However, where restraints of trade, including employment practices, lack "legitimate justifications," the FTC considers those trade restraints "naked restraints on competition."[52] According to Wilkins, the FTC ceases to find "legitimate justifications" for non-competes when "less restrictive" agreements are available to employers to protect their intellectual property or training investments.[53]

C. Understanding Non-Competes

Many businesses use non-competes as tools for trade secret protection and employee retention.[54] These agreements restrict employees' post-employment activities, including time, and/or area restrictions to

47. *Id.* at 4.

48. Shannon Lane, *Summary of Interview Elizabeth Wilkins by the Economic Policy Institute*, FED. TRADE COMM'N (Mar. 8, 2023), https://www.ftc.gov/system/files?file=ftc_gov/pdf/P201200NonCompeteNPRMExParteWilkinsEPIWebinar.pdf [https://perma.cc/L9J8-FVB4]; Economic Policy Institute, *Noncompete Clauses Cut Worker Power Off at the Knees*, YOUTUBE (Mar. 1, 2023), https://www.youtube.com/48.watch?v=folZhiw_HLM [https://perma.cc/L9LC-3RCG].

49. Lane, *supra* note 48.

50. *Id*.

51. Shannon Lane, *Summary of Elizabeth Wilkins' Speaking Engagement with Harvard Law School Employment Law Students*, FED. TRADE COMM'N (Mar. 8, 2023), https://www.ftc.gov/system/files?file=ftc_gov/pdf/P201200NonCompeteNPRMExParteWilkinsHarvardLaw.pdf [https://perma.cc/PR58-PMRT].

52. *Id.*

53. *Id.*

54. *See* 1-4 TRADE SECRET LAW AND CORPORATE STRATEGY § 4.04(6) (2024).

minimize the risk of trade secret theft or disclosure to competitors.[55] The most common types of non-compete restrictions prohibit employees from working for competitors or establishing competitive businesses within a specific time frame and/or geographical territory after the employment relationship ends.[56] These restrictions are drafted to prevent unfair competition between an employer and competitors.[57] However, courts critically view non-competes as restrictive covenants that "restrain trade and individual freedom."[58] To be enforceable, a non-compete agreement must serve a legitimate need of the employer.[59] "Legitimate business interests include, *inter alia*, protecting the goodwill that arises from the former employee's contacts with customers and safeguarding the confidential information to which the former employee had access."[60]

To understand how non-competes function as trade secret protection, it is helpful to understand what trade secrets are. While the law values innovation, it does not reward imitation. Equitable trade secret protection promotes fair competition by depriving defendants of unjust enrichment.[61] Trade secrets are broadly defined as, "any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others."[62] Trade secrets may include formulas, processes, algorithms, marketing strategies, research, financial data, customer lists, and even bread recipes.[63]

Suppose Bre Baguette had required her former employees to execute non-compete agreements that prohibited all BossBread employees from working for or opening any bakery or bread company within a twenty-five mile radius for one year after their departure. Assuming the non-competes were executed in a jurisdiction that enforces them, Bre's departed employees would have been unable to immediately work for her competitors, and effectively, her top-secret bread recipe would have been safe from disclosure for at least one more year. While non-competes would not indefinitely shield Bre's top-secret recipe disclosure or re-creation, the one-year non-compete restriction nevertheless would

55. *See* 1 BUSINESS TORTS § 4.05(1) (2023).

56. *See id.* at § 4.05(2).

57. *See id.* at § 4.05(1).

58. *Id.*

59. *See* 1 CONSTANGY NONCOMPETE LAW § 2.01 (2023).

60. Prometheus Grp. Enters., LLC v. Gibson, 22 CVS 14236, 2023 NCBC LEXIS 42, at*13 (N.C. Super. Ct. Mar. 21, 2023).

61. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (1995).

62. *Id.*

63. *See* 1 MILGRIM ON TRADE SECRETS § 1.01 5 (2024).

provide her with a crucial buffer period to secure her market position, retain her customer relationships, and further innovate her recipes. Bre may have even chosen to enter licensing and royalty agreements with competitors or retailers within the year covered by the non-compete restriction.

1. Historical Evolution of Non-Competes

In 1711, a London court set the modern framework for non-compete enforceability in *Mitchel v. Reynolds*[64]—a dispute involving two bakers whom the court enjoined from operating a bakery within a specific distance from one another under an enforceable non-compete agreement.[65] Where one of the bakers leased bakery space to the other, the court enjoined the lessor baker from opening a competing bakery down the street from the lessee baker in violation of the non-compete provision in the lease agreement.[66]

This Eighteenth century decision marked a pivotal departure from the 1414 *Dyer's Case*[67] precedent that branded all non-competes as *prima facie* unreasonable restraints of trade.[68] In *Dyer's Case*, an English court enjoined the enforcement of a post-employment agreement prohibiting an apprentice from practicing his trade for six months in the town he was trained in after he finished his apprenticeship.[69] Finding the non-compete agreement to lack any justice or consideration, the medieval English judge exclaimed the Latin equivalent of, "By God, if the plaintiff were here he would go to prison until he paid a fine to the King!"[70]

Silencing the *Dyer* judge's 300-year-old echo of disgust, *Mitchel* drew a distinction between general restraints of trade and reasonable restraints

64. [1711] 24 Eng. Rep. 347 (QB).

65. *Id.*

66. *Id.*

67. [1414] 73 Eng. Rep. 782 (KB).

68. Maureen B. Callahan, *Post-Employment Restraint Agreements: A Reassessment*, 52 UNIV. CHI. L. REV. 703, 708 n.20 (1985) ("The *Dyer's Case* was cited in the sixteenth century for the proposition that express agreements restraining the practice of a trade were invalid per se. In 1578, an action for debt against a merchant's former apprentice for breach of a covenant not to engage in trade was not allowed. . . . . The report contains no details, but cites the *Dyer's Case* as authority for refusing to enforce the covenant.") (citation omitted).

69. Russel Beck, *A Brief History of Noncompete Regulation*, FAIR COMPETITION L. (Oct. 11, 2021), https://faircompetitionlaw.com/2021/10/11/a-brief-history-of-noncompete-regulation/ [https://perma.cc/WN44-FJXD].

70. Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800–1920*, 52 HASTINGS L. J. 441, 454 n.33 (2001).

of trade.[71] According to *Mitchel*, general restraints of trade include unjustifiable and indefinite time and space limitations on trade, but reasonable restraints of trade can be limited to the necessary and legitimate goodwill of a business and other business transactions.[72] Though *Mitchel* was not an employment case, it provided a foundation for the legal implementation of non-compete clauses in employment contracts.[73]

2. The "State" of Non-Competes in the U.S.

Non-competes have appeared in employment contracts across the U.S. for over 200 years.[74] Without federal oversight, non-compete enforcement is a state law issue, leaving each state free to develop its own laws regarding the validity and enforceability of non-competes.[75] Due to the diverse political, business, and employment landscapes, these enforcement policies often appear ad hoc, varying from state to state.[76] As competitive markets evolve and expand in each state, non-compete laws are subject to revision.[77]

Additionally, the advancement of consumer technology sparked industry competition that influenced legislative non-compete reform in many states.[78] For example, Oregon revised its non-compete regulations

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71. Barry F. Rosen & Steven A. Loewy, *Restrictive Covenants in Maryland Employment Agreements: A Guide for Drafting*, 11 UNIV. BALT. L. REV. 377, 378 n.2 (1982).

72. *Id.*

73. *Id.*

74. Erik W. Weibust et al., *After 200+ Years Under State Law, FTC Proposes to Sweep Away Noncompetes in Unauthorized Federal Power Grab*, WASH. LEGAL FOUND.(Jan. 11, 2023), https://www.wlf.org/2023/01/11/publishing/after-200-years-under-state-law-ftc-proposes-to-sweep-away-all-noncompetes-in-unauthorized-federal-power-grab/#:~:text=For%20over%20200%20years%2C%20the%20regulation%20of%20noncompetition,state%20to%20ban%20them%20was%20Oklahoma%20in%201890 [https://perma.cc/H2LU-K9C9].

75. *Id.*

76. *Compare* N.D. CENT. CODE § 9-08-06 (2019) (banning the general use of non-competes in connection with any profession, trade, or business) *with* D.C. CODE § 32-581.02(a)(1) (2022) (banning the use of non-competes for employees making less than $150,000 per year, or less than $250,000 per year if the employee is a medical specialist).

77. California recently tightened non-compete restrictions by enacting S.B. 699 § 1(d), 2023 Leg., Reg. Sess. (Cal. 2023) (enacted) ("[A]s the market for talent has become national and remote work has grown, California employers increasingly face the challenge of employers outside of California attempting to prevent the hiring of former employees.").

78. Clark, *supra* note 3, at 25 ("Of the twelve state statutes restricting non-compete clauses based on a worker's earnings or a similar factor (including the DC statute), eleven were enacted in the past ten years.").

when Apple released the first iPhone in 2007.[79] In its revised non-compete legislation, Oregon bolstered protections for employees bound by non-competes by establishing minimum requirements for employers to follow. Under the revised non-compete laws, Oregon implemented minimum compensation thresholds for non-competes, and by mandating that employers provide advanced notice to employees of non-compete execution requirements.[80] Other states, such as Massachusetts and Georgia, began revising their non-compete laws shortly after.[81]

Today, the White House claims that "[r]oughly half" of private sector businesses subject employees to non-competes.[82] With an estimated 30–60 million U.S. employees under non-competes, the White House fears that employees have lost negotiation power to corporate employers who continue to consolidate through mergers and monopolies.[83] As evidenced by Biden's Executive Order, the government is keeping a close eye on Big Tech's anti-competitive behaviors, including the improper use of non-competes to stiffen the employment market for competitors.[84]

D. Evolution of the American Employment Market

A complete analysis of the history and trends of the American employment market exceeds the scope of this Comment. However, a brief overview of relevant U.S. labor and employment eras provides valuable insight into the competing interests between employers and employees under a potential non-compete ban. Those eras include (1) the Industrial Revolution; (2) the Technology and Innovation Era; and (3) the modern Gig Economy Era.

1. The Industrial Revolution: Late Eighteenth to Early Nineteenth Century

The Eighteenth century rise of steam and machines marked a historic departure from a predominantly agricultural workforce to an urbanized

79. OR. REV. STAT. § 653.295 (2009).

80. *Id.* § 653.295(1)(e) (2009).

81. *See* Beck, *supra* note 69; Mass. H.B. 1794; Mass. H.B. 1799; O.C.G.A. § 13-8-50 (2011).

82. *FACT SHEET: Executive Order on Promoting Competition in the American Economy*, WHITE HOUSE (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/ [https://perma.cc/5DAG-NWCN].

83. *Id.*

84. *Id.*

mass-production workforce.[85] The development of new technologies, including the cotton gin, steam engine, and spinning jenny, dramatically changed labor market conditions and the workplace.[86] Evolving from skilled apprentices to machine operators, Eighteenth century workers found themselves in the confines of assembly lines by the early Nineteenth century.[87] Departing from the traditional "apprentice-servant model" changed more than just the physical environment of the workforce.[88] Additionally, it changed the cultural climate. [89] Where apprentices once developed their skills under the close supervision of their masters, they now worked alongside other employees whose "skill inventory" was equally reduced by machines.[90] In result, employees became less critical in their employers' eyes than machines.[91]

2. Tech and Innovation Era (Late Twentieth to Early Twenty-First Century)

During the late Twentieth century, the development of technology and data storage led to the Digital Revolution, also known as "The Third Industrial Revolution."[92] One of the most significant contributions from this era was the World Wide Web, enabling people from all over the globe to connect to a central database for information.[93] Unsurprisingly, the World Wide Web evolved into a global business forum.[94] In 2003, the

85. Thomas Earl Gue & Martha S. Davis, *Work: A Legal Analysis in the Context of the Changing Transnational Political Economy*, 63 UNIV. CIN. L. REV. 1679, 1690 (1995); *see also* Fisk, *supra* note 70, at 451.

86. Gue, *supra* note 85, at 1686–87.

87. *Id.* at 1687.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. The Third Industrial Revolution was "essentially a digital or 'semiconductor' revolution. Computers and chips further mechanized the physical production of goods and agricultural products, therefore significantly reducing the marginal labor costs of many products. The Third Industrial Revolution also transformed communication, recordkeeping, and data accumulation." Steven R. Smith, *The Fourth Industrial Revolution and Legal Education*, 39 Ga. St. U.L. Rev. 337, 340–41 (2023); *The Third Industrial Revolution*, ECONOMIST (Apr. 21, 2012) https://www.economist.com/leaders/2012/04/21/the-third-industrial-revolution [https://perma.cc/P37T-5AXY].

93. *Id.*

94. *See* James Hardy, *Internet Business: A History*, HIST. COOPERATIVE (Nov. 8, 2023), https://historycooperative.org/internet-business-e-commerce-a-history [https://perma.cc/27H8-GTLX].

Bureau of Labor Statistics reported that 77 million U.S. employees used computers at work.[95]

As these significant technological breakthroughs took place, intellectual property laws strengthened.[96] However, with 89% of modern U.S. households owning a computer[97] and 90% owning a smartphone,[98] protecting sensitive data is still an uphill battle for employers. A report published in 2019 revealed that approximately sixty-eight data records are stolen every second.[99] With these numbers consistently on the rise since the incarnation of the internet, companies continue to combat data theft.

3. The Modern Gig Work Era

Some modern workers have begun to seek professional autonomy and extra earning potential by entering the "gig economy."[100] The gig economy is a "labor market comprised of independent contracting on a casual, temporary, and contingent basis that is commonly facilitated through electronically mediated means."[101] Gig workers often mine various digital platforms for work opportunities, such as Uber, DoorDash, Rover, Amazon Flex, and Upwork.[102] The gig economy allows workers to "set[] their own hours, work[] from home, [and] be[] their own bosses."[103]

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95. *Computer and Internet Use at Work Summary*, U.S. BUREAU OF LAB. STATS. (Aug. 2, 2005), https://www.bls.gov/news.release/ciuaw.nr0.htm [https://perma.cc/4VN5-CDU2].

96. *See generally* 1 LAW OF THE INTERNET § 5.01 (2023).

97. Camille Ryan, *Computer and Internet Use in the United States: 2016*, AM. CMTY. SURV. REPS. (2018), https://www.census.gov/content/dam/Census/library/publications/2018/acs/ACS-39.pdf#:~:text=In%202016%2C%20the%20American%20Community%20Survey%20%28ACS%29%20found,making%20it%20a%20common%20feature%20of%20everyday%20life [https://perma.cc/NHB5-SMBH].

98. Federica Larichhia, *Share of Smartphone Users that Use an Apple iPhone in the United States from 2014 to 2022*, STATISTA (Oct. 30, 2023), https://www.statista.com/statistics/236550/percentage-of-us-population-that-own-a-iphone-smartphone/ [https://perma.cc/5PC4-TNZK].

99. Ivana Vojinovic, *Data Breach Statistics That Will Make You Think Twice Before Filling Out an Online Form*, DATAPROT (May 5, 2023), https://dataprot.net/statistics/data-breach-statistics/ [https://perma.cc/92MK-BKG8].

100. *Gig Economy: Definition, Factors Behind It, Critique & Gig Work*, INVESTOPEDIA (Oct. 1, 2022), https://www.investopedia.com/terms/g/gig-economy.asp [https://perma.cc/YCU9-E6ZB].

101. Mitchael T. Alario, *We Want All Workers to Have the Right to Bargain Collectively: How the ABCs Can Equalize the Economy*, 64 B.C. L. REV. 1203, 1206 (2023).

102. *See* R.J. Weiss, *33 Highest Paying Gig Economy Jobs in 2023*, WAYS TO WEALTH (Jan. 25, 2024), https://www.thewaystowealth.com/make-money/gig-economy-jobs/ [https://perma.cc/X3LS-Z36C].

103. Joseph A. Seiner, *Platform Pleading: Analyzing Employment Disputes in the Technology Sector*, 94 WASH. L. REV. 1947, 1948 (2019).

Many gig work platforms and companies have sought to categorize their gig workers as independent contractors.[104] While some gig workers enjoy increased autonomy as independent contractors, most gig workers are left without the traditional protections of an employee classification, including benefits or wage and anti-discrimination protections.[105] This may result in many performing cross-platform gig work, and ultimately, working for multiple competitor companies at once to make ends meet. While gig work has broadened work opportunities for many formerly disenfranchised employees, gig workers often lack financial stability or legal protections under these work arrangements.[106] Therefore, "[t]he odds are always in the platform's favor, never the workers favor."[107]

E. Remote Connections to the Past

Although there has been a noticeable increase in remote work post-COVID-19, the "work from home" employment model has existed for centuries.[108] Though the social and historical contexts are vastly different, post-COVID-19 and pre-industrial revolution workers (who were predominantly farmers, blacksmiths, and textile workers) have many things in common, including the blurred lines between work and home.[109]

The key difference between pre-Industrial Revolution "remote workers" and post-COVID-19 remote workers is their relative proximity to their employers. Pre-Industrial Revolution workers began their careers by working under an apprenticeship model in close proximity with a master tradesman.[110] In exchange for a cash premium, a master taught an apprentice a vocational skill for a contractual period. Cash

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104. *See* Amazon Logistics, Inc. v. Labor & Indus. Rev. Comm'n, 407 Wis. 2d 807, (Ct. App. 2023) (holding that delivery partners who did not advertise or hold themselves out as being in business were properly classified as employees under Wis. Stat. § 108.02(12) (2022)).

105. Seiner, *supra* note 103, at 1949; *see also* Protect App-Based Drivers and Services Act, CAL. BUS. & PROF. CODE § 7449 (2020).

106. Seiner, *supra* note 103, at 1949.

107. Fatima Hussein, *Online Gig Work is Growing Rapidly, But Workers Lack Job Protections, A World Bank Report Says*, AP NEWS (Sept. 8, 2023, 10:17 AM), https://apnews.com/article/online-gig-workers-labor-employment-world-bank-40b81a789fd5f0fb366e83f0223d832f [https://perma.cc/Q5A8-MMJA].

108. *See generally* Preethi Jatjhanna, *The History of Remote Work: How it Came to be What it is Today*, SORRY ON MUTE (Jan. 2, 2023), https://www.sorryonmute.com/history-remote-work-industries/ [https://perma.cc/3CPK-WKBT].

109. *Id.*

110. Janet L. Dolgin, *Transforming Childhood: Apprenticeship in American Law*, 31 NEW ENG. L. REV. 1113, 1116 (1997).

premiums varied based upon the reputation and skill of the master and his trade.[111] The more reputable the master, the higher the premium an apprentice would pay to learn underneath him.[112]

The apprentice, who was often a young child, lived in the master's home and completed work under the training and supervision of the master until they reached the end of their contractual term.[113] The apprenticeship ended when the master and/or the trade guild determined that the apprentice's work arose to the level of a "Master."[114]

These apprenticeships were regulated by trade guilds and social constructs that often dictated when and where new masters could set up their own shops or businesses.[115] Often, however, apprenticeships were familial-based, and apprentices inherited the businesses of their masters. In theory,[116] the apprenticeship system was a voluntary, contractual system that was strongly regulated by social relationships in the community, family, and the collective respect and governance of the trade market.[117]

The post-COVID-19 remote worker, on the other hand, has been far removed from an apprentice-level proximity with their employers. In part, this evolved separation between employer and employee makes sense due to advancement in technology, an increased political emphasis on employment mobility, and the social separation of work and home over the past few centuries.[118] While many of these changes are positive, increased physical separation between an employee and their employer can leave both parties in vulnerable bargaining positions.

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111. *Id.* at 1120.

112. *Id.*

113. *Id.* at 1124.

114. *Id.* at 1120.

115. *Id.*

116. *Id.* While this Comment focuses on the functional aspects of voluntary apprenticeships in the pre-Industrial Revolution, it is important to note that many apprenticeships were involuntary and equated to indentured servitude and/or ultimately slavery.

> Until the end of the nineteenth century, poor children were subjected to indentured servitude, either "voluntarily" by their impoverished parents, or involuntarily under state poor laws. Such servitude, often referred to as "apprenticeship" as the two terms became increasingly synonymous, often closely approximated slavery and demonstrated that poor families, and their children in particular, were disadvantaged, often deliberately.

Id. at 1118.

117. *Id.*

118. *See supra* Part II, Section D of this Comment discussing the evolution of the American employment market.

Because many states characterize modern employment relationships as "at-will" relationships,[119]modern workers and employers enter employment relationships from a transactional standpoint rather than an investment standpoint.[120] Unlike master-apprentice systems that are governed by reputation, skill-based training, and field commitment, modern employment relationships sharply divide employer and employee interests from one another. Where masters made their living in an apprenticeship model by producing goods or services *and* developing the skills of their apprentices through a cash premium, modern employers need only focus on producing enough goods or services in a broader and more competitive market. Thus, modern employers are more inclined to invest more resources toward developing their trade secrets rather than developing the skills of their employees.

Because modern employers are predominantly driven by profit, modern employees are naturally driven by compensation and employment benefits. Given the lack of equity or investment in most employment relationships, many modern employees are open to working with the highest bidder on the job market.[121] To curtail potential trade secret theft as a result of this market reality, many employers subject employees to non-competes that restrict their ability to work for competitors.[122] Given the disparity of non-compete enforcement among the states and a potential federal non-compete ban, it may be time for employers to reconsider this approach.

F. Uncertain Long Term Side Effects of COVID-19

Whether a federal non-compete ban passes, states have demonstrated a reluctance to enforce non-competes in the aftermath of COVID-19.[123] California, Minnesota, North Dakota, and Oklahoma have banned most non-competes altogether.[124] Other states have implemented restrictions

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119. *At-Will Employment and Exceptions State Law Survey*, LEXIS (database updated Jan. 16, 2024).

120. Scott A. Moss, *Where There's At-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment At Will*, 67 UNIV. PITT. L. REV. 295, 300 (2005).

121. *See* Sean Fleming, *Survey: 40% of Employees are Thinking of Quitting Their Jobs*, WORLD ECON. F. (June 2, 2021), https://www.weforum.org/agenda/2021/06/remote-workers-burnout-covid-microsoft-survey/ [https://perma.cc/E3GD-8N2R].

122. *See* Boesch, *supra* note 10.

123. *See, e.g.*, Adecco USA, Inc. v. Staffworks, Inc., No. 6:20-CV-744(MAD/TWD), 2020 U.S. Dist. LEXIS 226382 at *33 (N.D.N.Y. Sept. 15, 2020) (holding the subject non-competes unenforceable where the agreements would cause defendants to lose their jobs "when the COVID-19 pandemic has wreaked havoc on the economy").

124. *See* CAL. BUS. & PROF. CODE § 16600 (2023); MINN. STAT. ANN. § 181.988 (2023); N.D. CENT. CODE § 9-08-06 (2019).

upon non-competes based on salary caps or fields of work.[125] These non-compete restrictions place increased pressure on businesses with nationwide operations to show goodwill to employees through alternative retention methods.

A current trend in employee retention is offering remote work options.[126] The recent spike in remote work is a lingering side effect of COVID-19. Known as the "[l]argest global experiment in telecommuting in human history," the COVID-19 pandemic irreversibly changed the employment market and how employers and employees view "work."[127] While remote work is an attractive work arrangement for many employees who seek increased work-life balance, it is a less attractive work arrangement for employers who seek increased security and control over their talent pools and trade secret protections. Though some businesses report positive results in employee satisfaction and retention from remote work, others report the opposite.[128] Acknowledging that multiple realities can be true at once, it appears that remote work yields uncertain employee retention results. Those results become even more uncertain under a non-compete ban.

Even if the non-compete ban does not pass, non-compete enforceability remains frustrated by conflicting state employment laws. Enhanced technology, the increased availability of remote work, and the increased potential for employees to relocate to other states raise jurisdictional questions for non-compete enforcement.

When an employee assumes employment in one forum, the employer might usually conduct its employment relationship with the employee under that state's laws.[129] However, when an employee unilaterally

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125. *See, e.g.*, COLO. REV. STAT. § 8-2-113 (2022) (implementing threshold compensation amount to exempt "highly compensated workers" from non-compete prohibition); *see also* CONN. GEN. STAT. § 31-50a (2007) (restricting the use of non-competes on security guards).

126. Adam Ozimek & Christopher Stanton, *Remote Work Has Opened the Door to a New Approach to Hiring*, HARV. BUS. REV. (Mar. 11, 2022), https://hbr.org/2022/03/remote-work-has-opened-the-door-to-a-new-approach-to-hiring [https://perma.cc/9H33-7TP3].

127. Jill E. Yavorsky et al., *The Gendered Pandemic: The Implications of COVID-19 for Work and Family*, SOCIO. COMPASS (Mar. 19, 2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8250288/ [https://perma.cc/GVU7-J69V].

128. *Compare* Enda Curran, *Work From Home to Lift Productivity by 5% in Post-Pandemic U.S.*, BLOOMBERG (Apr. 22, 2021, 1:39 AM), https://www.bloomberg.com/news/articles/2021-04-22/yes-working-from-home-makes-you-more-productive-study-finds [https://perma.cc/2JCL-SY9B] *with* Anneken Tappe, *Why Remote Work is a Big Problem for the Economy*, CNN BUS. (Aug. 2, 2021, 1:30PM), https://www.cnn.com/2021/08/02/economy/remote-working-economy/index.html [https://perma.cc/RNM7-YV6V].

129. Paul Salvatoriello, *Out-of-State Employees Working Remotely—Which State Law Applies?*, TRIMBOLI & PRUSINOWKSI (May 26, 2021), https://trimprulaw.com/out-of-state-employees-working-remotely-which-state-law-applies/ [https://perma.cc/ZUR9-NZLX].

moves to another state, courts are split on whether the new state has jurisdiction over employment disputes. In Maryland, a district court found that a state court may exercise jurisdiction "where the employer intentionally directed contact with the forum state" by recruiting and hiring an employee who is a resident of that state.[130] "In remote-work cases . . . a defendant's mere knowledge that an employee happens to reside in the forum state and conduct some work from home does not constitute purposeful availment."[131]

Where employees—most often remote employees—enter into a non-compete agreement in one state, but perform their work in another, enforceability lines become blurred. Although most non-competes include choice of law provisions that select the governance of a particular state's laws, some courts ignore these provisions entirely. [132] For example, some state courts look to where the contract was *formed* instead of where the contract was *performed*.[133] In *Award Incentives, Inc. v. Van Rooyen*,[134] the United States Court of Appeals for the Third Circuit explained that because a non-compete agreement was drawn and executed in connection with a New York office, New York law "unquestionably" controlled the validity and interpretation of the non-compete, despite the employee's New Jersey residence.[135] New York case law found non-competes to be against public policy without "special circumstances."[136]

III. INTERSECTIONAL CHALLENGES OF REMOTE WORK AND TRADE SECRET PROTECTION

While a non-compete ban might represent a victory for some employees, it represents significant legal and organizational challenges for employers who seek to protect their trade secrets and retain their talented workforce. Prohibiting non-competes forces employers to re-evaluate their relationships with employees and remain more vigilant in protecting trade secrets, especially those with multi-state operations.

130. Perry v. Nat'l Ass'n of Home Builders, No. TDC-20-0454, 2020 U.S. Dist. LEXIS 177304 *11 (D. Md. Sept. 28, 2020).

131. *Id.* at *12.

132. *See* Award Incentives, Inc. v. Van Rooyan, 263 F.2d 173 (3d Cir. 1959).

133. *Id.*

134. *Id.*

135. *Id.* at 177.

136. *Id. Award Incentives* illustrated those "special circumstances" when the New Jersey-based employee entered into the non-compete "with his eyes open" to its unenforceability after the employee's legal counsel advised him of the non-compete's illegality in New York. *Id.*

Remote work makes these objectives even more difficult for employers to achieve.

A. Remote Chances of Protecting Trade Secrets

In 2016, Congress enacted the Federal Defend Trade Secrets Act[137] to provide a federal cause of action and enhanced remedies for trade secret violations.[138] To receive protection for a trade secret, a plaintiff must show that the trade secret is "information that derives economic value, whether actual or potential, because it is not generally known and that the business took reasonable efforts to maintain its secrecy."[139] For example, the Court of Appeals of Georgia held that a tax return preparation firm made reasonable efforts to maintain the secrecy of its customers' list because it (1) did not publish the list; (2) established companywide policies to protect the information from disclosure to third parties; (3) counseled its employees regarding the policies; (4) limited access to its customer database to certain employees and the information was password protected; and (5) employees with permitted access were not permitted to print the information to take home.[140]

Employers seeking recourse for trade secret theft must consider whether they can argue they made "reasonable efforts" to protect trade secrets if they allowed employees to work and access sensitive information remotely.[141] Because employees have a right to privacy in their own homes, employers' ability to monitor potential trade secret misappropriation by their remote workers is limited, if not, obsolete. For example, some courts claim that a "webcams on" policy violates human rights.[142]

A particular dilemma arises when remote employment relationships terminate. The risk of an employee downloading or converting

137. 18 U.S.C. § 1836 (2016).

138. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3506 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

139. Jacqueline A. Hayduk & John F. Birmingham, Jr., *The Tools Used in Modern Business—Such As Videoconferencing—and the Social Media Culture Create Real Challenges to Protecting Trade Secrets*, THE NAT'L L. REV. (Feb. 16, 2021), https://www.natlawreview.com/article/tools-used-modern-business-such-videoconferencing-and-social-media-culture-create [https://perma.cc/4LYJ-RLYP].

140. *Id.*; Paramount Tax & Acct., LLC v. H & R Block E. Enters., 299 Ga. App. 596, 683 S.E.2d 141 (2009).

141. *Paramount*, 299 Ga. App. at 603, 683 S.E.2d at 147.

142. Spencer Feingold, *Could a Webcam-On Policy Violate Human Rights? A Dutch Court Thinks So*, WORLD ECON. F. (Oct. 12, 2022), https://www.weforum.org/agenda/2022/10/could-a-webcam-on-policy-violate-human-rights-a-dutch-court-thinks-so/ [https://perma.cc/VFJ9-FXAP].

confidential business information from a database before returning it as company property is heightened when the task can be completed inside the privacy of an employee's home.[143] Even if a remote employee does not misuse confidential business information, employers are not ideally positioned to account for data breaches committed by an employee's potential co-habitants.

Not only do remote employees have increased opportunities to misappropriate trade secrets without detection or surveillance by their employers, in the absence of non-competes, their ability to benefit from trade secret misappropriation is enhanced by their ability to immediately work for competitor employers.

B. The Costs of Competing for Remote Workers

Even if employers opt out of offering remote work opportunities, without non-compete obligations, employees are free to accept remote roles with competitors in exchange for higher compensation. If employers cannot accommodate demands for compensation increases or the costs to fund remote work opportunities, employers might significantly shrink their talent pool to save costs and limit trade secret exposure.

Even more troublesome, these costs disparately impact employers with smaller businesses, causing some employers to face a choice between retaining or hiring employees through pricey remote work investments or losing employees to other remote work opportunities.[144] Some employers may find themselves unable to compete with larger competitors who can accommodate the costs of those employee demands. While this scheme technically encourages worker mobility, it has the same potential to decrease worker mobility as companies are less hesitant to hire or invest in employment relationships—an anti-competitive result that runs counter to the objectives of the non-compete ban in the first place.[145]

1. Data Security Costs

As remote work converts more employee residences into an extension of employers' data networks, employers must make additional policies—

143. *See* VAS Aero Servs., LLC v. Arroyo, 860 F. Supp. 2d 1349, 1356 (S.D. Fla. 2012) (ordering former employee to turn over personal thumb drive containing sensitive business information).

144. *See* Kai Ryssdal & Maria Hollenhorst, *A Small Business Weighing the Costs and Savings of Remote Work*, MARKETPLACE (Feb. 3, 2022), https://www.marketplace.org/2022/02/03/a-small-business-weighing-the-costs-and-savings-of-remote-work/ [https://perma.cc/DE36-XZCL].

145. Exec. Order No. 14,036, 86 Fed. Reg. 36987 (July 14, 2021).

and purchases—to protect their confidential business information from security breaches. The cost of remote equipment, oversight, and potential liability for damages is high.[146] Employees can take their laptops anywhere with a Wi-Fi connection and potentially expose an employer's sensitive data, including customers' sensitive data, to cybersecurity threats.[147] Employers must equip those laptops with data security programs that are accompanied by a high price tag.[148]

Employers may forego some of the necessary costs to provide their employees with remote work flexibility. Recent reports show that 52% of remote workers use personal computers or devices with minimal security protection in place and 63% of businesses have experienced a data breach due to employees working remotely.[149] These findings are alarming for employers, employees, and consumers.

2. Reimbursement Costs

Although some remote employees do not require commercial office space to perform their work, many remote employees still need office supplies to perform their work. Prior to the recent spike in remote work, employees rarely had to consider the costs of essential office items such as telephones, computers, printers, pens, papers, and envelopes.

Because office supplies can be expensive, there is debate regarding who should foot the bill for these items.[150] Several states, such as California, Illinois, Iowa, Massachusetts, Montana, New York, and Washington D.C., require employers to reimburse employees for all necessary "business-related" expenses.[151] What qualifies as a "necessary

146. Bill Glose, *The Legal Concerns of Working Remotely: Data Security, Injury, Insurance, Taxes, and Legal Issues*, SUPER LAWYERS (Jan. 20, 2023), https://www.superlawyers.com/resources/employment-law-employee/the-legal-concerns-of-working-remotely/ [https://perma.cc/RNP5-HWHY].

147. *Id.*

148. Anna Fitzgerald, *110 Compliance Statistics to Know for 2024*, SECUREFRAME (Nov. 20, 2023), https://secureframe.com/blog/compliance-statistics [https://perma.cc/2ZMY-62dDD].

149. Matt Murray, *How Remote Work is Leading to More Data Breaches Than Ever*, TMC (Jan. 18, 2022), https://www.tmcnet.com/topics/articles/2022/01/18/451216-how-remote-work-leading-more-data-breaches-than.htm [https://perma.cc/V5Y7-XPA6].

150. *See* Hugo Martin, *Workers are Suing Their Bosses to Get Their Work-from-Home Costs Reimbursed*, L. A. TIMES (Apr. 4, 2022, 5:00 AM), https://www.latimes.com/business/story/2022-04-07/covid-work-from-home-lawsuits-pandemic-business-expenses-litigation [https://perma.cc/DGX2-9GKP].

151. Kylie Ora Lobell, *When Should Employers Reimburse Expenses for Remote Workers?*, SHRM (Nov. 5, 2020), https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/when-should-employers-reimburse-expenses-for-remote-workers.aspx [https://perma.cc/9ARK-VHSH].

business-related expense," however, is unclear.[152] In remote work contexts, some employees may have standing to seek reimbursement for hikes in their electricity bill, sewage services, and other home maintenance bills traditionally excluded from employers' financial consideration.[153]

While the Americans with Disabilities Act (ADA)[154] requires some employers to reimburse teleworkers with accommodations for their telecommuting expenses, some courts have drawn different lines regarding the scope of those accommodations. In *McEnroe v. Microsoft Corporation*,[155] the United States District Court for the Eastern District of Washington held that sewage bills and home cleaning services were outside the scope of reimbursable telework expenses under the ADA.[156] However, in *Smith v. Bell Atlantic*,[157] the Superior Court of Middlesex County held that the ADA may require some employers to provide employees with an adequate home office, including technical support and services under some circumstances.[158]

Additionally, employers face unique challenges when estimating the quantity of office supplies to purchase for remote employees. Some employers reimburse employees who purchase their own office supplies. Though seemingly simple, this policy becomes murkier when employees share office supplies with co-residents in their home or seek reimbursement for their cell phones, computers, printers, and so forth, for personal and professional purposes.

3. Future Costs of Remote Work

The long-term implications of the FTC's proposed non-compete ban may have a detrimental impact on the future of the employment market, especially in the context of remote work. For example, industries that cannot accommodate remote work might see a dip in workforce development. If the remote work statistics trend upward, more employees entering the workforce will demand remote work options. In exchange, certain industries such as healthcare, construction,

152. *Id.*

153. *See, e.g.*, Williams v. Amazon.com Serv. LLC., No. 22-cv-01892-VC, 2022 U.S. Dist. LEXIS 97920 (N.D. Cal. June 1, 2022); *see also* Patrick Lucas Austin, *Working From Home is Driving Up Our Energy Costs. Should Employers Foot the Bill?*, TIME (Feb. 26, 2021, 4:12 PM), https://time.com/5935050/remote-work-energy-bill/ [https://perma.cc/L8WV-RDFD].

154. 42 U.S.C.S. § 12101 (2008).

155. No. CV-09-5053-LRS, 2010 U.S. Dist. LEXIS 122477 (E.D. Wash. Nov. 18, 2010).

156. *Id.* at *7.

157. No. 98-2828, 2003 Mass. Super. LEXIS 99 *1 (Mass. Super. Ct. Mar. 4, 2003).

158. *Id.* at *16–21.

hospitality, emergency services, entertainment, and other manual labor trades that require in-person work may experience a shortage without similar employee benefits. Without non-competes, employers may invest significantly less time and resources in training, thus leading to the erosion of professional expertise and quality services.

IV. POTENTIAL SOLUTIONS

A. Alternative Contractual Solutions

To prevent employers from creatively contracting around the ban, the FTC's proposed rule devises a "functional test" for courts to determine whether an employment clause is a "*de facto* non-compete clause" by outlawing all employment clauses that "ha[ve] the effect of prohibiting [a] worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer."[159] In its proposed rule draft, the FTC enumerates several examples of *de facto* non-compete clauses, including overbroad non-disclosure agreements and contractual terms requiring employees to reimburse employers for training costs upon termination.[160]

In the wake of a non-compete ban, some employers may increase their reliance on alternative employment contractual devices, such as non-disclosure agreements and non-solicitation agreements. However, these alternative contractual tools may also become ineffective or outlawed by the FTC's potential non-compete ban. Director Wilkins herself stated that the FTC does not promote these types of agreements, the FTC simply acknowledges that they exist.[161]

1. Non-Disclosure Agreements

Non-disclosure agreements are contractual devices that bind parties to protect confidential business information.[162] They are generally considered uncontroversial, but like non-competes, their enforceability depends on how broad or over-restrictive they are.[163]

Courts scrutinize non-disclosures to ensure they are appropriately molded to protect confidential business information and are not so broad

159. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3482, 3535 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

160. *Id.*

161. Lane, *supra* note 51.

162. Non-Compete Clause Rule, 88 Fed. Reg. at 3507.

163. *Id.*

that they place an undue burden on a defendant.[164] These inquiries are highly fact specific and do not always yield consistent results for businesses or defendants. Some states impose a "reasonableness requirement" upon non-disclosure agreements and, like non-competes, will only enforce them if they are "reasonably related" to protecting confidential business information.[165] In Georgia, for example, a non-disclosure provision must meet two requirements, including: "(1) whether the employer is attempting to protect confidential information relating to the business, such as trade secrets, methods of operation, names of customers, personnel data, and so on; and (2) whether the restraint is reasonably related to the protection of the information."[166] Most states also impose time and place restrictions on non-disclosure agreements to ensure reasonableness.[167]

Many of the enforceability requirements for non-disclosures are the same enforceability requirements for non-competes.[168] The similar enforceability requirements between the two contractual devices suggest that courts will treat them similarly. As discussed earlier, the FTC's proposed rule bars employers from crafting *de facto* non-compete clauses, including overbroad non-disclosure agreements.[169]

Assuming an employer drafts an enforceable non-disclosure agreement, how will they enforce it once an employee immediately begins work for a competitor? How will an employer adequately monitor the departed employee's post-employment conduct to ensure compliance with the non-disclosure agreement without violating the departed employee's privacy? How will they prove non-compliance? Most importantly, will it be too late to remedy the harms created by a departed employee's violation of a non-disclosure agreement? With all of these unanswered questions, it is uncertain whether the cost of enforcing trade secret protection is worth the potential risk.

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164. Omnisec Int'l Investigations, Inc. v. Stone, 101 Va. Cir. 376, 383 (2019) (the "employer bears the 'burden to show that the restraint is no greater than necessary to protect a legitimate business interest, is not unduly harsh or oppressive in curtailing an employee's ability to earn a livelihood, and is reasonable in light of sound public policy.'").

165. Argi Fin. Grp. v. Hardigg, No. 3:20-cv-587-RGJ, 2020 U.S. Dist. LEXIS 222095 (W.D. Ky. Oct. 27, 2020).

166. Holland Ins. Group v. Senior Life Ins. Co., 329 Ga. App. 834, 838, 766 S.E.2d 187, 192 (2014).

167. *Id.*

168. *Id.*

169. Non-Compete Clause Rule, 88 Fed. Reg. at 3535.

2. Non-Solicitation Clauses

Employers might rely on non-solicitation agreements in mobilized job markets as a retention method. Many employers require employees to sign non-solicitation agreements that effectively ban departed employees from recruiting their former co-workers to join them at their new jobs.[170] In the event of a non-compete ban, it is unclear whether non-solicitation clauses will have much legal effect—especially amid a worker-mobility era in the White House. The Department of Justice has demonstrated hostility toward no-poach agreements as violations of anti-trust laws.[171] At the state level, California and Idaho have banned non-solicitation clauses.[172]

Aside from enforceability issues, if employers decide to use non-solicitation agreements for retention methods, they will likely face the same evidentiary or cost hurdles associated with litigating non-disclosure agreements—especially if their employees are remote.

B. Redefining Work Relationships

1. Independent Contractors

Some employers may consider hiring independent contractors instead of remote employees. However, employers should not assume that the costs they save on hiring employees are necessarily saved by hiring independent contractors whose fees likely compensate for their lack of traditional employment benefits.[173] While a remote workforce values autonomy, that autonomy does not necessarily equate to the desire to become independent contractors. Many employees enjoy the legal protections of being an employee, including wage protections, benefits, and anti-discrimination protections.[174] In a highly competitive employment market, competitors will undoubtedly offer those benefits.

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170. Charles Tait Graves, *Questioning the Employee Non-Solicitation Covenant*, 55 LOY. LA. L. REV. 959, 962 (2022).

171. *See Antitrust Guidance for Human Resource Professionals*, U.S. DEP'T OF JUST. & FED. TRADE COMM'N 1, 2–3 (Oct. 2016), https://www.justice.gov/atr/file/903511/download [https://perma.cc/C5C8-6LCS].

172. *See*, *e.g.*, Towers v. Iger, No. 15-cv-04609-BLF, 2017 U.S. Dist. LEXIS 217904, (N.D. Cal. Mar. 10, 2017) (holding the Department of Justice's press release regarding no-poach agreements was sufficient to put Disney shareholders on inquiry notice about potential wrongdoing by Disney's board, despite press release not mentioning Disney or its board).

173. Skye Schooley, *When to Hire a Full-Time Employee vs. Contractor*, BUS. (Aug. 29, 2023), https://www.business.com/articles/contractors-vs-employees-benefits-and-draw backs/ [https://perma.cc/UKQ3-EZY6].

174. *Id.*

2. Hybrid Work Solutions

As explained above, remote work implicates several concerns for employers, including legal, security, and retention issues.[175] While remote work poses considerable challenges to employers who seek to protect their trade secrets, employers may also face employee retention or recruiting challenges if they do not offer remote work options. A 2022 survey revealed that 87% of workers would accept an opportunity to work remotely.[176] The overwhelming results of this survey indicate that most workers would sacrifice their seniority and loyalty to one employer to work in the comfort of their own home with another. Although allowing employees to work remotely full-time may exacerbate trade secret protection issues, disallowing remote work may exacerbate the same issues if employees are lost to competitors who offer remote work.

Employers might strike a balance between these competing interests by remaining flexible. Offering hybrid or flexible work conditions that allow employees to split their time between home and the office might allow employers to maintain a central location for their confidential business records while allowing employees to complete non-confidential work tasks at home. Aside from offering flexible work environments, there may be additional value in allowing employees to work a flexible schedule with flexible start and end times. These practices can significantly decrease burdens on employees with children, family obligations, or unique health needs requiring workday flexibility.

To successfully implement flexible work schedules into an organizational culture, employers should draft clear work policies that outline flex-work.[177] These policies should include a minimum and/or mandatory in-office work period. [178] To further accommodate flexibility, these policies should provide employees with clear procedures for revising in-office work periods.[179] If drafted correctly, these policies can help employers alleviate some of their trade secret and employee retention concerns and minimize the risk of employees unilaterally bringing their work across state lines or to competitors.[180]

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175. *See supra* Part III, Sections A and B discussing the legal challenges and costs of data security and trade secret protections.

176. *See* Natalie Hamingson, *Communication Technology and Inclusion Will Shape the Future of Remote Work*, BUS. NEWS DAILY (Oct. 24, 2023), https://www.businessnewsdaily.com/8156-future-of-remote-work.html [https://perma.cc/3Q5R-65FY].

177. Adam Cohen et al., *Top Employer Return-To-Work Considerations: Part 3*, LAW 360 (May 8, 2020).

178. *Id.*

179. *Id.*

180. *Id.*

3. Employee-Centric Approaches

While employers must embrace the reality of an "employee" job market, employees may soon face shifting tides caused by automation. Just as Eighteenth century technologies created a divide between employer and employee, recent advancements in artificial intelligence (AI) may replace many modern workers.[181] The World Economic Forum has boldly predicted that AI technologies will replace 85 million jobs by 2025.[182] Many of these soon-to-be automated roles are projected to be "remote roles that are repetitive and can be easily automated."[183]

The only realistic way for remote workers to compete with AI is to acquire specialized "domain expertise" that supersedes potential glitches in AI systems.[184] For example, software developers will likely keep their work-from-home roles as long as they continue meeting deadlines with quantifiable lines of code and retain "deep knowledge" of their employers' internal systems.[185]

Though the government may eventually regulate the automation of the workforce, employees should not wait for potential damage to their livelihood to unfold. One survey shows that up to 60% of managers would lay off their remote workers first in the case of a recession.[186] This bias is likely formed due to several factors, including the lack of interpersonal connections between remote employers and employees, perceived decreases in productivity from remote workers, or plain generational or personal distaste for remote work. Regardless of the reasons, remote

181. *See* Lydia DePillis & Steve Lohr, *Tinkering With ChatGPT, Workers Wonder: Will This Take My Job?*, N.Y. TIMES (Apr. 3, 2023), https://www.nytimes.com/2023/03/28/business/economy/jobs-ai-artificial-intelligence-chatgpt.html [https://perma.cc/BA5S-YBCA].

182. Morgan Smith, *Some remote jobs will still be hot in 5 years, and others "might not exist," economists say—how to know the difference*, CNBC (May 5, 2023), https://www.cnbc.com/2023/05/05/why-some-remote-jobs-are-disappearing-while-others-are-hiring-like-crazy.html#:~:text=As%20for%20AI%2C%20the%20World%20Economic%20Forum%20has,easily%20automated%2C%20like%20customer%20service%20representatives%20and%20receptionists [https://perma.cc/QQC3-QB2G].

183. *Id.*

184. Nada R. Sanders & John D. Wood, *The Skills Your Employees Need to Work Effectively with AI*, HARV. BUS. REV. (Nov. 3, 2023), https://hbr.org/2023/11/the-skills-your-employees-need-to-work-effectively-with-ai [https://perma.cc/HCS5-S7XD].

185. *Id.*

186. Don Lee, *Remote workers could be the first to go in the next round of recession layoffs*, L.A. TIMES (Oct. 26, 2022), https://www.latimes.com/politics/story/2022-10-26/remote-workers-may-be-the-first-let-go-in-recession-related-layoffs [https://perma.cc/BZ3J-CERN].

workers are at a heightened risk of termination compared to their in-office counterparts.[187]

To compete with shiny new AI systems in the workplace, employees may seek to find roles that mirror some of the apprenticeship system aspects that predated technology in the workplace and armed employees with (1) a personal relationship with their employer and (2) a carefully crafted skill. In modern terms, this may look like entering or creating mentorship relationships with employers, returning to school—perhaps at the employer's expense—for a skill that a machine cannot complete. Given the stringent compliance requirements of the General Data Protection Regulation (GDPR)[188] and other state data privacy regulations, employers will need to form data privacy departments staffed with data privacy and compliance professionals to accommodate consumer and compliance requests.[189]

a. Employee Success Models: Equity and Transparency

Finally, and perhaps ultimately, employees may seek roles that provide them with clear paths to promotion, leadership, ownership, or equity within an organization. Even where employees are uninterested in leadership or equity positions within an organization, or where an organization's size or structure does not support equity, employers should create roles with clearly defined promotion and compensation paths. To clearly define these paths, employers can adopt transparent lockstep compensation models, create quantifiable metric-based promotion and compensation programs, and consistently assess employee professional goals on a one-on-one basis.

Employees who receive workplace recognition and access to clear-cut and achievable promotions and compensation increases are more likely to achieve longevity with an employer—not necessarily out of loyalty to their employer, but perhaps out of dedication to their career objectives.[190] In a transparent, development and growth-oriented work setting, employees may finally find the autonomy they seek over their careers. In result, employers could worry less about developing and retaining trade secrets and more about developing and retaining their relationships with employees—an investment that yields both desired results.

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187. *Id.*

188. General Data Protection Regulation 2016, O.J. (L 119) 679 [hereinafter GDPR].

189. GDPR Art. 39.

190. *See generally From Praise to Profits: The Business Case for Recognition at Work*, GALLUP, https://assets.ctfassets.net/hff6luki1ys4/DjH2m0CgenFWSymyjUMWD/363cf879c37af3708fb0f520566aefc0/from-praise-to-profits-the-business-case-for-recognition-at-work__1_.pdf [https://perma.cc/LC4X-8BA8] (last visited Mar. 10, 2024).

b. Training Agreements and Investments

Professional training is a large undertaking for both employers and employees that can require considerable investments of time and money. Employees often invest time and money to obtain a college degree or a professional certificate/license. Employers invest further time and money into training employees on the job. Each of these investments bears a risk of loss for both the employer and employee, especially in the standard at-will employment relationship.

One way to collateralize training investments is for employers to offer tuition-reimbursement or sponsor career development programs for professional skill-building. Some employers already engage in this practice through the use of training reimbursement agreements.[191] In a standard training reimbursement agreement, an employer agrees to fund professional schooling or training for an employee with the understanding that the employee will repay those costs to the employer if the employment relationship terminates within a specific amount of time.[192] So long as these agreements are not drafted unconscionably or overbroadly, they should not constitute a *de facto* non-compete clause under the FTC's proposed rule to ban non-competes.

4. Mentorship Programs

While it is unclear whether training reimbursement agreements will survive a non-compete ban, employers should nonetheless invest in holistically developing their employees' professional skills as a retention method. Even if employers are incapable of providing tuition reimbursement to employees, employers can provide skill development through formal mentorship programs. Mentorship programs provide multiple benefits for employers and employees.[193] From an employee standpoint, tailored mentorship can provide employees with shadowing opportunities to develop their career skills and goals, as well as a respected advocate in the workplace.[194] From an employer standpoint,

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191. *See*, *e.g.*, Worldwide Jet Charter Inc. v. Moen, No. CV 2020-095695, 2021 Ariz. Super. LEXIS 1009, at *1 (May 19, 2021).

192. *See* Gordon v. City of Oakland, 627 F.3d 1092, 1096 (9th Cir. 2010) ("As long as [an employer] pay[s] departing [employees] at least the statutory minimum wage, [the employer] could collect the training costs as an ordinary creditor.").

193. *See* Ania Smith, *Driving Employee Retention Through Mentorship*, FORBES (July 14, 2022, 7:30 AM), https://www.forbes.com/sites/forbesbusinesscouncil/2022/07/14/driving-employee-retention-through-mentorship/?sh=746dcac111b6 [https://perma.cc/HC42-DHYS].

194. *Id.* "Employees who participate[] in mentoring programs [are] 49% less likely to leave . . . . [Because] one of the main reasons employees leave is due to a lack of career development opportunities, creating mentorship programs can facilitate meaningful

mentorship can help employers administer tailored training to employees and avoid potential human resource issues by increasing employee morale through relationship building.

In many ways, mentorship reflects apprenticeship. To reap the employment longevity benefits associated with apprenticeship, modern employers should accordingly approach mentorship with a *support* mindset instead of a *hoard* mindset. In other words, employers who wish to protect trade secrets should not limit their focus to retaining employees. Employers should expand their focus to build relationships with employees through mutual respect, trust, and personal investment.

When pre-industrial revolution masters took on new apprentices, they holistically took them on with the understanding that the working relationship was likely not permanent.[195] Nonetheless, masters invested considerable amounts of time training their apprentices in and outside of the workplace.[196] They made these training investments despite the possibility that the apprentices would one day operate their own businesses or work elsewhere.[197] Even then, masters retained the benefit of an enhanced professional reputation and received enhanced premiums from other apprentices who desired to learn under a highly-esteemed master.[198]

V. CONCLUSION

If the FTC's proposed non-compete ban passes in 2024, the employment market will drastically change. Even if the ban does not pass, the employment market still faces drastic change. Note, however, that the winners and losers are not determined by the title employer or employee. Rather, the winners are determined by their ability to adapt to change and respond to market demands.

Despite the challenges enumerated throughout this Comment, including remote work and stiff employment market competition, modern employers still have a unique opportunity to break through the physical and technological barriers standing in the way of remote

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conversations about learning and growth and reduce the number of employees searching for greener pastures elsewhere." *Id.*

195. David de la Croiz et al., *Clans, Guilds, and Markets: Apprenticeship Institutions and Growth in the Pre-Industrial Economy* 11 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22131, 2016), https://www.nber.org/system/files/working_papers/w22131/w22131.pdf [https://perma.cc/VT4F-U43L].

196. Dolgin, *supra* note 110, at 1120; *see also* Chris Minns & Patrick Wallis, *The price of human capital in a pre-industrial economy: Premiums and apprenticeship contracts in 18th century England,* 50 EXPLORATIONS IN ECON. HIST. 335, 336–37 (2013).

197. De la Croiz*, supra* note 195, at 12.

198. *Id.* at 9.

employee and trade secret retention. Modern employers should likewise aim to rigorously develop the professional skills of their employees, regardless of the projected longevity of the working relationship.

While this Comment advocates for employers to adopt pre-Industrial Revolution apprenticeship models of mentorship and skill building, this Comment also stresses the importance of embracing modernity. Whether that means embracing remote work, hybrid work, work-life flexibility, or other non-traditional employment arrangements, there is still no better time than the present to build positive working relationships that optimize employees' talents and professional goals. When employees are properly trained, encouraged, and included in the important decisions that affect their career paths, employment relationships are more likely to end on the basis of mutual respect (if they end at all). Thus, trade secrets, loyalty, and professional relationships are more likely to remain intact.

Though young Bre Baguette chose beautiful words to live by, her idol had more wisdom regarding the careful balance necessary to manage autonomous dough: "Ye gods! But you're not standing around holding [the dough] by the hand all this time. No. [T]he dough takes care of itself."[199] Employees are the "dough" that protect business trade secrets and enhance profits. Non-compete ban or not, if employers remain mindful of their employees' evolving "kneads," things should pan out favorably.

199. CHILD, *supra* note 1.