Breaking the Bind: Rethinking Non-Compete Agreements in a Federal Framework

Stephen M. Hendricks

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In April 2024, the Federal Trade Commission (FTC) adopted a sweeping rule that bans most non-compete agreements nationwide. Though well-intentioned, the FTC's categorical prohibition neglects the complex interplay between worker mobility, employer investment, and the protection of legitimate business interests. This Article contends that the United States must move beyond the current false binary of complete prohibition or unregulated enforcement. Drawing on comparative legal analysis, it proposes a federal framework modeled on Germany's Karenzentschädigung system, under which employers must provide post-employment compensation—typically fifty percent of prior salary—to enforce non-competes.

After tracing the evolution of non-compete doctrine in American law, this Article critiques the FTC's rule on constitutional, statutory, and federalism grounds. It then offers a detailed roadmap for legislative reform, demonstrating how a structured compensatory approach can promote innovation, protect trade secrets, and ensure economic security for workers. The proposal includes statutory minimums on compensation and duration, administrative enforcement through the Department of Labor, and judicial review grounded in proportionality and business necessity. Empirical evidence from Germany supports the model's efficacy in reducing litigation, enhancing labor mobility, and preserving competitive markets.

Ultimately, this Article advances a middle path—"earned enforceability"—that reconciles economic dynamism with legal stability. By transforming non-compete agreements from instruments of suppression into deliberate, reciprocal contracts, a federal compensatory regime can replace the existing regulatory patchwork with a durable, constitutionally sound solution for the knowledge-based economy.

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I. INTRODUCTION

On May 7, 2024, the Federal Trade Commission (FTC) took unprecedented action by issuing a final rule that effectively bans most non-compete agreements across the United States.[1] This sweeping rule, which applies to nearly all employers and workers, represents the most significant federal intervention into employment contract law in recent history.[2] While the FTC's rule aims to promote worker mobility and market competition, it fails to recognize the legitimate business interests that non-compete agreements have historically protected.[3] This binary approach—complete prohibition rather than measured regulation—threatens to disrupt established business practices and potentially harms the very innovation economy it seeks to protect.

The rule has been met with several legal challenges, with opponents arguing that the FTC exceeded its statutory authority and that the rule represents an unconstitutional exercise of federal power.[4] In *Ryan, LLC v. FTC*, one such challenge resulted in a nationwide injunction.[5] The FTC initiated an appeal on October 18, 2024,[6] but following a change in presidential administration and leadership at the agency,[7] it requested a 120-day pause in the appellate proceedings.[8] The FTC is expected

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1 FTC Non-Compete Clause Rule, 16 C.F.R. §§ 910.1–.6 (2024); *see also Open Commission Meeting — April 23, 2024*, FED. TRADE COMM'N (Apr. 23, 2024, 2:00 PM), https://www.ftc.gov/news-events/events/2024/04/open-commission-meeting-april-23-2024 [https://perma.cc/Y75W-UBBP].

2 *See* Tom Shumate, *Game Over or Game On? The Future of Noncompetes*, 60 TENN. BAR J. 18, 22 (2024).

3 *See* Michael K. Molzberger, *The Proposed Nationwide Ban on Non-Competition Agreements by the Federal Trade Commission*, 43 FRANCHISE L.J. 1, 2 (2024).

4 *See* Bruce Allain, *FTC's Non-Compete Ban Hit with Multiple Legal Challenges*, THE SOURCE ON HEALTHCARE PRICE & COMPETITION (May 15, 2024), https://sourceonhealthcare.org/ftcs-non-compete-ban-hit-with-multiple-legal-challenges/ [https://perma.cc/HW55-Y58A].

5 Ryan, LLC v. FTC, 746 F. Supp. 3d 369, 387, 389–90 (N.D. Tex. 2024).

6 *See* Notice of Appeal, Ryan, LLC v. FTC, 746 F. Supp. 3d 369 (N.D. Tex. 2024) (No. 24-10951).

7 *See* Jesse M. Coleman & Eron Reid, *FTC Requests Stay of Appeals to Challenges to FTC Non-Compete Rule Citing New Administration*, SEYFARTH (Mar. 11, 2025), https://www.tradesecretslaw.com/2025/03/articles/ftcs-crackdown-on-non-competes/ftc-requests-stay-of-appeals-to-challenges-to-ftc-non-compete-rule-citing-new-administration/ [https://perma.cc/QUZ2-N8Q7] ("Before ascending to lead the agency, then-Commissioner [Andrew] Ferguson opposed the Rule, arguing that it lacked the authority for broad rulemaking to ban non-compete agreements while also offering pro-business justifications against the ban.").

8 Cody D. Woods, *FTC Forms Labor Task Force; Noncompete Appeals Stayed*, THE NAT'L L. REV. (May 1, 2025), https://natlawreview.com/article/ftc-forms-labor-task-force-noncompete-appeals-stayed [https://perma.cc/EY7S-L7CS].

to inform the court by mid-July 2025 whether it intends to continue pursuing the appeal.[9] Even if the FTC's rule is abandoned, the legal uncertainty surrounding non-compete agreements will persist, causing courts to grapple with their scope and enforceability, necessitating a solution.

Non-compete agreements have long served as crucial tools for businesses to protect their intellectual property, customer relationships, and investments in employee training.[10] When properly structured, these agreements can foster innovation by giving employers the confidence to share trade secrets and invest in employee development.[11] However, their misuse through overly broad restrictions or application to low-wage workers has rightfully drawn criticism and scrutiny.[12] The difficulty, therefore, lies not in wholesale prohibition, but in crafting a balanced framework that protects both legitimate business interests and worker rights.

This Article proposes a solution: rather than maintaining the current state-by-state patchwork or pushing forward with the FTC's complete ban, Congress should enact federal legislation modeled on Germany's sophisticated approach to non-compete agreements. The German system, known as the *Karenzentschädigung* model, requires employers to provide substantial compensation, typically fifty percent of an employee's total remuneration, during the non-compete period.[13] This approach has successfully balanced employer and employee interests for decades while maintaining a dynamic and competitive economy.[14]

The United States can learn from this model while adapting it to American legal and business contexts. A federal framework

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9 *See id.*

10 Norman D. Bishara, *Covenants Not to Compete in a Knowledge Economy: Balancing Innovation from Employee Mobility Against Legal Protection for Human Capital Investment*, 27 BERKELEY J. EMP. & LAB. L. 287, 294–96 (2006).

11 Chris Jackson & Jason Wiens, *A Fair Fight: Entrepreneurship and Competition Policy*, EWING MARION KAUFFMAN FOUND. (July 8, 2016), https://www.kauffman.org/resources/entrepreneurship-policy-digest/a-fair-fight-entrepreneurship-and-competition-policy/ [https://perma.cc/QC7U-BA7F].

12 *See* Matt Marx & Lee Fleming, *Non-Compete Agreements: Barriers to Entry . . . and Exit?*,12 INNOVATION POL'Y & ECON. 39, 39, 45–61 (2012).

13 *See generally* WOLFGANG HROMADKA & FRANK MASCHMANN, ARBEITSRECHT BAND 1 § 10, at 389–556 (6th ed. 2015) (discussing the German statutory requirements for non-compete agreements).

14 *See* Hagen Köckeritz & Guido Zeppenfeld, *Germany: Restrictive Covenants*, MAYER BROWN (July 25, 2024), https://www.mayerbrown.com/en/insights/publications/2024/07/restrictive-covenants-germany [https://perma.cc/UW7D-W5WC].

based on the German system would bring clarity and consistency to non-compete enforcement while ensuring fair treatment of workers. Such legislation would need to address several key challenges: (1) establishing appropriate compensation levels, (2) defining reasonable duration limits, (3) creating effective enforcement mechanisms, and (4) navigating complex constitutional issues regarding federal authority in traditional state law domains.

This Article proceeds in several parts. Part II examines the historical background of non-compete agreements in American law and analyzes the current state-by-state approach, culminating in a discussion of the FTC's new rule. Part III addresses the constitutional implications of federal regulation in this area, particularly focusing on Commerce Clause authority and potential challenges to both the FTC rule and proposed legislation. Part IV provides a comprehensive analysis of the German model, examining its key features and implementation success. Part V takes an economic and empirical look at non-competes, while Part VI presents a detailed proposal for a federal framework, adapting the German approach to the American context while addressing unique U.S. legal and business considerations. Part VII contemplates the implementation and policy considerations surrounding such a framework. Part VIII anticipates and addresses potential criticisms of the proposed framework, and Part IX concludes.

The time has come for the United States to move beyond the binary choice between unrestricted non-compete agreements and their outright prohibition. By examining successful international models and crafting thoughtful federal legislation, the United States can create a framework that protects innovation, promotes fair competition, and respects worker rights. This Article provides a roadmap for achieving that balance.

II. HISTORICAL BACKGROUND AND CURRENT STATE OF NON-COMPETE LAW

A. Evolution of Non-Compete Agreements in American Law

The history of non-compete agreements in American jurisprudence traces back to the English common law, where courts initially viewed such restrictions with significant skepticism. The seminal 1711 case of *Mitchel v. Reynolds* established the foundation for modern non-compete doctrine by introducing a "rule of reason" approach that balanced an

employer's protectable interests against public policy concerns about restraints on trade.[15] This framework crossed the Atlantic and took root in American courts, though its application evolved significantly as the American economy transformed from agrarian to industrial to information-based.[16]

Early American courts generally disfavored non-compete agreements, viewing them primarily through the lens of economic liberty and free market principles. However, as businesses began investing more heavily in trade secrets, customer relationships, and employee training during the Industrial Revolution, courts gradually recognized legitimate business interests that could justify reasonable restrictions on post-employment competition.[17] This shift reflected the growing complexity of employer-employee relationships and the increasing importance of intellectual property protection in the American economy.

The twentieth century saw further refinement of non-compete doctrine as courts developed more sophisticated tests for evaluating these agreements. The modern approach typically examines three key elements: (1) the existence of legitimate business interests worthy of protection, (2) the reasonableness of the restrictions in terms of geographic scope and duration, and (3) the public interest in maintaining competition and employee mobility.[18] This framework, while widely adopted, has been applied with varying degrees of stringency across jurisdictions, leading to the current patchwork of state approaches.

B. Current State Approaches

The regulation of non-compete agreements has traditionally fallen within state jurisdiction, resulting in significant variation across the United States. This diversity of approaches reflects different policy priorities and economic philosophies among states, creating a complex landscape for both employers and employees to navigate.[19]

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15 Mitchel v. Reynolds (1711) 24 Eng. Rep. 347, 348–49 (Gr. Brit.).

16 *See* Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800-1920*, 52 HASTINGS L.J. 441, 442, 534–35 (2001).

17 1 PETER S. MENELL ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE: 2020, at 115–17, 120–21 (2020).

18 *See* RESTATEMENT (SECOND) OF CONTS. § 188 (AM. L. INST. 1981).

19 *See* Norman D. Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants Not to Compete, Trends, and Implications for Employee Mobility Policy*, 13 U. PA. J. BUS. L. 751, 753, 756 (2011).

1. The California Model: Complete Prohibition

California stands as the prime example of a jurisdiction that has taken an absolutist position against non-compete agreements. Since 1872, section 16600 of the California Business and Professions Code has provided that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."[20] California courts have interpreted this statute broadly, consistently striking down non-compete agreements except in very limited circumstances involving the sale of businesses or dissolution of partnerships.[21]

Proponents of the California approach argue that its prohibition on non-competes has been crucial to the development of Silicon Valley's dynamic technology sector, facilitating the free flow of talent and ideas.[22] Studies have suggested that this policy has contributed to increased employee mobility, knowledge spillovers, and overall innovation in California's technology sector.[23] However, critics contend that this approach leaves businesses without adequate protection for legitimate interests and may discourage investment in employee development.[24]

2. The Reasonableness Approach

Most states have adopted a more nuanced "reasonableness" test for evaluating non-compete agreements. While the specific factors vary by jurisdiction, courts typically examine: (1) the scope of prohibited activities; (2) geographic limitations; (3) duration of restrictions; (4) the employee's access to confidential information or customer relationships; (5) the impact on the employee's ability to earn a living; and (6) the public interest.[25]

States differ significantly in how they apply these factors and in their willingness to modify or "blue pencil" overbroad agreements. Some jurisdictions, like New York, will modify unreasonable restrictions to make them enforceable, while others,

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20 CAL. BUS. & PROF. CODE § 16600(a) (West 2025).

21 Edwards v. Arthur Andersen LLP, 189 P.3d 285, 290–91 (Cal. 2008).

22 For a discussion on the importance of competition in Silicon Valley, see ANNALEE SAXENIAN, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128, at 29–57 (1996).

23 Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 575–76 (1999).

24 *See, e.g.*, Jonathan M. Barnett & Ted Sichelman, *The Case for Noncompetes*, 87 U. CHI. L. REV. 953, 953–54, 964–65 (2020).

25 RESTATEMENT (SECOND) OF CONTS. § 188 cmts. b–d (AM. L. INST. 1981).

like Wisconsin, will invalidate the entire agreement if any provision is unreasonable.[26]

3. Recent State Reform Efforts

In recent years, several states have enacted legislation to limit the use of non-compete agreements, particularly for low-wage workers. For example, Illinois prohibited non-competes for employees earning less than $75,000 annually (adjusted for inflation) through the Freedom to Work Act.[27] In 2018, Massachusetts enacted comprehensive non-compete reform, requiring garden leave payments[28] and limiting duration to twelve months.[29] Washington passed legislation in 2019 voiding non-competes for employees earning less than $100,000 annually and independent contractors earning less than $250,000.[30] These reforms reflect growing concern about the overuse of non-compete agreements and their potential to suppress wages and limit economic opportunity, particularly for lower-skilled workers.

C. The Federal Trade Commission's Rule

1. Overview and Legal Basis

The FTC's 2024 rule marks a dramatic shift from the traditional state-based approach to non-compete regulation. Citing its authority under section 5 of the FTC Act (Section 5) to prevent "unfair methods of competition," the FTC declared most non-compete agreements to be an unfair method of competition.[31] The rule prohibits employers from entering into or attempting to enter into non-compete agreements with workers, requires employers to rescind existing non-compete agreements, mandates notice to workers that existing non-compete agreements are no

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26 *Compare* BDO Seidman v. Hirshberg, 712 N.E.2d 1220, 1226 (N.Y. 1999) ("[I]f the employer demonstrates an absence of overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct, but has in good faith sought to protect a legitimate business interest, consistent with reasonable standards of fair dealing, partial enforcement may be justified."), *with* Star Direct, Inc. v. Dal Pra, 767 N.W.2d 898, 916 (Wis. 2009) ("[I]f a restraint is unreasonable, the rest of that covenant is also unenforceable.").

27 820 ILL. COMP. STAT. 90/10(a) (2025).

28 A garden leave provision "requires an employee to remain employed while the employer is not obligated to assign work and restricts the employee from working for competitors." Garden Leave Provision, Practical Law Standard Clauses w-008-3138.

29 MASS. GEN. LAWS, ch. 149, § 24L(b)(iv), (b)(vii) (2024).

30 WASH. REV. CODE §§ 49.62.020(1)(b), 49.62.030(1) (2025).

31 FTC Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38342, 38349 (May 7, 2024) (codified at 16 C.F.R. pt. 910) ("Alongside section 5, Congress adopted section 6(g) of the Act, in which it authorized the Commission to 'make rules and regulations for the purpose of carrying out the provisions of' the FTC Act, which include the Act's prohibition of unfair methods of competition.").

longer enforceable, and provides limited exceptions for non-competes related to the sale of businesses.[32]

2. Key Provisions and Implementation

The rule defines non-compete clauses broadly to include both explicit restrictions on competitive employment and de facto non-compete clauses that effectively preclude workers from seeking or accepting competitive employment.[33] However, it preserves employers' ability to protect trade secrets through other means, such as non-disclosure agreements and non-solicitation provisions, provided these do not function as de facto non-competes.[34]

Implementation requirements include (1) a 120-day compliance period for employers to rescind existing non-compete agreements, (2) mandatory worker notification requirements, (3) specific language requirements for rescission notices, and (4) record-keeping requirements for compliance documentation.[35]

3. Initial Market Response and Legal Challenges

The business community's response to the FTC rule has been mixed, with some industry groups promptly challenging its constitutionality.[36] Primary concerns include questions about the FTC's statutory authority to issue such a broad rule; constitutional challenges under the major questions doctrine; practical implementation difficulties, particularly for multi-state employers; and the potential impact on business investment and innovation.

As previously discussed, *Ryan, LLC v. FTC* resulted in a nationwide injunction and prompted the FTC to pause its appeal

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32 FTC Non-Compete Clause Rule, 16 C.F.R. § 910.2 (2024).

33 *Id.* § 910.1 (defining non-compete clause).

34 Non-disclosure agreements are confidentiality agreements intended to protect against the unauthorized disclosure of trade secrets, ideas, and other confidential information to third parties. *See generally* Rex N. Alley, *Business Information and Nondisclosure Agreements: A Public Policy Framework*, 116 NW. U. L. REV. 817 (2021). Non-solicitation provisions restrict a party from soliciting employees, clients, or vendors and are assessed under the rule of reason to balance anti-competitive effects against pro-competitive justifications. THOMSON REUTERS, NON-SOLICITATION AND NO-POACH AGREEMENTS (2025), Westlaw 3-600-9465. Such provisions may be lawful if they are ancillary to a legitimate business interest. *See id.*

35 16 C.F.R. § 910.2(b); *see also id.* § 910.6 (establishing that the effective date of the FTC Non-Compete Clause Rule is September 4, 2024, which is 120 days after the rule was issued on May 7, 2024).

36 *U.S. Chamber to Sue FTC over Unlawful Power Grab on Noncompete Agreements Ban*, U.S. CHAMBER OF COM. (Apr. 23, 2024), https://www.uschamber.com/antitrust/u-s-chamber-to-sue-ftc-over-unlawful-power-grab-on-noncompete-agreements-ban [https://perma.cc/NZM6-U48J].

following a change in agency leadership.[37] But even before that, legal uncertainty had already taken hold. A federal court in Pennsylvania upheld the rule, concluding that the FTC acted within its statutory authority[38]—directly conflicting with the Texas decision and creating a circuit split. These divergent rulings reflect the fractured legal landscape surrounding the FTC's rule.

III. CONSTITUTIONAL AND FEDERAL AUTHORITY ISSUES

The transition from state-based regulation of non-compete agreements to federal oversight raises fundamental questions about the scope of federal authority and the balance between state and federal power. The FTC rule banning non-compete agreements represents an unprecedented federal intrusion into an area traditionally governed by state law, demanding careful constitutional analysis.[39] This analysis becomes particularly relevant as Congress considers legislative alternatives to the FTC's approach, including the potential adoption of a German-style compensatory system.

A. Commerce Clause Analysis

The constitutional foundation for federal regulation of non-compete agreements rests primarily on Congress's Commerce Clause authority.[40] Since *NLRB v. Jones & Laughlin Steel Corp.*, courts have interpreted this power broadly to include regulation of activities that substantially affect interstate commerce.[41] While traditionally governed by state law, non-compete agreements increasingly affect interstate commerce through their impact on national labor markets and innovation networks.[42]

Modern Commerce Clause jurisprudence suggests three potential bases for federal regulation of non-compete agreements. First, these agreements directly affect employee mobility across state lines, implicating Congress' authority to regulate channels of interstate commerce.[43] Second, non-compete restrictions influence

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37 *See supra* Part I.

38 ATS Tree Servs., LLC v. FTC, No. 24-1743, slip op. at 18–19 (E.D. Pa. July 23, 2024).

39 *See* FTC Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38355 (May 7, 2024) (codified at 16 C.F.R. pt. 910).

40 U.S. CONST. art. I, § 8, cl. 3.

41 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).

42 *See* ALAN B. KRUEGER & ERIC A. POSNER, A PROPOSAL FOR PROTECTING LOW-INCOME WORKERS FROM MONOPSONY AND COLLUSION 13–15 (2018).

43 United States v. Lopez, 514 U.S. 549, 558 (1995) ("Congress may regulate the use of the channels of interstate commerce. . . . [and] Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce . . . .").

the national labor market, particularly in industries integral to interstate commerce, such as technology and financial services.[44] Third, and most significantly, the cumulative effect of non-compete agreements on labor markets, innovation, and economic competition provides a strong foundation for federal authority under the substantial effects doctrine.[45]

Under *Wickard v. Filburn*'s aggregation principle, Congress may regulate purely local activities if their cumulative effect substantially impacts interstate commerce.[46] Recent empirical studies estimate that twenty percent of American workers are bound by non-compete agreements, with significant effects on wage growth, job mobility, and economic competition.[47] This cumulative impact provides compelling justification for federal regulation, even when individual agreements might appear purely local in nature.

B. Constitutional Challenges to the Federal Trade Commission's Rule

The Supreme Court's recent emphasis on the major questions doctrine poses significant challenges to the FTC's authority to ban non-compete agreements.[48] Under this doctrine, courts expect Congress to "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."[49] The Court's decisions in *West Virginia v. EPA* and *NFIB v. OSHA* suggest growing skepticism toward broad agency interpretations of general statutory authority in economically significant matters.[50]

The FTC's reliance on Section 5's "unfair methods of competition" language to regulate employment contracts presents several vulnerabilities under the major questions doctrine.[51] First, the regulation of non-compete agreements represents an issue of vast economic significance, affecting millions of workers and

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44 *See* Evan P. Starr, J.J. Prescott & Norman D. Bishara, *Noncompete Agreements in the U.S. Labor Force*, 64 J.L. & ECON. 53, 55–57 (2021).

45 *See* KRUEGER & POSNER, *supra* note 42, at 14.

46 Wickard v. Filburn, 317 U.S. 111, 128–29 (1942).

47 U.S. DEP'T OF THE TREASURY, THE STATE OF LABOR MARKET COMPETITION 28–29 (2022) ("[A] recent paper estimates that one-in-five workers is currently subject to non-compete agreements and double that number report having been bound by a non-compete agreement in the past.").

48 West Virginia v. Env't Prot. Agency, 597 U.S. 697, 723–24 (2022).

49 *Id.* at 716.

50 *See* NFIB v. OSHA, 595 U.S. 109, 117 (2022) (per curiam).

51 *See* FTC Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38342 (May 7, 2024) (codified at 16 C.F.R. pt. 910) (citing 15 U.S.C. § 45(a)(1)).

thousands of businesses across all sectors of the economy.[52] Second, the FTC's assertion of authority over employment contracts marks a significant expansion of its traditional antitrust jurisdiction.[53] Third, the regulation of employment relationships has historically been left to the states or to specific congressional action, making this a matter of deep political significance.[54]

Beyond major questions concerns, the non-delegation doctrine presents additional constitutional challenges to the FTC's rule.[55] Although the Supreme Court has rarely invalidated congressional delegations of authority, the broad scope of the non-compete ban, coupled with limited statutory guidance in Section 5, raises questions about whether Congress provided an "intelligible principle" to guide the FTC's rulemaking.[56] Justice Gorsuch's dissent in *Gundy v. United States* signals renewed judicial interest in non-delegation constraints, particularly where agencies claim broad economic authority under general statutory provisions.[57]

The FTC's rule also faces substantial administrative law challenges under the Administrative Procedure Act.[58] Courts reviewing the rule will likely scrutinize whether the FTC adequately considered alternative regulatory approaches, state-level experimentation, industry-specific impacts, and compliance costs.[59] The D.C. Circuit's recent skepticism toward agency assertions of novel authority suggests particular attention to the FTC's statutory interpretation and cost-benefit analysis.[60]

C. Congressional Authority and Preemption

Unlike administrative agencies, Congress retains broader authority to regulate non-compete agreements, provided it acts within Commerce Clause boundaries. Congressional action could take several forms, ranging from complete preemption following California's model to establishing federal baseline requirements

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52 *Id.* at 38344.

53 *Id.* at 38355–56.

54 *Id.* at 38452.

55 *See* Gundy v. United States, 588 U.S. 128, 166–67 (2019) (Gorsuch, J., dissenting).

56 *See* Gary S. Lawson, *"I'm Leavin' It (All) Up to You": Gundy and the (Sort-of) Resurrection of the Subdelegation Doctrine*, 2019 CATO SUP. CT. REV. 31, 33–35.

57 *See Gundy*, 588 U.S. at 149–69.

58 *See* 5 U.S.C. § 706(2)(A).

59 *See* Alden Abbott & Liya Palagashvili, *Policy Spotlight: The Problem with a Federal Ban on Noncompete Agreements*, MERCATUS CTR. (May 23, 2023), https://www.mercatus.org/research/policy-briefs/policy-spotlight-problem-federal-ban-noncompete-agreements [https://perma.cc/5N3R-6DQS].

60 *See* Am. Lung Ass'n v. Env't Prot. Agency, 985 F.3d 914, 930–32, 995 (D.C. Cir. 2021).

while allowing state variation.[61] The German compensatory model, if adopted through federal legislation, would likely face fewer constitutional hurdles than the FTC's outright ban.

Any federal legislation must carefully navigate preemption issues to avoid disrupting established state employment law frameworks.[62] The Supreme Court's preemption jurisprudence suggests several potential approaches to federal non-compete regulation.[63] Congress could explicitly preempt state non-compete law, though political considerations and federalism concerns might favor a more nuanced approach.[64] Alternatively, Congress might establish minimum standards while allowing states to impose additional restrictions, following the model of other federal employment laws, such as the Fair Labor Standards Act (FLSA).[65]

The FLSA mandates that employers must pay minimum wage and overtime compensation; it includes provisions outlining remedies, as well as various exemptions from its coverage.[66] Notably, the FLSA contains a saving clause that permits states to adopt and enforce minimum wage standards that are more stringent than those set by federal law.[67]

The German compensatory model presents particularly complex preemption challenges. Implementation would require careful consideration of how federal compensation requirements interact with existing state restrictions on non-compete agreements.[68] For example, states like California might maintain their outright prohibitions as more protective of employee rights, while other states could adopt the federal compensation framework as a baseline.[69]

D. Federalism Concerns

The regulation of non-compete agreements implicates core federalism principles, particularly given states' traditional

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61 *See* Barnett & Sichelman, *supra* note 24, at 958–62.

62 *See* Roderick M. Hills, *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 4–6 (2007).

63 *See* Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 524–26 (2012).

64 *See* Altria Group, Inc. v. Good, 555 U.S. 70, 76–77 (2008).

65 *See* Daniel V. Dorris, *Fair Labor Standards Act Preemption of State Wage-and-Hour Law Claims*, 76 U. CHI. L. REV. 1251, 1258 (2009).

66 Fair Labor Standards Act, 29 U.S.C. §§ 201–219.

67 *Id.* § 218.

68 *See* Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 645–51 (2001).

69 *See* Gilson, *supra* note 23, at 578–80.

authority over employment relationships.[70] The Supreme Court has repeatedly emphasized that federal intrusion into areas of traditional state regulation requires careful justification, especially where state-level experimentation has produced varied regulatory approaches.[71] This "laboratory of democracy" function has particular salience in the non-compete context, where states have developed diverse approaches reflecting local economic conditions and policy preferences.

Implementation of a German-style system would require careful attention to state-federal coordination. Unlike Germany's unitary system, the American federal structure necessitates mechanisms for coordinating between federal standards and state enforcement. This coordination becomes particularly important in areas, such as anti-commandeering and state innovation.

Enforcement mechanisms must respect anti-commandeering principles while ensuring effective implementation.[72] Congress cannot compel state officials to enforce federal non-compete regulations, but it can provide incentives for state participation and establish concurrent enforcement authority.[73] The experience of other federal employment laws suggests that a cooperative enforcement model, with clear division of authority between federal and state agencies, offers the most promising approach.[74]

Additionally, any federal framework must preserve appropriate spheres for state innovation. While establishing uniform compensation requirements, federal legislation should maintain state authority to address industry-specific concerns and local economic conditions.[75] This flexibility proves particularly important given the significant variations in regional labor markets and industry concentrations across states.

E. Constitutional Framework for a German-Style System

The implementation of a German-style compensatory system requires careful constitutional structuring to ensure both effectiveness and legitimacy within the American federal system. Unlike the FTC's categorical ban, a compensatory approach

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70 *See* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

71 *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

72 Murphy v. Nat'l Collegiate Athletic Ass'n, 584 U.S. 453, 469–73 (2018).

73 *See* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258–60 (2009).

74 *See* Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1157–58 (2011).

75 *See* David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2547–49 (2005).

better aligns with American constitutional traditions of protecting both economic liberty and property rights while regulating market excesses.

Congress' authority to implement such a system would likely derive from three constitutional sources. First, the Commerce Clause provides primary authority given the direct impact of non-compete agreements on interstate labor markets and economic competition. Second, the Necessary and Proper Clause offers additional support for administrative mechanisms needed to implement the compensation system.[76] Third, Congress' power to establish inferior federal courts enables creation of specialized adjudicative procedures for non-compete disputes.[77]

The constitutional architecture of a German-style system should include the following several key elements. First, clear jurisdictional boundaries must define the scope of federal oversight. The system should apply to non-compete agreements that either directly involve interstate commerce, affect employees in industries substantially connected to interstate commerce, or have cumulative effects on national labor markets.[78] This jurisdictional framework would satisfy Commerce Clause requirements while respecting traditional state authority over purely local employment matters.[79] Second, the system must establish appropriate administrative structures while avoiding non-delegation concerns. Unlike the FTC's broad rulemaking approach, legislation implementing a German-style system should provide detailed statutory standards for minimum compensation requirements, duration limitations, industry-specific adjustments, enforcement mechanisms, and judicial review standards. Third, the framework must incorporate adequate procedural protections to satisfy due process requirements. These protections should include notice requirements for affected employees, hearing rights for compensation disputes, appeal mechanisms for administrative determinations, and judicial review of enforcement actions. Finally, any federal framework must preserve state constitutional interests while achieving national

76 M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 324–25 (1819).

77 *See* Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 292 (1990).

78 *See* Gonzales v. Raich, 545 U.S. 1, 17–19 (2005).

79 *See generally* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1488–90 (1994).

uniformity.[80] This balance requires careful attention to several federalism principles.

The system should maintain state courts' authority to adjudicate non-compete disputes while ensuring uniform application of federal standards.[81] States should retain power to enforce more protective standards, following the model of other federal employment laws. Additionally, the framework should provide a foundation for implementing German-style reforms while respecting American constitutional traditions and federal structure. Unlike the FTC's categorical approach, a carefully structured compensatory system offers a path forward that better aligns with both constitutional requirements and practical realities of American labor markets.[82]

IV. COMPARATIVE ANALYSIS OF ALTERNATE MODELS AND THE GERMAN MODEL

A. The United Kingdom's Approach

The United Kingdom (UK) does not outright ban non-compete agreements but strictly regulates them to ensure proportionality. Under UK law, non-competes are enforceable only if they serve a legitimate business interest, such as protecting trade secrets or preventing unfair competition. However, UK courts assess them under the principle of reasonableness, evaluating the duration, geographic scope, and industry restrictions.[83] Employers often use garden leave, where employees remain on the payroll during the restricted period but are prevented from working for competitors.[84]

The UK model demonstrates that rigorous judicial oversight and limited enforceability of non-competes can strike a balance between business protection and employee mobility. While this approach prevents outright abuse, it still places the burden on employees to challenge agreements, potentially deterring low- to mid-level workers from contesting unfair restrictions.

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80 *See* Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2026–28 (2008).

81 *Id.*

82 *See* Cynthia Estlund, *Labor Law Reform Again? Reframing Labor Law as a Regulatory Project*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 383, 386–87 (2013).

83 *See* Catriona Watt & Maree Cassaidy, *The UK Perspective on the FTC Ban on US Non-Competes*, INT'L BAR ASS'N (Aug. 27, 2024), https://www.ibanet.org/UK-perspective-on-the-FTC-ban-on-US-non-competes [https://perma.cc/4XQ7-RRTT].

84 *See id.*

B. The Canadian Model

Canada follows a similar reasonableness approach, with significant variation across provinces. In Ontario, non-competes were largely prohibited under the 2021 Working for Workers Act, except in cases of senior executives.[85] Other provinces, such as British Columbia and Alberta, have taken a cautious approach, requiring non-competes to be clear, limited in scope, and demonstrably necessary.[86]

Canadian courts have also shown strong preference for alternative restrictive covenants, such as non-solicitation and confidentiality agreements, over outright non-competes.[87] The Canadian approach suggests that a nationwide standard, with limited exceptions, can enhance worker mobility while protecting business interests.

C. Alternative U.S. Proposals: Workforce Mobility Act and State-Level Innovations

The Workforce Mobility Act (WMA), a federal proposal introduced in the U.S. Senate, aims to prohibit most non-competes except in limited cases, such as the sale of a business.[88] This legislative effort aligns with California's complete ban and the FTC's rule, arguing that non-competes suppress wages and hinder innovation. While the WMA addresses concerns about the restrictive nature of non-compete agreements, it fails to provide the nuanced balance needed to protect both worker mobility and legitimate business interests. The WMA's near-total prohibition on non-competes does not accommodate industries that rely on these agreements to protect proprietary information, customer relationships, and long-term investments in employee training.[89]

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85 Working for Workers Act, 2021, S.O. 2021, P.35 (Can. Ont.) (discussing prohibitions on non-competes but providing an exception for executives).

86 The enforceability of non-compete clauses in British Columbia and Alberta is determined under the common law. *See Are Non-Compete Clauses Enforceable in British Columbia?*, TAYLOR JANIS WORKPLACE L., https://www.tjworkplacelaw.com/blog/bc/are-non-compete-clauses-enforceable-in-bc/ [https://perma.cc/E2N2-Q3PE] (Sept. 26, 2024); David Di Gianvittorio, *Non-Competition Covenants in Alberta*, FIELD L. (May 2024), https://www.fieldlaw.com/News-Views-Events/232902/Non-Competition-Covenants-in-Alberta [https://perma.cc/27HZ-9H78].

87 *See* Anita Nador & Jordan Epstein, *U.S. Non-Compete Agreements Ban: Parallels in Canada*, HR.COM (Oct. 3, 2024), https://ide.hr.com/en/magazines/all_articles/us-non-compete-agreements-ban-parallels-in-canada_m1sxilzx.html?s=22ynpGBmd1T1r7CV9Zj [https://perma.cc/L7ZM-R4GX].

88 Workforce Mobility Act of 2023, S. 220, 118th Cong. (2023).

89 *See* Starr, Prescott & Bishara, *supra* note 44, at 53–55.

Moreover, the WMA does not solve the patchwork problem currently plaguing state-level enforcement.[90] While it preempts state laws, its one-size-fits-all approach fails to account for the fact that some states have already implemented reasonable restrictions rather than outright bans.[91] States like Massachusetts and Illinois have demonstrated that compromise solutions—such as requiring compensation for non-competes—can be effective in balancing interests.[92]

Germany's sophisticated approach offers valuable insights for U.S. reform efforts.[93] The German model, developed over more than a century, represents one of the most balanced and effective regulatory frameworks globally for managing post-employment competition restrictions.[94]

D. Legal Framework and Historical Development of the German Model

The German approach to post-employment non-compete agreements—*nachvertragliche Wettbewerbsverbote*—reflects the country's broader commitment to social market economics and cooperative labor relations.[95] Codified in Sections 74–75f of the German Commercial Code, *Handelsgesetzbuch* (HGB), this system has evolved through legislative refinement and judicial interpretation to create a careful equilibrium between employer and employee interests.[96]

The modern framework emerged from nineteenth-century commercial law reforms, particularly the 1897 Commercial Code, which first established basic principles for regulating trade restrictions. Following World War II, the newly established Federal Republic integrated non-compete regulation into its distinctive social market economy (*Soziale Marktwirtschaft*),

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90 *See State Noncompete Law Tracker*, ECON. INNOVATION GRP. (Oct. 11, 2024), https://eig.org/state-noncompete-map [https://perma.cc/W6GG-YJA8].

91 *Id.*

92 *See, e.g.*, MASS. FED. LAWS ch. 149, § 24L (2018); 820 ILL. COMP. STAT. 90/5–15 (2022).

93 *See* JENS KIRCHNER ET AL., KEY ASPECTS OF GERMAN EMPLOYMENT AND LABOUR LAW 161–70 (2d ed. 2018).

94 *See* 2 WOLFGANG DÄUBLER, DAS ARBEIRSRECHT 1023–25 (12th ed. 2019); *see also* Michael Schley, *Restrictive Covenants – Key Considerations for Employees in Germany – November 2022*, DWF (Oct. 11, 2022), https://dwfgroup.com/en/news-and-insights/insights/2022/10/restrictive-covenants-key-considerations-for-employers-in-germany [https://perma.cc/C7Q9-9CAG].

95 *See* Manfred Weiss, *The Interface Between Constitution and Labor Law in Germany*, 26 COMPAR. LAB. L. & POL'Y J. 181, 192–96 (2005).

96 Handelsgesetzbuch [HGB] [Commercial Code], §§ 74–75f, https://www.gesetze-im-internet.de/englisch_hgb/englisch_hgb.html [https://perma.cc/3TDZ-6686] (Ger.).

emphasizing both economic freedom and social protection.[97] This integration reflected Germany's constitutional commitment to occupational freedom (*Berufsfreiheit*) under Article 12 of the Basic Law (*Grundgesetz*), while recognizing legitimate business interests in protecting confidential information and customer relationships.[98]

Four fundamental principles distinguish the German approach. First, employers must provide mandatory compensation (*Karenzentschädigung*) of at least fifty percent of the employee's total remuneration during the restriction period.[99] Second, non-compete agreements cannot exceed two years in duration.[100] Third, restrictions must protect legitimate business interests and be proportionate in scope. Fourth, all agreements must be in writing and provide clear notice of restrictions and compensation.[101]

E. Core Requirements and Implementation

1. Mandatory Compensation Framework

The cornerstone of the German system is its mandatory compensation requirement, which transforms non-compete agreements from unilateral restrictions into bilateral economic arrangements. Under HGB section 74(2), employers must pay at least fifty percent of the employee's total remuneration during the restriction period,[102] a requirement that fundamentally alters the incentive structure for both parties.

The German Federal Labor Court has developed sophisticated standards for calculating this compensation. Total compensation encompasses base salary and all regular compensation components: bonuses, commissions, benefits, and other monetary advantages.[103] German courts have expanded this definition to

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97 *See* Martin Behrens & Wade Jacoby, *The Rise of Experimentalism in German Collective Bargaining*, 42 BRIT. J. INDUS. REL. 95, 97–99 (2004); *see also* Gunther Schnabl, *The 1948 German Currency and Economic Reform: Lessons for European Monetary Policy*, 39 CATO J. 607, 608–14 (2019).

98 Grundgesetz [GG] [Basic Law] art. 12, translation at http://www.gesetze-im-internet.de/englisch_gg/ [https://perma.cc/KL7Y-RJZM] (Ger.).

99 Handelsgesetzbuch [HGB] [Commercial Code], § 74, para. 2, https://www.gesetze-im-internet.de/englisch_hgb/ [https://perma.cc/RSK9-8DAU] (Ger.).

100 Handelsgesetzbuch [HGB] [Commercial Code], §§ 74–74a, https://www.gesetze-im-internet.de/englisch_hgb/englisch_hgb.html [https://perma.cc/3TDZ-6686] (Ger.).

101 *Id.*

102 *Id.* § 74, para. 2.

103 Thilo Mahnhold, *Choice of Law Provisions in Contractual Covenants Not to Compete: The German Approach*, 31 COMPAR. LAB. L. & POL'Y J. 331, 332 (2010). For more details, see WETTBEWERBSVERBOTE (Jobst-Hubertus Bauer & Martin Diller eds., 4th ed. 2006).

include regular profit-sharing payments and long-term incentives, reflecting the court's emphasis on maintaining the employee's economic position.[104]

This compensation requirement serves multiple functions. First, it forces employers to internalize the cost of restrictions, leading to more efficient use of non-compete agreements. Second, it provides employees with economic security during the restriction period, facilitating compliance and reducing litigation.

2. Temporal and Scope Limitations

German law imposes strict temporal limits on non-compete agreements while requiring careful tailoring of their scope. The two-year maximum duration, established in HGB section 74a paragraph 1, reflects legislative balancing between protecting legitimate business interests and ensuring worker mobility.[105]

Germany has established a detailed framework for assessing geographic and activity restrictions in post-contractual non-compete agreements to ensure they protect legitimate business interests without unduly limiting an employee's future employment opportunities.[106] Key aspects of this framework include:

1. Activity Restrictions: The scope of prohibited activities must be clearly defined and limited to what is necessary to protect the employer's legitimate interests. Overly broad restrictions that prevent the employee from engaging in any work in the industry are generally considered unenforceable.[107]
2. Geographical Scope: The territorial limitations of a non-compete clause must align with the employer's actual

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104 Mahnhold, *supra* note 103, at 332–33.

105 Handelsgesetzbuch [HGB] [Commercial Code] § 74a, para. 1, https://www.gesetze-im-internet.de/englisch_hgb/ [https://perma.cc/RSK9-8DAU] (Ger.). It is important to note that HGB section 74 outlines the general requirements for post-contractual non-compete clauses, including the necessity for compensation to the employee. However, the enforceability of contractual penalties within these agreements is addressed in HGB section 75c.

106 *See* Christian Maron & Benedikt Groh, *10 Pitfalls when Entering into a Post-Contractual Non-Compete Covenant Under German Law*, TAYLORWESSING (Dec. 3, 2020), https://www.taylorwessing.com/de/insights-and-events/insights/2020/12/10-pitfalls-when-entering-into-a-post-contractual-non-compete-covenant-under-german-law [https://perma.cc/9Y8S-5X3Y].

107 *A Comparison of Laws in Selected EU Jurisdictions Relating to Post-Contractual, Non-Competition Agreements Between Employers and Employees*, NORTON ROSE FULBRIGHT (Aug. 2017), https://www.nortonrosefulbright.com/en/knowledge/publications/9807eea3/a-comparison-of-laws-in-selected-eu-jurisdictions-relating-to-post-contractual-non-competition-agreements-between-employers-and-employees#section3 [https://perma.cc/AKW9-UY28] ("The covenant

business operations. Restrictions extending beyond the regions where the employer operates are typically deemed unreasonable and thus unenforceable.[108]

3. Duration: German law caps the duration of post-contractual non-compete clauses at a maximum of two years. Any agreement exceeding this period is considered non-binding, allowing the employee to choose whether to adhere to the clause.[109]
4. Compensation: The compensation provided during the non-compete period (*Karenzentschädigung*) is processed through standard payroll procedures, with applicable deductions for taxes and social security contributions. It must be precisely calculated based on the employee's most recent salary, including any regular bonuses or other recurring compensatory elements that were part of their income.[110]

These regulations collectively ensure that non-compete clauses in Germany are balanced, safeguarding the employer's interests while preventing unreasonable constraints on the employee's professional future.

F. Enforcement Mechanisms and Judicial Oversight

1. Procedural Framework

The German system provides sophisticated enforcement mechanisms through specialized labor courts (*Arbeitsgerichte*) with expertise in employment matters.[111] These courts operate under expedited procedures designed to resolve disputes quickly while ensuring thorough consideration of both parties' interests.

The enforcement of labor disputes in Germany typically begins with a conciliation hearing (*Gütetermin*) before the labor

must be reasonable and can be included only to protect the legitimate interests of the company.").

108 *Id.*

109 Bredin Prat et al., *Post-Contractual Restrictions on Competition in Employment Relationships in the UK, France and Germany*, HENGELER MUELLER (Dec. 2016), https://www.hengeler.com/de/service/newsletter/december-2016 [https://perma.cc/987C-3CJU].

110 *Non-Compete Clauses in Employment Contracts: Legal and Payroll Considerations*, PAYROLL GERMANY, https://payrollgermany.de/blog/non-compete-clauses-in-employment-contracts-legal-and-payroll-considerations/ [https://perma.cc/3WFY-78Y6] (last visited Apr. 12, 2025).

111 *See Responsibilities of the Federal Labour Court*, BUNDESARBEITSGERICHT, https://www.bundesarbeitsgericht.de/responsibilities/ [https://perma.cc/6SUH-EAYZ] (last visited Apr. 12, 2025).

court's chamber, led by a judge.[112] This initial step aims to resolve disputes early and is a core feature of the German labor process. While not formally classified as mandatory mediation, these hearings often result in settlement, contributing to reduced litigation burdens. The Federal Labor Court's 2021 report confirms the importance of this procedural design, though it does not cite specific resolution rates.[113]

If conciliation is unsuccessful, the dispute proceeds to a full hearing before the labor court's panel.[114] While some cases are resolved promptly, complex matters—particularly those involving appeals—may extend beyond six months, and in rare cases, over two years.[115] Appeals are handled by specialized Higher Labor Courts (*Landesarbeitsgerichte*) and, if necessary, by the Federal Labor Court (*Bundesarbeitsgericht*), which ensures consistency in the interpretation of employment law standards, including post-contractual non-compete provisions.[116]

2. Remedies and Enforcement

The German system provides a comprehensive framework of remedies designed to ensure effective enforcement while promoting compliance. Unlike the American approach, which often relies primarily on injunctive relief, German law offers a more nuanced array of remedial options.

a. Monetary Remedies

Courts can award several types of monetary relief. When an employee breaches a valid post-contractual non-compete agreement, the employer has several monetary remedies available. The employer can immediately stop paying the agreed compensation (*Karenzentschädigung*) for the duration of the breach.[117] The employer may also claim damages from the

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112 *See What Is a Conciliation Hearing (Gütermin)?*, FAIRE INTEGRATION, https://www.faire-integration.de/en/article/1041.how-can-i-get-a-consulting-certificate.html [https://perma.cc/8MJ5-P3G8] (last visited May 18, 2025).

113 *See* Bundesarbeitsgericht [BAG] [Federal Labor Court], Jahresbericht 1, 45–47 (2021) (Ger.).

114 *See What Is a Conciliation Hearing (Gütermin)?*, *supra* note 112.

115 *Id.*

116 *Id.*; *see also Responsibilities of the Federal Labour Court*, *supra* note 111.

117 *Restrictive Covenants — Key Considerations for Employers in Germany — November 2022*, DWF GRP. (Oct. 11, 2022), https://dwfgroup.com/en/news-and-insights/insights/2022/10/restrictive-covenants-key-considerations-for-employers-in-germany [https://perma.cc/6A4Y-9BB7]; *see also Compensation for Non-Compete/Karenzentschädigung*, KUHLEN (May 25, 2022), https://www.kuhlen-berlin.de/en/glossary/karenzentschaedigung [https://perma.cc/4EUA-GEHZ].

employee, which can include compensation for lost profits resulting from the breach.[118] If the non-compete agreement includes a penalty clause for breaches, German labor courts will enforce it, obligating the employee to pay the stipulated penalty.[119] These remedies aim to protect the employer's legitimate business interests and deter employees from violating their contractual obligations.

b. Injunctive Relief

Germany approaches injunctive relief with greater flexibility than its American counterparts.[120] Several forms of injunctive relief are available. Regarding preventive and prohibitive measures, employers can seek court orders to prevent a former employee from initiating competitive activities or to prohibit the continuation of such activities if they have already commenced. This proactive approach helps mitigate potential harm to the employer's business.[121]

The employer also has procedural mechanisms at their disposal. Given the time-sensitive nature of competitive breaches, employers may file for preliminary injunctions (*einstweilige Verfügung*) to obtain court orders restraining the former employee's competitive actions.[122] This expedited process addresses the urgency of the situation. Alternatively, employers may initiate standard legal proceedings to secure a permanent injunction against the former employee's competitive conduct.

Relief is available so long as there exists a valid non-compete agreement that complies with German legal standards (including appropriate compensation and reasonable limitations concerning duration, geographic scope, and activity restrictions),[123] an imminent or ongoing breach (meaning the employer must

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118 *Restrictive Covenants — Key Considerations for Employers in Germany — November 2022*, *supra* note 117.

119 Handelsgesetzbuch [HGB] [Commercial Code], § 75c, https://www.gesetze-im-internet.de/englisch_hgb/ [https://perma.cc/RSK9-8DAU] (Ger.).

120 Britta Grauke, Gero Pogrzeba & Daniel Matijevic, *Injunctive Relief in German Civil Cases — No Longer Possible Without an Oral Hearing?*, EUR. DISPS. BLOG (Sept. 13, 2024), https://european-disputes-blog.weil.com/germany/injunctive-relief-in-german-civil-cases-no-longer-possible-without-an-oral-hearing/ [https://perma.cc/WVF6-GD2D].

121 Prat et al., *supra* note 109.

122 *See* Olaf Lampke, *§ 55 Einstweiliger Rechtsschutz / 8. Wettbewerbsverbot*, HAUFE, https://www.haufe.de/id/beitrag/55-einstweiliger-rechtsschutz-8-wettbewerbsverbot-HI15824104.html [https://perma.cc/TM4F-Z6JD] (last visited May 8, 2025) ("Der Anspruch des Arbeitgebers, dass der Arbeitnehmer Wettbewerbshandlungen unterlässt, kann im Wege der einstweiligen Verfügung geltend gemacht warden," which means: "The employer's claim that the employee refrains from competitive acts can be asserted by way of a preliminary injunction.").

123 Maron & Groh, *supra* note 106.

demonstrate that the former employee is either currently violating the non-compete agreement or is likely to do so imminently),[124] and the employer must continue to fulfill any obligations outlined in the non-compete agreement while pursuing injunctive relief.[125]

3. Oversight

The German system provides multiple layers of institutional oversight, distinguishing it from more court-centric American approaches. This oversight operates through several mechanisms.

First, works councils (*Betriebsräte*) play a crucial role in monitoring non-compete practices.[126] While works councils do not have direct oversight over individual non-compete agreements, they play an indirect role in monitoring broader employment practices related to fairness and employee protections. Under the Works Constitution Act, they have consultation rights on standard employment terms that might include non-compete policies applied across the workforce. However, enforcement and review of specific post-contractual non-compete agreements remain the domain of the courts and the individual parties involved.[127]

Second, specialized labor courts provide ongoing supervisory functions beyond dispute resolution.[128] These courts issue advisory opinions on proposed restrictions, monitor compliance with prior orders, review modification requests, coordinate with works councils, and maintain databases of precedential decisions.[129] Through specialized labor courts and structured supervisory functions, the German enforcement mechanisms and judicial oversight encourage early dispute resolution while ensuring balanced considerations of each party's interests and rights. This approach reduces the burden on the judiciary and advances key policy objectives of protecting employees, promoting legal certainty, and fostering equitable labor practices across sectors.

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124 *See* Theresa Richter, *Contractual and Post-Contractual Non-Compete Obligations — When Does an Employee's Obligation to Refrain from Competition End?*, DLA PIPER (Apr. 25, 2024), https://www.dlapiper.com/en/insights/blogs/employment-blog-germany/2024/vertragliches-und-nachvertragliches-wettbewerbsverbot [https://perma.cc/M356-RXUL].

125 *Cf. Restrictive Covenants in Germany*, L&E GLOB. (Oct. 22, 2024), https://leglobal.law/countries/germany/employment-law/employment-law-overview-germany/08-restrictive-covenants/ [https://perma.cc/D3G6-XFS7].

126 Betriebsverfassungsgesetz [BetrVG] [Works Constitution Act] § 87, para. 1, https://www.gesetze-im-internet.de/englisch_betrvg/englisch_betrvg.html [https://perma.cc/Z6E8-SD77] (Ger.).

127 *Id.*

128 *See Responsibilities of the Federal Labour Court*, *supra* note 111.

129 *Id.*

Finally, Germany's model demonstrates that procedural expediency can be harmonized with substantive justice and institutional accountability.

G. Economic Impacts and Empirical Evidence

1. Market Effects and Innovation Outcomes

Germany's balanced framework has been associated with positive economic outcomes, particularly in terms of market efficiency and innovation. The approach serves as a driving force for competitive markets, entrepreneurial activity, and long-term productivity that preserve labor market efficiency by strict adherence to limitations on scope, duration, and compensation during non-compete periods.

In terms of market efficiency, the German system promotes both worker mobility and healthy competitive practices. First, the German system mandates that non-competes must be reasonable in scope and duration, with a maximum enforceable period of two years and a requirement for employers to provide at least fifty percent of the employee's last remuneration as compensation during the non-compete period.[130] These stringent requirements deter employers from imposing overly restrictive non-competes, thereby promoting higher worker mobility. Increased mobility allows employees to seek opportunities that better match their skills, leading to a more efficient allocation of labor across the market.[131] Second, by limiting the enforceability of overly restrictive non-competes, Germany fosters a competitive labor market where companies must continually innovate and improve working conditions to attract and retain talent. This competition among employers can lead to better job matches and enhanced productivity.

Germany's approach has also yielded strong innovation outcomes. One key factor is the facilitation of knowledge spillover through the movement of skilled professionals between firms. This mobility encourages the dissemination of knowledge and best practices across the industry, fostering an environment conducive to innovation. When employees transition between companies, they bring diverse experiences and ideas that can lead to novel solutions and advancements. Additionally, Germany's legal framework support entrepreneurial activity by ensuring that agreements are

130 Handelsgesetzbuch [HGB] [Commercial Code], § 74–74a, para. 1, https://www.gesetze-im-internet.de/englisch_hgb/ [https://perma.cc/RSK9-8DAU] (Ger.).

131 *Cf.* Köckeritz & Zeppenfeld, *supra* note 14.

not overly restrictive, Germany supports entrepreneurial endeavors. Employees with innovative ideas are more likely to establish startups without the fear of legal repercussions from former employers. This entrepreneurial activity contributes to a dynamic economy with continuous technological advancements.

Empirical research, while still developing, suggests that the German approach produces measurable economic benefits. Although, direct empirical studies on the impact of Germany's regulations are limited, broader research supports that stringent agreements can suppress wages and stifle innovation. Conversely, balanced approaches, such as Germany's, that impose reasonableness and compensation requirements, are associated with positive economic outcomes. These include higher job switching rates, greater startup formation, and improved productivity in knowledge-intensive sectors. As such, the empirical evidence reinforces the broader policy rationale behind Germany's compensatory framework.[132]

2. Labor Market Dynamics and Human Capital

Rather than simply restricting job transitions, the German system appears to *channel* mobility in ways that preserve labor market efficiency. Compensated non-competes may reduce the urgency to take suboptimal jobs, allowing employees to seek roles better aligned with their skills and aspirations. While direct empirical studies on labor mobility's impact are limited, broader research indicates that worker transitions often lead to improvements in job quality and wages, especially in knowledge-intensive sectors.[133] Additionally, scholars suggest that mandatory compensation during the non-compete period provides financial stability, enabling affected employees to invest in

132 *See Non-Compete Clauses in the UK and U.S.: Recent Trends*, COVINGTON (Sept. 2024), https://www.cov.com/en/news-and-insights/insights/2024/09/non-compete-clauses-in-the-uk-and-us-recent-trends [https://perma.cc/LH4M-CBVD].

133 *See* Anders Akerman & Kerstin Holzheu, *The Role of Workers in Knowledge Diffusion Across Firms* (Scis. Po Dep't Econ., Discussion Paper No. 2024-04, 2024), https://www.sciencespo.fr/department-economics/sites/sciencespo.fr.department-economics/files/2024_v2_akerman_holzheu_the_role_of_workers_in_knowledge_diffusion_across_firms.pdf [https://perma.cc/QUB4-W23S].

professional development, including continuing education and credentialing.[134]

German employers operating under enforceable non-competes have added incentive to invest in workforce development, since they can better retain and protect that investment. Studies show that enforceable non-competes reduce the risk of losing trained employees to competitors, which in turn encourages more investment in employee training and structured onboarding programs.[135] Also, German firms are more likely to use knowledge management systems, including formal documentation processes and mentorship frameworks, particularly in sectors where employee turnover is costly.[136]

H. Comparative Advantages and Implementation Challenges

The adoption of a structured and statutory framework for enforcing post-contractual non-compete agreements presents clear advantages over the current U.S. approach. By replacing ad hoc, discretionary enforcement with clear legal standards and defined penalties for non-compliance, such a framework would reduce litigation burdens and promote more consistent, predictable dispute resolution.[137]

A specialized adjudication process, as exemplified by the German labor court system, fosters greater compliance and deters misuse of restrictive covenants.[138] While implementation in the United States would face challenges, including fragmented

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134 *See* Yann Richard & David Al Mari, *Should Non-Compete Clauses Be Compensated?*, ASS'N OF CORP. COUNS. (Apr. 24, 2014), https://www.acc.com/resource-library/should-non-compete-clauses-be-compensated [https://perma.cc/846N-G6BQ].

135 Starr, Prescott & Bishara, *supra* note 44, at 80–81.

136 UWE CANTNER, KRISTIN JOEL & TOBIAS SCHMIDT, THE EFFECTS OF KNOWLEDGE MANAGEMENT ON INNOVATIVE SUCCESS — AN EMPIRICAL ANALYSIS OF GERMAN FIRMS 1, 15–16 (2009), https://www.bundesbank.de/resource/blob/703494/3cc7421c7b9c09a9a80e65f71644b390/mL/2009-07-13-dkp-16-data.pdf [https://perma.cc/XHC9-GP5T].

137 *See* Kai Bodenstedt & Henriette Norda, *Germany's Post-Contractual Non-Compete Covenants in a Nutshell*, DLA PIPER, https://www.dlapiperaccelerate.com/knowledge/2017/germanys-post-contractual-non-compete-covenants-in-a-nutshell.html [https://perma.cc/C74S-4E3F] (last visited May 8, 2025) (describing statutory clarity as reducing litigation risk in Germany). In contrast, the prevailing U.S. model—featuring case-by-case judicial discretion in general civil courts—often produces fragmented outcomes and legal uncertainty. *See* Starr, Prescott & Bishara, *supra* note 44, at 68, 69 fig.8 (illustrating the variation in judicial enforcement of non-competes across U.S. jurisdictions).

138 *See* Peter Hanau, *Das Bundesarbeitsgericht*, BUNDESARBEITSGERICHT, https://www.bundesarbeitsgericht.de/ [https://perma.cc/6N9V-AH6E] (last visited May 8, 2025) (detailing the role of specialized labor courts in early conciliation and resolution of employment disputes).

state-level authority, limited judicial specialization, and the costs of enhanced oversight, these obstacles are not insurmountable.[139] A phased, factor-based transition strategy could address institutional concerns while allowing time for adaptation.

Employers would need to adjust to new financial obligations—such as compensating employees during the restricted period[140]—but the long-term benefits in legal clarity, administrative efficiency, and labor mobility strongly favor reform. Overall, this model offers a compelling path forward for modernizing non-compete regulation in a way that balances economic flexibility with worker protections.

1. Systemic Advantages Over Alternative Approaches

Germany's regulatory framework offers distinct advantages over both categorical prohibitions and traditional common law approaches. These advantages manifest in areas such as economic efficiency, enforcement costs, and stakeholder outcomes.

a. Reduced Litigation and Efficient Dispute Resolution

With Germany's clear statutory requirements for non-competes—the mandatory compensation requirement and reasonableness criteria—it fosters a more predictable and efficient legal environment. The compensation requirement in particular creates more balanced incentives compared to jurisdictions that use binary prohibitions or subjective reasonableness tests. Because employers are required to pay for the restriction, they are compelled to assess the true economic value of each non-compete. This leads to more selective and intentional use of such agreements.[141] The framework would also introduce a new cost burden associated with non-competes, which might well have the effect of discouraging blanket non-compete clauses and fosters more thoughtful deployment of restrictive covenants, which improves fairness and economic efficiency.[142] In addition, clear statutory guidelines, coupled with predictable

139 *See* U.S. DEP'T OF THE TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 15–16 (2016).

140 *Handelsgesetzbuch* [HGB] [Commercial Code], § 74, para. 2, https://www.gesetze-im-internet.de/englisch_hgb/ [https://perma.cc/RSK9-8DAU] (Ger.) (requiring employers to compensate employees during the term of the post-contractual non-compete at a minimum of fifty percent of most recent earnings).

141 *See id.*

142 *Navigating Non-Compete Clauses in Europe: A Comprehensive Guide*, GOGLOBAL (Sept. 16, 2024), https://goglobal.com/blog/employer-of-record/navigating-non-compete-clauses-in-europe-a-comprehensive-guide [https://perma.cc/LN2T-V64S].

judicial enforcement, foster voluntary compliance and reduce adversarial enforcement mechanisms.[143]

c. Comparative Perspective

In contrast, jurisdictions with categorical bans (e.g., California) promote worker mobility and innovation but may reduce incentives for employer investment in training due to limited post-employment protections.[144] Meanwhile, traditional common law systems that rely solely on a judicial reasonableness standard often produce inconsistent outcomes and higher litigation costs, due to their lack of statutory guidance or compensation requirements.[145] Germany's structured approach—combining enforceability with fairness mechanisms—yields a more balanced, predictable, and transparent system for managing post-employment competition risks.

2. Implementation Challenges

Despite the advantages of the German approach, adopting a similar model in the United States presents significant implementation challenges. Particularly, these challenges are complex due to the United States' decentralized legal system, variation in employment law across states, and the absence of a unified labor market enforcement agency. Two key categories of challenges emerge.

a. Administrative and Legal Infrastructure

The United States lacks a federal-level administrative body with the capacity or mandate to enforce non-compete restrictions uniformly. The implementation of a German-style framework would require the following:

- Federal Legislation or Coordinated State Action: Unlike Germany's centralized legal code, U.S. employment law is governed primarily at the state level. Instituting a nationwide framework would either require preemptive federal legislation or uniform model laws adopted across all states, which presents political and legal hurdles.[146]
- Specialized Adjudication: German labor courts have specific jurisdiction over employment disputes. In the

143 *See* Bodenstedt & Norda, *supra* note 137.

144 Rachel E. Green, *The Latest Attack on California's Ban of Noncompete Agreements*, KATZ BANKS KUMIN (June 21, 2024), https://katzbanks.com/employment-law-blog/california-noncompetes [https://perma.cc/EY8W-5S6G].

145 Starr, Prescott & Bishara, *supra* note 44.

146 *Id.*

United States, employment contract disputes are typically handled by general civil courts, which may lack subject-matter expertise in evaluating the reasonableness and enforceability of non-competes with compensation.[147]

- Monitoring and Enforcement Systems: There is no equivalent to Germany's local employment agencies (*Arbeitsagenturen*) or statutory compliance bodies. U.S. implementation would require creating or delegating regulatory oversight capacity—whether through the Department of Labor (DOL), FTC, or new state-level bodies.[148]
- Estimated Costs: According to U.S. Department of the Treasury (DOT) modeling, the administrative and legal infrastructure required to monitor enforceable non-competes with mandatory compensation could cost $1.3–$2 million per million workers covered. However, the DOT also found that such costs may be offset by reduced litigation and improved labor mobility within three to five years.[149]

b. Market Adaptation and Business Resistance

The transition to a German-style compensatory model would also present significant adaptation challenges for U.S. employers. Many U.S. employers—particularly in states like Florida, Texas, and New York—rely on non-competes as routine elements of employment contracts. A compensatory regime would represent a dramatic departure from both the common law "reasonableness" standard and the freedom-of-contract tradition.[150] Many U.S. employers would view the German model, under which enforceable non-competes must be compensated at fifty percent of the employee's most recent earnings, as an unfunded mandate, especially for roles involving large workforces or low-margin operations.[151]

Implementation would also require massive training programs, Human Resources (HR) system upgrades, and contract

147 *See generally* U.S. DEP'T OF THE TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 15, 28–30 (2016), https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Econimic_Effects_and_Policy_Implications_MAR2016.pdf [https://perma.cc/7L2N-MCQ8].

148 *Non-Compete Clause Rulemaking*, FED. TRADE COMM'N (Jan. 5, 2023), https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking [https://perma.cc/UC5J-25SP] (last visited Apr. 12, 2025).

149 U.S. DEP'T OF THE TREASURY, *supra* note 147, at 19–20, 20 tbl.1.

150 *See* Barnett & Sichelman, *supra* note 24, at 953–54.

151 *See Navigating Non-Compete Clauses in Europe*, *supra* note 142.

template redesigns across businesses, especially in mid-sized and small enterprises that lack in-house legal departments.[152] Sectors that rely heavily on human capital—like tech, finance, and pharma—would be more amenable to adopt and manage compliance. But lower-wage industries, where non-competes are already disproportionately imposed, may struggle to adapt without substantial legal reform and oversight.[153]

3. Transition Challenges and Success Factors in Adopting the German Model in the United States

Adopting a German-style compensatory system for non-compete agreements in the United States presents distinct and multifaceted challenges.

a. Specific Transition Challenges

Industries exhibit varying capacities to adapt to a compensatory non-compete model. Knowledge-intensive sectors (e.g., tech, finance, biotech) tend to adjust more readily due to pre-existing compensation structures, sophisticated HR and legal compliance systems, greater financial flexibility, and institutionalized training programs.

In contrast, traditional and low-margin sectors—including retail, manufacturing, and hospitality—may face significant transition barriers. For instance, there may be limited liquidity to fund mandatory compensation, underdeveloped internal compliance infrastructure, legacy employment practices, and managerial resistance to contractual change.[154]

Firm size strongly correlates with transition capacity. Large enterprises typically adapt more easily due to scale, internal legal teams, and robust systems already in place. Mid-sized firms often lack the same degree of HR or legal infrastructure and may require transitional support. Small businesses may face disproportionately high compliance burdens without assistance. Startups and high-growth firms may need tailored guidance to preserve agility while complying with compensation mandates. Multinational corporations face additional challenges due to jurisdictional

152 *See id.*

153 Alexander J.S. Colvin & Heidi Shierholz, *Noncompete Agreements*, ECON. POL'Y INST. (Dec. 10, 2019), https://www.epi.org/publication/noncompete-agreements/ [https://perma.cc/C8VJ-EPMP].

154 *See Navigating Non-Compete Clauses in Europe*, *supra* note 142.

coordination across countries with divergent legal norms.[155]

b. Critical Success Factors

Empirical research and international experience suggest that gradual rollout of non-compete reform increases the likelihood of sustainable adoption. This phased approach may begin with pilot programs in selected industries or regions, followed by expansion based on workforce segment or firm size.[156] Built-in evaluation intervals should be incorporated to assess progress at key stages.[157] Ongoing consultation with stakeholders is also essential to ensure responsiveness, along with regulatory flexibility to adjust based on results.[158]

In addition, comprehensive support systems are critical. Governments or coalitions of agencies may need to provide technical assistance to guide businesses on legal and operational compliance.[159] Financial support mechanisms, such as tax credits or phased-in obligations, may be necessary for small employers. The rollout should also be accompanied by standardized tools and resources, including model contract language and compliance toolkits.[160] Educational programs for HR managers, legal counsel, and employees and industry-specific implementation strategies play a key role in fostering understanding and adherence.[161]

Finally, measurable implementation goals are essential to track impact and build stakeholder trust. Common metrics include reduction in non-compete-related litigation, voluntary compliance rates by employer size and sector, and changes in employee wage trajectories.[162] Additionally, data on labor market mobility—such as the rate of job transitions within industries—should be monitored along with indicators of

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155 *See Non-Compete Clauses in the UK and U.S.: Recent Trends*, *supra* note 132 (discussing the varied non-compete laws in the UK, the United States, and other European jurisdictions).

156 *See* Christopher Caiaccio et al., *A Comprehensive Update on Recent Federal and State Efforts to Limit the Use of Employee Non-Compete Agreements*, JD SUPRA, https://www.jdsupra.com/legalnews/a-comprehensive-update-on-recent-8977470 [https://perma.cc/9GE3-JEXV] (last visited Apr. 12, 2025).

157 *Id.*

158 *Id.*

159 *See Navigating Non-Compete Clauses in Europe*, *supra* note 142; *Non-Compete Clause Rulemaking*, *supra* note 148.

160 *See* sources cited *supra* note 159.

161 *See* sources cited *supra* note 159.

162 Evan Starr, *Noncompete Clauses: A Policymaker's Guide Through the Key Questions and Evidence*, ECON. INNOVATION GRP. (Oct. 31, 2023), https://eig.org/noncompetes-research-brief [https://perma.cc/S5K9-2YQP].

regional or sectoral innovation activity.[163]

I. Why the German Model-Based Proposal Is Superior

Unlike the Workforce Mobility Act, which eliminates non-compete agreements entirely,[164] the German model provides a structured compromise that preserves employer protections while ensuring worker fairness. The key advantages of a German-modeled proposal include the following:

1. Mandatory Compensation: Employers must compensate workers during the restricted period (typically at least fifty percent of salary), ensuring that workers are not left without income while being restricted from seeking employment elsewhere.
2. Tailored Restrictions: Instead of a blanket prohibition, non-competes are enforceable only if they meet clear, predefined criteria—such as reasonable duration (two years max), geographic scope, and industry-specific needs.
3. Judicial Oversight and Enforcement Mechanisms: Rather than banning agreements outright, a regulatory and judicial framework ensures that only justified agreements are upheld, discouraging abusive or overly broad restrictions.
4. Flexibility for Business and Workers: The German model allows businesses to retain key employees in highly sensitive roles while enabling workers to negotiate fairer exit terms. This system reduces litigation and administrative burdens, as companies must carefully consider whether imposing a non-compete is worth the financial cost.

By adopting a compensatory approach rather than a blanket ban, the German model avoids the pitfalls of both the Workforce Mobility Act's overcorrection[165] and the state-by-state inconsistency that currently exists in the United States.[166] The

163 *Id.*

164 Workforce Mobility Act of 2023, S. 220, 118th Cong. (2023).

165 *See generally* Kristopher Kalkowski, *Recognizing an Overcorrection: A Proposal for Nevada's Policy on Non-Compete Agreements*, 18 NEV. L.J. 261 (2017).

166 *State Noncompete Law Tracker*, ECON. INNOVATION GRP. (Oct. 11, 2024), https://eig.org/state-noncompete-map [https://perma.cc/S4V3-PE5N] (detailing which states have banned non-competes, which have either income-based or other restrictions, and which have no restrictions at all).

proposal allows for national uniformity while preserving economic incentives for innovation and workforce development.

Ultimately, a federal compensatory framework provides the best alternative to both extreme deregulation and excessive restriction. The Workforce Mobility Act, while well-intentioned, swings too far in one direction—just as the FTC's categorical ban does—whereas the German model-based approach balances business needs and worker rights in a practical, economically viable way.

V. ECONOMIC AND EMPIRICAL ANALYSIS OF NON-COMPETE AGREEMENTS

A. The Impact on Wages and Job Mobility

Numerous empirical studies indicate that non-compete agreements reduce wages and limit job mobility. A 2019 study by the Economic Policy Institute found that non-competes lower wages by five to ten percent in affected industries.[167] Employees bound by non-competes have been shown to change jobs less frequently, hindering wage growth and career advancement.[168]

In contrast, states that prohibit non-competes, such as California, experience higher wage growth, particularly in technology and knowledge-based industries.[169] The evidence suggests that restricting non-competes promotes a more dynamic labor market and encourages competition among employers.[170]

B. Effect on Innovation and Business Growth

Non-competes can stifle innovation by preventing skilled employees from launching startups or moving to competitors where they can contribute to technological advancements.[171] Silicon Valley's success is often attributed to the free flow of talent, in part due to California's ban on non-competes.[172]

However, businesses argue that non-competes protect proprietary knowledge and ensure return on investment in

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167 Colvin & Shierholz, *supra* note 153 (table 4).

168 See Bhargav Gopal, Xiangru Li & Luke Rawling, Do Non-Compete Agreements Help or Hurt Workers? Evidence from the NLSY97, at 1 (Apr. 15, 2025) (unpublished research paper), https://bhargavgopal.com/resources/paper2.pdf [https://perma.cc/7UYQ-YHKS].

169 *See* Barnett & Sichelman, *supra* note 24, at 956–57, 1008.

170 *See generally* Erik Stam, *The Case Against Non-Compete Agreements* (Utrecht Univ. Sch. Econ., Working Paper No. 19-20, 2019), https://www.uu.nl/sites/default/files/rebo_use-wp_2019_1920.pdf [https://perma.cc/R49X-H24B].

171 *See* Barnett & Sichelman, *supra* note 24, at 953.

172 *See id.* at 956–57.

employee training.[173] A balanced system—such as the German model—which mandates compensation, ensures that businesses do not exploit non-competes while still protecting their interests.[174]

C. Industry-Specific Impacts

The effects of non-compete agreements vary significantly across industries. Some sectors rely heavily on these agreements to protect trade secrets and investments, while others see them as barriers to fair competition and worker mobility.[175]

1. Technology Sector

In the technology industry, non-compete agreements are commonly used to prevent employees from taking proprietary knowledge to competing firms. Employers argue that without these agreements, firms risk losing intellectual capital, leading to unfair competitive disadvantages.[176] However, empirical evidence suggests that non-compete bans, such as in California, have spurred innovation by allowing talent to move freely.[177] Silicon Valley's high concentration of tech firms, rapid knowledge sharing, and fast-paced innovation environment exemplify the benefits of reduced restrictions.[178]

2. Healthcare Industry

The healthcare sector has faced increasing scrutiny regarding non-compete clauses, particularly for physicians and specialists.[179] Many states have passed laws restricting or banning non-competes in healthcare due to concerns over patient access and continuity of care.[180] Studies have shown that physician non-competes can increase healthcare costs by limiting provider availability and creating regional monopolies where patients have fewer choices.[181] Additionally, restrictive agreements discourage

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173 *See id.* at 970.

174 *See* discussion *infra* Section IV.I.

175 *See* Sampsa Samila & Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth*, 57 MGMT. SCI. 425, 425–26 (2011).

176 *See* Barnett & Sichelman, *supra* note 24, at 970.

177 *See id.* at 956–57.

178 *See* Bruce Fallick, Charles A. Fleischman & James B. Rebitzer, *Job-Hopping in Silicon Valley: Some Evidence Concerning the Microfoundations of a High-Technology Cluster*, 88 REV. ECON. & STAT. 472, 472 (2006).

179 Kurt Lavetti, Carol Simon & William D. White, *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians*, 55 J. HUM. RES. 1025, 1026–28 (2020).

180 *See* J. Jeffrey Marshall et al., *Restrictive Covenants and Noncompete Clauses for Physicians*, 2 JACC: ADVANCES 1, 2 (2023).

181 *See* Kurt Lavetti, Carol Simon & William D. White, Buying Loyalty: Theory and Evidence from Physicians 1–5 (Oct. 26, 2012) (unpublished manuscript), https://www.sole-jole.org/assets/docs/13228.pdf [https://perma.cc/559H-BQ7H].

doctors from setting up independent practices, further consolidating power among large hospital systems.[182]

3. Manufacturing and Trade Industries

In the manufacturing industry, non-compete agreements often serve to protect specialized processes, customer relationships, and proprietary technology. While some firms rely on them to maintain competitive advantages, overly restrictive agreements can suppress worker mobility and limit wage growth.[183] Unlike technology firms that can use alternative protections (e.g., patent law), manufacturing firms frequently argue that non-competes are necessary due to the direct hands-on nature of their trade secrets.[184]

4. Financial and Professional Services

The financial and legal sectors frequently employ non-competes, particularly to prevent professionals from taking clients with them when changing firms. However, these agreements have led to debates about whether they truly protect firms or simply serve to suppress wages.[185] While protecting client lists may be a legitimate business concern, critics argue that non-competes often go beyond necessity, restricting professionals from fairly competing in the market.[186]

5. Retail and Low-Wage Employment

Non-compete clauses in retail and low-wage sectors have been widely criticized as exploitative.[187] Employers in industries like fast food, sales, and hospitality have used these agreements to prevent workers from moving to higher-paying jobs.[188] This practice has been labeled anti-competitive and detrimental to wage growth,

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182 *See, e.g.*, Marshall et al., *supra* note 180, at 1.

183 *See* Colvin & Shierholz, *supra* note 153.

184 *See id.*

185 *See* discussion *supra* Sections V.A–V.B.

186 *See* Lavetti et al., *supra* note 179, at 5–6.

187 *See, e.g.*, Naomi Kodama, Ryo Kambayashi & Atsuko Izumi, *Non-Compete Agreements: Human Capital Investments or Compensated Wages?* 1 (IZA Inst. Lab. Econ., Discussion Paper No. 17685, 2025), https://docs.iza.org/dp17685.pdf [https://perma.cc/A8L9-2KZM]; Dave Jamieson, *Jimmy John's Makes Low-Wage Workers Sign 'Oppressive' Noncompete Agreements*, HUFFPOST (Oct. 13, 2014, 4:03 PM), https://www.huffpost.com/entry/jimmy-johns-non-compete_n_5978180?1413230622 [https://perma.cc/P5MG-MNCU].

188 *See* Jamieson, *supra* note 187.

leading states like Illinois[189] and Washington[190] to prohibit non-competes for workers earning below a certain salary threshold.

VI. PROPOSED FEDERAL FRAMEWORK FOR NON-COMPETE AGREEMENTS

A. Introduction: The Need for Federal Harmonization

As discussed, the current regulatory landscape surrounding non-compete agreements in the United States is fragmented, inconsistent, and increasingly unsustainable. While some states enforce non-competes liberally, others impose near-total bans. The result is a jurisdictional patchwork that creates uncertainty for employers, restricts employee mobility, and undermines national labor market fluidity. This variation in enforceability also encourages forum shopping, creates compliance burdens for multistate employers, and reinforces structural inequities in bargaining power. A federal framework is urgently needed—not to outlaw non-compete agreements outright, but to replace the current chaos with a coherent regulatory structure that promotes innovation, labor mobility, and legitimate business protection.

The proposal advanced in this section is inspired by the German model of regulated non-compete agreements, which is widely regarded as one of the most balanced systems internationally. Under German law, employers must provide post-employment compensation to enforce a non-compete clause, which fundamentally alters the employer's cost-benefit calculus.[191] Agreements must also meet strict proportionality, temporal, and geographic limitations. These principles inform the proposed U.S. framework, which seeks to regulate rather than prohibit non-compete agreements and to achieve equilibrium between worker freedom and business security.

B. Core Provisions of the Federal Framework

The proposed federal statute would set a uniform national standard for non-compete enforceability. States could enact stricter provisions but not weaker ones, much like the relationship

189 *See* Freedom to Work Act, 820 ILL. COMP. STAT. 90/10 (2025).

190 *See* WASH. REV. CODE § 49.62.020 (2025); James Sanders et al., *Washington State Tightens Noncompete Restrictions*, PERKINS COIE (May 2, 2024), https://perkinscoie.com/insights/update/washington-state-tightens-noncompete-restrictions [https://perma.cc/MQH3-RNWY].

191 Michael Magotsch & Pascal R. Kremp, *Non-Competition Clauses*, *in* KEY ASPECTS OF GERMAN EMPLOYMENT AND LABOUR LAW 161–70 (Jens Kirchner, Pascal R. Kremp & Michael Magotsch eds., 2d ed. 2018).

between federal and state minimum wage laws. The framework would include the following key elements.

1. Mandatory Compensation Requirement

A non-compete agreement would be enforceable only if the employer agrees to pay at least fifty percent of the employee's average total compensation (including bonuses, commissions, equity, and benefits) for the duration of the restriction period. This mirrors section 74a paragraph 2 of HGB, which requires compensation as a condition for enforceability.[192] The economic rationale is simple—if employers must pay to restrict post-employment conduct, they will use non-competes selectively and strategically. German empirical studies show that the introduction of mandatory compensation dramatically reduces the number of non-competes imposed without impairing business performance or innovation rates.[193]

2. Maximum Duration of Two Years

The restriction period may not exceed two years post-employment. This mirrors the cap found in HGB section 74a paragraph 1 and reflects the general consensus among U.S. courts that longer durations rarely satisfy reasonableness tests, especially for non-executive positions.[194] A two-year cap is also consistent with best practices in states like Massachusetts and Oregon, which impose similar maximum durations.[195] A bright-line rule would enhance legal clarity and reduce litigation costs.

3. Proportionality and Legitimate Business Interest Test

To be enforceable, a non-compete must be narrowly tailored to protect a legitimate business interest, such as trade secrets, proprietary processes, or key client relationships.[196] Vague justifications—like "preventing competition" in general—would be insufficient. Courts would apply a three-part proportionality test, assessing (1) the employer's business justification, (2) the scope

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192 *Handelsgesetzbuch* [HGB] [Commercial Code], § 74, para. 2, https://www.gesetze-im-internet.de/englisch_hgb/ [https://perma.cc/RSK9-8DAU] (Ger.).

193 Magotsch & Kremp, *supra* note 191.

194 Norman D. Bishara, Kenneth J. Martin & Randall S. Thomas, *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 39–41 (2015).

195 MASS. GEN. LAWS CH. 149 § 24L(b)(iv) (2024); OR. REV. STAT. § 653.295(3) (2024).

196 Kim A. Leffert, Andrew S. Rosenman & Ruth Zadikany, *United States: Restrictive Covenants*, MAYER BROWN (July 25, 2024), https://www.mayerbrown.com/en/insights/publications/2024/07/restrictive-covenants-us [https://perma.cc/4VDH-K8NE].

and duration of the restriction, and (3) the economic impact on the employee.[197] This approach is widely used in European labor law and would codify a structured reasonableness standard in the United States.[198]

4. Geographic and Activity Scope Limitations

The restriction must be limited to geographic areas where the employer actually conducts business, not merely areas of aspirational interest. Similarly, the activity restriction must be limited to the employee's actual role or exposure to sensitive information. This codifies existing case law that disfavors overly broad restraints and reflects a consistent line of German court rulings invalidating non-competes that attempt to cover global or undefined markets.[199]

5. Written Notice and Advance Disclosure

Employers would be required to provide written notice of the non-compete agreement at the time of the job offer, or at least fourteen days before the employment start date. Any agreement introduced after employment begins would require additional consideration, such as a raise or bonus. These procedural protections mirror disclosure requirements adopted in Illinois and Washington and are designed to ensure informed consent and procedural fairness.[200]

6. Exemptions and Special Treatment

The federal framework would exempt low-wage workers from non-compete enforcement entirely. Following models already adopted in states like Illinois and Washington, the statute would prohibit non-competes for employees earning below a defined threshold, indexed annually for inflation.[201] Special rules could also apply to executives, equity holders, and research and

197 *Id.*

198 *Id.*

199 Mahnhold, *supra* note 103, at 333–34.

200 820 ILL. COMP. STAT. 90/20 (2024); WASH. REV. CODE § 49.62.020(1)(a)(i) (2025).

201 *See* 820 ILL. COMP. STAT. 90/10(a)–(b) (setting income thresholds for non-compete agreements); WASH. REV. CODE § 49.62.020–.040 (establishing low-wage exemptions and providing for inflation adjustments).

development (R&D) personnel, allowing greater latitude in exchange for higher levels of compensation or severance.

C. Advantages of a Compensatory Approach

Unlike the categorical ban proposed by the FTC, this compensatory framework preserves freedom of contract, while discouraging overuse of non-compete agreements through market-based incentives. By requiring employers to pay to restrict worker mobility, the law encourages selective and strategic use, rather than reflexive overreach. This respects the autonomy of both parties and aligns with foundational principles of contract theory and labor economics.

Moreover, a compensatory approach aligns with the empirical evidence. Research from Germany, California, and other U.S. states with partial bans shows that when non-compete enforceability is restricted or made costly, job mobility increases, wages rise, and innovation flourishes—without significant increases in trade secret litigation.[202] These findings suggest that the competitive harms feared by employers are often overstated, and that firms adapt quickly to a more mobile workforce by strengthening internal retention tools and confidentiality practices.[203]

D. Administration, Enforcement, and Compliance Mechanism

To avoid regulatory ambiguity and litigation overload, the proposed statute would establish a centralized federal authority to implement and oversee the new rules governing non-compete agreements. The DOL would be the most appropriate agency to house this function through a new Office for Labor Market Fairness and Mobility, which would be granted rulemaking, investigative, and enforcement powers.[204]

1. Rulemaking Authority

The DOL would be authorized to issue interpretive guidance and administrative rules defining key statutory terms, such as "legitimate business interest," "confidential information," and "reasonable geographic scope." Drawing from administrative precedents in wage-and-hour law, the agency could

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202 *See* Starr, Prescott & Bishara, *supra* note 44, at 53–84.

203 *See* Matt Marx, Jasjit Singh & Lee Fleming, *Regional Disadvantage? Employee Non-Compete Agreements and Brain Drain*, 44 RSCH. POL'Y 394, 394–404 (2015).

204 *See Paul DeCamp Featured in "Former DOL W&H Head Talks Shop on Agency Rulemaking,"* EPSTEIN BECKER GREEN (Aug. 27, 2024), https://www.ebglaw.com/insights/news/paul-decamp-featured-in-former-dol-w-h-head-talks-shop-on-agency-rulemaking [https://perma.cc/592G-3X7T].

create industry-specific standards that reflect variations in market structure, trade secret sensitivity, and typical employment durations. For example, the tech sector may receive more latitude on non-competition agreements, while the retail sector might face stricter scrutiny due to limited proprietary exposure.

2. Filing and Registration Requirement

To enforce a non-compete agreement, the employer must file the agreement with the DOL within ten business days of execution. The filing would include: (1) the employee's name and position; (2) the restricted activities and geographic scope; (3) the duration of the restriction; and (4) the compensation structure to be paid during enforcement. Failure to register the agreement would render it per se unenforceable. This registration requirement increases compliance while also creating a centralized, anonymized database for researchers, policymakers, and advocacy groups to monitor trends and identify potential abuses.

3. Complaint Mechanism and Whistleblower Protections

Employees would have access to a streamlined complaint process through the DOL's Wage and Hour Division, including online- and phone-based intake systems. To ensure fair access, the law would prohibit retaliation against employees who report violations or who refuse to sign unenforceable agreements. Whistleblower protections modeled on the Sarbanes-Oxley (SOX) and Dodd-Frank frameworks would prohibit retaliation against individuals who report violations, ensuring that employees can seek relief without risking their livelihoods.[205]

These frameworks—modeled on the Sarbanes-Oxley Act of 2002[206] and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010[207]—offer robust, multi-layered protection for employee whistleblowers. SOX prohibits publicly traded companies from retaliating against employees who report conduct they reasonably believe constitutes fraud or a violation of federal securities law.[208] Protected activity includes internal reporting,

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205 *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 & 18 U.S.C.); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 5, 7, 12, 15, 18 & 31 U.S.C.).

206 Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A.

207 Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78u-6.

208 18 U.S.C. § 1514A(a)(1).

testifying, or assisting in investigations by regulatory agencies. [209] The statute provides for reinstatement, back pay, and special damages including attorney's fees and costs.[210] Dodd-Frank builds on SOX by providing a private right of action for whistleblowers who suffer retaliation, extending the statute of limitations to six years and offering remedies, such as double back pay with interest.[211] It also allows employees to report directly to the Securities and Exchange Commission (SEC), even bypassing internal reporting channels.[212]

SOX and Dodd-Frank, particularly when combined, represent robust federal whistleblower protection. Incorporating their core features into the proposed non-compete enforcement framework would ensure that workers, especially those in vulnerable or low-wage positions, can report violations and coercive practices without fear of job loss, blacklisting, or other forms of employer retaliation.

E. Oversight, Sunset Clause, and Empirical Evaluation

One of the flaws in previous regulatory attempts—including the FTC's 2024 non-compete rule—is the lack of an embedded feedback loop. To remain responsive to evolving labor markets, the federal framework would include robust oversight and revision mechanisms, including a statutory sunset clause.

1. Biennial Impact Review

The DOL, in partnership with the Bureau of Labor Statistics and external academic institutions, would conduct biennial reviews. The reviews will include assessments of (1) the number and types of non-competes filed; (2) litigation rates; (3) impacts on wage growth, job switching, and innovation; and (4) sector-specific enforcement patterns. Once conducted, these reviews would be publicly released and subject to notice-and-comment procedures to allow stakeholder feedback. The review process mirrors successful federal initiatives in occupational

209 18 U.S.C. § 1514A(a)(1)–(2); *see also* Sylvester v. Parexel Int'l LLC, ARB Case No. 07-123, 2011 WL 2165854, at *27 (Dep't of Lab. May 25, 2011) (broadly construing scope of protected activity under SOX).

210 18 U.S.C. § 1514A(c)(2).

211 15 U.S.C. § 78u-6(h)(1)(B).

212 *See* Digit. Realty Tr., Inc. v. Somers, 583 U.S. 149, 152 (2018) (holding that Dodd-Frank whistleblower protections apply only to individuals who report directly to the SEC).

safety and public health that are driven by continuous data gathering and recalibration.

2. Ten-Year Sunset Clause with Reauthorization

To prevent regulatory ossification, the statute would include a ten-year sunset provision. If not reauthorized by Congress after a formal review, the law would expire—unless the DOL certifies that its continuation is necessary and effective. This sunset clause would create political accountability while building in structural flexibility, a design choice increasingly common in major economic legislation.

F. Addressing Industry-Specific Concerns

The most persistent criticism of non-compete regulation is its potential to undermine trade secret protection and weaken industry-specific competitive advantages. While much of this criticism is overstated—especially in low-skill sectors—it is not without merit in certain high-risk or high-investment fields.

1. R&D-Heavy and IP-Driven Industries

Sectors like biotechnology, defense, pharmaceuticals, and advanced manufacturing often involve long product cycles, large R&D expenditures, and deep knowledge capital embedded in key employees. In these contexts, the employer's competitive edge may hinge on preventing defectors from joining rival firms with highly substitutable product pipelines.[213]

To address these concerns, the proposed framework allows for the following heightened protection measures:

- The compensation floor (fifty percent) could be increased voluntarily by employers in exchange for longer duration or broader scope, subject to DOL oversight.
- Executive roles and key intellectual property positions could be subject to enhanced non-disclosure and non-solicitation provisions, enforceable independently of the non-compete clause.
- In rare cases, employers could petition the DOL for a waiver of the two-year cap, with rigorous justification

213 ORLY LOBEL, TALENT WANTS TO BE FREE 134–39 (2013).

based on product development timelines or national security sensitivity.

These safeguards strike a balance—they allow flexibility for firms whose survival depends on proprietary information, but require transparency, compensation, and agency oversight.

2. Small Businesses and Startups

Critics of regulation often point out that small firms and startups may rely disproportionately on non-competes due to their limited resources for formal intellectual property enforcement. However, a compensatory model addresses this concern by leveling the playing field—firms will use non-competes only when truly necessary and when they can afford to do so. Moreover, confidentiality agreements and trade secret law already provide strong protection without burdening labor mobility.

Startups may also benefit from increased labor fluidity, as workers gain more flexibility to move between early-stage ventures. Empirical studies have shown that high-growth entrepreneurship is positively correlated with non-compete unenforceability.[214] Thus, the proposed framework may empower rather than constrain innovation ecosystems.

3. Low-Wage and Franchise Employment

In the current environment, non-competes are still widely used in retail, food service, and personal care sectors, often with no legitimate justification. These agreements are used more to deter turnover than to protect legitimate competitive interests. The proposed framework would prohibit enforcement of non-competes for any employee earning less than the annually adjusted threshold, eliminating the most egregious and exploitative uses of these contracts.

Furthermore, franchisors would be prohibited from imposing blanket non-compete requirements on franchisee employees unless they can demonstrate access to proprietary data, training, or recipes. This responds to widespread criticism of cases like

214 *See, e.g.*, Sampsa Samila & Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth*, 57 MGMT. SCI. 425, 425 (2011).

Jimmy John's and other fast-food chains that used non-competes to restrict sandwich-makers and delivery drivers.[215]

G. Normative Foundations and Constitutional Harmony

A compensatory, regulatory model for non-compete agreements is not only efficient and empirically grounded—it also aligns with core American constitutional and legal values. Critics of federal regulation often invoke the sanctity of freedom of contract, yet that very principle supports a model in which both parties to a restrictive covenant understand and internalize the full economic consequences of their agreement.

Unlike categorical bans, which foreclose private ordering, a compensatory framework respects party autonomy while simultaneously correcting for power imbalances and information asymmetries in employment negotiations. The proposal does not prohibit non-competes; it simply conditions their enforceability on fairness and transparency, ensuring that employers bear the financial cost of post-employment restrictions rather than externalizing them to workers.

Furthermore, this approach poses minimal constitutional risk. It does not compel speech or conduct, nor does it eliminate contractual freedom outright. By operating through the Commerce Clause—regulating instruments that materially affect interstate labor markets—it falls squarely within established federal authority. In contrast, the FTC's ban was challenged for exceeding the scope of rulemaking powers under the FTC Act, a vulnerability this framework avoids by grounding its authority in direct congressional legislation.

H. Complementary Role of State Law

Notably, this proposed statute is not intended to displace all state-level regulation. Rather, it would function as a federal floor, setting minimum standards for enforceability while allowing states to adopt stricter protections if they choose. In this way, it resembles the FLSA[216] or Title VII of the Civil Rights

215 *See* Richard L. Hathaway, *Fast Food Non-Compete Agreements?*, KANE RUSSELL COLEMAN LOGAN (Jan. 7, 2015), https://www.krcl.com/insights/fast-food-non-compete-agreements [https://perma.cc/4946-LFB8].

216 *See supra* note 66.

Act,[217] which establish baseline rights but permit local innovation and augmentation.

For example, states like California, which already prohibit most non-competes, could maintain that approach. However, in jurisdictions where non-competes are still widely enforced—including many Southern and Midwestern states—the federal floor would provide critical protection for workers who currently lack bargaining power or legal recourse. Uniform baseline rules would also benefit multi-state employers, who currently face a compliance burden navigating multiple inconsistent standards.

This dual-sovereignty model not only enhances practical enforceability—it also insulates the statute from Dormant Commerce Clause challenges, since it does not mandate uniformity but merely establishes minimum rights.

I. Conclusion: From Doctrine to Practice

This proposed federal framework is a practical middle path between deregulated inconsistency and blanket prohibition. It ensures that non-compete agreements serve their legitimate purpose—protecting trade secrets and competitive investments—without being weaponized to suppress wages, deter job switching, or entrench employer power.

By mandating compensation, limiting duration and scope, and requiring advance disclosure, the framework creates a labor market equilibrium in which restrictions are rare, rational, and remunerated. It aligns legal doctrine with economic reality, drawing from successful international models while remaining faithful to American legal principles. Most crucially, it

217 Title VII prohibits employment discrimination based on race, color, religion, sex, and national origin. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). *See generally* David A. Garcia*, Title VII Does Not Preempt State Regulation of Private Club Employment Practices*, 34 HASTINGS L.J. 1107 (1983) (affirming the notion that Title VII sets a floor, not a ceiling, on anti-discrimination protections). The statute contains a provision stating that nothing in the title shall be construed to invalidate or limit any law of any state or political subdivision that provides equal or greater protection to individuals. 42 U.S.C. § 2000e-7. This clause ensures that Title VII serves as a minimum standard, allowing states to offer broader anti-discrimination protections.

creates a structure that is both administratively feasible and politically defensible.

VII. IMPLEMENTATION AND POLICY CONSIDERATIONS

A. Introduction: From Concept to Enforcement

Even the most thoughtfully constructed federal framework for non-compete agreements will fail if it is not effectively implemented. As the previous section proposed, a compensatory structure aligned with German labor law balances flexibility and fairness.[218] Yet enacting such a regime in the United States requires careful consideration of institutional capacities, constitutional authority, transitional logistics, and stakeholder dynamics.

This section explores the practical challenges and strategic opportunities involved in operationalizing a federal non-compete policy. It addresses questions of administrative enforcement, legal defensibility, judicial review, state preemption, and political feasibility. It aims to move the conversation from what the law should be to how it could and should be implemented at scale.

B. Choosing the Right Administrative Home

1. The Department of Labor as Primary Regulator

The most logical agency to administer a national non-compete regime is the DOL, given its existing authority over wage-and-hour enforcement, workplace fairness, and labor protections. The Wage and Hour Division already maintains infrastructure for field investigations, regulatory rulemaking, and complaint processing—all of which are necessary to enforce non-compete laws effectively. Unlike the FTC, whose recent attempt to ban non-competes was struck down for exceeding its statutory mandate,[219] the DOL operates squarely within the labor and employment sphere authorized by Congress.

Locating non-compete oversight within the DOL would allow rulemaking to be harmonized with other federal employment policies, such as the FLSA and the National Labor Relations Act.[220] It would also enable industry-specific guidance, updated wage thresholds, and tailored exemptions based on evolving labor

218 *See supra* Section VI.I.

219 *See supra* notes 4–9 and accompanying text.

220 *See* Fair Labor Standards Act, 29 U.S.C. §§ 201–219; National Labor Relations Act, 29 U.S.C. §§ 151–169.

market data. Crucially, the DOL's integration into the existing federal labor enforcement ecosystem would streamline compliance and allow cross-referencing with wage, hour, and classification violations already within the agency's purview.

2. A New Division for Contract Oversight

To ensure focus and specialization, Congress should authorize the creation of a Contract Fairness and Mobility Division within the DOL. This division would be responsible for maintaining a centralized registry of enforceable non-compete agreements, reviewing agreements for statutory compliance, issuing interpretive guidance and technical assistance to employers and courts, investigating violations, and referring serious or willful cases for civil enforcement actions.

Moreover, the division could adopt a tiered structure with a review office to administer agreement filings and issue advisory opinions; a compliance office to handle employer outreach and policy interpretation; and an enforcement unit empowered to audit firms, impose civil penalties, and coordinate with state attorneys general. The model here could resemble that of the Occupational Safety and Health Administration (OSHA), which operates through a blend of rulemaking, technical assistance, and strategic inspection programs.[221]

Additionally, the division should offer a preclearance process for employers to voluntarily submit draft agreements in advance of employee signature. This mirrors the SEC's comment letter process for securities filings and would encourage employers to shape their contracts in accordance with clear statutory standards. Preclearance could be incentivized by granting safe harbor status to approved agreements or reduced penalties for firms that submit them in good faith.

C. Judicial Review and Constitutional Considerations

1. Authority Under the Commerce Clause

A federal statute regulating non-compete agreements would likely pass constitutional muster under Congress's power to regulate interstate commerce. In today's labor market where remote work, digital infrastructure, and national firms dominate, employee mobility is not confined by state borders. Non-compete

221 U.S. DEP'T OF LAB., OSHA FACT SHEET: OSHA COMPLIANCE ASSISTANCE 1–2 (2009), https://www.osha.gov/sites/default/files/publications/compliance-assistance-factsheet.pdf [https://perma.cc/W4H3-GVAN].

agreements directly affect the movement of labor and the flow of knowledge across states, especially in knowledge-based industries.

Judicial precedent is strongly supportive of congressional authority over labor-related conduct with substantial interstate effects. For instance, Congress has successfully legislated in areas involving minimum wages, workplace safety, and employee classification, all under the Commerce Clause.[222] Given this history, there is little doubt that a law governing the enforceability of post-employment restraints—which restrict mobility across state lines—would satisfy the substantial effects test. Under the Commerce Clause, Congress has the authority to regulate activities that substantially affect interstate commerce. This principle was affirmed in *United States v. Darby Lumber Co.*,[223] where the Supreme Court upheld the FLSA, recognizing that labor conditions have a significant impact on interstate commerce. Further, in *Garcia v. San Antonio Metropolitan Transit Authority*, the Court confirmed that Congress could apply the FLSA to state and local governments, emphasizing that the regulation of employment terms falls within the scope of the Commerce Clause when such employment substantially affects interstate commerce.[224] Post-employment restraints, like non-compete agreements, can restrict an individual's ability to work across state lines, thereby affecting the national labor market and interstate commerce. Given that such restraints can hinder labor mobility and economic competition, a federal law regulating their enforceability would likely be considered a valid exercise of Congress's Commerce Clause powers under the substantial effects test.

Moreover, the national scope of the problem provides a rational basis for federal regulation. Studies have demonstrated how restrictive covenants depress innovation and suppress wages at a macroeconomic level.[225] This economic drag constitutes a classic justification for congressional intervention.

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222 *See* United States v. Darby, 312 U.S. 100, 109, 115 (1941) (upholding the FLSA as a valid exercise of Congress's Commerce Clause power and affirming that regulation of labor standards, including wages and hours, is constitutional where such conduct substantially affects interstate commerce); Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 613–15 (1980) (recognizing that Congress may regulate workplace safety under the Commerce Clause by delegating authority to agencies like OSHA to issue rules affecting labor conditions in industries engaged in interstate commerce); Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 296–97, 306 (1985) (holding that the FLSA applies to employees engaged in activities that affect interstate commerce, even when employed by a nonprofit organization).

223 *Darby*, 312 U.S. at 109–10.

224 Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 530 (1985).

225 *See* KRUEGER & POSNER, *supra* note 42, at 4–6.

2. Avoiding the Pitfalls of Agency Overreach

Unlike the FTC's rule, which attempts to ban non-competes through agency rulemaking and was ultimately enjoined by a federal court, a statute passed by Congress and administered by the DOL would rest on far more solid legal ground. Critics of the FTC approach argued that the agency lacked clear statutory authority to adopt rules of such economic significance. These separation-of-powers concerns derailed the rule before it could be implemented.

By contrast, a DOL-administered statute would be built on express congressional authorization. Rather than categorically banning agreements, it would create conditions for enforceability—such as compensation and duration limits. This "earned enforceability" approach is more consistent with traditional labor policy and would withstand judicial scrutiny better than a sweeping ban.

Importantly, because the DOL already administers laws like the FLSA and the Family and Medical Leave Act (FMLA), it is an institution accustomed to interpreting broad statutory standards and updating regulations over time. Its rulemaking would benefit from established experience and could withstand post-*Chevron* scrutiny,[226] so long as it stays within congressional parameters.

3. Dormant Commerce Clause and Federalism

A well-drafted, federal non-compete law would avoid Dormant Commerce Clause[227] problems by creating uniformity and reducing burdens on interstate commerce. The Dormant Commerce Clause prohibits states from enacting legislation that discriminates against or unduly burdens interstate commerce.[228] The current patchwork of state noncompete laws forces multistate employers to navigate conflicting standards, increasing compliance costs and discouraging cross-border employment. This fragmented approach

226 *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (holding that courts must defer to a federal agency's reasonable interpretation of an ambiguous statute), *overruled by* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

227 The Dormant Commerce Clause is a judicially created doctrine inferred from the Commerce Clause, prohibiting states from enacting legislation that discriminates against or unduly burdens interstate commerce, even in the absence of federal regulation. *See* U.S. CONST. art. I, § 8, cl. 3. It reflects the principle that interstate economic activity must remain free from protectionist or inconsistent state laws that disrupt the national market. *See* Granholm v. Heald, 544 U.S. 460, 472 (2005) ("State laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity.'") (quoting Philadelphia v. New York, 437 U.S. 617, 624 (1978)).

228 *Granholm*, 544 U.S. at 472.

creates significant friction in the national labor market and may amount to an undue burden on interstate commerce.

Because the Dormant Commerce Clause reserves regulatory authority over interstate commerce to Congress, Congress may invoke its power to reduce the burdens imposed by inconsistent noncompete laws. The Supreme Court has affirmed that Congress may regulate even local activities if they have a substantial effect on interstate commerce in the aggregate.[229] While the Dormant Commerce Clause generally protects against direct state-imposed burdens on interstate commerce, it does not invalidate all incidental burdens. [230] However, even facially neutral state laws must be invalidated when the burdens they impose on interstate commerce are clearly excessive in relation to their local benefits.[231]

States currently vary widely in how they treat non-competes, leading to uncertainty for employers operating across borders. A uniform baseline would reduce this friction, promote consistent labor standards, and improve compliance.

Federal preemption could be structured as a floor rather than a ceiling, allowing states like California and Washington to maintain stricter rules while ensuring that no state allows abusive enforcement below the federal floor.[232] This cooperative federalism model mirrors other federal labor statutes, including the Employee Retirement Income Security Act and the FMLA, which preempt some aspects of state law while preserving room for more protective measures.

D. Transitional Design and Implementation Timeline

1. Phase-In Period

Policymakers must design a measured transition that allows employers and workers to adapt to the new legal regime. A minimum eighteen-month phase-in period would provide time for employers to review and revise current agreements, for courts to receive interpretive guidance, and for state regulators to reconcile overlapping statutes. During this period, the DOL could issue interim rules, publish guidance documents, and offer

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229 United States v. Lopez, 514 U.S. 549, 561 (1995).

230 Note, *The Dormant Commerce Clause and Moral Complicity in a National Marketplace*, 137 HARV. L. REV. 980, 983 (2024).

231 R. Randall Kelso, *The Proper Structure of Dormant Commerce Clause Review*, 59 TULSA L. REV. 109, 122 (2024).

232 *See* Chamber of Com. of the U.S. v. Bonta, 62 F.4th 473, 478 (9th Cir. 2023) (finding that California's Assembly Bill 51, a statute that attempted to bar the use of arbitration agreements by employers, is preempted by the Federal Arbitration Act).

employers a safe harbor for voluntary disclosures or good faith compliance efforts.

This phased approach would prevent mass invalidation of agreements and avoid placing businesses in sudden non-compliance. Transition rules should also recognize existing agreements entered into under good faith reliance on state law and offer "grandfathering" treatment where appropriate, subject to compliance with new compensation requirements. The Affordable Care Act offers a strong precedent for implementing labor reforms through phased rollout with delayed penalties and grace periods.[233]

2. Public Education and Compliance Outreach

Education and awareness will be critical to success. Workers often sign non-competes without legal counsel or full understanding of their implications. The DOL must fund a broad outreach initiative, including targeted online content and printed guides, worker rights materials in multiple languages, and partnerships with state agencies, bar associations, and labor unions.

Employers will also need technical assistance to revise contract templates, assess who qualifies for enforceable restrictions, and calculate proper compensation. The DOL should maintain a helpline, host webinars, and issue model clauses. Public access to the registry of enforceable agreements will deter illegal use and enable peer benchmarking.

E. Political Feasibility and Legislative Strategy

Implementing this framework in the United States would require navigating state autonomy and federal authority, but it offers a structured and equitable model guiding meaningful control. Although this model may face resistance due to increased costs and state-level control, the German framework encourages responsible use while preserving worker mobility.

1. Building a Coalition of Support

The political path to passage will require an unusual but achievable coalition. Worker advocates—particularly in labor unions and progressive think tanks—have long argued that

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233 Affordable Care Act, 42 U.S.C. § 18001 (establishing the statute's implementation timelines).

non-competes suppress wages and hinder job mobility. These groups will champion any serious effort to curb abuse.

What makes this proposal distinctive is its potential appeal to employers as well. By avoiding a blanket ban, it preserves flexibility for firms that truly need post-employment protection. Startups, regional hospitals, manufacturers, and financial institutions would all prefer clear, enforceable standards to total prohibition. The law would give them a lawful path to retaining talent—at a cost, yes, but a known and manageable one.

Furthermore, a compensatory structure would appeal to free market advocates who favor internalizing costs over government bans. It also resonates with individuals interested in reducing litigation and clarifying legal obligations. With polling consistently showing that most workers disapprove of non-competes, and with evidence showing they harm wage growth and entrepreneurship,[234] the politics are increasingly favorable.

2. Anticipating Opposition and Messaging

Despite this broad potential support, opposition is to be anticipated from trade associations and some corporate lobbies that favor the status quo. These associations and lobbies will argue that any federal action preempts states, increases compliance burdens, and invites litigation. To counter this perspective, lawmakers must emphasize that the statute does not ban non-competes, but *conditions* them, preserving contractual freedom while elevating fairness.

Messaging should focus on *earned enforceability*: employers can still use non-competes, but only if they pay for the restriction and ensure the agreement is narrow in scope. It is a market solution, not a mandate. Moreover, states like Massachusetts and Oregon have already demonstrated that requiring notice and compensation reduces litigation and clarifies enforceability.[235]

F. Economic Risk Mitigation and Regulatory Design

1. Reducing Litigation Through Clarity

One of the strongest advantages of a compensatory federal framework is its capacity to reduce costly, unpredictable litigation.

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234 Matthew S. Johnson, Kurt J. Lavetti & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility* 36, 40 (Nat'l Bureau Econ. Rsch., Working Paper No. 31929, 2020), https://www.nber.org/system/files/working_papers/w31929/w31929.pdf [https://perma.cc/Y78P-QYKZ].

235 *See, e.g.*, MASS. GEN. LAWS ch. 149, § 24L (2024).

Current disputes over non-compete enforceability hinge on fact-intensive judicial tests of reasonableness in scope, geography, and duration. This common law patchwork has produced inconsistent rulings and incentivized employers to overreach, knowing litigation can chill worker mobility regardless of merit.[236]

By contrast, a federal standard could include clear statutory thresholds: for instance, a two-year maximum duration, income floors, and mandatory post-employment compensation. These bright-line rules would reduce reliance on vague multi-factor tests and help judges decide enforceability without expensive discovery or conflicting expert testimony.

Moreover, a registry of enforceable non-competes, filed with the DOL and available for public audit, would add transparency and deter abuse. Firms would be less likely to include unenforceable provisions if they know they must disclose terms in a federal filing accessible to regulators, courts, and competitors.[237]

2. Supporting Innovation Through Predictability

Critics of non-compete regulation often argue that restrictions are necessary to protect proprietary information and incentivize investment in employee training. But these concerns can be addressed through other mechanisms. Confidentiality agreements, intellectual property protections, and equity-based compensation remain enforceable and widely used.

Importantly, jurisdictions that restrict or prohibit non-competes—such as California—have not seen a collapse in innovation. In fact, venture capital formation, startup creation, and inventor mobility are consistently higher in these areas compared to enforcement-heavy states.[238]

The federal proposal does not prohibit non-competes; it requires employers to internalize the cost of restricting labor mobility. This market-based incentive structure forces firms to use non-competes selectively, reducing overuse and focusing attention on high-value, defensible cases. Structured compensation transforms non-competes from a risk-free default into a deliberate choice—supporting innovation by preserving talent circulation

236 *See* Barnett & Sichelman, *supra* note 24, at 988–90.

237 Nickolaus Stumo-Langer, Formerly Employed Need Not Apply 5 (Apr. 30, 2020) (unpublished manuscript), https://conservancy.umn.edu/server/api/core/bitstreams/fb3726a3-a86f-4e13-9211-a75ab213cc78/content [https://perma.cc/T679-QE6H].

238 Johnson, Lavetti & Lipsitz, *supra* note 234, at 16.

and knowledge spillovers.[239]

G. Leveraging Empirical Monitoring and Policy Feedback

1. Built-in Oversight and Adjustment

Effective implementation must be paired with ongoing evaluation. Congress should mandate that the DOL produce biennial reports tracking: (1) aggregate usage of non-competes by sector and geography; (2) average compensation offered for enforceable agreements; (3) complaint rates and litigation outcomes; and (4) worker mobility and wage growth metrics. This data will inform agency rulemaking and guide future legislative amendments. To ensure independent oversight, a National Non-Compete Observatory could be established in partnership with academic institutions and research foundations.

Additionally, the law should include a ten-year sunset clause, requiring Congress to review outcomes and reauthorize the statute based on empirical performance. This sunset model encourages legislative engagement and ensures the law evolves with labor market conditions.

2. Studying Sectoral and Regional Variability

The economic effects of non-competes vary widely across industries. High-tech fields, for example, are more sensitive to talent mobility, while manufacturing sectors often rely on specific process know-how and client relationships. Similarly, rural and urban labor markets may respond differently to restrictions based on density and competition.

The statute should therefore require data collection that is disaggregated industry (e.g., software, healthcare, finance); region (e.g., rural vs. metropolitan); and employer size (e.g., under 50 employees vs. Fortune 500).

This level of granularity will support more nuanced enforcement and future exemptions or modifications based on real-world effects. Without it, policymakers risk overcorrecting in one direction or failing to address new forms of abuse as they emerge.

H. Balancing Protection and Mobility in Practice

The long-standing tension between protecting legitimate business interests and preserving worker freedom is not new. But it

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239 *See* Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 UN. CHI. L. REV. 357, 358, 373–74 (2020).

is newly urgent in a labor market shaped by technological disruption, widespread job switching, and growing economic inequality.

The proposed federal framework does not eliminate non-competes. It allows them—but only when employers can show that restrictions are narrow, justified, and paired with meaningful compensation. This earned enforceability model will discourage overuse, reduce litigation, and promote innovation by facilitating responsible use of non-competes.

Implementation matters as much as design. By situating enforcement in the DOL, building data systems, and adopting a phased rollout, the federal government can ensure a fair, functional, and future-proof regulatory structure. The goal is not to tip the scales—but to rebalance them.

VIII. ADDRESSING POTENTIAL CRITICISMS AND IMPLEMENTATION CHALLENGES

The proposed federal framework for non-compete agreements will likely face several significant criticisms and implementation challenges. This section addresses these potential objections while offering solutions to anticipated implementation difficulties.

A. Economic Impact Concerns

1. Business Cost Arguments

Critics will likely argue that mandatory compensation requirements impose excessive costs on businesses, particularly small and medium-sized enterprises.[240] This criticism warrants careful consideration but ultimately proves unpersuasive. Empirical evidence from Germany demonstrates that compensation costs are largely offset by reduced litigation expenses,[241] better employee retention, improved knowledge protection, enhanced innovation outcomes, and more efficient resource allocation. Additionally, the framework includes several cost-mitigation mechanisms, such as phased implementation schedules, small business assistance programs,

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240 Evan Starr, Comment by Evan Starr to the Federal Trade Commission Re: Non-Compete Clause Rulemaking, Matter No. P201200, at 11 (Apr. 19, 2023) (unpublished comment), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4427741 [https://perma.cc/6QFC-LQSR].

241 KURT LAVETTI, NONCOMPETE AGREEMENTS IN EMPLOYMENT CONTRACTS 3, 5, 8–10 (2021), https://wol.iza.org/uploads/articles/578/pdfs/noncompete-agreements-in-employment-contracts.pdf [https://perma.cc/JS2L-YLR6].

tax incentives for compliance, industry-specific adjustments, and hardship exemptions.

2. Market Efficiency Arguments

Some critics may contend that federal regulation will reduce market efficiency by limiting employers' flexibility.[242] However, evidence suggests that structured regulation actually enhances market efficiency. This efficiency results from better information flow in labor markets due to transparent compensation requirements, clear restriction parameters, standardized agreement terms, predictable enforcement, and enhanced mobility data.

3. Innovation and Competition Arguments

Critics might argue that increased regulation of non-competes will stifle innovation and reduce competitive advantage.[243] In reality, empirical evidence suggests the opposite effect. First, structured compensation requirements actually promote innovation by encouraging targeted protection of valuable information, facilitating efficient knowledge transfer, supporting strategic R&D investments, promoting collaborative innovation, and reducing defensive patents.[244] Second, competitive advantages are enhanced through better alignment of restrictions with business needs, more efficient allocation of protection resources, reduced employee poaching costs, enhanced knowledge management, and improved succession planning.

4. Regulatory Burden Arguments

Another significant criticism concerns the administrative burden of compliance.[245] These concerns can be addressed through several mechanisms. The framework includes burden-reduction features, such as standardized documentation requirements, automated compliance systems, electronic filing platforms, streamlined reporting processes, and integration with existing HR

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242 *See* Alan J. Meese, *Don't Abolish Employee Noncompete Agreements*, 57 WAKE FOREST L. REV. 631, 650–51 (2022).

243 Barnett & Sichelman, *supra* note 24, at 962–64.

244 *See generally* Karen Elliott et al., *Knowledge Protection in Firms: A Conceptual Framework and Evidence from HP Labs*, 16 EUR. MGMT. REV. 179 (2019); *see also* Jonathan M. Barnett, *Private Protection of Patentable Goods* 3 (Fordham Univ. Sch. L., Research Paper No. 28, 2003), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=445380 [https://perma.cc/KGA6-ZR8W].

245 Cameron Misner, Note, *Dependent Contractors? The Case for Giving Non-Competes a Central Role in Worker-Classification Tests Under Federal Law*, 109 CORNELL L. REV. 763, 770–71 (2024).

systems. Implementation assistance programs would provide technical support resources, compliance templates, training materials, industry-specific guidance, and small business assistance.

B. Federalism and Institutional Concerns

1. Federalism Challenges

The proposed framework must address significant federalism concerns regarding federal intervention in traditional state employment law.[246] State sovereignty considerations require careful attention, including traditional state regulation of employment, local economic conditions, state court expertise, existing state frameworks, and interstate competition. The framework addresses these concerns through cooperative federalism mechanisms, state implementation flexibility, local condition accommodation, existing institution utilization, and state-federal coordination.

2. Institutional Capacity Arguments

Critics may question whether federal institutions possess adequate capacity to implement comprehensive non-compete regulation. This challenge requires addressing several institutional components.

a. Administrative Capacity

The framework builds administrative capacity through specialized agency divisions, trained personnel development, technical infrastructure investment, interagency coordination, and state agency partnerships. Implementation would proceed through phased capacity building, pilot program testing, incremental jurisdiction expansion, regular capacity assessment, and resource allocation adjustment.

b. Judicial Capacity

The effectiveness of the proposed framework depends significantly on judicial capacity to handle non-compete disputes. Specialized judicial training programs would focus on non-compete agreement analysis, compensation calculation methods, geographic restriction evaluation, industry-specific considerations, and economic impact assessment. Structural modifications would enhance efficiency through specialized court

246 *See* Ernest A. Young, *Federal Preemption and State Autonomy*, *in* FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 249, 249–76 (Richard A. Epstein & Michael S. Greve eds., 2007).

divisions, streamlined procedures, alternative dispute resolution, expert magistrates, and technical support staff.

3. Enforcement Coordination

Effective implementation requires sophisticated coordination among multiple enforcement entities. The framework establishes clear coordination mechanisms.

a. Vertical Coordination

The system provides for coordinated enforcement in a hierarchical structure between federal oversight agencies, state labor departments, local enforcement units, administrative tribunals, and traditional courts. Coordination would occur through joint enforcement protocols, information sharing systems, jurisdictional guidelines, resource sharing agreements, and unified compliance databases.

b. Horizontal Coordination

The framework also facilitates coordination among entities operating at the same enforcement level, including multiple federal agencies, different state authorities, various court systems, industry regulators, and professional associations.

C. Implementation Challenges and Practical Solutions

1. Transition Management

The shift to a federal compensatory system presents significant transition challenges that require careful management. The framework addresses these challenges through structured implementation phases.

a. Initial Transition Period

The framework establishes a graduated implementation schedule: a twelve-month preparation period, phased industry rollout, geographic staging, size-based implementation, and finally, pilot program testing. Key transition tools during this period will include legacy agreement management, grandfather provisions, temporary exemptions, compliance assistance, and technical support.

b. Market Adaptation

The system facilitates market adaptation in two ways. First, it provides industry-specific adjustment mechanisms, including sector-based timing, custom compliance tools, specialized guidance,

industry liaison offices, and targeted assistance programs. Second, it accounts for business size by offering accommodations for small businesses, support for medium enterprises, compliance programs for corporations, assistance for start-ups, and scalable resources.

2. Practical Implementation Solutions

a. Operational Challenges

The framework addresses key operational issues through concrete solutions.[247] Cost management will be achieved through automated compliance systems, shared service platforms, standardized documentation, electronic filing systems, and bulk processing options.

b. Compliance Assistance and Monitoring Solutions

To ensure effective implementation, the framework incorporates a comprehensive set of support mechanisms. Compliance assistance programs provide technical guidance centers, online compliance tools, training programs, advisory opinions, and help desk support. These resources focus on practical implementation through step-by-step compliance guides, interactive decision tools, template agreements, calculation worksheets, and best practices databases. Then, monitoring solutions incorporate real-time systems that feature automated compliance checks, early warning indicators, performance metrics, risk assessment tools, and pattern detection. In addition, data analytics play a role by leveraging predictive modeling, compliance trending, impact assessment, efficiency metrics, and outcome analysis.

3. Long-Term Sustainability

The framework ensures sustainable implementation through continuous improvement mechanisms by way of regular system evaluation, stakeholder feedback loops, adaptive management, performance optimization, and innovation incorporation. It also supports institutional learning through knowledge management systems, best practices evolution, precedent databases, training updates, and process refinement.

While the transition to a federal framework presents significant challenges, these obstacles can be overcome through careful planning and robust support systems. Success

247 *See* DAVID WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT 1–2 (2010).

requires sustained commitment to implementation excellence and willingness to adapt based on empirical evidence and practical experience.

IX. CONCLUSION

The current debate over non-compete agreements in the United States has reached a critical juncture. The FTC's categorical ban, while addressing legitimate concerns about worker mobility, represents an overcorrection that fails to acknowledge the complex balance of interests at stake.[248] This Article has proposed an alternative approach: a federal framework based on the German model of compensated non-compete agreements.

The proposed framework offers several key advantages over both the status quo and the FTC's approach. First, mandatory compensation requirements create efficient market-based incentives that force employers to internalize restriction costs,[249] protect employee economic security, facilitate voluntary compliance, enable market-based adjustments, and preserve legitimate business interests. Second, the federal framework provides needed uniformity while maintaining appropriate flexibility through clear minimum standards, state implementation authority, industry-specific adaptations, size-based accommodations, and regional adjustments. Third, empirical evidence from Germany demonstrates that structured regulation produces superior outcomes in terms of innovation rates,[250] worker mobility, economic efficiency, litigation reduction, and knowledge protection.

The success of the German model provides compelling evidence that a compensatory approach can effectively balance competing interests while promoting economic dynamism. As the United States grapples with evolving workplace relationships and increasing competition for skilled workers, the need for sophisticated regulatory approaches becomes more pressing. The framework proposed in this Article offers a path forward that

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248 *See* Brian Albrecht, *When Protection Becomes Overreach*, CITY J. (May 13, 2024), https://www.city-journal.org/article/the-ftc-ban-on-noncompete-agreements-is-misguided [https://perma.cc/NJ5M-HZYF].

249 BRIAN C. ALBRECHT, DIRK AUER & GEOFFREY A. MANNE, LABOR MONOPSONY AND ANTITRUST ENFORCEMENT: A CAUTIONARY TALE 30–31 (2024).

250 *See* Iain Ross, *Non-Compete Clauses in Employment Contracts: The Case for Regulatory Response*, 35 ECON. & LAB. RELS. REV. 806, 822 (2024).

learns from international experience while accounting for unique American legal and economic conditions.

Implementation challenges, while significant, are not insurmountable. The proposed framework's graduated implementation schedule, coupled with robust support systems and clear guidance, provides a realistic pathway to reform. Experience demonstrates that initial transition costs are typically offset by reduced litigation expenses and improved economic outcomes within three to five years of implementation.[251]

Moreover, the framework's flexibility allows it to adapt to emerging workplace trends. For example, the rise of remote work challenges traditional geographic restrictions, but these can be addressed through carefully crafted scope limitations and compensation adjustments. Similarly, the growing importance of knowledge-based competition calls for more sophisticated strategies to protect legitimate business interests while still encouraging innovation. Finally, the increasing mobility of skilled workers demands balanced approaches that protect both employer investments and employee career development.

Looking forward, the success of this framework will depend on sustained commitment from multiple stakeholders. First, Congress must provide clear statutory authority and adequate resources for implementation. Second, federal agencies must develop sophisticated enforcement mechanisms while coordinating effectively with state partners. Third, courts must adapt to new methods of analysis while maintaining consistent interpretation of standards. Finally, and above all else, employers and employees must engage constructively with the new system, recognizing that structured regulation can create value for all parties.

Ultimately, the choice is not between unfettered non-compete agreements and their complete prohibition, but rather between thoughtful regulation and continued uncertainty. The framework proposed here offers a tested, balanced approach that has succeeded in one of the world's most innovative economies.[252] As Congress considers various approaches to non-compete reform, the compensatory model deserves serious consideration as a solution

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251 *See* Stam, *supra* note 170, at 6.

252 *See* Kate Whiting, *Germany Is the World's Most Innovative Economy*, WORLD ECON. F. (Oct. 18, 2018), https://www.weforum.org/stories/2018/10/germany-is-the-worlds-most-innovative-economy/ [https://perma.cc/BH62-HBB6] ("In the World Economic Forum's latest Global Competitiveness Report, Germany came top as the world's most innovative economy, with a score of 87.5 out of 100 in the Innovation capability pillar - one of the 12 drivers of a country's productivity.").

that serves both business interests and worker protection. By adopting this approach, the United States can move beyond the current regulatory impasse toward a system that promotes innovation, protects legitimate business interests, and ensures worker mobility and economic security. The time has come to replace our patchwork of state regulations and binary approaches with a sophisticated federal framework that reflects the complexities of modern employment relationships and the realities of our knowledge-based economy.