NOTE

DEPENDENT CONTRACTORS? THE CASE FOR GIVING NON-COMPETES A CENTRAL ROLE IN WORKER-CLASSIFICATION TESTS UNDER FEDERAL LAW

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As legal commentators and policymakers have taken greater notice of the harms that covenants not to compete ("non-competes") cause workers, they have offered numerous policy proposals seeking to curb those harms. Indeed, the Federal Trade Commission proposed an outright ban on non-competes on January 5, 2023. None of these policy proposals have yet become law at the federal level. But what if there was a way to increase the legal protections afforded to workers without a single new piece of positive law?

This Note identifies one such way. Under the federal employment laws, the primary test for determining whether a worker is an "employee," and thereby protected by those laws, is the "right-to-control" test. That test asks whether the purported employer has control over the manner and means by which the purported employee accomplishes their work. Non-competes greatly increase a worker's dependence on their purported employer, which in turn greatly increases the level of control that a purported employer exercises over the worker. Yet courts give insufficient attention to non-competes when applying the right-to-control test, effectively placing some workers who are subject to "employer"-level control outside the reach of federal employment law protections.

This Note makes the case that courts have erred in failing to give significant weight to non-competes when determining whether workers are "employees" under federal law and that a faithful application of the right-to-control test would include non-competes as a central factor. Indeed, this Note argues that courts should apply a presumption that workers beholden to non-competes are employees. Were courts to apply such a

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presumption, the pool of workers who are beholden to non-competes yet unprotected by the federal employment laws would decrease, thus affording greater legal protection to many non-compete-bound workers without a new law or regulation.

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Introduction

This Note examines the intersection of two trending legal subjects: covenants not to compete ("non-competes") and worker classification. Non-compete usage has increased significantly over the last two decades, and that rise has been accompanied by much scholarly attention and numerous reform proposals,[1] including the Federal Trade Commission's January 2023 proposal to outright ban the use of non-competes.[2]

1 *See infra* Part I.

2 Non-compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910) [hereinafter FTC Proposal].

Worker classification refers to the exercise of labeling workers as either employees or independent contractors; the former are protected by numerous federal employment statutes, while the latter are not.[3] Scholars have paid little attention to the overlap between worker classification and non-competes. And courts applying the worker-classification tests under federal law have also failed to accord non-competes the consideration they merit. This Note seeks to bridge that gap in the scholarship and case law and makes the case for putting non-competes front and center in the federal worker-classification tests.

In short, this Note argues that workers who are bound to non-competes should be presumed to be employees. Non-competes cause workers to become significantly dependent on their hiring parties for their economic well-being. That dependence translates into significant control by hiring parties over their workers. And the degree of a hiring party's control over a worker is the central factor for determining whether that worker is an employee under most of the federal employment laws. Thus, a presumption of employee status for non-compete-bound workers is appropriate under the federal employment statutes *as they are currently written*.

This Note proceeds in three Parts. Part I offers background on the proliferation of non-competes and the accompanying explosion of related scholarship. In doing so, it highlights the harms that non-competes cause workers, namely that they make workers dependent on their hiring parties for work.

Part II first presents brief background on the differential treatment of employees and independent contractors under federal law. It then explains the two tests that courts use to classify workers as one or the other—the "right-to-control" test and the "economic realities" test—and under which statutes each applies. Part II also explains an important deficiency in the right-to-control test; namely, that courts applying it fail to account for the fact that greater worker dependence on a hiring party translates into greater control by the hiring party over the worker. It also explains how courts currently treat non-competes under the two tests.

Part III makes the case for giving non-competes a central, presumption-creating role in worker classification under the federal employment laws. It begins by drawing on prominent sociological theory to demonstrate how the worker dependence

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[3] *See infra* Part II.

that non-competes engender translates into hiring-party control. Part III then argues that courts' failures to take sufficient account of the relationship between dependence and control in worker classification is not only mistaken as a matter of logic but also untethered to any Congressional edict or common law foundation. Finally, Part III surveys formulations of the right-to-control test outside of the context of federal employment laws, including those from federal agencies and state courts, showing that those formulations do recognize that worker dependence increases hiring-party control. Part III concludes, however, by arguing that courts applying the right-to-control test under federal law ought to give non-competes even more weight than other adjudicators have and apply a presumption of employee status to non-compete-bound workers.

I
The Effects of Non-competes on Workers

Non-competes are promises by workers not to work for competitors for a set period of time after termination (i.e., after the worker is fired or quits).[4] These agreements have become a regular facet of modern employment contracts.[5] Gone are the days of old where non-competes appeared only in sectors in which workers are privy to trade secrets and other high-value proprietary information. Instead, sandwich makers[6] and package handlers[7] are now told that they cannot work for competing employers, raising serious questions about whether non-competes still serve the goals of protecting information or whether their benefits derive simply from the anticompetitive effects they create.[8]

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4 *See* Alan B. Krueger & Eric A. Posner, The Hamilton Project, A Proposal for Protecting Low-income Workers from Monopsony and Collusion 7 (2018).

5 *See* Evan P. Starr, J.J. Prescott & Norman D. Bishara, *Noncompete Agreements in the US Labor Force*, 64 J.L. & Econ 53, 60 (2021) (finding that 38% of all labor-force participants have agreed to a non-compete at some point); *see also* Steven Greenhouse, *Noncompete Clauses Increasingly Pop Up in Array of Jobs*, N.Y. Times (June 8, 2014), http://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html [https://perma.cc/BF7Q-YHC4].

6 *See* Dave Jamieson, *Jimmy John's Makes Low-wage Workers Sign 'Oppressive' Noncompete Agreements*, Huffington Post (Oct. 13, 2014), http://www.huffingtonpost.com/2014/10/13/jimmy-johns-noncompete_n_5978180.html [https://perma.cc/C67S-BTYX].

7 *See* Spencer Woodman, *Amazon Makes Even Temporary Warehouse Workers Sign 18-Month Non-competes*, Verge (Mar. 26, 2015), http://www.theverge.com/2015/3/26/8280309/amazon-warehouse-jobs-exclusive-noncompete-contracts [https://perma.cc/7ZGS-MS3T].

8 *See* Krueger & Posner, *supra* note 4, at 12.

For that reason, non-competes have been a subject of significant scholarly debate in the twenty-first century,[9] as scholars have attempted to measure the effects of non-competes with an eye toward considering whether and under what circumstances non-competes should be enforceable. This Part surveys the scholarly debate and describes the broad agreement among scholars that non-competes harm worker welfare and have the effect of binding workers to the parties for whom they work. This Part both demonstrates the desirability of increasing legal protections for workers beholden to non-competes and builds the foundation for this Note's argument that workers beholden to non-competes should presumptively be deemed employees.

A. Non-competes Harm Workers, Primarily by Binding Them to the Parties that Hire Them

In the debate over whether and under what circumstances non-competes should be enforceable, scholars have uncovered a great deal of empirical evidence regarding the harmful effects of non-competes on workers. And the data shows that "[p]erhaps the most robust finding regarding non-competes is that they bind employees to their employers."[10]

One important study examined what the authors called "the Michigan experiment," referring to the Michigan Legislature's 1985 repeal of a statute making non-compete agreements unenforceable.[11] The authors studied inventors in Michigan and found that after the repeal, Michigan inventors' mobility decreased relative to inventors in states that did not enforce non-competes.[12] In 2011, Hawaii changed its law in the opposite way, passing a new ban on enforcement of non-competes for technology workers.[13] The result of that ban was an increase in worker mobility,[14] buttressing the conclusion

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9 *See* Robert W. Gomulkiewicz, *Leaky Covenants-not-to-compete as the Legal Infrastructure for Innovation*, 49 U.C. DAVIS L. REV. 251, 253–56 (2015) (highlighting the significant number of law journal articles discussing various aspects of non-competes over the last two decades).

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

11 *See id.* at 46.

12 Matt Marx, Deborah Strumsky & Lee Fleming, *Mobility, Skills, and the Michigan Non-compete Experiment*, 55 MGMT. SCI. 875, 876 (2009).

13 HAW. REV. STAT. § 480-4(d) (2023).

14 Natarajan Balasubramanian, Jin Woo Chang, Mariko Sakakibara, Jagadeesh Sivadasan & Evan Starr, *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-tech Workers*, 57 J. HUM. RES. S349, S349 (2022).

of the Michigan study that non-compete enforcement has an inverse relationship to worker mobility.

Another study explains that non-competes increase the number of "career detours," which are when workers who leave their job also leave their field of work entirely in order to avoid a lawsuit.[15] The derivative effects of these career detours include atrophy of the workers' skills and estrangement from their professional networks.[16] Notably, none of the workers reporting career detours in this study were sued by their former employers; rather, the workers elected to take detours out of fear for what would happen if they took a job with a competitor, suggesting that non-competes have a chilling effect even without hiring-party threats of enforcement.[17]

Understanding that non-competes bind workers to their employers and cause additional derivative harms, the natural follow-up inquiry is whether workers are compensated for these harms. They are not. In fact, workers beholden to non-competes make *less* overall than workers who are not so beholden.[18] This appears to be a result of workers' decreased bargaining power, which is caused by their non-compete agreements limiting their exit opportunities.[19] In addition to the general wage depression non-competes cause, workers also report having to take substantial pay cuts when they take the career detours described above.[20]

Apparently, hiring parties are also not ignorant to the harmful effects that non-competes have on employees. Indeed, hiring parties strategically manage the processes by which

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15 Matt Marx, *The Firm Strikes Back: Non-compete Agreements and the Mobility of Technical Professionals*, 76 AM. SOC. REV. 695, 695 (2011).

16 Marx & Fleming, *supra* note 10, at 48.

17 *Id.* at 49.

18 *See* Evan Starr, *Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete*, 72 I.L.R. REV. 783, 785 (2019) (finding non-competes associated with a 4% decrease in hourly wages); Mark J. Germaise, *Ties that Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment*, 27 J.L. ECON. & ORG. 376, 402 (2009) (finding that increased non-compete enforceability led to decreased executive compensation); *see also* Balasubramanian, Chang, Sakakibara, Sivadasan & Starr, *supra* note 14, at S349 (finding new-hire wages increased among tech workers after Hawaii banned non-competes in that industry).

19 Starr, *supra* note 18, at 785; *see also* Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power via Standard Form Noncompetes*, 2006 MICH. ST. L REV. 963, 977–83 (describing hiring-party bargaining practices that help them exploit employees' weak bargaining positions).

20 Marx, *supra* note 15, at 704–05.

they obtain worker assent to non-compete agreements so they can avoid having to bargain with the employee. Hiring parties frequently wait to mention the non-compete to a hired worker until after the worker has accepted the job offer (and thereby turned down other offers).[21] Some hiring parties even wait until a worker's first day before presenting the non-compete, thereby taking advantage of the worker when they are at their weakest bargaining position.[22] These efforts by hiring parties further suggest that non-competes do indeed harm workers; for why else would hiring parties engage in dubious practices to avoid informing their workers of non-competes?

B. The Debate on Non-compete Enforceability

To fully contextualize the scholarship around non-competes, this subpart will briefly outline the arguments for and against the enforceability of non-competes and the policy proposals accompanying these arguments. This Note takes no position on this debate but merely catalogues the arguments to further explain the harms of non-competes and to reinforce the desirability of increasing legal protections for workers beholden to them.

At common law, non-competes were subject to a reasonableness standard under which courts would enforce an agreement not to compete unless (1) it was stricter than necessary to protect the promisee's need or (2) the promisee's need was outweighed by hardship to the promisor or the public.[23] More recently, states have changed their approach to non-competes.[24] Of most importance is California's ban on non-competes[25] and Silicon Valley's subsequent rise as the US technology hub, which spurred the explosion of non-compete scholarship. Professor Ronald Gilson offered the first major work with his 1999 article comparing Silicon Valley's rise to the fall of Massachusetts' Route 128, which Gilson attributed

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21 *See id.* at 706 (finding that less than a third of those surveyed reported being told about the non-compete during their interview, and nearly half reported being told of the non-compete after their first day on the job).

22 *See* Arnow-Richman, *supra* note 19, at 980 (describing the switching costs that workers incur before their first day and the little opportunity workers have to recoup those costs unless they sign the non-compete).

23 Restatement (Second) of Conts. § 188 (Am. L. Inst. 1981).

24 *See* Jonathan M. Barnett & Ted Sichelman, *The Case for Noncompetes*, 87 U. Chi. L. Rev. 953, 960 (noting that thirty-seven states have considered bills that would change the enforceability of non-competes).

25 Cal. Bus. & Prof. Code § 16600 (West 2023).

to California's ban on non-competes and Massachusetts' willingness to enforce them.[26]

The scholarship since Gilson's article includes, on one far end, proposals for wholesale unenforceability of non-compete agreements. Professor Viva R. Moffat published one such proposal, in which she argues that the primary justification for non-compete enforceability is protection of intellectual property, and that this justification is faulty.[27] Professor Moffat also argues that adopting a uniform approach of unenforceability would cure the defects caused by varying state approaches to non-compete enforceability.[28] This view has garnered increased support among policy-makers as of late.[29]

Professor Robert W. Gomulkiewicz argues that an outright ban is unwise because in many circumstances non-competes are valuable tools for protecting trade secrets and intellectual property and because technology companies rarely enforce non-competes anyway.[30] A less radical but still transformative proposal is to ban non-competes only for low-wage employees, recognizing that whatever benefits might flow from non-competes, they will rarely flow from non-competes with low-wage workers.[31]

Other scholars have proposed stricter versions of a reasonableness test for non-competes. Professor Rachel Arnow-Richman has suggested a formation-based model of non-compete enforcement, focusing on the legitimacy of the bargaining process by which the hiring party and worker came to the agreement.[32] Another proposal is that courts should judge non-compete agreements with the same scrutiny as exclusive-dealing arrangements under the antitrust laws,

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26 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).

27 Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements*, 52 Wm. & Mary L. Rev. 873, 879 (2010).

28 Viva R. Moffat, *Making Non-competes Unenforceable*, 54 Ariz. L. Rev. 939, 984 (2012).

29 *See* FTC Proposal, *supra* note 2.

30 Gomulkiewicz, *supra* note 9, at 258.

31 Krueger & Posner, *supra* note 4, at 12.

32 Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 Or. L. Rev. 1163, 1168 (2001); *see also* Arnow-Richman, *supra* note 19, at 988–89 (arguing that courts should refuse to enforce non-competes where the employers fail to introduce the agreement to the employee until after they start working).

focusing on the hiring party's power in the market for labor.[33] Congress can also sharpen the tool of antitrust law for scrutiny of non-competes by passing a more detailed version of Section 2 of the Sherman Act to make antitrust cases against labor monopsonists easier.[34]

On the other side of the debate, scholars continue to emphasize potential benefits of non-compete agreements and challenge Gilson's narrative that California's non-compete ban is the reason for Silicon Valley's rise as a tech hub. One recent article makes a full defense of non-compete agreements and suggests that the reasonableness approach should continue to control.[35] But even the authors of that article recognize that non-competes harm workers' personal autonomy and often create an unequal balance of power between hiring parties and workers.[36] Importantly, the argued-for justifications for non-compete enforceability are disconnected from worker welfare. Those arguing for some form of continued enforceability posit that some other factor, such as innovation and efficiency[37] or fairness to hiring parties,[38] justifies the harm to workers.

II
Background and Deficiencies in Worker Classification under Federal Employment Law

Like non-competes, the problem of worker misclassification has been the subject of much recent academic debate and policy discussion.[39] Misclassification is also a frequent subject of litigation.[40] And some of the industries with frequent

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33 Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies For Labor Market Power*, 132 Harv. L. Rev. 536, 596–97 (2018).

34 Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 Cornell L. Rev. 1343, 1390 (2020).

35 Barnett & Sichelman, *supra* note 24, at 1044.

36 *Id.* at 1042.

37 *See id.* at 1042–46 (justifying continued use of the reasonableness standard by reference to economic efficiency and innovation).

38 Gomulkiewicz, *supra* note 9, at 290 (arguing that trade-secret protection justifies at least some non-compete enforceability); Outsource Int'l, Inc. v. Barton, 192 F.3d 662, 670 (7th Cir. 1999) (Posner, J. dissenting) (arguing that non-competes are valuable because they protect hiring parties' trade secrets and investments in their workers).

39 Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. Pa. J.L. & Soc. Change 53, 58–60 (2015).

40 *See* Richard R. Carlson, *Why the Law Still Can't Tell an Employee when it Sees One and How it Ought to Stop Trying*, 22 Berkeley J. Emp. & Lab. L. 295, 332

worker-classification litigation[41] are industries in which hiring parties frequently use non-competes.[42] This Part begins by offering background on how federal law treats employees differently from independent contractors, and then it explains how courts classify workers as one or the other.

A. The Difference in Federal Protections for Employees and Independent Contractors

Workers beholden to non-competes are either employees or independent contractors.[43] Federal law protects employees in many ways but does not similarly protect independent contractors. For example, the Employee Retirement Income Security Act ("ERISA") guarantees that employees' retirement plans are nonforfeitable,[44] but does not guarantee the same for independent contractors' retirement plans.[45] Moreover, the Family Medical Leave Act ("FMLA") grants employees job-protected leave for certain family and medical reasons,[46] but does not grant the same leave to independent contractors.[47] Further, federal law protects employees from discrimination based on race, color, religion, sex, national origin,[48] disability,[49] and age[50] but only protects independent contractors from discrimination based on race, color, and ethnicity.[51] Employees are also entitled

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n.222 (2001) (finding that during a thirty-six month period in New York, there were eleven reported decisions on the status of sales workers alone).

41 *See id.* at 337 (highlighting sales, transportation, and professional services like entertainment as occupations where worker-status ambiguity is common).

42 *See* Starr, Prescott, & Bishara, *supra* note 5, at 67 (finding that sales workers had a 16% probability of signing a non-compete, transportation workers had a 12% probability, and entertainment workers had a 22% probability).

43 States that enforce non-compete agreements against employees generally also do so against independent contractors. *See, e.g.*, Boulanger v. Dunkin' Donuts, Inc., 815 N.E.2d 572, 577 (Mass. 2004); Bristol Window & Door, Inc. v. Hoogenstyn, 650 N.W.2d 670, 679–80 (Mich. Ct. App. 2002); Eichmann v. Nat'l Hosp. & Health Care Servs., Inc., 719 N.E.2d 1141, 1146, (Ill. App. Ct. 1999); Quaker City Engine Rebuilders, Inc. v. Toscano, 535 A.2d 1083, 1087–89 (Pa. Super. Ct. 1987).

44 29 U.S.C. § 1053.

45 *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 321 ("Darden's ERISA claim can succeed only if he was Nationwide's 'employee.'").

46 29 U.S.C. § 2612.

47 *See id.* § 2611.

48 42 U.S.C. §§ 2000e(f), 2000e-2.

49 *Id.* §§ 12111(4), 12112(a).

50 29 U.S.C. §§ 623, 630(f).

51 42 U.S.C. § 1981.

to a minimum wage,[52] are protected by maximum-hour limits,[53] and have the right to organize, while independent contractors enjoy no such entitlements or protections.[54]

The differences in legal protections between employees and independent contractors incentivize hiring parties to classify their workers as independent contractors.[55] Hiring parties can save money in wages, tax withholdings, and benefits, they can avoid liability for worker negligence, and they can avoid scrutiny under antidiscrimination laws, which saves hiring parties time and money in legal fees and administrative costs.[56] And hiring parties who do act in good faith by classifying their workers as employees might actually be operating at a disadvantage in the competitive marketplace.[57] Because of this incentive structure, hiring parties and their lawyers "use all their ingenuity" to structure their relationships with workers such that courts will deem the workers independent contractors.[58]

B. The Tests for Worker Classification Under Federal Law

Federal employment laws apply only to employees and not independent contractors, but the laws offer little guidance to help courts distinguish between the two. For example, ERISA, Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), and the Americans with Disabilities Act ("ADA") define employee as any "individual

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52 29 U.S.C. § 206.

53 *Id.* § 207.

54 *See id.* § 206 (provisions only apply to "employees"); *id.* § 207 (same); *id.* §§ 157, 158 (same).

55 *See* Planmatics, Inc., Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs, at iii (2000), http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf [https://perma.cc/3A3L-GD9H] (finding that of the businesses audited, between 10 and 30% had misclassified at least some of their workers).

56 *Id.*; Robert W. Wood, *New Age Scrutiny of Employee vs. Contractor Liabilities*, 2009 Bus. L. News, St. Bar Cal., no. 2, at 11.

57 Deknatel & Hoff-Downing, *supra* note 39, at 55.

58 Clyde W. Summers, *Contingent Employment in the United States*, 18 Comp. Lab. L.J. 503, 518 (1997); *see also* Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. Rev. 351, 419 (2002) (describing how the primary federal employee-classification test is prone to manipulation); Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?*, 22 N.Y.U. Rev. L. & Soc. Change 557, 578 (1996) (explaining that businesses "enter complex arrangements of subcontracting and employee leasing in order to circumvent their responsibilities toward the workers involved").

employed by an employer."[59] The Fair Labor Standards Act ("FLSA") and FMLA use the same circular definition but also further provide that "employ" means "suffer or permit to work."[60] Federal courts have given teeth to these otherwise unhelpful definitions by developing tests that distinguish between employees and independent contractors. This subpart will explain the two primary tests that the courts use: the common law "right-to-control test" and the "economic realities" test. It will also explain under which statutes each test applies and how courts analyze non-competes and workers' dependence on their hiring parties under each test.

The first test that federal courts use to distinguish between employees and independent contractors is the right-to-control test, which developed under the common law of agency.[61] The test focuses on the employer's right to control the manner and means by which work is accomplished, which is why it is typically referred to as the "right-to-control" test.[62] In a 1992 case arising under ERISA, *Nationwide Mutual Insurance Co. v. Darden*,[63] the Supreme Court declared that courts should use the right-to-control test to distinguish between employees and independent contractors when the federal statute at issue fails to offer helpful guidance for making the distinction.[64] In short, the *Darden* Court determined that when Congress defined "employee" under ERISA as "any individual employed by any employer,"[65] it used this "completely circular" definition to incorporate the already-existing common-law-of-agency criteria as the measure for determining whether a worker is an employee.[66] While the hiring party's right to control the manner and means of work is the guidepost of the right-to-control test, the *Darden* opinion also delineates a non-exhaustive list of

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59 29 U.S.C. § 1002(6) (ERISA); 42 U.S.C. § 2000e(f) (Title VII); 29 U.S.C. § 630(f) (ADEA); 42 U.S.C. § 12111 (ADA). Another circular definition can be found in the National Labor Relations Act, which defines "employee" in part as "any employee" and excludes independent contractors from the definition. 29 U.S.C. § 152.

60 29 U.S.C. § 203(e)(1) (defining "employee" under the FLSA); *id.* § 203(g) (defining "employ" under the FLSA); *id.* § 2611(3) (explaining that the definition of "employee" under the FMLA is to have the exact same meaning as under the FLSA).

61 *See* RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958).

62 Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989).

63 503 U.S. 318 (1992).

64 *Id.* at 322–23.

65 29 U.S.C. § 1002(6).

66 *Darden*, 503 U.S. at 323 (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989)).

twelve other factors for courts to weigh, "with no one factor being decisive."[67] In addition to the employer's right to control, the *Darden* factors are:

> the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.[68]

The *Darden* right-to-control test[69] applies under most federal employment and employment-related statutes. The Supreme Court has explicitly said the *Darden* right-to-control test applies under ERISA[70] and the ADA[71] and has at least suggested, but not held, that the right-to-control test applies under Title VII.[72] Similar versions of the right-to-control test also apply under the National Labor Relations Act ("NLRA")[73] and the Internal Revenue Code.[74]

An important note is that the "right-to-control" formulation can be misleading because it suggests that judges should only examine the agreement between a hiring party and a worker to determine how much control the parties have agreed the hiring party may exercise. Notwithstanding the "*right*-to-control" language, however, the law also considers the control that the hiring party *actually exercises* over the details of the work.[75]

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67 *Id.* at 324.

68 *Id.* at 323–24.

69 This Note specifically refers to the test set forth in *Darden* as the "*Darden* right-to-control test" because, as we shall see, other adjudicative bodies such as agencies and state courts apply slightly different formulations of a right-to-control test.

70 *Darden*, 503 U.S. at 323–24.

71 Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 448–49 (2003).

72 Walters v. Metro. Educ. Enters., 519 U.S. 202, 211–12 (1997).

73 NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256 (1968); Horror Inc. v. Miller, 15 F.4th 232, 245 (2d Cir. 2021) ("It is true that courts today may look to the common law of agency to determine whether an individual is an employee for NLRA purposes.").

74 I.R.S. Tech. Guidelines § 4.23.5.7.1 (2013).

75 *See* Restatement (Third) of Agency § 7.07, cmt. f (2006) ("Also relevant is the extent of control that the principal has exercised in practice over the details of the agent's work.").

Notwithstanding the centrality of hiring-party control to the *Darden* analysis and the significant control that non-competes give hiring parties,[76] courts applying the *Darden* right-to-control test have treated non-compete agreements as just one factor to be weighed alongside the other circumstances of a relationship between a worker and hiring party.[77] And despite the fact that a worker's dependence on their hiring party has a significant impact on the amount of control that a hiring party may exercise over the worker,[78] the *Darden* right-to-control test contains no explicit instruction that courts should consider worker dependence as a factor.[79]

The second test[80] that courts use to distinguish between employees and independent contractors under federal employment law is the "economic realities" test.[81] Whereas the right-to-control test focuses primarily on the hiring party's control over the employee, the touchstone for the economic realities test is the worker's dependence on the hiring party for work.[82] The Sixth Circuit lists six factors that help judge the level of worker dependence:

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76 *See infra* Part III.

77 *See, e.g.*, Alexander v. Avera St. Luke's Hosp., 768 F.3d 756, 762 (8th Cir. 2014) (stating briefly that the absence of a non-compete agreement was suggestive of an independent-contractor relationship); Bell v. Atl. Trucking Co., No. 3:09-cv-406-J-32MCR, 2009 U.S. Dist. LEXIS 114342, at *18–19 (M.D. Fla. Dec. 7, 2009) (stating, with little explanation, that the existence of a non-compete agreement suggested an employment relationship); Axakowsky v. NFL Prods., No. 17-4730, 2018 U.S. Dist. LEXIS 193937, at *16, n.12 (D.N.J. Nov. 14, 2018) (suggesting in a footnote that evidence of a non-compete agreement evidenced an employment relationship).

78 *See infra* subpart III.A.

79 Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992).

80 This Note does not consider the "hybrid test" applied by some courts under some federal statutes. *See, e.g.*, Muhammad v. Dall. Cnty. Cmty. Supervision & Corr. Dep't, 479 F.3d 377, 380 (5th Cir. 2007) (explaining that the Fifth Circuit applies a hybrid test under Title VII and the ADEA). These courts emphasize that the most important metric in this hybrid approach is the hiring party's right to control the employee's conduct, *id.* at 380, so it is hard to see how this test is distinct from the right-to-control test in any meaningful way. *Cf. Alexander*, 768 F.3d at 763–64 (noting there is no significant difference between the hybrid test and the common-law test set forth in *Darden*).

81 Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 300–01 (1985).

82 Bartels v. Birmingham, 332 U.S. 126, 130 (1947) ("[E]mployees are those who as a matter of economic reality are dependent upon the business to which they render service."); Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376, 1385 (3d Cir. 1985) (The economic realities test "examines whether the workers are dependent on a particular business or organization for their continued employment.").

> 1) the permanency of the relationship between the parties; 2) the degree of skill required for the rendering of the services; 3) the worker's investment in equipment or materials for the task; 4) the worker's opportunity for profit or loss, depending upon his skill; 5) the degree of the alleged employer's right to control the manner in which the work is performed; and 6) whether the service rendered is an integral part of the alleged employer's business.[83]

These factors derive from the Supreme Court's opinion in *United States v. Silk*,[84] and other Circuits follow a mostly similar approach, applying the same or similar factors to gauge the worker's dependence.[85]

Under the economic realities test, like under the right-to-control test, courts treat non-competes as merely one factor among many to be considered.[86] Some courts have considered the existence of a non-compete to be relevant under the "permanency of the relationship" factor, acknowledging that a worker who cannot perform work for anyone other than a single hiring party is more likely to have a permanent relationship with that hiring party and thus more likely to be an employee.[87] Often, however, when courts applying the economic realities test consider non-competes, they do so under the "hiring-party control" factor,[88] which is notable because it acknowledges that non-competes, worker dependence, and hiring-party control are interrelated.

A brief recap of worker dependence and hiring-party control under the tests is in order. The right-to-control test contains no

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[83] Keller v. Miri Microsystems, LLC, 781 F.3d. 799, 807 (6th Cir. 2015) (internal modifications omitted).

[84] 331 U.S. 704, 716 (1947).

[85] *See, e.g.*, Parrish v. Premier Directional Drilling, L.P., 917 F.3d 369, 379 (5th Cir. 2019) (using five factors, including all of the same factors as the Sixth Circuit except for the sixth factor); Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 754 (9th Cir. 1979) (using the same factors as the Sixth Circuit but listing them in a different order); Razak v. Uber Techs., Inc., 951 F.3d 137, 142–43 (3d Cir. 2020) (using same formulation as Ninth Circuit).

[86] *See, e.g.*, Williams v. Fla. Farm Bureau Cas. Ins. Co., No. 1:19-cv-70, 2022 U.S. Dist. LEXIS 66926, at *19, *22–23 (N.D. Fla. Mar. 9, 2022) (acknowledging the plaintiffs' non-competes but concluding they were independent contractors).

[87] *See, e.g.*, Benson v. United InvestexUSA 10, LLC, No. 3:19-cv-01161-E, 2021 U.S. Dist. LEXIS 50879, at *21 (N.D. Tex. Mar. 18, 2021).

[88] *See, e.g.*, Saleem v. Corp. Transp. Grp., Ltd., 854 F.3d 131, 141–42 (2d Cir. 2017) (stating that the absence of a non-compete suggested minimal hiring-party control); Herman v. Express Sixty-Minutes Delivery Serv., 161 F.3d 299, 303 (5th Cir. 1998) (considering non-compete under hiring-party control factors); Walsh v. Freeman Sec. Servs., No. 8:21-cv-217, 2022 U.S. Dist. LEXIS 26218, at *19 (M.D. Fla. Feb. 14, 2022) (same).

explicit instruction that courts consider the degree of a worker's dependence to gauge their hiring party's degree of control. The economic realities test, on the other hand, does explicitly instruct courts to consider a hiring party's control to gauge their worker's dependence. Subpart III.B of this Note will explain why this distinction makes no sense.

III
The Case for Non-competes as a Centerpiece of Worker Classification Under the Federal Employment Laws

This Part sets forth the Note's fundamental argument: Non-competes make workers significantly dependent on their hiring parties, which consequently allows the hiring parties to exercise significant control over their workers. And because hiring party control is the central factor in determining worker status under most federal employment laws, workers beholden to non-competes should presumptively be deemed employees. This Part begins by drawing on prominent sociological theory to demonstrate how non-competes engender significant worker dependence and consequently allow hiring parties to exercise significant control.

As explained at the end of Part II, however, the right-to-control test does not explicitly instruct courts to consider worker dependence as a factor when gauging hiring party control. Subpart III.B addresses the possible argument that courts applying the right-to-control test really should not consider worker dependence as a measurement of hiring party control and concludes that the argument is misguided.

The final subpart of Part III surveys formulations of the right-to-control test outside of the *Darden* context, including from the Second Restatement of Agency, the Internal Revenue Service ("IRS"), the NLRA, and state caselaw. In doing so, the subpart demonstrates that outside of the post-*Darden* federal jurisprudence, adjudicators accord non-competes and worker dependence more weight in favor of employee status. Nevertheless, the subpart concludes by arguing that non-competes ought to raise a presumption of employee status, an even greater role under the right-to-control test than the surveyed sources give them.

A. Fundamental Sociology Tells Us that One Party's Dependence is the Other Party's Control

Sociologists have long understood that the degree of dependence by one party on another is directly proportional to

the degree of control that the other party can exercise over the first. Richard M. Emerson theorized the "power-dependence relation" in an influential 1962 article, where he explained that "power resides implicitly in the other's dependency."[89] Emerson's conception of "power" is consistent with the right-to-control test's conception of "control." Emerson defines the "power" of actor A over actor B as "the amount of resistance on the part of B which can be potentially overcome by A."[90] And "control" under the right-to-control test refers to the extent of the hiring party's ability to direct the way that a worker accomplishes a task.[91] Because the right-to-control test considers the hiring party's control both in the terms of the work agreement and in practice,[92] the test effectively measures how much the hiring party can direct the worker before the worker puts their foot down and refuses to submit to that direction. In this way, "power" and "control" are fairly interchangeable.

As Emerson explains it, two variables work together to fix the dependence of one actor (B) on another actor (A). The first variable is B's "motivational investment" in goals mediated by A; that is, B's dependence on A is directly proportional to B's level of desire for something that A controls.[93] The second variable is the availability of those goals to B outside of B's relationship with A; that is, B's dependence on A is inversely proportional to B's ability to obtain B's goals from someone other than A.[94] This is a seemingly a straightforward theoretical proposition, and Emerson's "Power-dependence Relation" inspired a huge corpus of sociological scholarship and is a foundational part of sociologists' understanding of social relations.[95] It is thus strange that the proposition is not equally reflected in federal employment case law.

Although this Note has already reviewed empirical support for the proposition that non-competes engender worker

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89 Richard M. Emerson, *Power-dependence Relation*, 27 Am. Soc. Rev. 31, 32 (1962) (emphasis omitted).

90 *Id.*

91 *Cf.* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) ("right to control the manner and means by which the product is accomplished").

92 *See supra* note 75 and accompanying text.

93 Emerson, *supra* note 89, at 33.

94 *Id.*

95 *See* Karen S. Cook, Coye Cheshire & Alexandra Gerbasi, *Power, Dependence, and Social Exchange*, *in* Contemporary Social Psychological Theories 194, 194 (Peter J. Burke ed., 2018) (describing Emerson's article as a "citation classic" and "[o]ne of the most significant contributions to the analysis of social power").

dependence and consequently engender hiring-party control,[96] it is worthwhile to briefly map non-competes onto power-dependence theory to further demonstrate the proposition. Consider an insurance company (A) who has hired an insurance sales agent (B). Under the power-dependency theory, A's power over B is a function of B's desire for goals that A controls and the availability of those goals to B other than through A. Presumably, B strongly desires monetary income and desires to a lesser degree the ability to be a salesperson and to reside near B's current location. Holding aside non-compete agreements for a moment, the availability of these goals to B depends on things like B's employable skills, the number of nearby employers who employ sales agents and who value B's skills, and the level of pay that those nearby employers offer. For illustration purposes, assume that B only has the skills to be an insurance salesman, that there are three other insurance companies near enough to A that B would find them a good substitute, and each of those companies pays equal to A.

Holding each of these variables constant, it is obvious how substantial the difference is in the power that A has over B depending on whether B is beholden to a non-compete agreement. Where B is not beholden to a non-compete agreement, B is able to negotiate with A about the tasks required of B and how B must accomplish those tasks because if A is too unreasonable, B can simply apply to work at one of the other three companies who can meet B's desires just as well as A can. But where B is beholden to a non-compete agreement that bars B from working for one of the other three insurance companies upon leaving A, B is left to choose between two undesirable outcomes: either accept A's unreasonableness in order to achieve B's goals, or abandon those goals in order to escape A. Thus, in the scenario where B is beholden to a non-compete agreement, A holds far more power over B.

B. Why the Economic Realities Test's Focus on Worker Dependence Does Not Foreclose Consideration of Worker Dependence under the Right-to-control Test

As subpart III.A demonstrates, the worker dependence engendered by non-competes gives hiring parties significant control over their workers. But one might argue that worker dependence is nevertheless properly excluded from consideration under the right-to-control test because worker dependence is the

96 *See supra* Part I.

central consideration under the FLSA's economic realities test.[97] And if the right-to-control test recognized the interrelatedness of worker dependence and hiring party control, as the economic realities test does, the economic realities test might cease to include more employees than the right-to-control test,[98] contrary to the FLSA's clear purpose.[99] Though not a ridiculous thought, this argument is flawed because, as scholars have persuasively demonstrated, the economic realities test is already too narrow.

The New Deal-era Congress that passed the FLSA meant to create a statute with far broader coverage than exists under the economic-realities-test jurisprudence.[100] The FLSA defines "employ" as "includ[ing] to suffer or permit to work."[101] As Judge Easterbrook observed, the language on its face "sweeps in almost any work done on the employer's premises, potentially any work done for the employer's benefit or with the employer's acquiescence."[102] Moreover, the "suffer or permit to work" language did not appear for the first time in the FLSA; rather, its origins are in state child-labor statutes,[103] under which there was extensive state-court jurisprudence.

One example of that jurisprudence is *Curtis & Gartside Co. v. Pigg*,[104] a 1913 decision by the Oklahoma Supreme Court. *Curtis* involved a fourteen-year-old boy who lost his hand while oiling a handsaw that was in motion.[105] The employer argued that its agreement with the boy's father did not include oiling machinery while in motion, so it had not employed the

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97 *See supra* Part II.

98 Timothy P. Glynn, *Taking the Employer Out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise Disaggregation*, 15 EMP. RTS. & EMP. POL'Y J. 201, 216 (2011) (noting that because dependence, control, and integration are related concepts, the tests necessarily overlap some); Marc Peralta, *Identifying Joint Employment Is as Easy as ABC*, 45 SETON HALL LEGIS. J. 261, 289 (noting the "eerie" similarity between the economic-realities test and the right-to-control test set forth in the Second Restatement of Agency Section 220(2)); Murray v. Principal Fin. Grp., Inc., 613 F.3d 943, 945 (9th Cir. 2010) (identifying "no functional difference" between the tests).

99 Glynn, *supra* note 98, at 216.

100 For the most comprehensive description of the FLSA's origin, see generally Bruce Goldstein, Marc Linder, Laurence E. Norton, II & Catherine K. Ruckelshaus, *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1002–55 (1999).

101 29 U.S.C. § 203(g).

102 Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1543 (7th Cir. 1987) (Easterbrook, J., concurring).

103 Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992); *see also* Goldstein, Linder, Norton & Ruckelshaus, *supra* note 100, at 1030.

104 134 P. 1125 (Okla. 1913).

105 *Id.* at 1127.

boy for that purpose and therefore could not be held liable.[106] But the relevant statute provided that children were not to be "employed, permitted, or *suffered*" to engage in certain works,[107] and the court held that "suffer" meant "not to forbid or hinder; to tolerate."[108] Thus, the employer was liable for failing to hinder the boy from oiling the handsaw.

Another example is found in *People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*,[109] where Justice Cardozo, then of the New York Court of Appeals, found that although the milk company-defendant technically prohibited its drivers from hiring children to guard milk bottles during delivery, the company knew that the drivers did so anyway.[110] The relevant New York statute did not use the term "suffer," but it did use the term "permitted."[111] Justice Cardozo interpreted the statute to make no distinction between permission and sufferance, holding that the company was negligent because it failed to "discover and prevent the employment of this child," which was a "sufferance of the work."[112] Scholars have recognized *Curtis* and *Price* as examples of the consistently broad interpretations that state courts gave "suffer or permit."[113]

That Congress knew about these state child labor laws and the state court interpretations of them is also well-documented.[114] Indeed, the Congress that passed the FLSA incorporated the "suffer or permit" language to target clothing manufacturers who had evaded wage and hour laws in the past.[115] These clothing manufacturers did not themselves run sweatshops with oppressive working conditions, but they certainly "permitted" or "suffered" the companies they hired to run sweatshops,[116] so the language in the FLSA created a tool to hold these manufacturers accountable.

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106 *Id.* at 1128.

107 *Id.* at 1128–29 (citing 1909 Okla. Sess. Laws 629).

108 *Id.* at 1129.

109 121 N.E. 474 (N.Y. 1918).

110 *Id.* at 475.

111 *Id.*

112 *Id.* at 477.

113 *See* Goldstein, Linder, Norton & Ruckelshaus, *supra* note 100, at 1039–41; Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. Rev. 1673, 1694 (2016).

114 *See* Goldstein, Linder, Norton & Ruckelshaus, *supra* note 100, at 1066.

115 Cunningham-Parmeter, *supra* note 113, at 1693.

116 *Id.*

But instead of giving actual effect to the words "suffer or permit," the Supreme Court and the circuit courts have done little more than acknowledge that the terminology denotes broader coverage of workers than other federal employment statutes.[117] In other words, the federal courts have not given substantive meaning to the FLSA's language outside of its comparative scope to other federal employment statutes.[118] Given that the economic realities test is, at least in theory, meant to effectuate that comparatively broader scope, one could be excused for seeing the emphasis of worker dependence under the economic realities test and concluding that consideration of dependence under the right-to-control test is improper. Otherwise, courts run the risk of having an identical worker-classification test under the FLSA as under the other federal employment statutes,[119] an outcome that Congress did not intend.

Nevertheless, it is clear enough from the FLSA's history that when Congress passed the Act, it did not intend some inexplicable distinction between worker dependence and hiring-party control to be the dividing line between the FLSA's coverage and the coverage under the traditional right-to-control test. Rather, the Act is meant to cover those who "suffer" or "permit" others to work for them, a standard far different than is reflected in the economic realities test. Thus, courts applying the right-to-control test ought not to draw an inference that worker dependence is an improper consideration under the right-to-control test.

C. The Right-to-control Formulations Applied Outside of the *Darden* Context Consider Non-Competes and Worker Dependence, But Still Do Not Go Far Enough

To this point, Part III has demonstrated two points. Subpart III.A showed how non-competes increase the degree of control that hiring parties can exercise over their workers, which is the central consideration under the right-to-control test. Subpart III.B then dispensed with a possible argument for why courts applying the right-to-control test under federal law might still be advised not to give much weight to non-competes and the dependence they engender. This subpart

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117 *See* James Reif, *'To Suffer or Permit to Work': Did Congress and State Legislatures Say What They Meant and Mean What They Said?*, 6 Ne. U. L.J. 347, 353–54 (2014) (describing a pattern in FLSA cases wherein courts give a "tip-of-the-cap" to the FLSA language, but never make an effort to construe it).

118 *See* Cunningham-Parmeter, *supra* note 113, at 1696.

119 *See supra* note 91 and accompanying text.

first reinforces the proposition that the significant dependence engendered by non-competes is a proper consideration under the right-to-control test. It does so by surveying legal sources espousing a formulation of the right-to-control test outside of the *Darden* context. It then goes further to argue that even though these other formulations of the right-to-control test may afford non-competes and worker dependence greater weight as an indicator of employee status, courts applying the federal worker-classification tests ought to give non-competes even greater weight and apply a presumption of employee status.

Beginning with the right-to-control test outside of the *Darden* context, the *Darden* Court itself cited two sources that acknowledge the relevance of worker dependence to the question of hiring-party control. One such source is an IRS ruling[120] that sets forth twenty factors relevant to determining "whether sufficient control is present to establish an employer-employee relationship."[121] The ruling lists as a factor whether the hiring party requires full-time work from the hired party, explaining that "an independent contractor . . . is free to work when and for whom he or she chooses."[122] This is a clear recognition that dependence on a single party for work is relevant to the question of hiring-party control. The Second Restatement of Agency, also cited in *Darden*, similarly recognizes that a worker's dependence on a single hiring party for work increases that hiring party's control over the worker.[123] Comment h to Section 220(2) lists factors that indicate the relation of master and servant (employer and employee), and one such factor is "full time employment by *one* employer."[124]

Second, other adjudicators apply the right-to-control test when determining worker status, and those adjudicators recognize that the dependence engendered by non-competes is important to the question of hiring-party control. One such adjudicator is the National Labor Relations Board ("NLRB"), which has long considered working exclusively for a single hiring party to be a factor in favor of employee status under the NLRA.[125]

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120 *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324 (1992) (citing Rev. Rul. 87-41, 1987-1 C.B. 296).

121 Rev. Rul. 87-41, 1987-C.B. 296.

122 *Id.*

123 *Darden*, 503 U.S. at 323–24 (citing RESTATEMENT (SECOND) OF AGENCY, § 220(2) (1958)).

124 RESTATEMENT (SECOND) OF AGENCY, § 220, cmt. h at 489 (1958) (emphasis added).

125 *See, e.g.*, Keystone Floors, Inc., 130 N.L.R.B. 4, 14 n.3 (1961) *aff'd*, 306 F.2d 560, 563 (3d Cir. 1962).

Let us not forget either that states have their own employment laws, and many of them use the right-to-control test to determine employment status. The courts in those states frequently consider non-competes and worker dependence as a factor in favor of employee status. For example, the Pennsylvania Supreme Court acknowledges that analyses of control and dependence will necessarily overlap.[126] The same court also states that non-competes are indicia of hiring-party control.[127] The Idaho Supreme Court is also clear that non-compete agreements are "more indicative of the type of control an employer typically exercises over an employee."[128] Courts applying a right-to-control test in Ohio,[129] Utah,[130] Mississippi,[131] and Missouri[132] have made similar pronouncements that non-compete agreements are indicative of employer-level control.

Nevertheless, a proper application of the right-to-control test would do more than treat non-competes as one factor among many relevant to the degree of hiring-party control. Instead, a test that accurately measured the degree of hiring-party control would place non-competes front and center. Recall first the empirical findings that non-competes bind workers to their hiring parties.[133] And recall further our hypothetical sales agent mapped onto the power-dependence theory.[134] The reality for most workers beholden to non-competes is that they must operate at the whim of

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[126] Lowman v. Unemployment Comp. Bd. of Rev., 235 A.3d 278, 306 (Pa. 2020) ("Although the control and independence factors in Section 753(l)(2)(B) are articulated as separate considerations, it is apparent that certain indicia considered in the context of the control factor are also relevant in the analysis of the . . . independence factor").

[127] *Id.* at 301.

[128] Idaho *ex rel.* Indus. Comm'n v. Sky Down Skydiving, LLC, 462 P.3d 92, 101 (Idaho 2020).

[129] State *ex rel.* Ugicom Enters. v. Morrison, No. 17AP-895, 2021 Ohio App. LEXIS 1247, at *11 (Ct. App. 2021) ("Most notably, the individuals were bound by a non-compete provision . . . . This level of exclusivity and ongoing association is representative of an employer-employee relationship.").

[130] Jensen Tech Servs. v. Lab. Comm'n, 506 P.3d 616, 622 (Ut. Ct. App. 2022) (recognizing that non-compete clauses are indicative of an employer-employee relationship).

[131] Handyman House Techs, LLC v. Miss. Dep't of Emp. Sec., 337 So. 3d 681, 690 (Miss. App. 2022) (same).

[132] Timster's World Found. v. Div. of Emp. Sec., 495 S.W.3d 211, 222 (Mo. Ct. App. 2016) (same).

[133] *See supra* subpart I.A.

[134] *See supra* subpart III.A.

the party for whom they work because the alternative is to either expend money and effort testing the legal efficacy of their non-compete, or simply comply by moving locations or leaving their field of work.

Thus, when a worker beholden to a non-compete comes before a court in employment litigation under federal law, the court ought to find that worker to be an employee unless the hiring party points to a good reason to find that they did not actually exercise control over the worker. One such reason might be that the worker beholden to a non-compete does in fact work for multiple hiring parties and is therefore not dependent on a single party. Another might be that the hiring party can show that they, in fact, did not instruct the worker to perform their work in a particular way, and that the worker did not face any consequences for choosing a particular way of doing the work. Absent any such circumstances, the right-to-control test ought to give workers beholden to non-competes the benefit of the doubt that the worker is an employee, given the power to control that non-competes vest in hiring parties.[135]

Conclusion

Comprehensive legal reform around non-competes is very likely forthcoming, whether by the federal government or the states. In the meantime, however long that might be, courts ought to use the tools they already have under the federal employment laws to ameliorate the harms that non-competes cause workers. One of those tools is to give non-competes the attention they merit under the federal worker-classification tests, which would likely decrease the pool of workers who both suffer the harms that accompany non-competes and are also unprotected by federal employment laws. Courts should recognize that non-competes engender significant dependence by workers on the parties that hire them, consequently allowing hiring parties to exercise greater control over the workers. Under the right-to-control test, such a recognition would ensure workers beholden to non-competes are likely to be deemed employees, which would ensure greater protection of those workers under the federal employment laws.

[135] Note that because the FLSA's scope is broader than the statutes under which the right-to-control test applies, increasing coverage under the right-to-control statutes might also increase coverage under the FLSA.