BUSINESS LAW FALL FORUM: WORKPLACE SECRETS, LOYALTY, AND THEFT

BUSINESS LAW FALL FORUM INTRODUCTION: WORKPLACE SECRETS, LOYALTY, AND THEFT

by
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Who owns or controls the cognitive property and human capital possessed by employees that increasingly creates innovation, growth, and wealth? Should the law of trade secrets, non-competition agreements, employee duty of loyalty, and tortious interference encourage employee mobility and the cross-fertilization conducive to new conceptualizations, products, and services? The current legal landscape often fails to adequately weigh the varied interests of employers as a class, and instead puts undue weight on the narrow interests of individual employers in particular situations. This introductory Essay explores three major mechanisms for controlling the wealth-creating cognitive property found increasingly in employees' minds: (1) free labor markets for both employees and prospective new employers; (2) contractual restrictions on employee liberty required as a condition of employment; and (3) socially imposed restrictions via the law of trade secrets, duty of loyalty, and tortious interference. As we shall see, all three areas are marked by a rising trend of litigation in a surprisingly varied set of businesses and industries. These disputes may carry a warning that rather than the further haphazard development of rules in this area via state trade-secret, noncompetition, and employee-loyalty law, a fundamental rethinking of both social and longer term employer interests in this area may be in order.

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I. INTRODUCTION

Who owns the ideas, knowledge, and analytical skills that increasingly define and create wealth?[1] These attributes—*cognitive property*, to use Professor Orly Lobel's terms in her leading *Texas Law Review* article—exist not only in company databases and computers, but also in the minds of employees.[2]

What is to be done when employees seek to carry their talents and human capital,[3] often accumulated in their jobs, to a new employer or venture? Who owns or controls the cognitive property and human capital that increasingly creates innovation, growth, and wealth? The answers to these questions may affect the rate of idea circulation—and the cross-fertilization conducive to new conceptualizations, products, and services to satisfy human needs—in the larger economy.[4] Restating the question from that perspective, should the law of trade secrets, non-competition agreements, employee duty of loyalty, and tortious interference encourage greater or lesser employee mobility in the knowledge-based economy?

This Introduction serves as a comment on these questions, the focal point for the 2015 Lewis & Clark Law School Business Law Forum.[5] In this emerging area at the intersection of employment and intellectual property law, the interests of employers are not monolithic, but rather fall on both sides of the greater/lesser employee mobility question.[6] That

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[1] *See* ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING 13–16 (2013).

[2] Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property,* 93 TEX. L. REV. 789 (2015).

[3] *Id.* at 794.

[4] *Id.* at 835.

[5] "Workplace Secrets, Loyalty, and Poaching: Protecting Employer Interests and Employee Liberty," Sept. 11, 2015, Lewis & Clark Law School. The Forum papers published in this edition are: Norman D. Bishara & Evan Starr, *The Incomplete Noncompete Picture*, 20 LEWIS & CLARK L. REV. 497 (2016); Rochelle Cooper Dreyfuss & Orly Lobel, *Economic Espionage as Reality or Rhetoric: Equating Trade Secrecy with National Security*, 20 LEWIS & CLARK L. REV. 419 (2016); Robert W. Gomulkiewicz, *Reasons for Counseling Reasonableness in Deploying Covenants-Not-to-Compete in Technology Firms*, 20 LEWIS & CLARK L. REV. 477 (2016); Elizabeth Tippett, *Using Contract Terms to Detect Underlying Litigation Risk: An Initial Proof of Concept*, 20 LEWIS & CLARK L. REV. 547 (2016).

[6] *See* LOBEL, *supra* note 1, at 7–8.

is, for every employer losing an employee, another employer (or a new venture) gains that same human capital. Moreover, even for a single employer losing an employee to another employer today, that same employer may be hiring the employee of a different employer tomorrow.

The law, and attorneys representing clients, often fails to adequately weigh these varied interests of employers as a class and, instead, puts undue weight on the narrow interests of the incumbent employer in a particular dispute with an employee. Despite the understandably protective instincts of human-resources departments and management attorneys, which emphasize the short-term interests of incumbent employers,[7] employer interests generally, together with social interests in a legal regime which facilitates economic growth via free labor markets, most often align with the liberty interests of employees.[8]

The difficulty (in separating the legitimate interests of incumbent employers in preventing "free riding," on the one hand, from the legitimate interests of future employers, employees, and society, in free labor markets, on the other hand) arises from the nature of the new wealth potential in cognitive property.[9] To be sure, companies entrust and invest in employees with information, knowledge, ideas, plans, and new skills. But beyond that, employees grow their capacities, accumulate new knowledge, span new ideas, and create, in more or less inchoate form, new innovations for new products and services to address human needs. The line between *outputs* and *inchoate capacities* thus becomes more blurred in a knowledge/information/idea-based economy. Moreover, some of what employees learn at work properly belongs to them. Mere skills have long been distinguished from trade secrets,[10] and a light-bulb idea or breakthrough perception may occur to the employee on their own time.

Take an example. When the American cultural icon of two generations, Barbie Dolls (owned by Mattel), met stiff competition from the

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[7] For example, at the Lewis & Clark Business Law Forum on Sept. 11, 2015, one attorney in the audience opined that her practice was to *load* non-competition and similar agreements with provisions that might be triggered in the event of a disputed departure, leaving it for the actual circumstances in each case to decide which provisions might and should be enforced. Professor Gomulkiewicz's article for the Forum, *see* Gomulkiewicz, *supra* note 5, emphasizes that in the business culture of Washington State, for example, non-competition agreements are enforceable (if reasonable in various ways) but rarely enforced. Employees thus may face restrictions that even lawyers for the company might not view as enforceable, or wise to enforce, in the circumstances. This "chilling" effect on employee mobility may often be as significant as the prospect of enforcement in litigation from the point of view of a company seeking to retain employees.

[8] Lobel, *supra* note 2, at 835.

[9] *See id.* at 842.

[10] *See* Robert Unikel, *Bridging the "Trade Secret" Gap: Protecting "Confidential Information" Not Rising to the Level of Trade Secrets*, 29 Loy. U. Chi. L.J. 841, 849 (1998).

newer, "hipper" Bratz Dolls (owned by MGA Entertainment), Mattel sued MGA. Mattel claimed that ex-Barbie fashion and hairstyle designer Carter Bryant carried the idea for the Bratz line of dolls from Mattel to MGA, in breach of his employment agreement with Mattel since it assigned all of Bryant's creative ideas and inventions to Mattel.[11] With the trial seemingly turning on whether Bryant first had the Bratz idea while on a one-year leave from Mattel, the jury awarded Mattel $100 million. The jury found that MGA broke the rules of competition by intentionally interfering with Mattel's contract with Bryant, by inducing Bryant's breach of his duty of loyalty while still employed at Mattel, and by misappropriation of Mattel's trade secrets.[12] Bryant, by the way, made $30 million from royalties as the Bratz Dolls challenged Barbie Dolls with substantial success.[13] The Ninth Circuit, however, reversed,[14] and on retrial a second jury found against Mattel's claims, awarding $88.5 million to MGA on its counterclaim for trade secret infringement (doubled by the trial court with an award of exemplary damages under the California statute for "willful and malicious" conduct, plus an award of attorney's fees).[15] Two lessons from this case are: (1) employers and employer interests were present on both sides; and (2) it is often far from clear who owns the ideas that come to employees as a result of employment.[16]

When cognitive property or human capital bears fruit or *outputs*—say new commercially valuable products and processes, new written works or copyrightable doll designs, or plans and detailed strategies for commerce ahead—those enhancements often find the law's protection via patent, copyright, trademark, works for hire, shop right and other areas of traditional intellectual property law.[17] In patent and copyright, the law protects monopolies (including the right to royalties and other proceeds of licensing) for a period of time in exchange for disclosure and the knowledge that eventually the enhancement will enter the public realm, either incrementally by licensing, or at expiration of the monopoly period legally conferred.[18] These laws constitute compromise arrangements: judgments about the relative need to reward investment with a monopoly

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[11] Mattel, Inc. v. MGA Entm't, Inc., 616 F.3d 904, 907–08 (9th Cir. 2010).

[12] *See* LOBEL, *supra* note 1, at 160–61.

[13] *See id.* at 160.

[14] *Mattel*, 616 F.3d at 917–18.

[15] Mattel, Inc. v. MGA Entm't, Inc., 705 F.3d 1108, 1110 (9th Cir. 2012). The Ninth Circuit reversed the second jury's award of damages against Mattel on the ground that MGA's counterclaim was not allowable, and should not have been submitted to the second jury. *Id.* at 1111.

[16] *See* LOBEL, *supra* note 1, at 161.

[17] *See* Lobel, *supra* note 2, at 795.

[18] 35 U.S.C. § 154 (2012) (patent duration); 17 U.S.C. § 304 (2012) (copyright duration); *see* Abraham Bell & Gideon Parchomovsky, *Reinventing Copyright and Patent*, 113 MICH. L. REV. 231, 234 (2014).

to avoid free riding, and yet to promote the diffusion of new knowledge throughout the economy. The courts draw nuanced lines about *what* inventions, ideas, and innovations are eligible for this monopoly period, as part of this careful balancing of conflicting social interests.[19] Carefully crafted *when* and *what* doctrines limit and balance the monopoly provided in the traditional patent and copyright law.

Not so for cognitive property. Even before *outputs* take shape, employees often face restrictions on the ideas, skill, and knowledge they may carry to a new employer, or to a new start-up venture.[20] Thus, not only *outputs*, but more or less *inchoate* and *embryonic* conceptualizations, ideas, innovation potential, and knowledge are swept into the legal vortex at the intersection of intellectual property and employment law. The law of non-competition agreements (NCAs),[21] trade secrets,[22] duty of employee loyalty,[23] and tortious interference[24] often operate to constrain employee mobility to "be all that they can be." And because most of this law originates at the state level, employee liberty—and the allowable reasonable restrictions on that liberty—varies from state to state.

At the same time, incumbent employers suffer breaches of loyalty by employees,[25] theft of their secrets, violations of agreements promising not to compete, disclosure of confidential information, and solicitation of customers and employees for competing enterprises.[26] But as noted above, employer interests may vary: employer 1 may seek to retain an employee and the knowledge, skill, and ideas she has built up, while employer 2 seeks to benefit from putting her talents to work in another enterprise. What is the right balance between, on the one hand, the liberty interests of employees and prospective new employers to create new wealth via new ventures and new jobs and, on the other hand, the property and proprietary interests of current employers seeking to curb "free riding" by employees and rival firms, and to protect the current employer's investments and confidence in their employees?

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[19] *See* Alice Corp. v. CLS Bank Int'l, 134 S. Ct. 2347, 2354 (2014); Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107, 2116 (2013); Mayo Collaborative Servs. v. Prometheus Labs., Inc., 132 S. Ct. 1289, 1293 (2012) (distinguishing abstract ideas from patent-eligible inventions).

[20] Lobel, *supra* note 2, at 853.

[21] *See* BRIAN M. MALSBERGER, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY (10th ed. 2015).

[22] *See* BRIAN M. MALSBERGER, TRADE SECRETS: A STATE-BY-STATE SURVEY (5th ed. 2015); UNIF. TRADE SECRETS ACT § 1 note 42, 14 U.L.A. 564 (1985).

[23] *See* BRIAN M. MALSBERGER, EMPLOYEE DUTY OF LOYALTY: A STATE-BY-STATE SURVEY (5th ed. 2015).

[24] *See* BRIAN M. MALSBERGER, TORTIOUS INTERFERENCE IN THE EMPLOYMENT CONTEXT: A STATE-BY-STATE SURVEY (4th ed. 2015).

[25] *See, e.g.*, Rash v. J.V. Intermediate, Ltd., 498 F.3d 1201, 1213 (10th Cir. 2007); Eckard Brandes, Inc. v. Riley, 338 F.3d 1082, 1086 (9th Cir. 2003).

[26] Lobel, *supra* note 2, at 791.

Finally, how should society's interests—in both the cross-fertilization and idea sharing that often leads to further innovation and wealth creation,[27] and the competing need to safeguard employer investment and knowledge, shared and developed with employees, from "free ridership"—weigh in the calculus?[28]

This Essay, which serves as well as the introduction to the papers presented at the 2015 Lewis and Clark Law School Business Law Forum, explores three major mechanisms for controlling the wealth-creating cognitive property found increasingly in the minds of employees: (1) free labor markets for both employees and prospective new employers, unconstrained by restrictions on competition in the labor markets; (2) contractual restrictions on employee liberty, like non-competition and similar agreements,[29] required as a condition of employment; and (3) socially-imposed restrictions via the law of trade secrets, duty of loyalty, and tortious interference. As we shall see, all three areas are marked by a rising trend of litigation in a surprisingly varied set of businesses and industries. These disputes may carry a warning that rather than further haphazard development of rules in this area via state trade-secret, non-competition, and employee-loyalty law, a fundamental rethinking of both social and employer interests in this area may be in order.

II. POACHING, FREE LABOR MARKETS, AND THE ANTITRUST LAWS

Let us start with *poaching*, or talent raids on employer 1 by employer 2. Recruiting employees working for other employers is an aspect of free labor markets. While often depicted as a contest between the interests of employees and employers, the dynamics in this area often start when employer 2 seeks the talents of employer 1's employees, which often includes cognitive property and secrets acquired by the employees while working for employer 1.

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[27] *See id.* at 795.

[28] Both in the past and today, scholars have probed the negative effects of restrictions in the law and culture on employee mobility. *See, e.g.*, LOBEL, *supra* note 1, at 7–8; BRETT M. FRISCHMANN, INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES 109 (2012); 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, 577–78 (1999).

[29] In addition to NCAs, employees are sometimes required to sign non-solicitation, non-dealing, confidentiality, bonus restriction/reduction, and other limitations on their activity during and after employment. "Garden leave" agreements, for example, restrict an employee from competing for a period of time, in exchange for substantial payments from the employer during the period of disqualification. Greg T. Lembrich, Note, *Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants*, 102 COLUM. L. REV. 2291, 2292 (2002).

There is nothing new in employer 2 poaching employer 1's employees. Our economic system generally presumes free external labor markets.[30] Indeed, in the earlier common law, especially after the 13th Amendment, courts often struck down restrictions on an employee's freedom to "be all that she can be" by resigning employment "at will" and accepting employment with another employer, or starting a competing business.[31] Thus a generation ago, managerial and professional employees commonly "jumped ship" by accepting a job offer from employer 2 that included perhaps more money, better hours, better fringe benefits, or other advantages such as location, responsibility, and potential for further growth.

Yet today, we see the pejorative term "poaching" placed upon this most traditionally American style of structuring business relationships around free markets and competition, albeit, in this instance, competition in labor, rather than product and service markets. Indeed, it seems quite obvious that the liberty to hire employees of other employers—that is to say, employees with experience—underlies much wealth creation done by firms.

Not surprisingly, given the critical role of poaching in wealth creation and innovation, it remains common in both the older and newer sectors of the economy. Thus the "Unicorns"—"hot startups valued at $1 billion or more" such as Uber and Airbnb—"attack" more established firms like Google and Apple seeking the knowledge, skill, and ideas of their employees.[32] As Jeff Bezos, CEO of Amazon, put it, there is a "highly competitive tech hiring market," and employees from established companies like Amazon "are recruited every day by other world-class companies."[33] And start-ups raid each other for employees and their cognitive property, ideas, and knowledge.[34]

It is not just Silicon Valley firms. Even faculty at academic institutions, like Duke University and the University of North Carolina, benefit

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[30] Comment, *Assignability of Employees' Covenants Not to Compete*, 19 U. CHI. L. REV. 97, 102 (1951).

[31] *See* Howard C. Ellis, *Employment-at-Will and Contract Principles: The Paradigm of Pennsylvania*, 96 DICK. L. REV. 595, 600 n.23 (1992).

[32] Mike Isaac, *Unicorns Hunt for Talent Among Silicon Valley's Giants*, N.Y. TIMES (Aug. 18, 2015), http://nyti.ms/1NDgt4u.

[33] *Id.* And poaching shifts quickly as fortunes ebb and flow. Yelp and Twitter, for example, are now poaching *from* newer firms like Airbnb. *Id.*; *see also* Kathleen Chaykowski & Ryan Mac, *Snapchat Sneakily Uses Its Own App to Poach Uber, Airbnb Engineers*, FORBES (Apr. 15, 2015).

[34] *Id.*; *see* Kali Hays, *GeneDx Says Rival Startup Poaches Staff for Trade Secrets*, LAW360 (Sept. 17, 2015), http://www.law360.com/articles/703870/genedx-says-rival-startup-poaches-staff-for-trade-secrets; *see also* Adrianne Jeffries, *Poaching Etiquette: As Talent Tightens, New York Startups Try to Stay Civil*, OBSERVER (Nov. 17, 2011), http://observer.com/2011/11/poaching-etiquette-as-talent-tightens-new-york-startups-try-to-stay-civil/.

from competition by universities in the labor markets for academics.[35] Such is the American way.

But firms can face lawsuits over both poaching and non-poaching—a kind of "damned if you do, damned if you don't" Catch 22. On the one hand, firms can face allegations of improper poaching, poaching via a tortious interference with contracts, including non-compete and non-disclosure agreements, or via recruiting for an improper motive such as access to another firm's secrets.[36] In a notorious dispute in Portland, Oregon, Nike sued three former employees alleged to have violated their duty of loyalty and employment contracts by taking confidential information, including product and marketing plans, to a new consulting firm working for Adidas.[37] Although the case was settled, it illustrates the often symbiotic relationship between the interests of departing employees and competitor employers, and the potential for much dispute about what legitimately belongs to employer 1, and what ideas, knowledge, and skills can fairly be carried by an aspiring employee to a new job with employer 2. To make a clear delineation of interests more difficult, today's poached employer may be tomorrow's poaching employer. Once again, we see that employers have interests on both sides of these disputes—interests in safeguarding their investments and secrets, but also interests in tapping the talent, skill, knowledge, and ideas of employees currently working for other employers.

There are many other examples of poaching disputes. Tyco brought a lawsuit against its rival, Conbraco Industries, for allegedly using the trade secrets former Tyco employees brought to Conbraco, and also alleged tortious interference with the contracts of the former Tyco employees.[38] Sysdyne Corporation, which provides staff augmentation services, sued its competitor Xigent Solutions LLC for allegedly inducing Sysdyne's employee to breach an NCA and to come work for Xigent.[39] Human-fitness-tracking firm Jawbone sued former employees and their

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[35] Stephen P. Murphy & Daryl Lapp, *Duke, UNC and Nonpoaching Agreements—What Not to Do*, LAW360 (June 24, 2015), http://www.law360.com/articles/670750/duke-unc-and-nonpoaching-agreements-what-not-to-do.

[36] *E.g.*, Y. Peter Kang, *Apple Says A123's Poaching Suit Based on Speculation*, LAW360 (Mar. 10, 2015), http://www.law360.com/articles/630043/apple-says-a123-s-poaching-suit-based-on-speculation.

[37] *See* Allan Brettman, *Nike Breach of Contract Lawsuit Against 3 Former Designers Dismissed*, OREGONLIVE (June 5, 2015), http://oregonlive.com/playbooks-profits/index.ssf/2015/06/nike_breach_of_contract_lawsui.html.

[38] Complaint, Tyco Fire Prods., L.P. v. Conbraco Indus., Inc., No. 5:15-cv-00359 (E.D. Pa. filed Jan. 23, 2015); Tony Burchyns, *Tyco Sues Fire Safety Rival for Stealing Employees, Secrets*, LAW360 (Jan. 26, 2015), http://www.law360.com/articles/614932/tyco-sues-fire-safety-rival-for-stealing-employees-secrets.

[39] Sysdyne Corp. v. Rousslang, 860 N.W.2d 347, 349 (Minn. 2015).

new employer, Fitbit Inc., forcing a return of trade secrets to Jawbone.[40] Dow sued its former employee for allegedly carrying trade secrets to his consulting business where he did work for a Dow competitor.[41] In the auto parts industry, National Auto claimed three former managers and a top salesperson were lured to take trade secrets to rival firm Automart Nationwide.[42] In the food industry, U.S. Foods claimed rival Performance Food Group poached two top salespersons who carried confidential information to Performance, allowing them to lure away customers of U.S. Foods.[43] A fight between Booz Allen Hamilton and Deloitte Consulting involved Booz Allen's claim that Deloitte induced three former employees to defect with confidential information about other employees and Booz Allen customers and contracts.[44]

On the other hand, firms cannot safely agree simply not to hire each other's employees.[45] *Anti-poaching agreements* between firms competing in labor markets have commanded much recent media and judicial attention. But not only might such agreements actually be detrimental to a firm's efforts to improve its workforce and meet new challenges by tapping the labor available in a free market, anti-poaching or *no raid* agreements suffer presumptive condemnation in our law as an anti-competitive restraint of trade in the labor markets.[46] In the most covered story, Steve Jobs at Apple allegedly agreed with Google's CEO Eric Schmidt to refrain

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[40] Complaint, Aliphcom, Inc. v. Fitbit, Inc., No. CGC 15-546004 (Cal. Super. Ct. filed May 27, 2015); Beth Winegarner, *Fitbit Workers Must Hand Over Alleged Jawbone Trade Secrets*, LAW360 (Oct. 13, 2015), http://www.law360.com/articles/713662/fitbit-workers-must-hand-over-alleged-jawbone-trade-secrets.

[41] Complaint, Dow Chem. Co. v. Nene, No. 151000545 (Pa. Ct. Com. Pl. filed Oct. 8, 2015); Bonnie Eslinger, *Dow Chemical Sues Ex-Employee for Stealing Trade Secrets*, LAW360 (Oct. 9, 2015), http://www.law360.com/articles/712892/dow-chemical-sues-ex-employee-for-stealing-trade-secrets.

[42] Nat'l Auto Parts, Inc. v. Automart Nationwide, Inc., No. 14-c-8160, 2015 WL 5693594 (Sept. 24, 2015); Dani Meyer, *Ex-Auto Parts Supply Workers Must Face Trade Secrets Row*, LAW360 (Sept. 28, 2015), http://www.law360.com/articles/707919/ex-auto-parts-supply-workers-must-face-trade-secrets-row.

[43] Complaint, US Foods, Inc. v. Performance Food Group Co., No. 1:15-cv-08672 (N.D. Ill. filed Oct. 1, 2015); Vin Gurrieri, *US Foods Says Sales Aces Took Confidential Info to Rival*, LAW360 (Oct. 2, 2015), http://www.law360.com/articles/710641/us-foods-says-sales-aces-took-confidential-info-to-rival.

[44] Complaint, Booz Allen Hamilton Inc. v. Harr, No. 3:13-cv-01460 (D.N.J. filed Mar. 8, 2013); Jacob Fischler, *Booz Allen, Deloitte Settle Poaching Suit*, LAW360 (Sept. 25, 2015), http://www.law360.com/articles/707240/booz-allen-deloitte-settle-poaching-suit.

[45] Sherman Act, 15 U.S.C. §§ 1–7 (2012).

[46] *See, e.g.*, Press Release, Dep't of Justice, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010), http://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee.

from recruiting or hiring Google employees, and vice versa.[47] The allegations seemed to be supported by certain emails from executives at Apple and Google.[48] Allegedly, these anti-competitive practices spread to other firms doing business with Apple and Google, such as Intel.[49] Not surprisingly, these anti-poaching pacts came under attack in antitrust suits. The leading Google/Apple case[50] recently settled for $415 million, after a federal district court judge refused to accept a proposed $324.5 million settlement as inadequate to protect the interests of the affected employees.[51] Google shareholders have sued Google's Board of Directors over these arrangements,[52] and at Apple, executives found it necessary to declare they had no knowledge of the alleged deals.[53] So, the stakes are high.

The alleged Google/Apple deal not to compete in certain labor markets, and spin-offs from that deal, triggered more allegations of such pacts involving firms like Microsoft and Oracle.[54] Ask.com faced a similar claim.[55] Dreamworks also faces antitrust claims in its labor market.[56] Aca-

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[47] David Streitfeld, *Engineers Allege Hiring Collusion in Silicon Valley*, N.Y. TIMES (Feb. 28, 2014), http://www.nytimes.com/2014/03/01/technology/engineers-allege-hiring-collusion-in-silicon-valley.html.

[48] *Id.*

[49] *Id.*

[50] There were other defendants, but at least according to press reports, Apple and Google took the lead role in negotiations with the plaintiffs. Brian Fung, *What the Apple Wage Collusion Case Says About Silicon Valley's Labor Economy*, WASH. POST (Apr. 23, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/04/23/what-the-apple-wage-collusion-case-says-about-silicon-valleys-labor-economy/.

[51] Melissa Lipman, *Judge Koh OKs $415M Google, Apple Anti-Poaching Deal*, LAW360 (Sept. 3, 2015), http://www.law360.com/articles/677683/judge-koh-oks-415m-google-apple-anti-poaching-deal.

[52] Y. Peter Kang, *Google Shareholders Sue Board Over Anti-Poaching Deals*, LAW360 (Mar. 23, 2015), http://www.law360.com/articles/634880/google-shareholders-sue-board-over-anti-poaching-deals.

[53] Michael Lipkin, *Apple Execs Deny Knowledge of Jobs' Anti-Poaching Deals*, LAW360 (Apr. 20, 2015), http://www.law360.com/articles/645374/apple-execs-deny-knowledge-of-jobs-anti-poaching-deals.

[54] Joel Rosenblatt, *Apple-Google No-Poaching Evidence Triggers More Lawsuits*, BLOOMBERG BUSINESS (Nov. 19, 2015), http://www.bloomberg.com/news/articles/2014-11-19/apple-google-no-poaching-evidence-triggers-more-lawsuits.

[55] Complaint, Arriaga v. IAC/InterActiveCorp., No. 5:14-cv-04656 (N.D. Cal. filed Oct. 17, 2014); Kurt Orzeck, *Ask.com Slapped with Anti-Poach Suit over Deal with Google*, LAW360 (Oct. 20, 2014), http://www.law360.com/articles/588332/ask-com-slapped-with-anti-poach-suit-over-deal-with-google.

[56] Nitsch v. Dreamworks Animation SKG, Inc., 100 F. Supp. 3d 851 (N.D. Cal. 2015); Brandon Lowrey, *Dreamworks to Face Some No-Hire Pact Claims in Arbitration*, LAW360 (Apr. 27, 2015), http://www.law360.com/articles/648051/dreamworks-to-face-some-no-hire-pact-claims-in-arbitration.

demia joined this trend when professors at Duke brought antitrust claims against Duke and North Carolina universities.[57]

Let us summarize. In every instance of poaching—or less pejoratively, the operation of free labor markets—employers stand on both sides of any dispute. They are both the poached and the poachers. While employees' interests in these competitive labor markets may enjoy protections under the Sherman Act—as the Google/Apple case shows—a deeper reason for skepticism about anti-poaching pacts arises from the negative impact such agreements might have on the agreeing firms' own capacities to compete by optimal organization of capital, management, and labor. Protecting one's investments in existing employees—by entering into an anti-poaching agreement with competitors in the labor markets—exposes firms to the risk that they will be in a less competitive position: such firms narrow the available markets for talent to the employees of non-competing employers, the firms' own "in house" existing employees, and employees newly entering the labor pool. Further, a firm making such an agreement denies itself the benefits of cross-fertilization and "new mixing" innovation. Thus, lawyers have a role in helping clients to understand the larger business implications of such arrangements.

These observations about anti-poaching agreements—and the obvious interests of employers on both sides of poaching transactions—apply as well to the other devices for controlling cognitive property: trade secrets and NCAs. At first blush an attorney might agree with an HR Executive or management attorney's "protect my client" instinct to attempt maximum protection for firm loyalty and secrets via trade secrets law and contractual restrictions on employee liberty during and after employment. However, the deeper interests of that employer might be in a robust labor market with *less* protection of ideas, knowledge, and skills accumulated by employees, but with a more talented, knowledgeable, and creative labor pool in its own hiring and employment decisions. So an employer may want to restrict an employee's liberty and protect information via an NCA, but upon further reflection, realize that it also is a buyer in the labor markets. In due course, that employer might, and likely will, be seeking to hire an employee of another employer restricted by an NCA. So just as employers and firms are both poachers and the poached, in trade-secret and restrictive-agreement disputes, employers and firms similarly will find themselves on both sides of the questions presented. Thus, one wonders whether it makes any sense for firms to pay lawyers to advocate for conflicting legal positions depending on the circumstances; whether they are trying to hire, or retain, talent and

[57] Complaint, Seaman v. Duke Univ., No. 1:15-cv-00462 (M.D.N.C. filed Jun. 9, 2015); Kurt Orzeck, *Duke Professor's Suit Alleges Hiring Conspiracy with UNC*, LAW360 (June 9, 2015), http://www.law360.com/articles/665845/duke-professor-s-suit-alleges-hiring-conspiracy-with-unc; *see also* Murphy & Lapp, *supra* note 35.

knowledge? Today's favorable ruling or precedent when an employer seeks to retain or restrain its employees from taking their talents elsewhere may be tomorrow's adverse precedent when the position of the employer changes to buyer in the labor markets. And this juxtaposition of interests will occur again and again and again.

III. TRADE SECRETS

If poaching or competition in the labor markets is the American way, protected by antitrust laws, nothing justifies recruitment of employees to learn the secrets of the employees' former employers. Trade secrets law in many states reaches far beyond the Coca-Cola formula,[58] and covers a wide variety of information, product-planning data, and strategic planning.

And it is often, perhaps most often, the poached employee who carries those secrets from a former employer to a new employer. For example, Tyco claimed its competitor in the fire-safety business poached Tyco's employees to lure customers by learning their trade secrets.[59] Competing in the labor markets for an improper purpose, such as learning the secrets of another company, or improper means, such as inducing a breach of a valid non-competition or non-disclosure agreement, loses the protection of our laws.[60]

Allegations of improper poaching to gain secrets ensnarls more than the tech sector. For example, Juice LLC alleged its former chief operating officer worked with its competitor, Indie Fresh, to steal four managers crucial to Juice LLC's business.[61] Walgreens alleged that Pharmacy Solutions poached managers knowledgeable about a recently acquired home infusion-therapy business.[62] In another context, lawyers sued a former associate for stealing client lists and other proprietary information when starting a rival business.[63] A medical company's ex-IP attor-

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[58] *See* Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co., 107 F.R.D. 288 (D. Del. 1985).

[59] *See* Burchyns, *supra* note 38.

[60] *See* 28 U.S.C. § 1338 (2012) (unfair competition cause of action).

[61] Complaint, Juice Press, LLC v. Chowdhury, No. 161455/2014 (N.Y. Sup. Ct. filed Nov. 18, 2014); Michael Lipkin, *Juice Co. Sues Ex-COO for Poaching Workers for Startup*, LAW360 (Nov. 19, 2014), http://www.law360.com/articles/597485/juice-co-sues-ex-coo-for-poaching-workers-for-startup.

[62] Complaint, Walgreen Co. v. Bonnema, No. 1:14-cv-00300 (D. Idaho filed July 21, 2014); Jonathan Randles, *Walgreens Settles with Rival Over Poached Employees*, LAW360 (Nov. 19, 2014), http://www.law360.com/articles/597804/walgreen-settles-with-rival-over-poached-employees.

[63] Petition for Plaintiff, Daspit Law Firm, PLLC v. Wagoner, No. 2015-31736 (Tex. Dist. Ct. filed June 3, 2013); Paul DeBenedetto, *Houston Firm Sues Ex-Associate for Trying to Poach Clients*, LAW360 (June 4, 2015), http://www.law360.com/articles/663924/houston-firm-sues-ex-associate-for-trying-to-poach-clients.

ney faced trade secrets allegations for taking confidential documents in a purported bid to reveal embezzlement.[64] Adam Levine, the former deputy press secretary to President George W. Bush, was alleged to have stolen confidential information from his employer, TPG Capital, in a scheme to extort millions from TPG in exchange for not going public with the information.[65] Citibank sued a former vice president for allegedly using its confidential information to solicit clients when he jumped ship to work for Bank of America.[66] AIG accused the former chief operating officer of a subsidiary aircraft-leasing company of taking trade secrets to a rival.[67] Mayo Clinic settled a trade secrets case against a former executive who went to work for competitor Quest Diagnostics.[68] In the energy sector, Chesapeake sued its former CEO's rival firm for allegedly taking its trade secrets.[69] CVS Pharmacy accused the senior director of specialty clinical services of taking confidential information on his way out the door to work for a rival.[70] All of these disputes became public just in the last year. There were many more.

Adding to the "to poach or not to poach" dilemma for firms, trade secrets law varies between states (though most follow some version of the Uniform Trade Secrets Act),[71] and the definition of trade secrets often

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[64] Complaint, West Hills Research & Dev., Inc. v. Wyles, No. BC516417 (Cal. Super. Ct. filed July 26, 2013); Daniel Langhorne, *Medical Co.'s Ex-IP Atty Can't Dodge Trade Secrets Row*, LAW360 (July 20, 2015), http://www.law360.com/articles/681146/medical-co-s-ex-ip-atty-can-t-dodge-trade-secret-row.

[65] Complaint, TPG Global, LLC v. Levine, No. 4:15-cv-00059 (N.D. Tex. filed Jan. 26, 2015); Kaitlyn Kiernan, *TPG Accuses Ex-Spokesman of Stealing Info, Extortion*, LAW360 (Jan. 29, 2015), http://www.law360.com/articles/616174/tpg-accuses-ex-spokesman-of-stealing-info-extortion.

[66] Petition for Plaintiff, Citibank, N.A. v. Mourra, No. 651215/2015 (N.Y. Sup. Ct. filed Apr. 13, 2015); Michael Lipkin, *Citibank Says Ex-VP Ran Off with Trade Secrets*, LAW360 (Apr. 13, 2015), http://www.law360.com/articles/642643/citibank-says-ex-vp-ran-off-with-trade-secrets.

[67] Petition for Plaintiff, Am. Int'l Grp., Inc. v. Superior Court, No. B258943, 2014 WL 7463887 (Cal. Ct. App. Dec. 23, 2014); Brandon Lowrey, *AIG Says Exec's Work Emails with Atty Aren't Privileged*, LAW360 (Mar. 17, 2015), http://www.law360.com/articles/632700/aig-says-exec-s-work-emails-with-atty-aren-t-privileged.

[68] Complaint, Mayo Collab. Servs., LLC v. Cockerill, No. 55-CV-14-6861 (Minn. Dist. Ct. Oct. 14, 2014); Jessica Corso, *Mayo Settles Trade Secrets Suit with Former Exec*, LAW360 (Dec. 18, 2014), http://www.law360.com/articles/606040/mayo-settles-trade-secrets-suit-with-former-exec.

[69] Petition for Plaintiff, Chesapeake Energy Corp. v. Am. Energy Partners., LP, No. CJ-2015-933 (Okla. Dist. Ct. filed Feb. 17, 2015); Bill Donahue, *Chesapeake Hits Ex-CEO's New Firm with Trade Secrets Suit*, LAW360 (Feb. 17, 2015), http://www.law360.com/articles/622096/chesapeake-hits-ex-ceo-s-new-firm-with-trade-secrets-suit.

[70] Complaint, CVS Pharmacy, Inc. v. Kridner, No. 8:15-cv-00144 (C.D. Cal. filed Jan. 30, 2015); Kat Greene, *CVS Accuses Former Director of Stealing Trade Secrets*, LAW360 (Jan. 30, 2015), http://www.law360.com/articles/617109/cvs-accuses-former-director-of-stealing-trade-secrets.

[71] UNIF. TRADE SECRETS ACT § 1, 14 U.L.A. 564 (1985).

leads to uncertainty about what is and is not a trade secret. Even if the information or knowledge is not a trade secret, other information may be protected by confidentiality and non-disclosure agreements sweeping beyond the scope of trade secrets law. Yet, it seems obvious that one of the attractive things about hiring employees from other firms is the knowledge, skill, awareness, and ideas they gained as a result of their former employment. Doctrines like *inevitable disclosure* make the journey to a new employer perilous for the employee and new employer alike,[72] and result in restrictions on post-employment competition even where there is no NCA.

Moreover, with the expansion of criminal filings under the federal Economic Espionage Act (EEA),[73] criminal prosecution can result from stepping across the often vague lines separating trade secrets from other knowledge and skills. Professors Rochelle Dreyfuss's and Orly Lobel's article demonstrates, without question, serious problems in the language and application of the EEA.[74] Given the vague definitions in the statute, which tracks trade secrets law generally, the federal criminalization of trade secrets raises the ante in a way inconsistent with a careful balancing of the interests of the employee, the competing employer seeking the employee's talents, and society seeking to facilitate cross-fertilization and exchange of ideas and knowledge in today's information and knowledge-based economy.

In July 2015, criminal convictions against Goldman Sachs' programmer Sergei Aleynikov were thrown out, first in a Second Circuit ruling under the federal criminal statute,[75] and then state criminal law charges were tossed by a New York lower court.[76] This case seems a far cry from the type of *economic espionage* the statute's name brings first to the mind's eye. For example, a former Pratt and Whitney engineer was charged with copying national defense relevant data and attempting to take those documents to China.[77]

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[72] The inevitable disclosure doctrine allows a court to find that a certain type of employment is so certain to lead to disclosure of trade secrets as to amount to a kind of constructive disclosure, even in the absence of active disclosure. PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1269 (7th Cir. 1995).

[73] Economic Espionage Act of 1996, 18 U.S.C. §§ 1831–1839 (2012).

[74] Dreyfuss & Lobel, *supra* note 5, at 427–34.

[75] United States v. Aleynikov, 676 F.3d 71, 82 (2d Cir. 2012).

[76] People v. Aleynikov, 15 N.Y.S.3d 587 (Sup. Ct. 2015); Daniel Siegal, *NY to Appeal Reversal of Ex-Goldman Coder's Guilty Verdict*, LAW360 (July 27, 2015), http://www.law360.com/articles/684011/ny-to-appeal-reversal-of-ex-goldman-coder-s-guilty-verdict; *see also* Lobel, *supra* note 2, at 804–09.

[77] Criminal Complaint, United States v. Long Yu, No. 3:14-mj-00271 (D. Conn. filed Nov. 7, 2014); Daniel Wilson, *Ex-Pratt & Whitney Engineer Accused of Defense Data Theft*, LAW360 (Dec. 9, 2014), http://www.law360.com/articles/603137/ex-pratt-whitney-engineer-accused-of-defense-data-theft.

Meanwhile, a move to federalize all trade secrets law percolates through Congress.[78] While a uniform definition might create efficiencies for many metropolitan, regional, national, and global firms, the lack of consensus as to whether trade secrets should be broadly or narrowly defined, makes the resulting loss of state-level flexibility and experimentation significant.

The trade secrets law presents society with a social choice not unlike that presented in the context of poaching and anti-poaching agreements. A broader definition or application places a greater restriction on the employee's ability to carry knowledge and skills to another enterprise. It decreases the employee's worth in the external labor market outside of the firm, lowers the value and knowledge the new employer gains, and impedes society's interest in the fluidity of knowledge and ideas. A narrower definition of trade secrets enhances the position of the employee in those same markets, maximizes the value that employee brings to the new employer, and promotes the social interest in innovation and wealth creation through new exchanges and arrangements. Whatever the scope of legal protection of trade secrets, the ability to expand the categories of cognitive property protected from disclosure via confidentiality agreements represents another policy choice with negative impacts. Such negative impacts include the employee's leverage in the external labor markets; the skills, knowledge, and ideas gained by the employee's new employer; and the social interest in cross-fertilization and innovation.

IV. DUTY OF LOYALTY

Less controversy surrounds the duty of loyalty (a.k.a. fiduciary duty) than trade secrets law or poaching issues. Students sometimes seem surprised to learn that an employee: (1) may not compete with an employer while still employed; (2) may not solicit other employees and customers for another business while still employed; (3) may not use the property, equipment, and time of their present employer in pursuit or planning for a job with another employer or competing business; and (4) may not (in some states) exploit a corporate opportunity that came to their attention while working for an employer.[79] Surely these restrictions, during employment, constitute legitimate employer interests that the law may properly protect.

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[78] Erin Coe, *Lawmakers Take Another Stab at Federal Trade Secrets Law*, LAW360 (July 30, 2015), http://www.law360.com/articles/685131/lawmakers-take-another-stab-at-federal-trade-secrets-law. Under the proposed bill, companies would be able to bring an action in federal court alleging trade secret misappropriation.

[79] *See generally* Robert A. Kutcher, *Breach of Fiduciary Duties*, AM. BAR ASS'N, http://apps.americanbar.org/abastore/products/books/abstracts/5310344_chap1_abs.pdf.

Yet it seems likely that employees routinely violate these duties, either out of ignorance or perceived self-interest. Again, take the dispute between Nike and Adidas noted above[80] in which Nike sued three former designer/managers for allegedly "stealing" plans and strategies and taking them to Adidas through the smokescreen of a consulting firm.[81] The three employees allegedly used Nike's time and resources to plan and hide their plans to leave, even as they were intimately involved in Nike's strategic development plans, unreleased product design materials, and financial performance information.[82] Though the matter was settled on undisclosed terms, what at first looked like a "coup" by Adidas against its arch-rival, soon became a headache for both sides in the form of litigation—never a first choice in a human-resources policy.

V. NON-COMPETITION AND SIMILAR AGREEMENTS

Add to this mix the considerable controversy[83] surrounding contractual restrictions during and post-employment: these include NCAs, *garden leave* agreements,[84] non-disclosure and confidentiality agreements, non-solicitation and non-dealing agreements,[85] bonus-forfeiture agreements,[86] and other devices which attempt to restrict an employee's liberty to use their knowledge, skill, ideas, and innovations both in their present employment, and in their next job or in their own start-up. Employers invest and confide in their employees, entrusting them with information not meant to leave the company. They deserve reasonable protections for le-

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[80] *See* Brettman, *supra* note 37.

[81] Allan Brettman, *Ex-Nike Designers, Destined for Adidas, Stole 'Treasure Trove of Nike Product Designs,' Lawsuit Contends*, OregonLive (Dec. 10, 2014), http://www.oregonlive.com/playbooks-profits/index.ssf/2014/12/ex-nike_designers_sued_by_adid.html.

[82] Jacob Palmer, *Designers Sued by Nike Fire Back*, Or. Bus. (Mar. 18, 2015), http://www.oregonbusiness.com/must-reads/14799-designers-sued-by-nike-fire-back-says-company-has-stifling-bureaucratic-overlay.

[83] *See, e.g.*, Angie Davis, Eric D. Reicin & Marisa Warren, *Developing Trends in Non-Compete Agreements and Other Restrictive Covenants*, 30 A.B.A. J. Lab. & Emp. L. 255 (2015).

[84] Garden leave softens a non-competition provision on the employee by continuing pay, or partial pay, during the period the employee is restricted from competition. Lembrich, *supra* note 29, at 2292.

[85] A hot issue regarding non-solicitation agreements is the effect of social media on enforceability. Do postings on Facebook, Twitter, or even a professional site like LinkedIn violate non-solicitation agreements? Larry Del Rossi, *Is Social Media Eroding Nonsolicitation Agreements?*, Law360 (July 20, 2015), http://www.law360.com/articles/681026/is-social-media-eroding-nonsolicitation-agreements.

[86] Chris Deubert & Glenn M. Wong, *Understanding the Evolution of Signing Bonuses and Guaranteed Money in the National Football League: Preparing for the 2011 Collective Bargaining Negotiations*, 16 UCLA Ent. L. Rev. 179, 183 (2009) (highlighting the controversy of bonus forfeitures in the NFL).

gitimate interests, for limited times and in limited geographical areas, so long as they have given consideration for the employees' promises.

Yet, as several papers in this Forum ask, what is the social effect of such agreements? Do they foster innovation and idea sharing within companies competing in the global marketplace, or do they hinder the liberty and exchange across companies that enable new concepts and new breakthroughs?

California, with its statute making NCAs unenforceable, has adopted the latter view and embraced a legal regime that recognizes the needed mobility of employees across company boundaries.[87] North Dakota follows the California rule.[88] Other states, such as Washington[89] and Massachusetts,[90] considered legislation to adopt the California approach.

But most states allow the agreements with certain safeguards (amounting largely to a rule of reason) under state common law[91] or statutes in some cases, such as Oregon.[92] There may be a trend to ban the

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[87] In *Golden v. California Emergency Physicians Medical Group*, the Ninth Circuit interpreted section 16600 of the California Business Professional Code, which voids contracts that restrain persons from "engaging in a lawful profession," to apply beyond NCAs to reach other agreements, such as a discrimination settlement agreement. 782 F.3d 1083, 1093 (9th Cir. 2015). Judge Kozinski dissented from Judge O'Scannlain's opinion for the majority. *Id.* at 1093–94; s*ee* Michael Lipkin, *More Than Just Noncompete Deals Barred in Calif.: 9th Circ.*, LAW360 (Apr. 8, 2015), http://www.law360.com/articles/640903/more-than-just-noncompete-deals-barred-in-calif-9th-circ.

[88] Viva R. Moffat, *Making Non-Competes Unenforceable*, 54 ARIZ. L. REV. 939, 946 (2012).

[89] Todd Bishop, *Cracking Down on Non-Compete Deals: Bill Would Change Wash. State Law to Mirror Calif. Approach*, GEEKWIRE (Feb. 9, 2015), http://www.geekwire.com/2015/cracking-non-compete-deals-bill-change-washington-state-employment-law-mirror-californias-approach/.

[90] Callum Borchers & Michael B. Farrell, *Patrick Looks to Eliminate Tech Noncompete Agreements*, BOS. GLOBE (Apr. 10, 2014), https://www.bostonglobe.com/business/2014/04/09/gov-patrick-pushes-ban-noncompete-agreements-employment-contracts/kgOq3rkbtQkhYooVIicfOO/story.html.

[91] *E.g.*, McInnis v. OAG Motorcycle Ventures, Inc., 35 N.E.3d 1076, 1085 (Ill. App. Ct. 2015) (upholding and applying rule requiring two years continued employment after signing of NCA to support adequate consideration); Prairie Rheumatology Assocs. v. Francis, 24 N.E.3d 58, 62 (Ill. App. Ct. 2014) (holding that consideration is required for restrictive covenant); *see also* Charles T. Creech, Inc. v. Brown, 433 S.W.3d 345, 353 (Ky. 2014) (holding that continued employment was not sufficient consideration for three-year restriction where employees did not get promotion, wage increase, or special training); Socko v. Mid-Atl. Sys. of CPA, Inc., 126 A.3d 1266, 1268 (Pa. 2014) (allowing an employee to challenge an NCA based on lack of consideration); Runzheimer Int'l, Ltd. v. Friedlen, 862 N.W.2d 879, 892 (Wis. 2015) (upholding continued employment as sufficient consideration to support an NCA).

[92] *See, e.g.*, OR. REV. STAT. § 653.295 (2013). The Oregon statute, enacted in response to policy arguments that unregulated NCAs were unfair to employees and

use of these agreements with lower ranking and earning employees; disputes over the use of such agreements to restrict employee labor-market mobility in "lower end" employment, for example, have included Jimmy John's employees and Starbucks baristas.[93] A few states, such as Georgia and Wisconsin, have considered or passed legislation loosening the controls on NCAs.[94]

Whatever the restrictions under state law for NCAs and similar agreements, they have been increasingly in the news and the subject of criticism. Thus, in June 2015, the President of the National Employment Lawyers Association declared that NCAs are "running wild."[95] For example, in Illinois, Jimmy John's workers sued to void NCAs restricting their ability to work for food employers within three miles of a Jimmy John's outlet.[96] The New York Court of Appeals refused to apply a Florida choice of law provision on the grounds that Florida law was inconsistent with New York public policy.[97] That case involved an employee given, among other things, a non-solicitation agreement on her first day of employment that restricted her for two years from soliciting or servicing a cus-

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detrimentally affected innovation, requires, inter alia: two weeks notice of an NCA to newly hired employees or a bona fide promotion for other employees; limiting the agreements to classes of employees exempt from Oregon's wage and hour laws; limiting NCAs to a maximum of 18 months under a 2015 amendment; and limiting NCAs to employees with annual gross salaries that "exceeds the median family income for a four-person family, as determined by the United States Census Bureau." *Id.* § 653.295(d). However, the Oregon statute specifically exempts trade secret enforcement, non-solicitation and non-dealing agreements respecting fellow employees and customers, bonus restriction agreements, and garden leave agreements in which the employee continues to receive pay during the period of restriction equal to 50% of the employee's prior salary, or 50% of median family income—all without these statutory requirements. The statute also explicitly broadens the allowable scope of Oregon NCAs to include as a protectable interest not only trade secrets but also "competitively sensitive confidential business or professional information." *Id.* § 653.295(c)(B).

[93] Ben Rooney, *Jimmy John's Under Fire for Worker Contracts*, CNN MONEY (Oct. 22, 2014), http://money.cnn.com/2014/10/22/news/jimmy-johns-non-compete/.

[94] *See* GA. CODE ANN. § 13-8-54 (LexisNexis 2013); WIS. STAT. ANN. § 103.465 (West 2015).

[95] Aaron Vehling, *Noncompete, Arbitration Deals Running Wild, NELA Head Says*, LAW360 (June 18, 2015), http://www.law360.com/articles/667815/noncompete-arbitration-deals-running-wild-nela-head-says.

[96] *Id.* This story also discusses the now infamous agreements Jimmy John's imposed on workers restricting their ability to work within three miles of a Jimmy John's location that makes more than 10% of its revenue from selling sandwiches. In *Brunner v. Liautaud*, an Illinois federal district court refused to declare the agreements unenforceable on the grounds Jimmy John's did not enforce them. No. 14-c-5509, 2015 WL 1598106, at *10 (N.D. Ill. Apr. 8, 2015); Matthew Bultman, *Jimmy John's Noncompete Pact Survives Worker Challenge*, LAW360 (Apr. 8, 2015), http://www.law360.com/articles/640901/jimmy-john-s-noncompete-pact-survives-worker-challenge.

[97] Brown & Brown, Inc. v. Johnson, 34 N.E.3d 357, 367 (N.Y. 2015).

tomer of the employer post-employment.[98] Even the Securities and Exchange Commission brought an enforcement action under whistleblower rules and statutes against technology/engineering firm KBR Inc. for requiring employees to sign confidentiality agreements that warned employees they could be fired if they discussed internal investigations with outside parties without first getting approval from KBR's lawyers.[99]

VI. SUMMARY

How do the pieces of this puzzle fit together? Free external labor markets may stimulate innovation via exchange of ideas, knowledge, and skills. Yet free markets require competition, and that may involve hiring the employees of other employers. Employer 1 or employer 2 may claim that the other acted for improper motives, such as a desire to gain the use of trade secrets or other confidential information protected by agreement. The employers may also claim that the other acted with improper means, such as using employees who are breaching their duty of loyalty to solicit employees or customers of rivals, or employer 1 interfering with the employee's new contract with employer 2. Rather than rapturous acclaim for following the American free market system, employers hiring employees of others may face tortious interference and trade secret claims. Yet agreements *not* to hire the employees of other employers face antitrust challenges that are substantial. What's an employer to do?

And consider the plight of the employee who may feel bound by an NCA or similar agreement, or by a confidentiality agreement, *not* to use the ideas, skills, knowledge, and creative and innovative potential they have acquired. This may be bad not only for the employee, but for employers collectively, and for the larger economy.

Most importantly, perhaps, how can we have a society where people and businesses are free to "be all that they can be," when the flow of information and cross-fertilization inherent in changing employers is so often restricted by the vague application of trade secrets and tort law, and the existence of NCAs and similar contractual restrictions applying post-employment? What approach will most foster innovation and cutting-edge technology and business models—the California "wild west" approach of fostering employee movement between employers,[100] and business-culture variations like Washington State's, where NCAs are enforce-

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[98] *Id.*

[99] KBR, Inc., Exchange Act Release No. 74619, 2015 WL 1456619 (Apr. 1, 2015); Stephanie Russell-Kraft, *SEC Brings 1st Whistleblower Action over Confidentiality Pact*, LAW360 (Apr. 1, 2015), http://www.law360.com/articles/638252/sec-brings-1st-whistleblower-action-over-confidentiality-pact.

[100] Of course, even in California, an employee leaving employer 1 for employer 2 may not legally carry and use trade secrets, perhaps too often the point of, or at least an advantage of, the hiring.

able but rarely enforced, or the reasonableness approach followed in most states?[101] And what is the empirical data on how businesses and employees more broadly function under non-compete agreements in the real world, the empirical data needed to inform a policy discussion in courts and legislatures?[102] Finally, are contracts the answer to the myriad problems presented, or do they inevitably involve litigation risk in a variety of emerging workplace models?[103] Which approaches, in NCAs and trade secret law, are broad enough to protect the legitimate interests of existing employers, yet narrow enough to protect human liberty and the capacity for cross-fertilization and innovation for future employers? While the Lewis & Clark Forum did not provide definitive answers to these questions, it did mark an effort to raise awareness of the issues facing legislators and courts in defining rights to the new cognitive property.

[101] Robert W. Gomulkiewicz, *Leaky Covenants-Not-to-Compete as the Legal Infrastructure for Innovation*, 49 U.C. DAVIS L. REV. 251, 252 (2015). *See generally* Gomulkiewicz, *supra* note 5.

[102] Bishara & Starr, *supra* note 5, at 515–33; *see also* Evan Starr, Norman Bishara & JJ Prescott, *Noncompetes in the U.S. Labor Force*, 4 TULANE L. REV. (forthcoming 2016); 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, 27 (2015).

[103] Bishara & Starr, *supra* note 5, at 507.