

WAY AHEAD OF YOU, MR. PRESIDENT

By: [Andrew K Jacobson](#)

A big drag on the health of the economy is labor mobility – or rather, the lack of it. People trapped in jobs that they don't want to be in do not supply productivity and innovation. Non-competition agreements contribute significantly to that lack of labor mobility. Some employers like them because they suppress threats of competition from employees who could thrive elsewhere. The sandwich chain Jimmy John's used them for their regular line employees until pressure last June forced them to [discontinue the practice](#).



Love and trust are better than a leash. Photo image courtesy of the White House and Wikimedia Commons.

On October 25, 2016, President Obama's White House issued a [Call to Action](#) to states against non-compete agreements. Finding a "gross overuse of non-compete clauses today," the President urged states to dramatically limit non-compete clauses, as research has found that "states that strictly enforce non-compete agreements have lower wage growth and lower mobility than states that do not enforce them." California is 144 years ahead of the President.

California's [Business and Professions Code § 16600](#), barring covenants not to compete for most employment, has been on the books in the Golden State since 1872: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." The only exceptions are when someone sells a business: then, the seller can agree to be prohibited from competing against the buyer in a given geographic area for a reasonable length of time. Only two other states, Oklahoma and North Dakota, have similar strong prohibitions against non-competition agreements.

President Obama encourages other states yet unwilling to part with non-competition agreements to reserve them for only the highest-level workers, and to require them to be disclosed before a job or a significant promotion can be accepted, thereby increasing the options of the worker (and the worker's bargaining power).

Some California employers still add non-competition clauses to their employment agreements. They know that they can never enforce them, but hope that the clauses will

intimidate employees who might want to leave. President Obama addresses that in the Call to Action as well, saying that “[t]o promote compliance and enforcement, states should assign appropriate remedies or penalties for employers that do not comply with state non-compete statutes California.” California employers may not realize that this could constitute an unfair business practice under Cal. Bus. & Prof. Code § 17200, with penalties of up to \$5000 for *each* contract that contains a non-competition clause.

Employers worried about *unfair* competition from their employees still have remedies, by having employees sign agreements to keep trade secrets confidential, including after employment ends. This protects the legitimate expectations of the employers, while allowing the employee freedom to move forward with his life if he chooses.

Employers might think that a non-compete covenant promotes their company’s prosperity, but an employee frustrated by being stuck in his current job is just as likely to be a saboteur as a traitor. Reasonable limits like trade secret protections are far more useful to the company than a non-compete covenant that promotes distrust and resentment.

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