

IPSC 2009 Proposal

Viva Moffat
Assistant Professor
University of Denver Sturm College of Law
2255 E. Evans Ave.
Denver, CO 80208
303.871.6508
vmoffat@law.du.edu

The Uniform Noncompetition Agreement Act: A Proposal

In this article, I propose a uniform noncompetition agreement act, similar to the Uniform Commercial Code and the Uniform Trade Secrets Act, for adoption by the states.

A uniform act is, I argue, necessary because of the profound difference between the states in their treatment of noncompetition agreements. Some states refuse to enforce virtually all noncompetition agreements, while others merely require that such agreements be “reasonable.” These state-to-state differences have led to frequent conflicts between the states, forum-shopping, and protracted litigation over choice-of-law issues. These disputes have become more frequent as employers often operate nationally (and internationally) and as employees have become more mobile. In addition, employers have begun more regularly to use choice of law provisions to select for what they perceive to be favorable state law concerning noncompetition agreements. For these reasons, uniformity is desirable.

The uniform act I propose would render noncompetition agreements void and unenforceable, with just a few narrow exceptions. There are a number of reasons that this strong position against the enforceability of noncompetes is preferable. First, this rule protects employees’ interests. There is a substantial body of literature supporting the notion that employees are in a uniquely bad bargaining position vis-à-vis their employers: they have little power (generally), they are subject to behavioral and cognitive constraints that make effective negotiation unlikely, and they are relatively less likely to be aware of the relevant legal and factual information necessary to make informed choices about noncompetition agreements. Second, a strong rule against the enforceability of noncompetition agreements is precompetitive. Third, and related, employers’ interests are not significantly impinged by this rule. There is literature supporting the fact that the use of noncompetition agreements does not protect employers as much as might be perceived and the fact that the absence of noncompetition agreements supports increased innovation and growth.