

# Leashed: How Veterinarian Noncompetes Accelerated Industry Consolidation

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*The veterinary services industry, once characterized by locally-owned general care providers, has been rapidly consolidating into one dominated by multinational conglomerates. These corporate consolidators leverage their size and capital both to fund acquisitions and to attract debt-laden veterinary school graduates with above-market starting salaries. Whether they join a corporate practice through entry-level hiring or an acquisition, veterinarians typically become bound by employment contracts containing restrictive noncompete provisions. Regardless of their specific terms, legal enforceability, or actual enforcement, these noncompetes appear to keep young associates from leaving to competitors until later than they otherwise would have. These provisions serve to withhold scarce labor from competitors, which has increased pressure on independent veterinarians to sell their practices and accelerated consolidation.*

*In detailing the effects of veterinary consolidators' use of noncompetes, this Note lends support to a broad federal rule prohibiting these provisions without an exception based on income or job function. A rule eliminating all veterinarian noncompetes except those covering practice owners or those used in the sale of a practice can best foster more equitable and sustainably competitive growth in the veterinary services industry.*

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*“If you don’t like us, bummer, you’re stuck with us for a long time.”*  
*—Pamela Mars, ambassador to Mars Petcare, the world’s largest*  
*veterinarian employer*<sup>1</sup>

## INTRODUCTION

We Americans love our pets. As President Harry S. Truman stated in 1948, “Children and dogs are as necessary to the welfare of the country as Wall Street and the railroads[.]”<sup>2</sup> Truman’s statement remains salient today as more Americans than ever have turned to pets as a source of comfort since the start of the COVID-19 pandemic.<sup>3</sup> Pet ownership reached an all-time high in 2020, with roughly 70% of U.S. households owning at least one pet, up from 56% in 1988.<sup>4</sup> Growth in both ownership and spending are expected to continue after the pandemic.<sup>5</sup> The

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1. R. Scott Nolen, *The Corporatization of Veterinary Medicine*, JAVMA NEWS (Nov. 14, 2018), <https://www.avma.org/javma-news/2018-12-01/corporatization-veterinary-medicine> [<https://perma.cc/2L2M-S33M>] (reporting Pamela Mars’ plans for the company to stay involved in the veterinary services industry for “the long haul”). Neither Mars nor the article specifically mentions non-compete clauses. *Id.*

2. Remarks at the National Conference on Family Life, 1 PUB. PAPERS 245, 247 (May 6, 1948).

3. See Steve King, *Understanding Today’s Pet Owner*, PET BUS. (June 1, 2021), [https://www.petbusiness.com/featured\\_articles/understanding-today-s-pet-owner/article\\_4ebc1194-bcf5-11eb-af77-4f65cce3dec5.html](https://www.petbusiness.com/featured_articles/understanding-today-s-pet-owner/article_4ebc1194-bcf5-11eb-af77-4f65cce3dec5.html) [<https://perma.cc/2YVK-8K5L>].

4. *Id.*; see also Luiz Fernando Bimbatti Mattos, *Private Mergers and Acquisitions in the United States: A High-Level Overview of Veterinary Health Industry Deals and Its Recent Consolidation Wave*, 11 J. ANIMAL & ENV’T L. 28, 43 (2019).

5. See King, *supra* note 3. Despite concerns about abandonment by first-time pet owners, nearly 90% of dogs and cats acquired during the pandemic remained in their new homes through May 2021. See *New ASPCA Survey: Vast Majority of Dogs and Cats Acquired During Pandemic Still in Their Homes*, ASPCA, <https://www.aspcapro.org/resource/new-aspcas-survey-vast-majority-dogs-and-cats-acquired-during-pandemic-still-their-homes> [<https://perma.cc/ND56-65YH>]. Further, the overall pet ownership rate remained stable from 2021 to 2022. See R. Scott Nolen, *Pet Ownership Rate Stabilizes as Spending Increases*, JAVMA NEWS (Oct. 26, 2022), <https://www.avma.org/news/pet-ownership-rate-stabilizes-spending-increases> [<https://perma.cc/TEA2-58EV>].

veterinary care industry plays a key role in supporting this ongoing source of national welfare and has grown in tandem, generating an all-time high of over \$31 billion in annual revenue in 2020,<sup>6</sup> more than a four-fold increase from \$7 billion in 2001.<sup>7</sup>

The veterinary services industry's growth has invited the entry of multinational conglomerates. These companies have been rapidly consolidating a once highly fragmented industry that consisted primarily of local, independent practitioners. While many of the older, independent veterinarians have benefitted from the premiums that consolidators paid to acquire their practices, young veterinarians who lack ownership share do not stand to reap the benefits of the industry's growth or consolidation. Recent veterinary graduates carry increasingly heavy student debt loads that compel them to take positions with the corporate practices that offer a higher initial salary.<sup>8</sup> Those practices, however, impose contractual non-competition provisions that prevent these veterinarians from leaving for competitors and likely reduce their lifetime earnings.<sup>9</sup>

While veterinary practices across the industry had commonly used such "noncompetes" in the past, their use by consolidators raises new concerns. Specifically, the imposition of noncompetes by consolidators withholds already-scarce labor and increases pressure on independent competitors to sell their practices, accelerating the industry's consolidation and hastening the decline of independent practices.<sup>10</sup> Moreover, consolidator noncompetes do not appear to confer higher earnings beyond the initial post-graduation period.<sup>11</sup> Coupled with associates' diminishing prospects of practice ownership, these noncompetes likely preclude associates from sharing in the industry's growth.<sup>12</sup>

As more evidence has emerged revealing the pervasiveness of noncompetes in the United States across industries,<sup>13</sup> scholars

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6. Michael Browne, *Pet Industry Sales in 2020 Surpass \$100 Billion for First Time*, SUPERMARKET NEWS (Mar. 29, 2021), <https://www.supermarketnews.com/winning-pet-care/pet-industry-sales-2020-surpass-100-billion-first-time> [https://perma.cc/36SU-TVUE].

7. Mattos, *supra* note 4, at 43.

8. *See infra* Part I.B.

9. *See infra* Part I.C.

10. *See infra* Part I.C.

11. *See infra* Part I.C.

12. *See infra* Part I.B.

13. *See* ALEXANDER J.S. COLVIN & HEIDI SHIERHOLZ, ECON. POL'Y INST., NONCOMPETE AGREEMENTS: UBIQUITOUS, HARMFUL TO WAGES AND TO COMPETITION, AND PART OF A GROWING TREND OF EMPLOYERS REQUIRING WORKERS TO SIGN AWAY THEIR

have increasingly focused on the issue. Several recent studies have weighed evidence of noncompetes' harms to employees against the justifications offered by employers.<sup>14</sup> These studies have found, for example, that although noncompetes may be associated with increased investment in employee training,<sup>15</sup> noncompetes tend to reduce wages both for the workers bound by noncompetes<sup>16</sup> and for those not themselves subject to noncompetes.<sup>17</sup> Moreover, other studies have found that noncompetes may stifle innovation or forestall new entry.<sup>18</sup> Meanwhile, other scholars have examined the doctrinal barriers to challenging harmful noncompetes.<sup>19</sup> Scholars have also hypothesized that noncompetes *may* be used by dominant firms or consolidators as an anticompetitive tool to withhold labor from competitors,<sup>20</sup> while two recent studies showed that the

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RIGHTS 2 (Dec. 10, 2019), <https://files.epi.org/pdf/179414.pdf> [<https://perma.cc/UN34-CTWN>] (estimating that between 28% and 47% of private-sector workers in the United States are bound by noncompetes based on data collected in 2017); discussed *infra* Part I.C.

14. See, e.g., Kenneth Glenn Dau-Schmidt et al., *The American Experience with Employee Noncompete Clauses: Constraints on Employees Flourish and Do Real Damage in the Land of Economic Liberty*, 42 COMPAR. LAB. L. & POL'Y J. 585, 585–635 (2022); see also Evan P. Starr et al., *Noncompete Agreements in the U.S. Labor Force*, 64 J.L. & ECON. 53, 53–84 (2021) [hereinafter *Noncompete Agreements in the U.S. Labor Force*].

15. See Evan Starr, *Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete*, 72 INDUS. & LAB. REL. REV. 783, 812 (2019).

16. See *id.*

17. See Evan Starr et al., *Mobility Constraint Externalities*, 30 ORG. SCI. 961, 966–68 (2019) (finding negative wage impacts for workers not themselves subject to noncompetes when they work in states or industries that use noncompetes at a high rate).

18. See, e.g., Sampsa Samila & Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth*, 57 MGMT. SCI. 425, 432 (2011); Michael Lipsitz & Mark Tremblay, *Noncompete Agreements and the Welfare of Consumers* (Working Paper, Dec. 1, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3975864](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3975864) [<https://perma.cc/HC4U-94VB>]; discussed *infra* Part IV.

19. See, e.g., Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 ANTITRUST L.J. 165 (2020); Suresh Naidu et al., *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 595 (2018).

20. See, e.g., *id.* at 191 (“Even when labor markets are relatively competitive, so that noncompetes are associated with wage premiums when they are initially introduced, the spread of noncompetes may eventually cause market concentration by deterring entry, and ultimately cause harm in the aggregate.”). See also OPEN MKTS. INST. ET AL., PETITION FOR RULEMAKING TO PROHIBIT WORKER NON-COMPETE CLAUSES 37 (July 21, 2020), <https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5eaa04862ff52116d1dd04c1/1588200595775/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf> [<https://perma.cc/L482-LMG8>] (“Incumbents can use non-compete clauses to tie up scarce labor and thereby deprive current and would-be rivals of essential workers.”); Ioana Marinescu & Herbert J. Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1056 (2019) (“[Noncompetes] can serve to increase the level of effective market concentration to the extent that employees subject to such agreements face fewer competitive choices.”).

enforceability of noncompetes at the state-level is associated with increased market concentration generally<sup>21</sup> and at the firm level in the context of physicians.<sup>22</sup>

Following these recent studies, government enforcers have begun to take action to curtail the harmful effects from noncompetes.<sup>23</sup> Most significantly, the Federal Trade Commission (FTC) proposed a rule on January 5, 2023, that would “prevent[] employers from entering into non-compete clauses with workers and requir[e] employers to rescind existing non-compete clauses.”<sup>24</sup> In addition, the FTC recently took action against several individual companies to force them to drop the broad noncompetes they imposed on their workers.<sup>25</sup> These actions constitute a significant step in the agency’s broader attempt to revive its authority to both define and police methods of unfair competition.<sup>26</sup>

This Note adds to the growing literature examining the effects of and justifications for noncompetes by detailing their role in the consolidation of the veterinary services industry. This discrete study adds to the evidence that noncompetes tend to negatively affect competitive conditions and highlights the limits of our current employment and antitrust tools to address these provisions’ harmful uses. Accordingly, this Note offers support both for the FTC’s broad rule prohibiting noncompetes and for further enforcement actions against individual companies that

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21. See Lipsitz & Tremblay, *supra* note 18, at 6 (finding “that concentration rises substantially following [noncompete] law changes, and appears to remain at a high level several years into the future”).

22. See Naomi Hausman & Kurt Lavetti, *Physician Practice Organization and Negotiated Prices: Evidence from State Law Changes*, 13 AM. ECON. J. 258, 273 (2021) (finding that enforceability is negatively correlated with concentration at the establishment level but positively associated at the firm level).

23. See, e.g., Statement of Interest of the United States, *Beck v. Pickert Med. Grp.*, P.C., No. CV21-02092 (D. Nev. Feb. 25, 2022), ECF No. 215 [hereinafter Statement of Interest in *Pickert*]; discussed *infra* notes 165, 177.

24. *Non-Compete Clause Rulemaking*, FTC (Jan. 5, 2023), <https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking> [<https://perma.cc/94SA-EFGN>].

25. See Press Release, FTC, FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers (Jan. 4, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers> [<https://perma.cc/EB6D-8F4K>] [hereinafter FTC Press Release Regarding Noncompetes]; discussed *infra* Part III.

26. See *infra* Part III.A; see also Press Release, FTC, FTC Restores Rigorous Enforcement of Law Banning Unfair Methods of Competition (Nov. 10, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-restores-rigorous-enforcement-law-banning-unfair-methods-competition> [<https://perma.cc/C6WW-ZEQZ>].

unfairly restrict their workers with noncompetes.<sup>27</sup> Specifically, the Note shows that noncompetes covering highly-trained, high-income veterinarians tend to negatively affect competition in the veterinary services industry by limiting veterinarian mobility and stifling small practices' ability to fairly compete.

This Note begins in Part I by detailing corporate consolidators' rapid roll-up of the veterinary services industry. Part I also introduces the newfound role of veterinary noncompetes in contributing to the speed of the industry's consolidation. Part II details the inability of employment law to constrain the pervasiveness and effects of noncompetes, emphasizing how subjective beliefs about their enforceability drive employee, and specifically veterinarian, employment decisions. Part III demonstrates that while antitrust provides a better theoretical framework to address anticompetitive uses of noncompetes, the numerous doctrinal and practical barriers to antitrust challenges to noncompetes limit the frequency of court challenges and diminish their likelihood of success. Part IV explores various approaches to fostering more equitable and sustainably competitive growth for the industry, ultimately arguing in support of the FTC's proposed rule to prohibit noncompetes without exemptions based on income or occupation.

#### I. NONCOMPETES LIKELY ACCELERATE CONSOLIDATION AND LIMIT VETERINARIANS' ABILITY TO SHARE IN THE INDUSTRY'S RAPID GROWTH

The dramatic growth in the veterinary services industry over the last two decades has invited multinational conglomerates to roll up and reshape it. Neither consumers nor veterinarians stand to benefit. Price increases for consumers have substantially outpaced inflation. Wages for young, debt-laden veterinarians remain low and have not kept pace with the industry's growth. Meanwhile, their prospects for practice ownership appear increasingly dim. Veterinary consolidators'

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27. This Note endorses the FTC's proposed prohibition on all noncompetes except those used in the sale of a business or those with a substantial ownership share of the business. In particular, the Note supports the lack of income-based or occupational-based exceptions to the prohibition. This Note suggests lowering the threshold to qualify for the "substantial ownership" exception from 25% to 10% but otherwise endorses the proposed rule in its entirety. See discussion *infra* Part IV.A.

use of noncompetes has played a key role in accelerating the industry's consolidation and limiting veterinarians' abilities to share in its growth.

#### A. THE RAPID CONSOLIDATION OF THE GROWING VETERINARY SERVICES INDUSTRY

The veterinary industry's rapid growth brought with it a change in character, as corporate and private equity investors led a wave of consolidation over the past decade that has only accelerated since the pandemic.<sup>28</sup> Through a practice commonly referred to as an industry "roll-up," large, corporate conglomerates have significantly expanded their presence through consistent acquisitions of veterinary practices of all sizes, paying top dollar to do so.<sup>29</sup> As the industry's major consolidators remain privately-held companies that do not publicly disclose their holdings or acquisitions, precise measurements of their market shares remain elusive.<sup>30</sup> Industry analysts, however, estimate that consolidators now own 25% of veterinary practices,<sup>31</sup> a dramatic increase from a share of closer to 10% of corporate-owned practices in 2017.<sup>32</sup> More significantly, consolidators now capture a nearly 50% share of both revenue and client visits.<sup>33</sup> The ideal of the independent veterinarian appears increasingly archaic.<sup>34</sup> Meanwhile, average prices for veterinary services have continued to increase for consumers.<sup>35</sup> Spending per visit increased by 17% from 2016 to 2020,

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28. See Ross Kelly, *Pandemic Hastens Ongoing Trend in Veterinary Consolidation*, VIN NEWS (Dec. 30, 2021), <https://news.vin.com/doc?id=10652228> [<https://perma.cc/5KEH-UAP3>]; see also Mattos, *supra* note 4, at 43–44.

29. See *id.*; see also Mattos, *supra* note 4, at 43–44.

30. See Kelly, *supra* note 28.

31. *Id.*

32. See Nolen, *supra* note 1.

33. See Kelly, *supra* note 28.

34. See James Herriot, *ALL CREATURES GREAT AND SMALL* (1972) (romanticizing an independent veterinarian in rural England); see also Judith Evans & Kaye Wiggins, *Going to the Vet: What Happens When Private Equity Invests in a Cottage Industry*, FIN. TIMES (Apr. 20, 2021), <https://www.ft.com/content/9a825fe8-8ea5-4ef3-84b7-2529bfe5ffed> [<https://perma.cc/2VA5-6RJB>] (quoting one veterinarian as saying, "The old-fashioned way of running a practice . . . the practices were mainly small, you worked all the hours God sends and there was no work-life balance and then you got your partnership").

35. See Matthew Salois, *Are We in a Veterinary Workforce Crisis?*, JAVMA NEWS (Aug. 25, 2021), <https://www.avma.org/javma-news/2021-09-15/are-we-veterinary-workforce-crisis> [<https://perma.cc/P5H7-W54S>].



significantly outpacing inflation.<sup>36</sup> Neither an increase in productivity nor in quality of care appears to have accompanied this price increase.<sup>37</sup>

Two major players in particular—Mars, Inc. and National Veterinary Associates, Inc.—have led the consolidation of the veterinary services industry in the United States. Mars, the privately-held candy and pet food producer, has become the largest veterinary practice owner in the country, having grown its pet care division to include roughly 2,500 veterinary practices employing over 15,000 veterinarians.<sup>38</sup> Although Mars took its first major step into the industry in 2007 with its purchase of Banfield Pet Hospital, a hospital commonly operated inside PetSmart stores, the company began accelerating its entry in the mid-2010s.<sup>39</sup> After adding most of Procter & Gamble's pet food brands to its portfolio in 2014, Mars acquired Blue Pearl Hospital, a specialty and emergency veterinary hospital chain, in 2015.<sup>40</sup> In 2017, Mars purchased former rival Veterinary Centers of America (VCA), spending \$9.1 billion to add over 800 new locations to its portfolio.<sup>41</sup> National Veterinary Associates (NVA) owns the second-largest group of veterinary practices in the country, operating over 1,400 locations, with a focus on large and specialty practices.<sup>42</sup> NVA is backed by German conglomerate

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36. See Angelica Williams et al., *The Impact of Pet Health Insurance on Dog Owners' Spending for Veterinary Services*, ANIMALS, July 2020, at 2 (finding a per visit spending increase of 17%, from \$138 in 2016 to \$161 in 2020). The Consumer Price Index from July 2016 to July 2020 rose only 8%. *CPI Inflation Calculator*, BUREAU OF LAB. STAT., [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm) [<https://perma.cc/PKL6-MSW7>].

37. See Salois, *supra* note 35. Average veterinarian productivity, measured by patients per veterinarian per hour, declined almost 25% from 2019 to 2020. *Id.* Productivity remained relatively stable until the COVID-19 pandemic, increasing slightly from 2017 to 2018 before declining in 2019 back to 2017 levels. *Id.*

38. See Kelly, *supra* note 28; MARS VETERINARY HEALTH, <https://www.marsveterinary.com/> [<https://perma.cc/5Q8M-CD4Q>].

39. *BluePearl, Banfield Now Part of Same Company*, JAVMA NEWS (Nov. 17, 2015), <https://www.avma.org/javma-news/2015-12-01/bluepearl-banfield-now-part-same-company> [<https://perma.cc/T5NH-UL5P>].

40. *Id.*; see also *Petcare*, MARS (Jan. 8, 2022), <https://www.mars.com/made-by-mars/petcare> [<https://perma.cc/5BT6-F6TT>]. Mars' pet food brands now include Iams, Pedigree, and Whiskas, among others. *Id.*; *Mars, Incorporated Completes Acquisition of Procter & Gamble's Pet Food Business in Major Markets*, PR NEWswire (Aug. 1, 2014), <https://www.prnewswire.com/news-releases/mars-incorporated-completes-acquisition-of-procter-gambles-pet-food-business-in-major-markets-269521471.html> [<https://perma.cc/84UR-JU9Y>].

41. See Mattos, *supra* note 4, at 44.

42. See Kelly, *supra* note 28; see also Bryan Koenig, *FTC Dems Put PE on Blast in Vet Clinic Merger Settlement*, LAW360 (June 13, 2022), <https://www.law360.com/articles/>

JAB Holding Company.<sup>43</sup> Both Mars and NVA have continued spending aggressively to acquire practices through 2022, commonly paying premiums up to twenty times a target's EBITDA for general practices and even higher premiums for specialty practices.<sup>44</sup>

#### B. YOUNG VETERINARIANS DO NOT STAND POISED TO SHARE IN THE GROWTH

Some industry experts predict that this ongoing roll-up will lead to the disappearance of local, family-owned practices that historically characterized the profession.<sup>45</sup> Although a complete elimination seems unlikely to occur any time soon, the wave of consolidation has already begun to impact the career trajectories of veterinarians, particularly the recent graduates and young associates on whose labor the industry depends.

High debt levels are taking a toll on young veterinarians. Before the Great Recession, the mean debt-to-income ratio for veterinary graduates was roughly 1.4:1.<sup>46</sup> As schooling costs began to outpace wage growth, however, the ratio increased to roughly 2:1 throughout the 2010s, with recent graduates now carrying an average of nearly \$150,000 in student loan debt.<sup>47</sup> By 2018, 79% of veterinary associates reported feelings of depression, burnout, anxiety, or reported experiencing panic attacks, driven by high student debt levels and long-hours.<sup>48</sup> That same year, veterinarians ranked “low compensation” as the

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1502282/ftc-dems-put-pe-on-blast-in-vet-clinic-merger-settlement [https://perma.cc/F84W-N78L].

43. See Koenig, *supra* note 42.

44. *Id.*; see also Kelly, *supra* note 28. Mars acquired a controlling interest in VetSource, a major online veterinary pharmacy and prescription management business in May 2021, demonstrating Mars' continued efforts to strengthen its position in the sector through vertical integration as well. *Id.* For reference, EBITDA is short for “earnings before interest, taxes, depreciation and amortization.” EBITDA is a widely-used measure of a business' profitability. See Adam Hayes, *EBITDA: Meaning, Formula, and History*, INVESTOPEDIA (Aug. 10, 2022), <https://www.investopedia.com/terms/e/ebitda.asp> [https://perma.cc/S5NZ-JFVT].

45. See Mattos, *supra* note 4, at 43.

46. See Malinda Larkin, *Increase in Veterinarians' Starting Salaries Long Overdue, Economist Says*, JAVMA NEWS (Nov. 17, 2021), <https://www.avma.org/javma-news/2021-12-01/increase-veterinarians-starting-salaries-long-overdue-economist-says> [https://perma.cc/Z4KL-24ED].

47. *Id.*

48. John O. Volk et al., *Executive Summary of the Merck Animal Health Veterinary Wellbeing Study*, 252 JAVMA 1231, 1231–33 (2018).

biggest reason not to enter the profession.<sup>49</sup> Correspondingly, higher income, lack of debt, and owning a practice were associated with higher levels of wellbeing.<sup>50</sup> Through 2021, young veterinarians have been found more likely to experience serious psychological distress than both older veterinarians in the industry and young employees in the general U.S. population.<sup>51</sup>

Recent graduates have entered private practice at increasing rates in order to service their debt, more often choosing positions with corporate consolidators who offer higher starting salaries than most other entry-level positions. Between 2017 and 2021, 49% of graduates entered private practice as opposed to internships, residencies, continuing education, or other options, up from 37% just eight years ago.<sup>52</sup> Of those who entered private practice in 2021, 39% joined a corporate practice, up from 35% in 2020.<sup>53</sup> While the consolidators' growth in location count may partially explain these increases, the wage premium that consolidators offer over their independent counterparts likely plays a greater role.<sup>54</sup> In 2021, consolidators offered a mean starting salary roughly \$12,159 higher than that offered by independent practices, often including signing bonuses and moving allowances as well.<sup>55</sup> Correspondingly, graduates who chose corporate practices had a mean loan debt of \$12,628 more than those who chose independents.<sup>56</sup>

Despite higher *initial* salaries at corporate practices, however, corporate associates' wages appear to largely stagnate over the course of their careers. Mid- and senior-level veterinary associates may earn only a fraction more than entry-level

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49. *Id.* at 1233.

50. *Id.* at 1232–33; see also Jarod Facundo & Brian Osgood, 'Welcome to Hell,' PROSPECT (July 20, 2022), <https://prospect.org/labor/welcome-to-hell-mars-pet-hospitals/> [<https://perma.cc/B8XF-ZU92>] (collecting employee reports of "toxic" conditions at Mars-owned hospitals, including VCA, Banfield, and BluePearl, that allegedly caused psychological distress).

51. John O. Volk et al., *Executive Summary of the Merck Animal Health Veterinary Wellbeing Study III and Veterinary Support Staff Study*, 260 JAVMA 1547, 1549 (2022); Volk et al., *supra* note 48, at 1233.

52. Larkin, *supra* note 46.

53. *Id.*

54. In fact, one study has confirmed the correlation between new veterinarians' career choices and their educational debt. See Bridgette Bain & Sandra L. Lefebvre, *Associations Between Career Choice and Educational Debt for Fourth-Year Students of US Veterinary Schools and Colleges, 2001–2021*, 260 J. AM. VET. MED. ASS'N, 1063, 1063–68 (2022).

55. Larkin, *supra* note 46.

56. *Id.*

associates but lack the additional opportunity for equity that independent practices provide. Veterinarians at Mars-owned Banfield with four to six years of experience report earning \$120,646 annually, an amount which is only slightly more than the \$116,849 reported for those with zero to one years of experience and not significantly less than the \$133,035 reported for those with seven to nine years of experience.<sup>57</sup> Banfield's mid-level salary also appears markedly lower than the marketwide salary estimate for private practice veterinarians with comparable experience and qualifications, which the American Veterinary Medical Association estimates is between \$135,000 and \$150,000.<sup>58</sup>

Further, longer-term prospects for independent practice ownership have begun to vanish for younger associates, heightening the importance of wages in a new graduate's initial choice of employment. In the past, young veterinarians could enter an independent practice with the chance to take it over one day.<sup>59</sup> Now, however, clinic owners nearing retirement have a difficult time turning down the price premiums offered by consolidators, which increasingly leaves young associates locked out of the potential for ownership.<sup>60</sup> While some veterinarians have formed an association of independent practices in an attempt to remain competitive, the number of holdouts remains

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57. *Banfield Pet Hospital Salaries*, GLASSDOOR (Sept. 15, 2022), [https://www.glassdoor.com/Salary/Banfield-Pet-Hospital-Veterinarian-Salaries-E137890\\_D\\_KO22,34.htm](https://www.glassdoor.com/Salary/Banfield-Pet-Hospital-Veterinarian-Salaries-E137890_D_KO22,34.htm) [<https://perma.cc/KKQ2-YNW9>]. The mean starting salary for all consolidators in 2021 was reported as \$106,053. Larkin, *supra* note 46.

58. *Veterinary Salary Estimator for New Veterinarians*, AVMA, <https://myvetlife.avma.org/new-veterinarian/your-financial-health/veterinary-salary-estimator> [<https://perma.cc/HZ3G-3JMU>] (Inputs: Class of 2017, Various states, Companion Animal Exclusive, No residency, No board certification, No practice ownership).

59. See Edie Lau, *Ex-Banfield Leaders Buy Practices as 'LegacyVet'*, VIN NEWS (Oct. 18, 2016), <https://news.vin.com/VINNews.aspx?articleId=42406> [<https://perma.cc/5BB7-DLU2>].

60. See Kelly, *supra* note 28; see also Nolen, *supra* note 1 ("I never in a million years dreamed I would ever sell to a corporate group. . . . But for me, in the end, after months of due diligence, I realized it was the right decision and the best fit for my future. . . ."); @lisagB, Comment to *Why are Vets Transitioning to VCA?*, REDDIT (Apr. 21, 2021, 12:04 AM), [https://www.reddit.com/r/Calgary/comments/mp4q04/why\\_are\\_vets\\_transitioning\\_to\\_vca/](https://www.reddit.com/r/Calgary/comments/mp4q04/why_are_vets_transitioning_to_vca/) [<https://perma.cc/WT28-R8JH>] ("These consolidators are able to offer veterinary practice owners multiples higher than they would have been offered had they sold to an associate, allowing them a higher payout for retirement. Some practices are choosing to NOT sell to corporate, they'd rather keep it in the family or have an agreement in place, but often the dollars are too large to walk away from.").

relatively small in light of the rampant pace of consolidators' expansion.<sup>61</sup>

Veterinarian scarcity amidst the industry's explosive growth further increases independent veterinarians' pressure to sell to consolidators. While the raw number of veterinarians has steadily increased, practice owners have reported difficulties in hiring attributed to a veterinarian shortage since at least 2019.<sup>62</sup> The pandemic has exacerbated these difficulties, with increased staffing shortages and heightened demand driving many practices to turn away clients for the first time.<sup>63</sup> Consolidators, meanwhile, need veterinarians to staff their own hospitals, likely contributing to the high prices they have been paying for acquisitions.<sup>64</sup> With a large number of older veterinarians already set to retire within the next fifteen years,<sup>65</sup> the growing difficulty of operating a practice amid ongoing staffing shortages,<sup>66</sup> coupled with consolidators' aggressive desire to acquire more practices, appears to be pushing many practice owners to sell earlier than they otherwise might have.<sup>67</sup>

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61. See Kelly, *supra* note 28 ("A growing number of independent practices in the U.S. have joined the Independent Veterinary Practitioners Association (IVPA), which was founded in 2018 and offers members services to help them compete more effectively. These include retirement and employee benefits plans, marketing services, and discounts from suppliers and service providers. The IVPA also works to educate veterinary students about the value of working for or owning an independent practice."); see also IVPA Board of Directors, *Why We Need to Advocate Now for Independent Veterinary Practices*, DVM360 (May 11, 2020), <https://www.dvm360.com/view/why-we-need-to-advocate-now-for-independent-veterinary-practices>, [<https://perma.cc/LR2D-3736>] (describing the IVPA's mission, goals, and member benefits).

62. See Renee Hickman, *Vet Shortages Are the Latest Wrinkle in the Pandemic Puppy Boom*, FORTUNE (Oct. 21, 2021), <https://fortune.com/2021/10/21/vet-shortages-covid-puppies-dogs-pandemic-pets/> [<https://perma.cc/V9P8-CSQH>]; see also Katie Burns, *Census of Veterinarians Finds Trends with Shortages, Practice Ownership*, JAVMA NEWS (June 26, 2019), <https://www.avma.org/javma-news/2019-07-15/census-veterinarians-finds-trends-shortages-practice-ownership> [<https://perma.cc/4Y79-4DY3>].

63. See Hickman, *supra* note 62; see also Jackson Wang, *Veterinarians Facing Staffing Shortages Across New York State*, SPECTRUM NEWS (Oct. 23, 2021), <https://spectrumlocalnews.com/nys/capital-region/news/2021/10/23/veterinarians-facing-staffing-shortages-across-new-york-state> [<https://perma.cc/4A95-66QZ>].

64. See Kelly, *supra* note 28 (quoting an investment banker as saying, "Major vet clinics have a human capital crisis . . . . They don't have the vets to cover slack shifts, so they need to acquire other clinics for the doctors.").

65. See Burns, *supra* note 62.

66. See Volk et al, *supra* note 51, at 1547 (finding that declines in veterinarian wellbeing from 2019 to 2021 were driven in part by "extreme labor shortages").

67. See, e.g., @funkyyc, Comment to *Why Are Vets Transitioning to VCA?*, REDDIT (Apr. 11, 2021, 10:26 PM), [https://www.reddit.com/r/Calgary/comments/mp4q04/why\\_are\\_vets\\_transitioning\\_to\\_vca/](https://www.reddit.com/r/Calgary/comments/mp4q04/why_are_vets_transitioning_to_vca/) [<https://perma.cc/7MPC-8TM7>] ("[Selling to VCA] takes the pressure of actually operating the business off their shoulders."); see also

### C. THE NEWFOUND ROLE OF VETERINARY NONCOMPETES: HASTENING ROLL-UP

Non-competition agreements, otherwise known as “noncompetes,” are provisions in employment contracts that limit workers’ post-employment options. These provisions have drawn an increasing amount of interest due, in part, to both high-profile examples of their use in low-wage positions and emerging data on their pervasiveness throughout the U.S. economy.<sup>68</sup> A study drawn from data collected in 2017 estimates that between 28% and 47% of private-sector workers in the United States are bound by noncompetes,<sup>69</sup> notably higher than the 18% estimate drawn from a 2014 survey.<sup>70</sup>

Noncompetes have long bound veterinarians. Long before the industry’s consolidation began, such provisions commonly appeared in employment agreements between practice owners and associate veterinarians, practice sale contracts, and partnership agreements at independent practices.<sup>71</sup> Historically, these agreements were primarily meant to protect a practice’s reputation, which, at the time, heavily depended on an individual veterinarian’s client relationships.<sup>72</sup> Although no study yet has detailed the incidence of noncompetes among veterinarians specifically, numerous sources and anecdotal accounts suggest that they remain common for veterinarians at both independent and corporate practices.<sup>73</sup>

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@whateverobviously, Comment to *Why Are Vets Transitioning to VCA?*, REDDIT (Apr. 11, 2021, 1:24 AM), [https://www.reddit.com/r/Calgary/comments/mp4q04/why\\_are\\_vets\\_transitioning\\_to\\_vca/](https://www.reddit.com/r/Calgary/comments/mp4q04/why_are_vets_transitioning_to_vca/) [<https://perma.cc/VV7Y-CDYZ>] (describing stress as a key factor motivating sales to VCA and stating, “COVID has already pushed me to my limit and the stress of just day to day practice is wearing me to my breaking point”).

68. John M. McAdams, *Non-Compete Agreements: A Review of the Literature* 2 (FTC, Working Paper, 2019), <https://ssrn.com/abstract=3513639> [<https://perma.cc/T4RZ-83HV>].

69. COLVIN & SHIERHOLZ, *supra* note 13.

70. See *Noncompete Agreements in the U.S. Labor Force*, *supra* note 14, at 53.

71. See Margaret Rosso Grossman & Gregg A. Scoggins, *The Legal Implications of Covenants Not to Compete in Veterinary Contracts*, 71 NEB. L. REV. 826, 828–832 (1992); see also Katie Burns, *The Shifting Landscape of Noncompete Agreements*, JAVMA NEWS (Jan. 21, 2022), <https://www.avma.org/news/shifting-landscape-noncompete-agreements> [<https://perma.cc/KTC4-W5BJ>] (“Across the country, noncompete agreements have long been a fact of life for many veterinarians.”).

72. See Grossman & Scroggins, *supra* note 71, at 828–29.

73. See *id.* at 831 (“Though no studies document the prevalence of non-competition covenants in veterinary medicine, anecdotal as well as circumstantial evidence suggests that these covenants are common.”); see also *Non-Compete Agreements*, MAHAN LAW, <https://mahanlaw.com/practice-areas/veterinary-practice-litigation/non-compete->

Distinct from historical uses, consolidators' imposition of noncompetes likely accelerates the ongoing industry roll-up by exacerbating the hiring crunch independent veterinarians experience, which raises their labor and recruiting costs and increases pressure to sell to consolidators. In addition to imposing noncompetes on new graduates, consolidators typically include lengthy—often five-year—noncompete provisions in acquisition agreements that bind the veterinarians who work for the acquired practice.<sup>74</sup> Regardless of their specific terms, legal enforceability, or actual enforcement, consolidators' noncompetes appear to keep veterinarians from joining a competitor until later than they otherwise might.<sup>75</sup> Further, misconceptions surrounding the terms of consolidators' noncompetes likely increase the provisions' effective scope, particularly where veterinarians work across multiple locations.<sup>76</sup>

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agreements/ [https://perma.cc/3FTS-NYKG] (“In the contemporary veterinary space, it is becoming increasingly common for practices to require employees to sign non-compete agreements as a condition of employment.”); *Non-Compete Clauses for Veterinarians: Are they Ethical?*, VETERINARY IDEALIST (Jan. 19, 2021), <https://vetidealist.com/non-compete-clauses-veterinarians-ethical/> [https://perma.cc/N4ZP-ESHR] (“Most veterinary practices, large and small, privately and corporately owned, use employment contracts with non-competition provisions.”). Of the five veterinarians interviewed by the author, four have worked for a corporate practice since graduation from veterinary school. All five of these veterinarians believed they were bound by noncompetes. Two Banfield veterinarians produced copies of their noncompetes, which remain on file with the author. Figure 4 includes the terms from one Banfield employment agreement. The other veterinarians did not share their employment contracts. Though such agreements undoubtedly vary by individual and by state, blog and forum posts confirm that Banfield and other consolidator-owned chains include non-competition provisions in their employment contracts with new graduates. *Id.*; see also @amb-ly, Comment to *Working for Banfield? Please Help My Girlfriend!*, REDDIT (Apr. 27, 2019, 12:34 AM), [https://www.reddit.com/r/Veterinary/comments/bhuzo8/working\\_for\\_banfield\\_please\\_help\\_my\\_girlfriend/](https://www.reddit.com/r/Veterinary/comments/bhuzo8/working_for_banfield_please_help_my_girlfriend/) [https://perma.cc/5SXM-8VMX] (“I have worked at two different Banfield locations, several years each. . . . [T]here isn’t much room for negotiation other than the actual salary. The non-compete clause is pretty standard.”). Data on noncompetes for comparable occupations from the 2014 survey further suggests a high incidence, with a 31% incidence among those in “professional and scientific services” and a 47% incidence among physicians. *Noncompete Agreements in the U.S. Labor Force*, *supra* note 14, at 66–67. “Professional and scientific services” may include veterinarians, but the survey does not specifically indicate their inclusion in this category. See *id.* at 7.

74. Burns, *supra* note 71 (describing the experience of one veterinarian bound for five years as the result of her small practice being acquired and stating, “[s]he thinks shortages of veterinary specialists and emergency veterinarians, especially in larger metropolitan areas, might be partly attributable to people waiting out noncompetes”); see also *Choker v. Pet Emergency Clinic, P.S.*, No. 2:20-CV-00417-SAB, 2021 WL 934037 (E.D. Wash. Mar. 11, 2021) (citing the claim that NVA included a five-year noncompete in the acquisition agreement); discussed *infra* Part III.

75. See *infra* Part II.D.

76. See *infra* Part II.C.

Simultaneously, these noncompetes likely preclude many young veterinarians from capturing their fair share of the industry's explosive growth. While consolidators do offer recent graduates an initial wage premium, the premium seems to disappear shortly thereafter.<sup>77</sup> Moreover, new graduates do not appear to receive clear notice of their noncompete provision at the same time as their initial offer, which suggests that the wage premium might not compensate for the noncompete.<sup>78</sup> Further, while noncompetes can be associated with increased investments in training, training at veterinary consolidators does not appear significantly superior than that at independents.<sup>79</sup> Some veterinarians even report that consolidators' style of training hinders their veterinarians' marketability.<sup>80</sup> And in the meantime, consolidation limits young veterinarians' prospects for practice ownership,<sup>81</sup> while prices for consumers continue to rise.<sup>82</sup>

## II. EMPLOYMENT LAW FAILS TO CURTAIL NONCOMPETES

Despite employment law's ability to declare unduly restrictive noncompetes unenforceable, these provisions remain pervasive and effective. Employees tend to assume their noncompetes are

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77. See *infra* Part I.B.

78. See *Noncompete Agreements in the U.S. Labor Force*, *supra* note 14, at 76 (explaining that late-notice noncompetes are not associated with the wage premiums generally associated with noncompetes).

79. See Starr, *supra* note 15, at 30; see also *Noncompete Agreements in the U.S. Labor Force*, *supra* note 14, at 54 (“[E]mployers will be reluctant to invest in developing valuable information or specialized training . . . if employees can easily convey the value of such investments to a competitor simply by taking a new job.”).

80. See, e.g., @throwawaytruths14, Comment to *Warning About Banfield (Long)*, REDDIT (Nov. 3, 2014, 3:33 PM), [https://www.reddit.com/r/Veterinary/comments/2l0a67/warning\\_about\\_banfield\\_long/](https://www.reddit.com/r/Veterinary/comments/2l0a67/warning_about_banfield_long/) [<https://perma.cc/CDW5-HE5Y>] (responding to a question of how private employers would view starting one's career at Banfield by commenting, “I did find that other Vets in my area have a very negative view of Banfield”); @Sevisium, Comment to *Working for Banfield? Please Help My Girlfriend!*, REDDIT (Apr. 27, 2019, 9:48 PM), [https://www.reddit.com/r/Veterinary/comments/bhuzo8/working\\_for\\_banfield\\_please\\_help\\_my\\_girlfriend/](https://www.reddit.com/r/Veterinary/comments/bhuzo8/working_for_banfield_please_help_my_girlfriend/) [<https://perma.cc/S6TR-F5MV>] (claiming that Banfield veterinarians “weren't growing professional[ly] and . . . weren't comfortable with much outside the routine”).

81. See Nolen, *supra* note 1 (quoting one veterinarian as saying, “If you're a younger veterinarian wanting to buy one of these high-earning practices, it's incredibly hard to do these days . . . because either they're already bought up by corporates or the owner wants to sell at a corporate price, and a younger veterinarian can't get financing for that”).

82. See Salois, *supra* note 35.



valid regardless of actual enforceability,<sup>83</sup> and behave accordingly, declining offers from competitors even in states that do not enforce noncompetes at all.<sup>84</sup> An employer's lack of upfront transparency about the terms of a noncompete and "late notice" can both heighten the provision's practical effect and dampen the employee's ability to negotiate increased compensation for the restrictions.<sup>85</sup> These dynamics deter veterinarians employed by consolidators from joining competitors. Even if some veterinarians do receive a wage benefit, the proffered justifications for veterinary noncompetes do not justify their use by consolidators to withhold scarce labor from competitors.

#### A. BRIEF OVERVIEW OF THE LEGAL STANDARDS FOR NONCOMPETE ENFORCEMENT

Judges have been determining the enforceability of noncompetes since the early fifteenth century.<sup>86</sup> As of today, no federal law directly regulates noncompetes in the United States, so state common law and statutes govern noncompete enforceability.<sup>87</sup> The common law standard presumes employment noncompetes are invalid subject to their reasonable necessity, a standard that requires employers to demonstrate a "legitimate protectable interest" as a prerequisite to a particular noncompete's enforcement.<sup>88</sup> Many states, however, have passed statutory schemes that vary significantly from the common law. Three states and the District of Columbia statutorily prohibit noncompete enforcement entirely.<sup>89</sup> Still, thirty-one states

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83. See J.J. Prescott & Evan Starr, *Subjective Beliefs About Contract Enforceability*, J. LEGAL STUD. (forthcoming 2023) (manuscript at 2), <https://ssrn.com/abstract=3873638> [<https://perma.cc/3LUS-BQXG>].

84. See Evan Starr, J.J. Prescott, & Norman Bishara, *The Behavioral Effects of (Unenforceable) Contracts*, 36 J.L. ECON. & ORG. 633 (Sept. 18, 2020) (finding that employees with invalid noncompetes frequently indicate that their noncompetes are an important reason for declining offers from competitors) [hereinafter *The Behavioral Effects of (Unenforceable) Contracts*]; discussed *infra* Part II.B.

85. See *Noncompete Agreements in the U.S. Labor Force*, *supra* note 14, at 80–81.

86. See Grossman & Scroggins, *supra* note 71, at 832.

87. See Dau-Schmidt et al., *supra* note 14, at 589; *but see infra* Part III (discussing how the Sherman Act and the FTC Act can, in theory, prohibit noncompetes). At the time of publication, the FTC's proposed rule prohibiting all noncompetes has not yet gone into effect. See *infra* Part IV.

88. See Dau-Schmidt et al., *supra* note 14, at 593.

89. *Id.* at 590.

continue to treat noncompetes under the common law standard, ten of which have actually codified that standard.<sup>90</sup>

Under state common law, an employer can most easily show a “legitimate protectable interest”—and thus a court is likely to enforce the challenged noncompete—either in the sale of a business by an owner-employee to an employer or where an employer engages an employee for a specific research project.<sup>91</sup> In these instances, the employer directly compensates the other party either for the business and its goodwill or for the knowledge the employee produces.<sup>92</sup> As such, California, North Dakota, and Oklahoma—each of which statutorily prohibits noncompete enforcement entirely—permit their use in the sale of a business.<sup>93</sup>

But in a typical employment relationship in which an employer retains an employee to perform services, determining whether a noncompete is reasonable is less clear.<sup>94</sup> Courts most commonly accept customer contacts, trade secrets, and reputation to be legitimate protectable interests in this typical employment relationship.<sup>95</sup> Emerging research suggests that an employer’s investment in employee training may also warrant consideration as a sufficiently legitimate protectable interest. One recent study showed a positive association between investment in employee training and noncompete enforceability (though a negative association with wages).<sup>96</sup> This evidence adds credence to the positive account of noncompetes as solving what economic literature has termed a “holdup problem,” in which an employer only invests in intangible assets like training if they can be sure to recoup that investment later on.<sup>97</sup> Even so, only two states

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90. *Id.*

91. *Id.*; see also RESTATEMENT (THIRD) OF EMP. L. § 8.07 cmt. e (AM. L. INST. 2015) (“When selling a business, the owner commonly agrees not to compete with the purchaser of the business for a period and often becomes an employee of the purchaser as well. While the basic enforceability test . . . applies to these restrictive covenants as well . . . the policy considerations that counsel narrow tailoring are less compelling.”).

92. *Id.* (noting that “the sale of a business’s goodwill is often difficult to accomplish effectively unless the seller agrees not to compete with the buyer”); Dau-Schmidt et al., *supra* note 14, at 593.

93. See Dau-Schmidt et al., *supra* note 14, at 590.

94. *Id.* at 594.

95. *Id.*

96. See Starr, *supra* note 15; see also Jessica Jeffers, *The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship* (Working Paper, 2019), <https://ssrn.com/abstract=3040393> [<https://perma.cc/7DTL-FVBR>] (showing that noncompete enforceability in knowledge-intensive occupations increases investment but decreases firm entry).

97. See Dau-Schmidt et al., *supra* note 14, at 603–04.

have accepted the training justification as a legitimate protectable interest under common law or by statute.<sup>98</sup> Other more narrowly-targeted contractual provisions, such as requiring an employee to reimburse their employer for training costs, may just as effectively overcome the holdup problem without the same breadth of restraint.<sup>99</sup>

In weighing enforceability of these types of noncompetes, courts will conduct a fact-specific, individualized determination as to whether the noncompetes' restraints are reasonably necessary to protect the employer's interest at issue.<sup>100</sup> While courts most commonly evaluate noncompetes' geographic scope, temporal scope, or limit on types of activity, courts may also consider other factors, such as evidence that the employee bargained over the provision, the circumstances of the termination, or, more broadly, whether the restraint creates an undue hardship or violates the public interest.<sup>101</sup> As such, the reasonableness of specific terms will vary significantly by the particular employee's location, occupation, and individual circumstances.

#### B. COMMON JUSTIFICATIONS FOR NONCOMPETES DO NOT STRONGLY SUPPORT THEIR BROAD USE BY VETERINARY CONSOLIDATORS IN VERTICAL AGREEMENTS

Despite the fact-intensive nature of noncompete enforceability determinations, state law may specify particular circumstances under which a noncompete will or will not be enforceable.<sup>102</sup> For example, even states with broad statutory noncompete prohibitions do not prohibit their use in connection with the sale

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98. *Id.* at 595 (“[P]rotect[ing] investments in training the employee . . . [is a] minority position[] without general support in the common law.”) (citing RESTATEMENT (THIRD) OF EMP. L. § 8.07 (AM. L. INST. 2015) (listing four legitimate protectable interests: (1) trade secrets; (2) customer relationships; (3) “investment in the employee’s reputation in the market”; and (4) “purchase of a business owned by the employee”)); *see also* Posner, *supra* note 19, at 179 (noting that only two states accept investments in training as a legitimate protectable interest under state employment law).

99. *See* Dau-Schmidt et al., *supra* note 14, at 595. As one example, consider that law firms pay for bar prep courses but require reimbursement if the new lawyer leaves the firm before one year.

100. *Id.* at 596.

101. *Id.* at 592.

102. *See id.* at 600–01.

of one veterinary practice to another.<sup>103</sup> While the enforceability of noncompetes in vertical employment relationships for veterinarians as employees will vary much more by individual and by state, many states with statutory prohibitions of noncompetes include exemptions for professionals.<sup>104</sup> At least one such state specifically names veterinarians as exempt from the broader prohibition.<sup>105</sup> Whether the “professional” exemption applies to veterinarians can vary under each state’s common law, but courts will most commonly approach them on a case-by-case basis and pursuant to the reasonable necessity standard.<sup>106</sup>

Historical justifications for veterinary noncompetes do not clearly apply to their use by consolidators today. As veterinary medicine is a client-oriented profession, the primary motivation for noncompete provisions has historically been the protection of the practice’s reputation, or “practice goodwill,” which has, in turn, driven the success of a practice.<sup>107</sup> In sales of practices, purchasers clearly give consideration for practice goodwill such that the noncompete is likely enforceable on its own terms.<sup>108</sup> In agreements with new employees, however, corporate chains likely rely much less on individual veterinarians’ reputations than did small, independent practices in the past. As corporate chains grow in scale, so too grow their advertising budget, their ability to rely on national brand equity, and their ability to leverage national partnerships with chains like PetSmart, each of which

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103. Burns, *supra* note 71 (describing how the recent statutory prohibitions on noncompetes passed in Washington and Massachusetts do not apply to agreements made in connection with the sale of a veterinary practice); Dau-Schmidt et al., *supra* note 14, at 629 (California, North Dakota, Oklahoma, and the District of Columbia broadly prohibit noncompetes, except those used in the sale of a business or in the dissolution of a partnership).

104. Dau-Schmidt et al., *supra* note 14, at 600–01 (Arkansas).

105. *Id.* at 601 n.106. Massachusetts has also considered an amendment that would add veterinarians to the categories of professionals exempt from noncompete enforcement (in addition to physicians, nurses, psychologists, social workers, members of the “broadcasting industry,” and lawyers). See S. 1246, 2021–22 Leg., 192d Sess. (Mass. 2022); MASS.GOV, Massachusetts Law About Noncompetition Agreements, <https://www.mass.gov/info-details/massachusetts-law-about-noncompetition-agreements> [<https://perma.cc/634Z-8HCZ>]. On February 17, 2022, the State Senate authorized the joint committee on Labor and Workforce Development to investigate and study the issue further. Order S. 2697, 2021–22 Leg., 192d Sess. (Mass. 2022). In advocating for the exemption, the Massachusetts Veterinary Medical Association conducted a poll of its members and reported that fifty-five of the fifty-eight respondents were in favor of prohibiting enforcement. Burns, *supra* note 71.

106. See Grossman & Scoggins, *supra* note 71, at 861–64.

107. *Id.* at 829, 832.

108. See Dau-Schmidt et al., *supra* note 14, at 597.

lessens their reputations' reliance on individual veterinarians' relationships with clients.<sup>109</sup> Additionally, Banfield veterinarians may refer more complicated procedures to specialty hospitals due to a lack of equipment or ability to hospitalize overnight.<sup>110</sup> Banfield's focus on quick and routine services may also decrease the emotional bonds clients form with individual veterinarians.<sup>111</sup> Practice reputation may remain relevant, but the shifting way in which clients interact with corporate veterinarians diminishes the weight of this "practice goodwill" justification in determining the reasonability of consolidators' noncompetes.

More tangibly, consolidators' proffered justification for their noncompetes to protect trade secrets and confidential information appears overbroad when viewed in tandem with the bundle of other restrictions imposed on their veterinarians. Companies frequently include non-disclosure, non-solicitation, and non-

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109. See Burns, *supra* note 71 (quoting one veterinarian as saying, "Emergency and critical care doctors don't have clientele . . . . You see whatever walks in to see you, but you aren't building relationships usually in a way that you are trying to keep clients who will always come to see you"); see also Deven R. Desai & Spencer Weber Waller, *Brands, Competition, and the Law*, 2010 BYU L. REV. 1425, 1427 (2010) ("Brands allow businesses to reach consumers directly with messages regarding emotion, identity, and self-worth, such that consumers are no longer buying a product but buying a brand.").

110. See @nolanmcclellan & @FaronIsKing, Comment to *Any Vet Here Ever Work for Banfield? I Need Your Opinion!*, REDDIT (Jan. 18, 2018, 11:25 AM), [https://www.reddit.com/r/Veterinary/comments/7r6t7i/any\\_vet\\_here\\_ever\\_work\\_for\\_banfield\\_i\\_need\\_your/](https://www.reddit.com/r/Veterinary/comments/7r6t7i/any_vet_here_ever_work_for_banfield_i_need_your/) [https://perma.cc/4S9T-ZHYU] ("We are also limited in the equipment available and the fact that we are not 24hrs and cannot hospitalize overnight. I personally would not recommend doing major surgery at a Banfield. If I see a broken bone or a big mass in the abdomen on x-ray, I will always refer to a specialty hospital."); @FaronIsKing, Comment to *Any Vet Here Ever Work for Banfield? I Need Your Opinion!*, REDDIT (Jan. 18, 2018, 4:50 PM), [https://www.reddit.com/r/Veterinary/comments/7r6t7i/any\\_vet\\_here\\_ever\\_work\\_for\\_banfield\\_i\\_need\\_your/](https://www.reddit.com/r/Veterinary/comments/7r6t7i/any_vet_here_ever_work_for_banfield_i_need_your/) [https://perma.cc/4S9T-ZHYU] ("Since almost every Banfield is within a Petsmart and therefore no access to the hospital past Petsmart's hours, we rarely kept patients overnight. Anything on fluids, we referred to the ER for overnight care."); *Referrals Expand the Array of Options to Meet Pets' Diverse Needs*, BANFIELD EXCH., <https://www.banfieldexchange.com/News/Referrals-options> [https://perma.cc/X22A-UFVH] ("But when pets have needs that go beyond primary care, they may be referred to 24-hour hospitals or specialty practices. Referrals have become more common in veterinary medicine with advances in diagnostic and treatment approaches and the growth of the veterinary profession.").

111. See Sam I. Hill et al., *How to Brand Sand*, STRATEGY+BUS. (Apr. 1, 1998), <https://www.strategy-business.com/article/16333> [https://perma.cc/24QB-5HLA] (describing how marketing commoditized products requires "communicat[ing] the value clearly, using economics rather than emotion"); see also Ashish Nanda & Das Narayandas, *What Professional Service Firms Must Do to Thrive*, HARV. BUS. REV. (2021) <https://hbr.org/2021/03/what-professional-service-firms-must-do-to-thrive> [https://perma.cc/G83A-429R] (distinguishing the needs of customers served by "commodity practices" from those served by other types of practices).

recruitment provisions alongside noncompetes.<sup>112</sup> This “bundling” is associated with lower wages, which suggests a diminished ability for employees to bargain in the first place.<sup>113</sup> As seen in Figure 1 below, Banfield cites trade secrets and confidentiality as justification for their non-competition provision.

FIGURE 1: PORTION OF BANFIELD (MMI) NON-COMPETITION PROVISION FROM 2019 IN OHIO<sup>114</sup>

**8. Non-Competition for Full-Time Doctor Associates.** Because MMI has spent time, money and effort to develop and retain the confidentiality of its trade secrets and/or Confidential Information, has entrusted me with those trade secrets or Confidential Information to perform my duties, and because MMI will spend money and resources to train me, I agree as follows:

FIGURE 2: EXCERPT FROM A 2019 BANFIELD EMPLOYMENT AGREEMENT IN FLORIDA<sup>115</sup>

**6. Return of Confidential Material.** Upon my termination of employment with MMI for any reason, voluntarily or involuntarily, I will promptly return all Confidential Information to MMI, including all copies, notes and extracts therefrom. After returning a complete copy of all such Confidential Information to MMI, I will erase or cause to be erased all Confidential Information from any personal computer or electronic memory or storage device. Following my termination of employment, I will not take or copy any property, document, or information, whether electronic or otherwise, belonging to MMI.

**7. Non-Solicitation of Associates.** I understand that MMI has used its resources to educate, train, and develop its workforce. At all times during my employment and for two (2) years after my employment with MMI terminates for any reason, voluntarily or involuntarily, I will not directly or indirectly solicit, request or induce any associate of MMI to terminate employment with MMI and/or seek employment with any Person other than MMI or any of its Affiliates or related entities.

**8. Non-Solicitation of Clients.** Because MMI has spent time, money, and effort to develop and retain its client base, during my employment and for two (2) years after my employment with MMI terminates for any reason, voluntarily or involuntarily, I will not directly or indirectly solicit, or induce any Person to solicit, any MMI client, except my immediate family members, with whom I had contact or for whom I provided services during the eighteen (18) month period before termination of my employment with MMI, unless otherwise prohibited by applicable law.

112. See Natarajan Balasubramanian et al., *Employment Restrictions on Resource Transferability and Value Appropriation from Employees* 1 (Working Paper, 2023), <https://ssrn.com/abstract=3814403> [<https://perma.cc/YVG8-JRTM>]; see also Grossman & Scoggins, *supra* note 71, at 834.

113. See Balasubramanian et al., *supra* note 112, at 4.

114. Banfield Pet Hosp., Med. Mgmt. Int'l Inc.: Confidentiality, Non-Solicitation, and Non-Competition Agreement (2019) (on file with the author) (Ohio). Medical Management International, Inc. (MMI), is the legal unit of Mars that owns and operates veterinary clinics through PetSmart stores under the “Banfield Pet Hospital” name. *Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007, 1013 (9th Cir. 2020).

115. Banfield Pet Hosp., Med. Mgmt. Int'l Inc.: Confidentiality, Non-Solicitation, and Non-Competition Agreement (2019) (on file with author) (Florida). Full employment contract on file with the author.

As shown in Figure 2, however, Banfield also includes other provisions to prevent departing veterinarians from taking confidential material, associates, and clients with them. Although violations of these other provisions may be more difficult for the employer to prove, they nonetheless impose only the restrictions directly necessary to protect the proffered interest.<sup>116</sup>

The “training investment” justification for veterinary noncompetes also does not stand up to close scrutiny. First, veterinarians will have already completed four years of specialized training and education in veterinary school by the time they start working as licensed veterinarians.<sup>117</sup> Moreover, anecdotal evidence suggests that Banfield does not provide any higher levels of training than do other practices and may in fact *under-prepare* veterinarians for work elsewhere. Some describe working at Banfield as practicing “cookie cutter”-style medicine with limited flexibility that affords minimal experience with non-routine procedures.<sup>118</sup> While Banfield’s flexibility and standards for training undoubtedly vary by location, anecdotal evidence suggests a reputation for poor training that undermines this justification for the company’s imposition of noncompetes.<sup>119</sup>

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116. See Dau-Schmidt et al., *supra* note 14, at 600.

117. Ilana Kowarski, *How to Go to Vet School and Become a Veterinarian*, U.S. NEWS (Jan. 9, 2020), <https://www.usnews.com/education/best-graduate-schools/articles/how-to-apply-to-veterinary-school-and-become-a-veterinarian>.

118. See @Hotsauce11, Comment to *Working for Banfield? Please Help My Girlfriend!*, REDDIT (Apr. 30, 2019, 7:25 AM), [https://www.reddit.com/r/Veterinary/comments/bhuzo8/working\\_for\\_banfield\\_please\\_help\\_my\\_girlfriend/](https://www.reddit.com/r/Veterinary/comments/bhuzo8/working_for_banfield_please_help_my_girlfriend/) [https://perma.cc/UR9E-79RD] (“The big potential downside is the ‘cookie cutter medicine’ which is absolutely true.”); see also @PrinceofPersians, Comment to *Working Corporate vs. Local Owned*, REDDIT (Oct. 19, 2020, 7:25 AM), [https://www.reddit.com/r/Veterinary/comments/jdu0xa/working\\_corporate\\_vs\\_local\\_owned/](https://www.reddit.com/r/Veterinary/comments/jdu0xa/working_corporate_vs_local_owned/) [https://perma.cc/876F-LCN6] (“If you wind up at a good [independent practice] then you’ll get better training and mentorship . . . and . . . might be able to do a lot more rather than simply follow protocols. . .”).

119. See @Hotsauce11, *supra* note 118; see also @PrinceofPersians, *supra* note 118; Facundo & Osgood, *supra* note 50 (collecting employee reports of “toxic” conditions at Mars-owned hospitals).

C. VETERINARY CONSOLIDATOR NONCOMPETES LIKELY LIMIT  
ASSOCIATES LEAVING TO COMPETITORS REGARDLESS OF THEIR  
ENFORCEABILITY OR ACTUAL ENFORCEMENT

The fact that employees tend to *believe* that their noncompetes are enforceable—even when they are not—likely drives much of their ongoing, widespread use even in non-enforcing states because employees’ beliefs drive their decisionmaking.<sup>120</sup> Multiple studies show that noncompete incidence remains roughly the same between states that do and do not enforce noncompete provisions.<sup>121</sup> Notably, the 2017 survey of noncompete use revealed that 45% of businesses in California continue to use noncompetes *despite* a state statute declaring noncompetes unenforceable.<sup>122</sup> Another study found that 40% of workers bound by noncompetes reported their noncompete as a reason for declining an offer of employment irrespective of the relevant law in their jurisdiction.<sup>123</sup> In fact, even employees in non-enforcing jurisdictions reported that their employers affirmatively reminded departing employees of their noncompetes.<sup>124</sup> The study concludes that employees’ incorrect beliefs and employers’ reminders likely drive many employees “to turn down a job offer they would have otherwise taken.”<sup>125</sup>

Despite the prevalence of noncompetes for veterinarians, veterinarians also appear to lack clarity about the enforceability of these provisions. As an initial matter, the specific terms of consolidators’ noncompetes may vary by location, by hospital chain or brand, and even by individual employee.<sup>126</sup> Anecdotal evidence and contracts obtained from working veterinarians offer the best guidance available as to both the actual terms of veterinarian noncompetes and to veterinarians’ beliefs about their scope. Some veterinarians believe that consolidators impose

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120. See Prescott & Starr, *supra* note 83, at 2.

121. See *Noncompete Agreements in the U.S. Labor Force*, *supra* note 14, at 68; see also Colvin & Shierholz, *supra* note 13.

122. Colvin & Shierholz, *supra* note 13; see also *infra* Part IV (discussing states’ attempts to rein in the use of unenforceable noncompetes).

123. See *The Behavioral Effects of (Unenforceable) Contracts*, *supra* note 84, at 34.

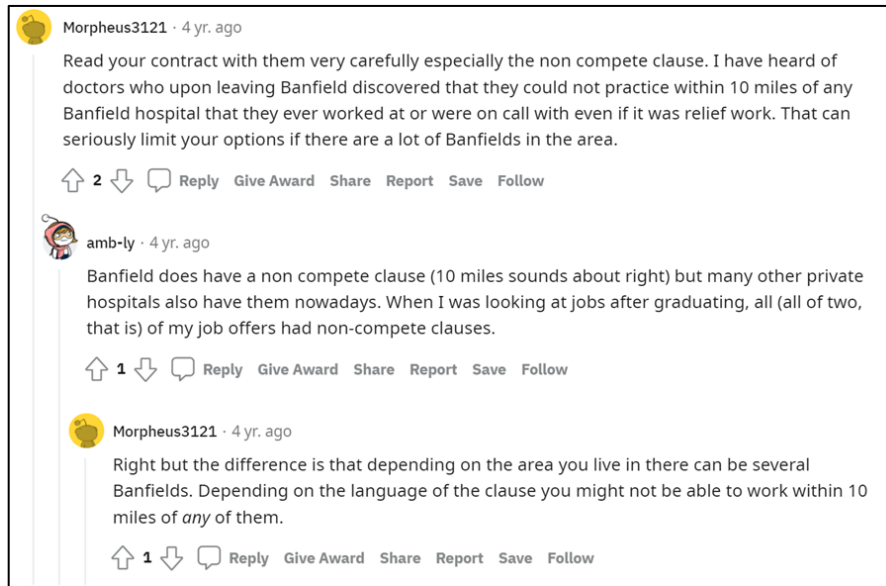
124. *Id.* at 33.

125. *Id.* at 38.

126. See *Associate Contracts for Corporate Consolidators*, VETERINARY BUS. ADVISORS, INC. (July 26, 2019), <https://veterinarybusinessadvisors.com/associate-contracts-for-corporate-consolidators/> [<https://perma.cc/74GB-TJM6>] (describing possible variances in veterinary contracts with corporate consolidators).



noncompetes with stricter terms than independents by imposing large geographic restrictions or preventing post-employment opportunities in proximity to *any* of the consolidators' locations.<sup>127</sup> See, for example, the discussion in Figure 3.

FIGURE 3<sup>128</sup>

Such descriptions, however, do not comport with two Banfield contracts reviewed by the author, which include time and distance limitations no stricter than some offered by independent practices.<sup>129</sup> See Figure 4 below for one example. These two

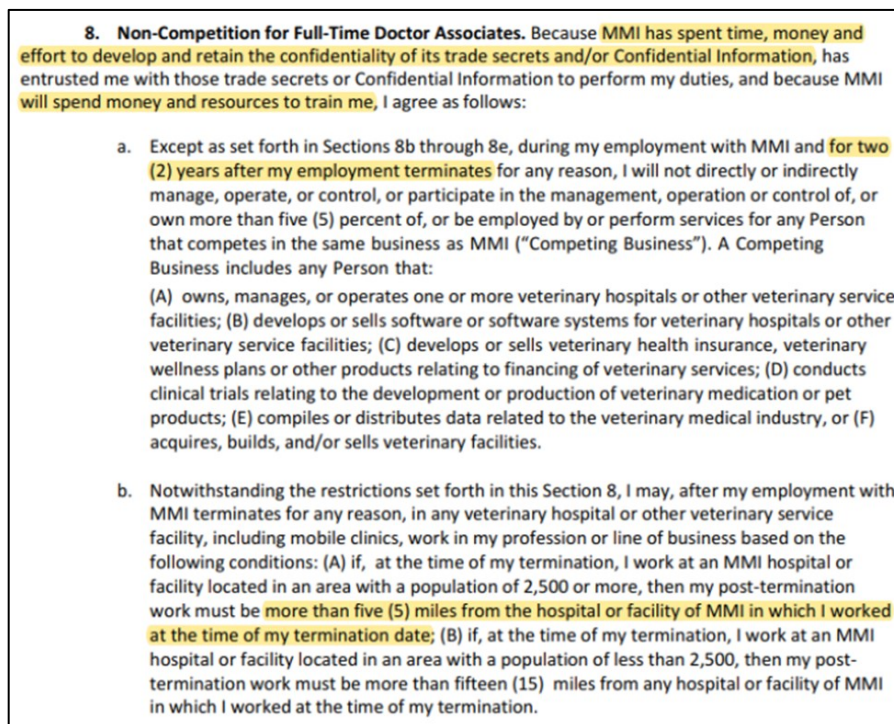
127. See, e.g., *id.* (“[Corporate consolidators] often have a much stricter policy than private practices. For example, some do not allow you to work in proximity to any of their hospitals. This could easily double or triple the area you could be prohibited from working in and can change if new hospitals open up. Also, the scope of restricted activity may be broader. . . .”).

128. @Morpheus3121 & @amb-ly, Comments to *Any Vet Here Ever Work For Banfield? I Need Your Opinion!*, REDDIT (Jan. 25, 2018), [https://www.reddit.com/r/Veterinary/comments/7r6t7i/any\\_vet\\_here\\_ever\\_work\\_for\\_banfield\\_i\\_need\\_your/](https://www.reddit.com/r/Veterinary/comments/7r6t7i/any_vet_here_ever_work_for_banfield_i_need_your/) [https://perma.cc/QB4X-VBW2].

129. See also @MoxAK, Comment to *Working for Banfield? Please Help My Girlfriend!*, REDDIT (Apr. 27, 2019, 3:34 AM), [https://www.reddit.com/r/Veterinary/comments/bhuzo8/working\\_for\\_banfield\\_please\\_help\\_my\\_girlfriend/](https://www.reddit.com/r/Veterinary/comments/bhuzo8/working_for_banfield_please_help_my_girlfriend/) [https://perma.cc/5SXM-8VMX] (“Hell, my noncompete for the corporate offer was 5 miles for 18 months. My second-best choice (non-corporate) was 15 miles and 2 years.”). Reddit discussions, while anecdotal, provide direct evidence as to at least some veterinarians’ beliefs. In addition, such posts are

agreements contracts also do not prevent the associates from working in proximity to *any* of Banfield's locations, nor do they clearly prevent the employee from working in proximity to locations besides the associate's primary location, even if the employee worked at multiple Banfield locations during their employment.

FIGURE 4: BANFIELD NON-COMPETITION PROVISION FROM 2019 IN OHIO<sup>130</sup>



As contractual terms may vary by individual, it is still possible that some employees' noncompetes cover all locations where they worked. It is also possible that Banfield may have decreased the scope of the noncompete provisions they tend to impose as the chain grew in size. Either way, the example highlights a likely

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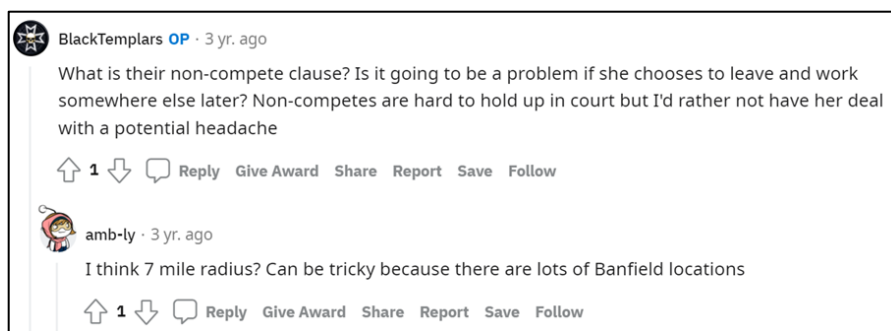
visible to future veterinarians who search for advice on negotiating or understanding their own noncompetes.

130. Banfield Pet Hosp., *supra* note 114.

gap between some veterinarians' beliefs about the scope of their noncompetes and their actual scope.

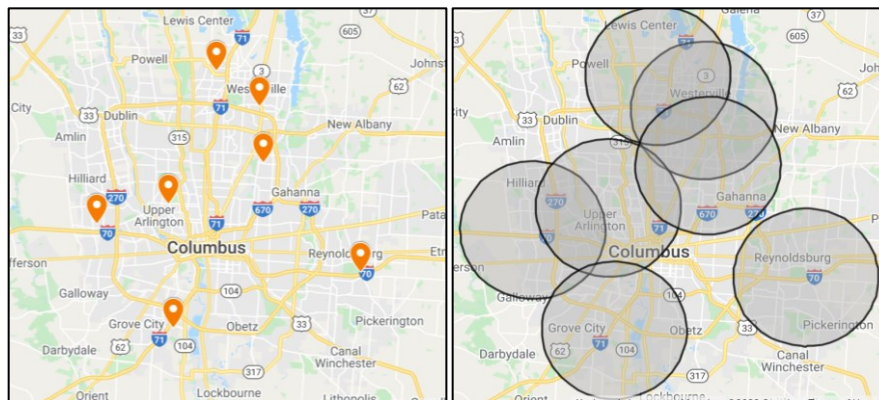
Veterinarians' beliefs about their noncompetes likely influence their employment decisions. Figure 5 shows, for example, that one Banfield employee's spouse sought noncompete advice on an internet forum rather than from an attorney. In response, one user suggested that the particular noncompete applies to *any* Banfield location. This exchange, in turn, may have influenced the veterinarian's decision about leaving Banfield, particularly as the veterinarian's spouse sought to avoid the "potential headache" of litigation. If the noncompete did apply to any location as the Reddit user suggested, the growing number of Banfield locations means such restrictions could cover many entire metropolitan areas. Figure 6, for example, shows an illustration of the five-mile radius around each Banfield location in Columbus, Ohio. While a court would surely find such a broad scope unreasonable, an employee who believes that their noncompete covers the five miles surrounding any Banfield location may assume that they need to move to an entirely new city to take a new veterinarian job—a decision with clear deterrent effects on an employee's willingness to explore positions at Banfield's competitors.

FIGURE 5<sup>131</sup>



131. @BlackTemplars & @amb-ly, Comments to *Working For Banfield? Please Help My Girlfriend!*, REDDIT (Apr. 29, 2018), [https://www.reddit.com/r/Veterinary/comments/bhuzo8/working\\_for\\_banfield\\_please\\_help\\_my\\_girlfriend/](https://www.reddit.com/r/Veterinary/comments/bhuzo8/working_for_banfield_please_help_my_girlfriend/) [<https://perma.cc/S6TR-F5MV>].

FIGURE 6: BANFIELD LOCATIONS IN COLUMBUS, OHIO (LEFT);  
5-MILE RADIUS AROUND EACH (RIGHT)<sup>132</sup>



Growth in relief work and cross-office staffing may amplify the impact of consolidators' noncompetes. Relief work, long a mainstay of veterinary practice and increasingly in demand since the start of the pandemic, allows veterinarians to take additional shifts by filling in at practices other than their primary practices, often with higher hourly pay to compensate for the lack of other full-time employment benefits.<sup>133</sup> Although many veterinarians who do relief work do so on a full-time basis, the relief work option also provides younger associates with a way to more quickly pay down their veterinary school debt.<sup>134</sup> Similarly, veterinarians at corporate chains commonly take shifts at other locations within the same chain and may even be asked to do so

132. Banfield, all locations in Columbus, OH, as of Jan. 9, 2022. The author generated the map using MAP DEVS., <https://www.mapdevelopers.com/draw-circle-tool.php> [<https://perma.cc/X2SC-9MDW>]; *Our Locations*, BANFIELD, <https://www.banfield.com/locations> [<https://perma.cc/Z8G8-X83D>].

133. *Why Relief Work Has Become So Appealing For Vets*, VET INT'L (Oct. 5, 2021), <https://www.vetxinternational.com/why-relief-work-locumming-has-become-so-appealing-for-vets/> [<https://perma.cc/2ZLG-CG7R>] ("Since lockdown, 20% of veterinary professionals in North America, and 26% of professionals in Western Europe are reportedly looking to reduce their hours or turn to work relief work entirely. Though this trend existed before lockdown, it has (like many things) been accelerated by the pandemic.").

134. See Melissa King, *5 Benefits of Veterinary Relief Work*, INDEVETS BLOG (Feb. 11, 2018), <https://indepets.com/blog/5-benefits-of-veterinary-relief-work/>; see also Katie Burns, *Relief Practice Not Just a Temporary Gig*, JAVMA NEWS (Nov. 4, 2019), <https://www.avma.org/javma-news/2019-12-01/relief-practice-not-just-temporary-gig> [<https://perma.cc/MN4H-KVE5>].

by their employer to cover staff shortages.<sup>135</sup> Covering shifts at these other locations, however, would immediately expand the scope of the noncompete if the provision does in fact cover all locations where the veterinarian has worked. More importantly, as long as employees *believe* that their noncompetes apply to multiple locations—as did the employee in Figure 3—they may decide to stay in their current role rather than join a competitor.

#### D. LATE NOTICE OF CONSOLIDATOR NONCOMPETES LIKELY HEIGHTENS THEIR IMPACT

Confusion regarding enforceability and the lack of transparency from employers keeps most employees from bargaining over noncompetes in the first place. Less than 10% of workers report negotiating over the terms of their noncompete, with the vast majority (88%) reporting just reading and signing.<sup>136</sup> More than 30% of workers do not even learn of their noncompete until *after* accepting their employment offer.<sup>137</sup> Such notice may occur only upon the formal acceptance that occurs during the signing of a full employment contract but after the employee has already either verbally or informally—yet effectively—accepted the offer. Those employees who receive late notice of their noncompetes and subsequently attempt to negotiate any terms report doing so at a lower rate than those given earlier notice.<sup>138</sup> Further, many employees say that knowing about their noncompete earlier would have made them reconsider accepting the offer entirely.<sup>139</sup>

This belated presentation likely impacts wages, training, and job satisfaction. Employees who report receiving early notice often experience associated wage increases, supporting both a heightened ability to bargain and the underlying justification for

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135. See Review of Banfield Pet Hospital by Associate Veterinarian, GLASSDOOR (Sept. 30, 2020), <https://www.glassdoor.com/Reviews/Employee-Review-Banfield-Pet-Hospital-RVW36566222.htm> [<https://perma.cc/2BY8-5HSV>]. Banfield's 2018 "Associate Doctor Variable Pay Plan" (on file with the author) confirms that veterinarians may take shifts at other Banfield locations for extra pay.

136. See *Noncompete Agreements in the U.S. Labor Force*, *supra* note 14, at 69–71.

137. *Id.* (observing that 30% of individuals with noncompetes "first learn they will be asked to agree only *after* they have accepted their offer[s]").

138. *Id.* Negotiation attempts include not only bargaining over the terms of the noncompete but also "asking for additional compensation or benefits in exchange for agreeing to such an employment condition." *Id.*

139. *Id.*

noncompetes as part of a two-party agreement with real consideration.<sup>140</sup> Late-notice noncompetes, on the other hand, are *not* associated with any additional compensation or training and are instead associated with lower job satisfaction.<sup>141</sup>

For Banfield veterinarians in particular, the company's relative lack of up-front transparency likely heightens the effect of noncompetes and possibly negatively impacts wages.<sup>142</sup> Bargaining over veterinary noncompetes occurs on an individual basis, as unions have not yet taken hold among veterinarians.<sup>143</sup> Banfield's hiring process appears to make such bargaining particularly difficult. One Banfield offer letter from 2020, for example, lists numerous benefits but does not provide the noncompete provision.<sup>144</sup> The veterinarian who received this letter reported later finding the provision deep in a list of other terms in a "Post-Offer Contingent Terms and Conditions" form completed online during onboarding. Further, once employed, some corporate veterinarians report difficulties finding these noncompete provisions, with one Banfield associate reporting reaching out to the Mars corporate human resources department

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140. *Id.* at 2, 15.

141. *Id.* at 15.

142. This section discusses timing of employment offer and noncompete disclosure for Banfield veterinarians as one particular example due to the author's access to information about the hiring and onboarding process. It does not claim that the same practice occurs throughout the veterinary service industry.

143. With the historically small number of employees per clinic, veterinarians have typically had a stronger voice in workplace discussions and less of a need to consider unionization as compared with employees in larger workplaces. See Malinda Larkin, *Veterinary Workers Explore Forming a Union*, JAVMA NEWS (Oct. 11, 2017), <https://www.avma.org/javma-news/2017-11-01/veterinary-workers-explore-forming-union> [<https://perma.cc/Z4SZ-6CG3>]. Following the growth in large veterinary practices, however, the comparative opportunity for inclusion has diminished significantly and thereby increased the potential benefits of organization, leading to a growing interest in veterinary unionization. See Erica Tricario, *A Closer Look at Veterinary Unions*, DVM360 (Apr. 19, 2021), <https://www.dvm360.com/view/a-closer-look-at-veterinary-unions> [<https://perma.cc/E4CP-J85J>]; Lisa Wogan, *Veterinary Staff Unionize at Another Seattle-Area Clinic*, VIN NEWS (Jul. 2, 2021), <https://news.vin.com/default.aspx?pid=210&Id=10335250> [<https://perma.cc/73TQ-VH8F>]. Still, as U.S. labor law remains built around organization at individual locations or practices, veterinarians face the same general challenges and obstacles to unionization as workers throughout the country. See Alexander Hertel-Fernandez, *Labor Law Makes It Too Hard to Start Unions. Workers Deserve a Bigger Voice*, CNN BUS. (Jan. 29, 2020), <https://www.cnn.com/2020/01/29/perspectives/labor-union-laws/index.html> [<https://perma.cc/5YYN-DPEK>]; see also Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 25 (2016).

144. Letter from Talent Acquisition, Banfield Pet Hosp., to Prospective Emp. (2020) (on file with the author).

to do so.<sup>145</sup> Notably, too, when one veterinarian attempted to share their noncompete provision with this author after finally obtaining it, they initially shared the incorrect portion of the agreement. This evidence not only comports with research that employees' beliefs about their noncompetes predominate over the noncompetes' actual terms but also suggests that consolidators' initially-high starting salaries may not actually include compensation for the noncompete itself.

### III. ANTITRUST LAW PERMITS CHALLENGES TO NONCOMPETES, BUT THEIR SCOPE IS LIMITED

Although veterinary consolidators may face continued antitrust challenges for unlawful agreements between competing practices<sup>146</sup> or for hospital acquisitions,<sup>147</sup> the scope of antitrust law remains limited in its ability to reach their noncompetes. Courts have long recognized that the antitrust laws reach anticompetitive behavior in both product and labor markets.<sup>148</sup> Although antitrust enforcement has historically focused almost exclusively on enforcing competition in product markets,

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145. Two veterinarians interviewed by the author were not able to find their noncompete provisions but both believed they were bound by one. *See also* @amb-ly, *Banfield Employment Contract, Anyone?*, REDDIT (Apr. 3, 2018, 10:36 PM), [https://www.reddit.com/r/veterinaryprofession/comments/89liqb/banfield\\_employment\\_contract\\_anyone/](https://www.reddit.com/r/veterinaryprofession/comments/89liqb/banfield_employment_contract_anyone/) [<https://perma.cc/HZ8K-6YDP>] ("I am currently a Banfield vet looking to get out, but I can't seem to find my employment contract. I am specifically looking for the section pertaining to a non-compete clause. . . . I'm going to try to reach out to P&O today.").

146. *See, e.g.*, *Choker v. Pet Emergency Clinic, P.S. by & through Bd. of Dirs.*, No. 2:20-CV-00417-SAB, 2021 WL 934037 (E.D. Wash. Mar. 11, 2021) (alleging that noncompetes imposed by NVA in its purchase of a horizontal competitor created a monopoly in the Spokane, WA veterinary labor market); discussed *infra* Part III.B.

147. *See, e.g.*, Press Release, FTC, FTC Takes Second Action Against JAB Consumer Partners to Protect Pet Owners from Private Equity Firm's Rollup of Veterinary Services Clinics (June 29, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-takes-second-action-against-jab-consumer-partners-protect-pet-owners-private-equity-firms-rollup-of-veterinary-services-clinics> [<https://perma.cc/9EKR-ST56>] [hereinafter FTC Press Release Regarding JAB Consumer Partners]; discussed *infra* Part III.B.

148. *See* Naidu et al., *supra* note 19, at 569–70. *See also* *Anderson v. Shipowners' Ass'n of Pac. Coast*, 272 U.S. 359, 361–65 (1926) (finding shipowners' employment restrictions unlawfully prevented the "free exercise of the rights" of the seamen to engage in trade); *NCAA v. Alston*, 141 S. Ct. 2141, 2147 (2021) (finding restrictions on student-athlete compensation unlawful under the Sherman Act); *id.* ("In the Sherman Act, Congress tasked courts with enforcing a policy of competition on the belief that market forces 'yield the best allocation' of the Nation's resources.").

government enforcers<sup>149</sup> and some private plaintiffs<sup>150</sup> have begun to more actively pursue labor market violations. Noncompete provisions—either between employers and employees or between parties in the sale of a business—can also constitute unreasonable restraints of trade in violation of the antitrust laws.<sup>151</sup> In fact, the FTC recently challenged several companies' uses of noncompetes as constituting unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act (FTC Act).<sup>152</sup> But challenges to noncompetes under Section 5 have not faced any recent judicial scrutiny, and courts may require the same demanding showings for these challenges as for those brought under the Sherman Act.<sup>153</sup> As summarized by Professor Eric Posner, vertical employment restraints in particular present such high barriers to legal challenges that “[f]or all practical purposes, antitrust law is a nullity for employment noncompetes.”<sup>154</sup>

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149. See, e.g., *United States v. Surgical Care Affiliates, LLC & SCAI Holdings, LLC*, No. 3:21-cr-00011-L (N.D. Tex. Jan. 5, 2021) (health care company criminally indicted for labor market collusion); see also Press Release, DOJ, Justice Department Sues to Block Penguin Random House's Acquisition of Rival Publisher Simon & Schuster (Nov. 2, 2021), <https://www.justice.gov/opa/pr/justice-department-sues-block-penguin-random-house-s-acquisition-rival-publisher-simon> [<https://perma.cc/B9N4-9WKK>] (challenging acquisition and alleging that the “merger will cause harm to American workers, in this case authors, through consolidation among buyers”).

150. See, e.g., Order Denying Motion to Dismiss, *Choker v. Pet Emergency Clinic, P.S. by & through Bd. of Dirs.*, No. 2:20-CV-00417-SAB, 2021 WL 934037 (E.D. Wash. Mar. 11, 2021) (denying motion to dismiss where a veterinary clinic challenged a consolidator's no-poach agreement with competitors).

151. See Posner, *supra* note 19, at 172. Dominant firms, for example, may employ noncompetes to prevent key workers from working at actual and would-be rivals in order to maintain a monopoly position. See *id.*; see also OPEN MKTS. INST. ET AL., *supra* note 20, at 39.

152. See FTC Press Release Regarding Noncompetes, *supra* note 25; see also 15 U.S.C. § 45(a)(2) (empowering the Commission to prohibit “persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce”).

153. See FTC Press Release Regarding Noncompetes, *supra* note 25 (FTC accepting consent agreements with each of the parties); discussed *infra* Part III.A.

154. Posner, *supra* note 19, at 175. “Vertical” refers to noncompetes between an employer and employee as opposed to “horizontal” restraints between competitors. *Id.* at 173; discussed *infra* Part III.A.



### A. NUMEROUS BARRIERS LIMIT ANTITRUST CHALLENGES TO NONCOMPETES

As an initial matter, employees restrained by noncompetes have little incentive to bring antitrust challenges where they can escape the restraints at issue by challenging these provisions under employment law.<sup>155</sup> Some employees may want to take advantage of antitrust's treble damages rule, but litigation costs would likely exceed the amount they could hope to receive.<sup>156</sup> As described later in this section, most courts will apply a "rule of reason" test to analyze noncompete challenges, and litigating rule of reason cases is "one of the most costly procedures in antitrust practice."<sup>157</sup> As a result of the high litigation costs, the few successful private labor antitrust cases have involved specialized settings like sports leagues or fashion models where employees are very highly paid; "run-of-the-mill" cases remain rare.<sup>158</sup>

Even if a private litigant does seek to bring an antitrust challenge, demonstrating an antitrust injury sufficient for antitrust standing may prove difficult. In analyzing whether a plaintiff has "antitrust standing," courts undertake a case-by-case analysis to determine whether the injury asserted is one "of the type the antitrust laws were intended to prevent and that flows from the that which makes defendants conduct unlawful."<sup>159</sup> As only injuries resulting from harm to competition qualify,<sup>160</sup> plaintiffs must generally show harm to the competitive process itself.<sup>161</sup> An individual employee challenging a noncompete, however, would have little incentive to demonstrate the agreement's anticompetitive effect as a whole when a challenge

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155. See Posner, *supra* note 19, at 173–75.

156. See Naidu et al., *supra* note 19, at 543.

157. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 917 (2007) (quoting HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 105 (2005)).

158. Naidu et al., *supra* note 19, at 543–44.

159. Order Granting Defendants' Motion for Summary Judgment, *Choker v. Pet Emergency Clinic, P.S. by & through Bd. of Dirs.*, No. 2:20-CV-00417-SAB, 2021 WL 934037 at \*6–7 (E.D. Wash. Aug. 4, 2022) (citing *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990)). Note that antitrust standing is distinct from Article III standing.

160. See *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 109–10 (1986) ("It is inimical to the antitrust laws to award damages for losses stemming from continued competition" (cleaned up)).

161. See *Brown Shoe Co., Inc. v. U.S.*, 370 U.S. 294, 320 (1962) (indicating that this showing is often made by showing negative effects on prices).

under employment law only requires showing that the employee's individual restriction was overbroad.<sup>162</sup> A plaintiff could point to the general anticompetitive effect of a noncompete by showing that he or she attempted to participate in a market and was excluded from doing so; however, some courts have found that a loss of a job on its own is not sufficient to show antitrust injury.<sup>163</sup> Instead, courts may require employees to show that they attempted to join a competitor and were prevented from doing so in violation of the noncompete, an expensive and risky endeavor for a plaintiff.

Even if employees attempt to challenge their employers' use of noncompetes on behalf of all employees at their company as a class, they can face difficulties proving the commonality and predominance elements required to obtain class certification. If a plaintiff class cannot demonstrate sufficient commonality and predominance in their complaint, their claims would still likely require individualized inquiry.<sup>164</sup> Plaintiffs have an even harder time demonstrating predominance and effects in "vertical" noncompete cases, as each employee's situation and contractual terms likely differs more significantly based on past experience, local market conditions, and other individualized factors.<sup>165</sup>

Even if a private party challenging a noncompete *can* demonstrate an injury—or where the plaintiff is the federal government—courts' universal application of the rule of reason poses another barrier bringing a successful challenge. Although the Sherman Act broadly prohibits contracts "in restraint of trade,"<sup>166</sup> courts have since interpreted it to only prohibit

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162. See Posner, *supra* note 19, at 173–74.

163. See Order Granting Defendants' Motion for Summary Judgment, *Choker v. Pet Emergency Clinic, P.S. by & through Bd. of Dirs.*, No. 2:20-CV-00417-SAB, 2021 WL 934037, at \*7 (E.D. Wash. Aug. 4, 2022) (citing *Vinci v. Waste Mgmt.*, 80 F.3d 1372 (9th Cir. 1994)).

164. See Naidu et al., *supra* note 19, at 543; see also *DeSlandes v. McDonald's USA, LLC et al.*, No. 17 C 4857, 2021 WL 3187668 (N.D. Ill. July 28, 2021) (denying class certification in challenge to no-poach agreement due, in part, to the fact that the proposed class included members across many labor markets such that harms were not clearly common to the class).

165. See Naidu et al., *supra* note 19, at 543; see also Posner, *supra* note 19, at 173. Note, however, that some veterinary employment noncompetes could still be considered horizontal where, for example, one veterinary practice purchases another and imposes noncompetes on the joining—and formerly competitor—veterinarians. See, e.g., Statement of Interest in *Pickert*, *supra* note 23, at 6–8 (describing previously-competing anesthesiologist noncompetes as horizontal restraints).

166. 15 U.S.C. § 1 (2004).

*unreasonable* restraints.<sup>167</sup> Whether a restraint qualifies as unreasonable presumptively requires courts to undertake a “rule-of-reason” analysis, a fact-specific assessment to determine the challenged restraint’s actual effect on competition.<sup>168</sup> While courts have found some types of restraints to be so “manifestly anticompetitive” as to warrant per se treatment,<sup>169</sup> courts reserve per se treatment only for rare types of restraints<sup>170</sup> and practically always apply rule of reason to employment noncompetes.<sup>171</sup>

The FTC asserts that challenging restraints under its Section 5 authority does not necessarily require the same showing of unreasonableness. In its recently-updated policy statement regarding its Section 5 authority, the FTC describes how Congress passed Section 5 as a way to “to push back against the judiciary’s adoption and use of the open-ended rule of reason for analyzing Sherman Act claims” and to give the Commission “flexibility to adapt to changing circumstances.”<sup>172</sup> Specifically, the FTC argues that in enacting Section 5, “Congress evinced a clear aim that ‘unfair methods of competition’ need not require a showing of current anticompetitive harm or anticompetitive intent in every case.”<sup>173</sup> Courts, however, may not agree. One Seventh Circuit decision from 1963, for example, refused to find a noncompete unlawful under Section 5 absent a showing of

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167. See Posner, *supra* note 19, at 173; see also Dau-Schmidt et al., *supra* note 14, at 9 n.35.

168. See *NCAA v. Alston*, 141 S. Ct. 2141, 2151 (2021).

169. See, e.g., *United States v. Jindal*, No. 2021 WL 5578687 at \*2, \*5, \*14–15 (E.D. Tex. Nov. 29, 2021) (finding a wage-fixing agreement between horizontal competitors to be one such per se illegal restraint, equivalent to price-fixing violations most commonly found per se illegal in product market cases).

170. See *Alston*, 141 S. Ct. at 2156.

171. See Posner, *supra* note 19, at 173. Many courts consider noncompetes between employers and employees to be vertical restraints and thus comparable to an exclusive dealing agreement warranting rule of reason. *Id.* Other courts may consider an employment noncompete “ancillary” to a broader agreement that is on the whole procompetitive, also warranting rule of reason analysis. *Id.* Courts will thus also consider noncompetes in the sale of a business as “ancillary” to the transaction. *Id.* Many other courts more simply ignore labels and apply rule of reason as a default to transactions not plainly anticompetitive. *Id.*

172. FTC, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT 2–3 (Nov. 10, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P221202Section5PolicyStatement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf) [<https://perma.cc/F7H8-HP8J>] [hereinafter FTC POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS].

173. *Id.* at 4.

unreasonableness.<sup>174</sup> And prior to the recent change in policy, the FTC had applied the rule of reason framework when deciding whether to bring actions under its standalone Section 5 authority, aligning these actions with those brought under the Sherman Act.<sup>175</sup>

Assuming courts would apply the rule of reason framework,<sup>176</sup> plaintiffs must first demonstrate anticompetitive effects from the restraint at issue and then weigh those effects against defendants' procompetitive justifications to determine whether a less restrictive alternative exists.<sup>177</sup> A court's analysis would

174. See *Snap-On Tools Corp. v. FTC*, 321 F.2d 825, 837 (7th Cir. 1963) ("Restrictive clauses of this kind are legal unless they are unreasonable as to time or geographic scope; but even if this restriction is unreasonable as to geographic scope, we are not prepared to say that it is a *per se* violation of the antitrust laws.").

175. See Press Release, FTC, FTC Issues Statement of Principles Regarding Enforcement of FTC Act as a Competition Statute (Aug. 13, 2015), <https://www.ftc.gov/news-events/news/press-releases/2015/08/ftc-issues-statement-principles-regarding-enforcement-ftc-act-competition-statute> [<https://perma.cc/PE56-7DP6>] ("[T]he act or practice will be evaluated under a framework similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications. . . ."). The FTC rescinded its prior policy on July 21, 2021. See Press Release, FTC, FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act (July 21, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under-ftc-act> [<https://perma.cc/SP4N-KLJP>]. Notably, in voting against filing the recent noncompete challenges, FTC Commissioner Christine Wilson advocated for this prior approach. See Christine S. Wilson, Comm'r, FTC, Dissenting Statement, In the Matter of O-I Glass, Inc. & In the Matter of Ardagh Group S.A. (Jan. 4, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/wilson-dissenting-statement-glass-container-cases.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/wilson-dissenting-statement-glass-container-cases.pdf) [<https://perma.cc/K6K8-YJLL>] (noting that the complaints neither allege "that the non-compete provisions at issue are unreasonable" nor "a market effect on wages or other terms of employment"); see also Christine S. Wilson, Comm'r, FTC, Dissenting Statement, In the Matter of Prudential Security (Jan. 4, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/wilson\\_dissenting\\_statement\\_-\\_prudential\\_security\\_-\\_final\\_-\\_1-3-23.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/wilson_dissenting_statement_-_prudential_security_-_final_-_1-3-23.pdf) [<https://perma.cc/C8MJ-DDGU>].

176. Further analysis as to whether courts may properly find that a practice violates Section 5 without a showing of current anticompetitive effects falls outside the scope of this Note. For arguments on this issue, see FTC POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS, *supra* note 172; see also Christine S. Wilson, Comm'r, FTC, Dissenting Statement Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" (Nov. 10, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P221202Section5PolicyWilsonDissentStmnt.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmnt.pdf) [<https://perma.cc/4K56-D3FN>].

177. See Posner, *supra* note 19, at 174; *DeSlandes v. McDonald's USA, LLC*, No. 17 C 4857, 2021 WL 3187668, at \*11 (N.D. Ill. July 28, 2021) (applying a rule of reason analysis to noncompetes between a fast-food franchisor and its franchisees—horizontal competitors for labor—in light of the proffered procompetitive justifications). The Department of Justice did, however, recently advocate for *per se* treatment in a case challenging noncompetes between anesthesiologists and their employer, characterizing the experienced anesthesiologists as former competitors who, by agreeing to the provisions,

then proceed much as it would under an employment law challenge, requiring the employer to proffer a legitimate protectable interest and then weighing it against the harms from the restraint.<sup>178</sup> Under this framework, defendants have a number of justifications in their arsenal, as outlined *supra* Part II.B. In a case challenging no-poach agreements between a franchisor and its franchisees, one court, for example, accepted the employer’s “training investment” justification as sufficient to warrant a rule of reason analysis.<sup>179</sup> Studies that question the efficacy and causality of noncompetes in achieving that proffered goal, however, continue to emerge.<sup>180</sup> Either way, dominant or consolidator firms have less of an incentive to increase their investment in employee training where their primary goal is to starve competitors of labor than where their primary goal is to enhance their product.<sup>181</sup>

Anticompetitive noncompetes can operate as a form of “predatory hiring” that would likely be just as difficult to challenge as is product-side predatory pricing. In product markets, a seller may charge customers below-market prices in order to bankrupt a competitor and then charge above-market prices afterward.<sup>182</sup> In labor markets, a monopsonist or consolidator may subsidize wages to deter new entrants from entering the marketplace or to raise their competitors’ labor costs, only to reduce wages to a sub-competitive wage

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formed an unlawful horizontal “market allocation” with the new employer. *See* Statement of Interest in *Pickert*, *supra* note 23, at 6–8. The majority of the Statement, however, alleges that the noncompetes are unreasonable vertical restraints. *Id.*

178. *See supra* Part II.B.

179. *See DeSlandes*, 2021 WL 3187668, at \*9–10 (finding evidence of procompetitive effects where defendants’ expert argued that restaurant worker noncompetes incentivize franchisees to invest in training); *see also supra* Part II.B (citing studies that put forth evidence to support this training justification).

180. *See, e.g.,* Lipsitz & Tremblay, *supra* note 18, at 3 (finding that, “[c]ounterintuitively, increased investment benefits may . . . exacerbate consumer harms from [noncompetes]”). *See also* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3493 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910) (discussing several studies that examine the effects of noncompetes on training investment but ultimately “plac[ing] relatively minimal weight on these studies” for purposes of the proposed rule due to the studies’ inabilities to demonstrate a causal relationship).

181. Realistically, some mix of both approaches seems most likely, but it’s certainly not hard to imagine a firm spending less to compete on the merits when erecting barriers may be cheaper, easier, and similarly effective.

182. *See* Naidu et al., *supra* note 19, at 598 (explaining that monopolists will under-charge consumers to drive new market entrants out of business and then resume their pattern of over-charging).

afterward.<sup>183</sup> While such tactics can be part of a strategy to drive out competition, they simultaneously appear procompetitive, making them notoriously difficult to prove as harmful.<sup>184</sup> The heightened wages associated with some noncompetes—particularly where employees do not receive up-front notice of their noncompete, bargain over the terms, or understand their noncompetes’ enforceability—may be part of a “predatory” hiring strategy rather than compensation for the restraint itself. Proving that such a strategy is in fact anticompetitive remains difficult without showing a negative wage impact, preventing successful actions until long after a consolidator or dominant firm has already driven out its competition.<sup>185</sup>

#### B. ANTITRUST LITIGATION WILL NOT LIKELY CURB VETERINARY CONSOLIDATORS’ USE OF NONCOMPETES

While veterinary consolidators have already faced some antitrust scrutiny, the barriers to bringing antitrust challenges to the noncompetes binding most veterinarians to their consolidators remain sufficiently high that successful challenges likely remain out of reach.

Although individual veterinarians rarely have any incentive to bring antitrust challenges to their own noncompetes, two experienced veterinarians recently challenged the horizontal restraints, including noncompetes, imposed by NVA and Pet Emergency Clinic (PEC) as conditions of PEC’s acquisition by

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183. See Posner, *supra* note 19, at 190–91 (proposing that noncompetes may suppress wages because “they block firms from entering labor markets and competing for workers”). One study, in fact, found that the increased enforceability of noncompetes allows large firms to add more establishments at the expense of new entrants. See Dau-Schmidt et al., *supra* note 14, at 617 (citing Hyo Kang & Lee Fleming, *Non-Competes, Business Dynamism, and Concentration: Evidence from a Florida Case Study*, 29 J. ECON. & MGMT. STRATEGY 663 (2020)).

184. See Naidu et al., *supra* note 19, at 598–99; see also Louis Kaplow, *Recoupment and Predatory Pricing Analysis*, 10 J. LEGAL ANALYSIS 1, 46 (2018) (noting that “the boundary between illegal and legal predation . . . is notoriously difficult to identify under cost-based tests because of the challenges in measuring a defendant’s costs”).

185. See *Brooke Grp. Ltd. v. Brown & Williamson*, 509 U.S. 209, 222–24 (1993) (indicating that to prove a predatory pricing case, a plaintiff must show that both (1) the prices complained of are below an appropriate measure of its rival’s costs and (2) the competitor had a reasonable prospect or a “dangerous probability” of recouping its investment).

NVA.<sup>186</sup> In *Choker v. Pet Emergency Clinic*, the plaintiffs—former employees and shareholders of PEC—alleged that the restraints violated Sections 1 and 2 of the Sherman Act.<sup>187</sup> By imposing broad noncompetes and mandatory referral agreements on the PEC veterinarians, the plaintiffs alleged that NVA and PEC together “sought to create a closed network” in the Spokane, Washington area, “with PEC as the emergency hospital hub . . . and over 50 ‘feeder’ veterinarian practices whose owners would be mandated to refer all customers to the merged NVA/PEC entity.”<sup>188</sup> PEC fired the plaintiffs for refusing to sign the new employment agreements, forcing them to relocate to a different market to practice as the newly merged company created a local monopoly that “covered 100% of the animal emergency services market in the twenty-five-mile radius around PEC’s Spokane facility.”<sup>189</sup>

Despite the breadth of the challenged noncompetes, the court ultimately granted summary judgment for the defendants, holding that the plaintiffs lacked antitrust injury and antitrust standing.<sup>190</sup> The court held, quite broadly, that because job termination cannot constitute an antitrust injury, plaintiffs’ firings did not give them antitrust standing.<sup>191</sup> The court also found that plaintiffs’ decisions to relocate to a new market meant they were no longer competitors of PEC/NVA and so their business could not suffer an antitrust injury.<sup>192</sup> Finally, the court found the plaintiffs’ claims that they could not enter the Spokane market to be unsupported because the noncompetes at issue did not actually go into effect.<sup>193</sup> While this third consideration in particular would likely bar suits brought by future plaintiffs, the court’s general holding highlights both the practical and doctrinal difficulties of bringing successful antitrust challenges to noncompetes. In this case, the veterinarians would have needed

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186. See Order Denying Motion to Dismiss, *Choker v. Pet Emergency Clinic*, P.S. by & through Bd. of Dirs., No. 2:20-CV-00417-SAB, 2021 WL 934037, at \*1 (E.D. Wash. Mar. 11, 2021).

187. *Id.* at \*2.

188. *Id.* at \*1.

189. Order Granting Defendants’ Motion for Summary Judgment, *Choker v. Pet Emergency Clinic*, P.S. by & through Bd. of Directors, 2021 WL 3129569, at \*2 (E.D. Wash. Aug. 4, 2022).

190. See *id.*

191. *Id.* at \*4.

192. *Id.*

193. *Id.*

either to have signed the highly restrictive employment agreements or, after their firings, attempted to enter a market fully monopolized by their former employer. More broadly, the case demonstrates how consolidators can use noncompetes in acquisition agreements as a competitive tool for driving their roll-up.

Even the facts that allowed the *Choker* plaintiffs to survive a motion to dismiss do not apply to most veterinarians bound by noncompetes. In *Choker*, the plaintiffs were experienced veterinarians and former practice owners who presumably had both the capital to bring a lawsuit and the knowledge about their noncompetes' effects. New veterinarians, on the other hand, likely have neither. And while veterinarians at one consolidator could attempt to bring an action challenging the use of noncompetes as a group, they would likely face the same substantial hurdles to proving a common injury faced by plaintiffs in other attempted labor-market class actions. A court would likely require evidence that the noncompetes harmed each individual plaintiff, which is difficult to provide due to the differences across markets, among individuals, and in each noncompete's terms.

Alternatively, the Independent Veterinary Practices Association, referenced *supra* Part I.B, may have sufficient incentive and capital to bring an antitrust challenge by alleging harm from the heightened costs of recruiting and labor as a result of the consolidators' noncompetes. Such a challenge, while plausible, would still face difficulties proving the requisite injuries described *supra* Part III.A. Moreover, even if a court found harms that outweighed the procompetitive justifications, a court may narrowly tailor its ruling as to leave some form of the noncompetes in place. Such a ruling would not likely change employees' decisionmaking processes for the reasons described *supra* Part II.C.

Additionally, consolidators' acquisitions themselves remain subject to review.<sup>194</sup> Mars already faced one such challenge in its

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194. While companies only need to report transactions above \$92 million as of 2021, the FTC may impose specific prior approval or prior notice requirements for transactions below the standard reporting threshold. See Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 86 Fed. Reg. 7870 (Mar. 4, 2021) (stating that transactions valued at \$92 million or less are not reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976); see also FTC Press Release Regarding JAB Consumer



2017 acquisition of VCA, which ultimately resulted in an order requiring Mars to divest some of its clinics across multiple hospital brands in locations where the acquisition would lessen competition.<sup>195</sup> More notably, as a condition of two recent large acquisitions by NVA, the FTC not only required divestitures of clinics in certain markets, but also imposed ten-year prior approval and prior notice requirements for future acquisitions of clinics within a twenty-five-mile radius of the clinics NVA already owns.<sup>196</sup> While these recent actions will likely slow the industry's consolidation, the noncompetes that enabled the veterinary consolidators to reach this point so quickly remain effective and largely out of reach from direct antitrust challenges. Ultimately, merger review, while undoubtedly helpful, cannot effectively prevent analogous situations in other markets until after the effects of noncompete-aided consolidation take hold.

#### C. CHANGES WITHIN CURRENT ANTITRUST DOCTRINE COULD BENEFIT VETERINARIANS BUT WOULD HAVE LIMITED IMPACT

While opponents of the FTC's proposed rule may point to the possibilities for current antitrust doctrine to capture and prevent anticompetitive harms and effects from noncompetes, such reforms remain limited in their reach. Indeed, encouraging more rigorous merger review or shifting antitrust doctrine to lower plaintiffs' burdens could mitigate some of the issues veterinarians face. These proposals, however, would not likely sufficiently prevent the ways in which noncompetes have negatively affected competition in the veterinary industry.

As one approach, lowering the merger notification threshold for all companies could broaden federal enforcers' reach to more proactively address both consolidation and consolidators' imposition of noncompetes. To be sure, the FTC can already require prior approval and notice for small acquisitions by certain

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Partners, *supra* note 147 (announcing a notice requirement regarding certain acquisitions not otherwise required by the Hart-Scott-Rodino Act).

195. Press Release, FTC, FTC Requires Mars to Divest 12 Veterinary Clinics as a Condition of Acquiring Pet Care Company VCA Inc. (Aug. 30, 2017), <https://www.ftc.gov/news-events/press-releases/2017/08/ftc-requires-mars-divest-12-veterinary-clinics-condition> [<https://perma.cc/VN9A-CRPS>]; *see also* In the Matter of Mars, Inc. & VCA Inc., 2017 WL 3887831, at \*11–12 (Aug. 30, 2017).

196. *See* FTC Press Release Regarding JAB Consumer Partners, *supra* note 147.

firms.<sup>197</sup> The FTC's recent consent agreements with JAB, for example, grant substantial oversight into and control over future NVA deals below the merger threshold.<sup>198</sup> Enforcers may also request the termination of unduly restrictive noncompetes used in the sale of a business even where the noncompete may otherwise be exempt from a prohibition. One FTC enforcer previously noted that "[e]ven when such [noncompete] provisions are ancillary to an otherwise legitimate business transaction, we will still make a determination that the restraints do not independently violate the antitrust laws by being overly broad."<sup>199</sup> The FTC's proposed rule specifically notes its authority to continue challenging noncompetes that are ancillary to broader merger agreements.<sup>200</sup> While the Commission has filed at least two administrative complaints challenging noncompetes used in acquisitions, these challenges remain rare relative to the pervasiveness of noncompetes.<sup>201</sup> The doctrinal burdens outlined *supra* Part III.A likely contribute to their rarity as courts may hesitate to act in the face of substantial procompetitive justifications for ancillary noncompetes.

While reducing the merger notification threshold may enable enforcers to more aggressively police ancillary noncompetes, doing so would require individual adjudications and further exacerbate enforcers' already-significant resource restraints.<sup>202</sup> In addition, such an approach would not likely mitigate the

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197. *Id.*

198. *Id.*

199. Brian Telpner, *Just Because It's Ancillary Doesn't Make It Legal*, FTC: COMPETITION MATTERS (Sept. 30, 2019), <https://www.ftc.gov/news-events/blogs/competition-matters/2019/09/just-because-its-ancillary-doesnt-make-it-legal> [<https://perma.cc/47S9-LW2M>].

200. See Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3483 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910) ("Non-compete clauses covered by this exception would remain subject to Federal antitrust law as well as all other applicable law.").

201. See DTE Energy Co., Docket No. C-4691 (F.T.C. Nov. 21, 2019) 2019 WL 6893028 (complaint) (alleging that NEXUS Gas Transmissions cannot enter into agreements that would restrict competition in the relevant area); see also Axon Enter., Inc., Docket No. D9389 (F.T.C. Jan. 3, 2020), 2020 WL 223850 (complaint) (alleging that a party's noncompetes were not reasonably limited in scope and prevented competition). Both challenges concerned product-side—rather than labor-side—non-competition provisions and customer non-solicitation agreements. Nevertheless, the Commission's authority remains the same on either side as discussed *supra* Part III.A.

202. See Press Release, FTC, FTC-DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), <https://www.ftc.gov/news-events/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early> [<https://perma.cc/6JJJ-22ZQ>] (citing resource and budgetary constraints in the face of an "unprecedented volume" of merger filings).

harms from the pervasive vertical noncompetes discussed *supra* Part II.C. Still, merger review serves as an additional avenue for government enforcers to deal with consolidators' noncompetes in real time. As part of their future monitoring, enforcers should look closely at noncompetes used in veterinary clinic acquisitions to ensure against potentially overbroad terms like those used by NVA in its acquisition, described *supra* Part III.B.

Alternative proposals to shift antitrust doctrine to lower plaintiffs' evidentiary burdens in challenges to noncompetes would also not likely suffice, particularly in light of the practical concerns that enable unenforceable noncompetes to remain effective. While at least one scholar has posed that the only real "limits" of the doctrine stem from government enforcers' "self-imposed neglect of labor markets in the exercise of prosecutorial discretion,"<sup>203</sup> the doctrine undoubtedly remains tipped in favor of defendants as discussed *supra* Part III.A.<sup>204</sup> Proposals to tip the doctrine back in plaintiffs' favor, however, vary in approach and in scope. Professor Eric Posner, for example, argues that the law "treat noncompetes as presumptively illegal, allowing employers to rebut the presumption if they can prove that the noncompetes they use will benefit rather than harm their workers."<sup>205</sup> Other proposals seek to shift the doctrine away from the consumer welfare standard that has made proving an antitrust violation reliant on an empirical showing of harms to wages or output.<sup>206</sup>

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203. Nicolas Petit, *A Theory of Antitrust Limits*, 28 GEO. MASON L. REV. 1399 (2021) (arguing that major criticisms of antitrust law can be solved by making practical considerations in an empirical and context dependent setting).

204. See Herbert Hovenkamp, *Noncompete Agreements and Antitrust's Rule of Reason*, REG. REV. (Jan. 16, 2023), <https://www.theregreview.org/2023/01/16/hovenkamp-noncompetes-and-rule-of-reason/> [<https://perma.cc/EQE4-QJTF>] ("In its present form, antitrust law's rule of reason is not effective for addressing this issue [of overbroad noncompetes]. Its requirements are too onerous, including that the employer possess significant market power in the labor market. Today, nearly all plaintiffs lose rule of reason cases.").

205. Posner, *supra* note 19, at 167. Such a presumption would be akin to the "quick look" standard which courts reserve for restraints where, "based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition." *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005).

206. See Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, 87 U. CHI. L. REV. 595, 595 (2020) (proposing an "Effective Competition Standard," which looks primarily to promote "competition wherever in the economy it has been compromised"); see also Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175, 180 (2021) (arguing that antitrust should focus on dispersing "economic coordination rights," chiefly by aiming to both contain "domination and accommodate[] democratic coordination, while

And alternatively, the FTC can bring additional challenges to noncompetes under its Section 5 authority, which may provide an escape from the confines of the current doctrine.<sup>207</sup>

While each of these proposals may more flexibly permit workers to succeed on the merits of antitrust challenges, each may not sufficiently deter the continued uses of and harms from veterinary noncompetes. Indeed, a presumption of illegality or a more flexible judicial standard could permit courts to more easily find antitrust standing or give less weight to procompetitive justifications. As uses of noncompetes by veterinary practices continue to have some legitimate justifications as described *supra* Part II.B, however, courts would certainly not uniformly find *all* veterinary noncompetes unreasonable. Barring such a finding, consolidators would likely continue imposing noncompetes and veterinarians would continue assuming these noncompetes are both broad and enforceable rather than take their employer to court to find out.<sup>208</sup> And even if courts agree that the FTC need not show anticompetitive effects to prove Section 5 violations, challenging companies one by one for imposing noncompetes may not suffice to curtail the widespread use of noncompetes that have endured even in the face of statutory prohibitions at the state level.<sup>209</sup> Lower doctrinal barriers would undoubtedly benefit workers, but without a profession-wide prohibition on noncompetes, veterinarians will likely continue to stay in their positions for longer than they otherwise might.

#### IV. THE FTC'S PROPOSED RULE WOULD SUBSTANTIALLY BENEFIT THE VETERINARY SERVICES INDUSTRY

In light of the shortcomings of employment and antitrust law, directly targeting noncompetes through federal rulemaking offers the best approach to constrain the present harms from veterinary consolidators' noncompetes. The FTC's proposed rule would invalidate most existing noncompetes and broadly prohibit most noncompetes going forward, permitting only those between the

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also carrying forward the emphasis on fair competition already present in the common-law tradition").

207. See *supra* Part III.A.

208. See also *supra* Part II.C (discussing the chilling effect of unenforceable noncompetes).

209. See *supra* Part II.C.

seller and buyer of a business or where the person bound by the noncompete has a substantial ownership interest.<sup>210</sup> The FTC now seeks comment on its proposed rule and potential alternative formulations.<sup>211</sup>

In weighing potential alternatives, this Part considers several proposals for noncompete reform pursuant to their categorization by Professors Kenneth G. Dau-Schmidt and Phillip J. Jones as having one of four primary objectives: (1) to discourage overly broad noncompetes; (2) to ensure notice, clarity, and bargaining over noncompetes; (3) to completely ban noncompetes; or (4) to help ensure an employer's legitimate interest in the noncompete.<sup>212</sup> In doing so, this Part finds that promulgating a rule focused on ensuring an employer's legitimate interest offers the fairest and most effective approach.

Ultimately, this Part recommends that the FTC adopt its proposed rule largely as written, departing only from the FTC's proposed threshold for what ownership share constitutes a "substantial" ownership or partnership interest to warrant the exemption.<sup>213</sup> Adopting a broad prohibition with limited exceptions would best alleviate the harms felt by veterinarians and small veterinary practices resulting from consolidators' noncompetes. While a complete ban on noncompetes in *any* veterinary context may unfairly impede the legitimate use of noncompetes by small veterinary practices—particularly in small partnerships or in practice sales—the FTC's proposed rule would, in fact, permit this use. Exempting professionals or high-income earners altogether, however, would fail to alleviate the negative effects of veterinary noncompetes described in this Note. Moreover, a professional or high-income exemption could still permit similar and yet-to-be-seen uses and negative effects by dominant firms or consolidators going forward. Accordingly, for the veterinary services industry, the FTC's proposed rule would

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210. See Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3483 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910) (specifying 25% as threshold for a "substantial" interest).

211. See *id.* at 3483. This Note specifically addresses whether the FTC's rule ought to apply different standards to workers who qualify as "learned professionals" or whose incomes meet a certain threshold, as veterinarians may fall within either the profession-based or high-earner exemption. See *id.* at 3500, 3518–19.

212. See Dau-Schmidt et al., *supra* note 14, at 619.

213. In contrast to the FTC's proposed rule, this Note suggests a lower threshold of 10% ownership or partnership interest for the "substantial owner" exception than the 25% suggested by the FTC. See discussion *infra* Part IV.A.

help to ensure employers' legitimate interests in using noncompetes, would encourage less restrictive means of retention, and would mitigate the harmful effects of any use of noncompetes in the future.

A. THE FTC'S PROPOSED RULE WILL EFFECTIVELY CURTAIL HARMS AND PROTECT LEGITIMATE EMPLOYER INTERESTS

As written, the FTC's proposed rule would mitigate most veterinary noncompetes' harmful effects without unduly infringing on the most clearly legitimate uses of these provisions. In shaping a more narrowly-tailored alternative to a complete ban on all noncompetes in all contexts, many proposals attempt to prohibit noncompetes where not clearly necessary to protect the employer's proffered interest. The FTC's proposed rule does just that. While it broadly prohibits employee noncompetes, the proposed exemptions demonstrate a considered concern for employer interests by permitting some noncompetes where they would protect a clearly legitimate interest.

Noncompetes imposed on low-wage workers who do not have access to proprietary information, for example, rest on shaky justifications.<sup>214</sup> To target unfair uses of such noncompetes, some proposals seek to define an income threshold under which noncompetes are unenforceable.<sup>215</sup> Other proposals exempt specific occupations or categorically delineate permissible interests that do not warrant the strong protection afforded by noncompetes. Some enacted state statutes, for example, prohibit noncompetes specifically for technology workers, emphasizing that the innovation spurred by potential spin-off firms outweigh the intellectual property rights of employers, which are already protected by more targeted provisions.<sup>216</sup> Like these state laws, other proposals call for prohibiting noncompetes specifically for healthcare workers, emphasizing that consumers' choice in

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214. See *supra* Part II.B.

215. See Dau-Schmidt et al., *supra* note 14, at 622 (noting that "eleven states have enacted statutes that prohibit or constrain the application of noncompetes to low wage workers, although they disagree considerably as to how to define who is a 'low wage worker'").

216. See *id.* at 614, 629 (citing Gilson, *supra* note 238).

provider predominates over employers' interest in protecting practice goodwill.<sup>217</sup>

For veterinarians, only noncompetes used in connection with a practice sale or where the covered person owns a substantial amount of equity warrant the broad protection that noncompetes afford. Independent veterinary practice owners most clearly have an interest in the historically-protectable practice goodwill in partnership agreements or when acquired with the purchase of a practice.<sup>218</sup> Consolidators, in contrast, rely much less on newly-graduated veterinarians to maintain or further strengthen their practice goodwill. That consolidators' interests in their reputation and client base do not depend on these young veterinarians substantially weakens the justification for practice goodwill as a legitimate protectable interest.<sup>219</sup> Given the weakness of this justification, consolidators must proffer other justifications for their noncompetes, such as protecting investments in training, confidential information, and trade secrets. These also do not hold up to scrutiny and are already covered by other targeted provisions in veterinarians' employment contracts.<sup>220</sup>

Ultimately, the FTC's proposed rule as written would curtail the harms from veterinary noncompetes and promote healthier competitive conditions across the industry.<sup>221</sup> While the proposed rule would prohibit noncompetes used in small veterinary practices, these practices would likely see a net benefit from a freer labor force where veterinary associates are no longer bound to consolidators' practices.<sup>222</sup> Under the rule, moreover, practice owners would remain free to impose noncompetes so long as they provide enough consideration in the form of equity. This substantial equity requirement would, in turn, prevent practices from providing only a de minimis share. While the FTC proposes a 25% threshold to qualify for this exception,<sup>223</sup> a lower threshold of 10% may better encourage equity-based consideration for

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217. *See id.* at 624. This emphasis on client choice comports with the longstanding prohibition on noncompetes enjoyed by lawyers. *See id.* Notably, in 2021, corporate lawyers commonly received six-figure lateral bonuses to leave their firms or hefty retention bonuses for staying at their current ones. *Id.*

218. *See supra* Part IV.A.

219. *See supra* Part II.B.

220. *See supra* Part II.B.

221. *See supra* Part II.A; Part II.B.

222. *See supra* Part I.B.

223. Proposed Text of Non-Compete Clause Rule, *supra* note 200, at 114–15.

younger associates at smaller practices while still effectively eliminating noncompetes from large consolidators. As one illustration, a 10% threshold could encourage an independent practice with four veterinarian owners—each with a 25% share and each bound by a noncompete—to give a younger associate a 10% ownership share conditioned on signing a noncompete. In doing so, the four owners could each give up 2.5% of their own ownership. All five noncompetes in this scenario—assuming reasonable scopes—would be valid. Under the FTC’s proposed threshold, however, the same distribution would render all of these veterinarians’ noncompetes invalid, disincentivizing this type of equity-based consideration at small practices. Either way, the FTC’s proposed rule—without occupational or income-based exemptions—would encourage more equitable retention tools than noncompetes and substantially benefit both individual veterinarians and small veterinary practices.

B. A RULE ATTEMPTING TO ENSURE “REASONABLE SCOPE”  
WOULD NOT SOLVE THE PROBLEM

Considering the evidence of noncompetes’ continued use and effectiveness, even in states statutorily banning the enforcement of noncompetes,<sup>224</sup> proposals to limit the scope of noncompetes without prohibiting their use are unlikely to have a substantial impact on employee and employer behavior. In attempting to curtail overly broad noncompetes, several states, for example, have established presumptive maximums for the terms used to set a noncompete’s scope.<sup>225</sup> By defining a presumptively “reasonable” scope in duration (most often two years), geographic area, or activity, these reforms seek to rein in the most egregious restrictions while preserving a more fundamental freedom to contract.<sup>226</sup>

Alternative proposals suggest that enabling administrative fines or creating a private cause of action with damages, class actions, and attorney fees will limit employers’ use of unreasonable noncompetes.<sup>227</sup> In fact, some states have recently codified this approach. In 2020, Washington passed a law that

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224. See *supra* Part II.C.

225. See Dau-Schmidt et al., *supra* note 14, at 627.

226. See *id.* at 596, 627.

227. See *id.* at 627.



imposes a \$5000 minimum for damages, attorney fees, and costs where a court or arbitrator does not fully uphold a noncompete.<sup>228</sup> While this approach certainly lowers the barriers for individual employees—including veterinarians—to sue, it remains limited in its reach. Employees bound by noncompetes who are unclear as to the provisions' enforceability would still likely want to avoid the "potential headache" of litigation, particularly where they are unsure of the likely costs or unfamiliar with the jurisdiction's recently-enacted legal reforms.<sup>229</sup> Enabling easier enforcement could eliminate and deter some unreasonable uses—particularly in completely non-enforcing states—but such an approach, on its own, is unlikely to address noncompetes' continued effects.

### C. A RULE FOCUSED ON NOTICE, TRANSPARENCY, AND BARGAINING WOULD NOT GO FAR ENOUGH

While transparency-focused reforms could mitigate some of the issues associated with unfair bargaining, such proposals, on their own, would also not be sufficient to curtail the harms from noncompetes. In line with the emerging research demonstrating harms from either late-notice noncompetes or those signed without bargaining,<sup>230</sup> some academics and policymakers have endorsed relatively narrow reforms that would promote transparency and bargaining with respect to noncompetes.<sup>231</sup> A number of states, for example, amended their state law to condition enforceability of noncompete provisions on the employers having provided these provisions to the employees *prior* to their employment offers.<sup>232</sup> Other states now require employers to provide additional consideration for noncompetes proposed *after* the subject employee joins the company.<sup>233</sup>

To be sure, a federal rule in line with these efforts could mitigate the issues associated with late-notice noncompetes, lack of bargaining, and employees' misconceptions about the scope and

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228. *Id.* at 628.

229. @BlackTemplars & @amb-ly, *supra* note 131; see also *The Behavioral Effects of (Unenforceable) Contracts*, *supra* note 84, at 10 ("Employees may know the law, be confident about how the law ought to apply to their noncompete, and yet still abide by the provision's terms to avoid the potential financial and opportunity costs of a protracted legal battle that they cannot afford or may (erroneously) lose." (internal citation omitted)).

230. See *supra* Part II.D.

231. See Dau-Schmidt et al., *supra* note 14, at 620.

232. See *id.* at 620–21.

233. See *id.* at 621.

meaning of noncompete terms. Imposing such a notice requirement at the federal level in particular could limit uncertainty about enforceability and continued employer noncompliance resulting from state-level implementation. Still, a notice requirement alone would leave in place the underlying restraints on mobility that have permitted veterinary consolidators to withhold scarce labor from their competitors. As a result, a federal prohibition would better limit the variety of harms that flow from pervasive uses of noncompetes.

#### D. AN OUTRIGHT BAN IN ALL CONTEXTS WOULD GO TOO FAR

While some commentators, advocacy groups, and policymakers have advocated for an outright ban on noncompetes,<sup>234</sup> the legitimate uses for some veterinarians suggests a need for at least some carve-outs for noncompetes used in practice sales or where the covered person owns a share of the business. In practice sales, the restrained veterinarian most clearly receives consideration in exchange for the restraint while the purchaser most clearly has a protectable interest in the form of the practice, client goodwill, or both.<sup>235</sup> In partnership agreements, where a veterinarian has an ownership stake in the practice itself, noncompetes meant to protect practice goodwill in the event of dissolution also appear sufficiently justifiable. Where terms of provisions in both scenarios may be overbroad, however, employment and antitrust law offer some recourse, particularly as potential plaintiffs would be much more likely to have sufficient incentive and capital to challenge the noncompetes' scope in court.<sup>236</sup> As discussed in regard to *Choker*, *supra* Part III.B, however, noncompetes in practice sale agreements may still unfairly restrict competition particularly when they are imposed by consolidators.

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234. See *id.* at 629 (collecting and summarizing proposals, including, for example, Colvin & Shierholz, *supra* note 13 (a blanket ban is “a means of simplifying enforcement issues and improving the economy”)); EVAN STARR, ECON. INNOVATION GROUP, THE USE, ABUSE, AND ENFORCEABILITY OF NON-COMPETE AND NO-POACH AGREEMENTS: A BRIEF REVIEW OF THE THEORY, EVIDENCE, AND RECENT REFORM EFFORTS 2 (Feb. 2019), <https://eig.org/wp-content/uploads/2019/02/Non-Competes-Brief.pdf> [<https://perma.cc/JM35-PERX>] (stating that a complete ban will “help spur the spread of economic growth”).

235. See *supra* Part II.B.

236. See discussion *supra* Part III.B.

Considering that the pervasiveness of and harms from noncompetes have only recently come to light, an even broader ban would most clearly prevent further negative effects. In low-wage and unskilled occupations where employees are less likely to have access to employers' client lists and other protected information, for example, proponents of a blanket ban cite noncompetes as overly broad tools, relative to employers' purported justifications, that would rarely hold up under judicial scrutiny.<sup>237</sup> A complete ban could also spur technological innovation<sup>238</sup> and economic growth by spin-off firms<sup>239</sup> or new market entrants.<sup>240</sup>

A truly complete ban, however, assumes that the harms from noncompetes universally outweigh employers' legitimate interests. Belying that assumption are state-level "blanket ban" proposals or enactments that exempt noncompetes incident to the sale of a business or the dissolution of a partnership where employers' interests are clearest.<sup>241</sup> In the end, the available evidence suggests that a broad prohibition that does not exempt professionals or high-earners but does permit some limited uses—as does the rule proposed by the FTC—would best serve the veterinary services industry.

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237. See OPEN MKTS INST. ET AL., *supra* note 20, at 39. See also discussion *supra* Part II.B. (noting that non-solicitation agreements can protect employers' by prohibiting their former employees from stealing their business and that confidentiality and trade secret agreements can protect employers' sensitive, business information). While emerging research suggests noncompetes encourage employers' investments in employee training, less restrictive means to recoup such training costs exist. Further, those investments do not clearly pass through to consumers. And at the end of the day, paying employees a higher wage can retain them. Consider, for example, the "special bonuses" offered by law firms—which are prohibited from using noncompetes—to retain their lawyers from lateralizing to competitors who offer six-figure signing bonuses.

238. See Dau-Schmidt et al., *supra* note 14, at 629 (citing 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 (1999) and describing Gilson's article as the "famous case study arguing that the dominance of the Silicon Valley . . . is in large part due to the fact that noncompetes are not enforceable in the state of California").

239. See generally Evan Starr, Natarajan Balasubramanian & Marik Sakakibara, *Screening Spinouts?: How Noncompete Enforceability Affects the Creation, Growth, and Survival of New Firms*, 64 MGMT. SCI. 552 (2018).

240. See Dau-Schmidt et al., *supra* note 14, at 617 (citing Kang & Fleming, *supra* note 183).

241. See *id.* at 629. California, for example, permits noncompetes used in the sale of a business. *Id.*

## CONCLUSION

Pamela Mars, ambassador to Mars Petcare, said it directly: “If you don’t like us, bummer, you’re stuck with us for a long time.”<sup>242</sup> Veterinary consolidators are not going anywhere and neither are their veterinarians. The noncompetes that directly ensure the latter also enable the former, permitting consolidators to withhold scarce labor from the same competitors they seek to acquire. Debt-laden veterinarians, meanwhile, face increasingly dim prospects for capturing their fair share of the industry’s explosive growth. Eliminating employment noncompetes for veterinarians without substantial equity may not address every negative effect of the industry’s consolidation, but the FTC’s proposed rule would go a long way in fostering more equitable and sustainably competitive growth for the industry.

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242. See Nolen, *supra* note 1.