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Practice Update

Blurring the Lines: How NASAA's Franchise Noncompete Advisory Threatens Doctrinal Clarity

October 14, 2025

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This article was originally published in the ABA's Franchise Law Journal, Vol. 44, No. 1, Fall 2025.

Introduction

Noncompete agreements occupy the center of today's unfair competition debate. Critics contend that these covenants suppress employee mobility, depress wages, and entrench power imbalances—particularly in labor markets. Those concerns have triggered waves of regulatory action, most prominently an executive-branch directive that culminated in an attempt by the Federal Trade Commission (FTC or Commission) to ban most worker noncompetes nationwide. In parallel, many states have tightened or abolished such restraints, reflecting an emerging consensus that employment noncompetes often impose more social cost than benefit.

Franchise covenants, however, are different. A franchisee is not an employee but an independent business owner who receives a limited, time-bound license to deploy the franchisor's trademarks, proprietary know-how, and goodwill. When that license ends—whether by expiration or termination—the franchisor has a legitimate interest in ensuring that the former franchisee does not immediately

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compete with the very assets just entrusted to it. The interest is structural, not speculative, and arises from the logic of trademark licensing itself.

Post-term noncompetes serve at least three procompetitive functions in franchising. First, they deter the misappropriation of brand equity and confidential systems. Second, they give franchisors confidence to invest in training, marketing, and product innovation that benefit the entire network. Third, by protecting franchisees' territorial exclusivity from copycat entrants, they sustain system-wide incentives to invest. Far from stifling competition, properly tailored franchise noncompetes facilitate healthy inter-brand competition by preserving the integrity of each brand platform.

The 2025 advisory from the North American Securities Administrators Association (NASAA), if followed, would nevertheless curtail these covenants beyond what many courts would enforce in franchise disputes. Although the NASAA advisory correctly urges reasonableness and tailoring, it often conflates the franchisee-franchisor relationship with the employer-employee relationship and thus imports a labor-market framework ill-suited to business-format licensing. Although NASAA's advisory is nonbinding, the reality is that many registration states follow NASAA's guidance, and, as a result, state examiners may demand substantive restrictions on noncompetes as a condition for registration.

This article offers a different perspective. Part II sets the regulatory stage, summarizing recent federal and state initiatives directed at employment noncompetes. Part III analyzes the NASAA advisory and highlights its doctrinal gaps. Part IV explains why post-term franchise noncompetes are both distinctive from employment noncompetes and justified. And Part V proposes a franchise-specific framework that preserves the traditional reasonableness test while accounting for the structural features of franchising.

The Regulatory Context: Employment Noncompetes Under Fire

President Biden opened the current chapter on July 9, 2021, when he issued an executive order directing the FTC to consider rules that would "curtail the unfair use" of worker noncompetes.[1] The Commission responded on January 19, 2023, with a Notice of Proposed Rulemaking that would deem it an unfair method of competition for any employer to enter into or maintain a noncompete with a "worker," broadly defined to include employees, contractors, and interns.[2] Citing empirical studies that link noncompetes to lower wages, reduced entrepreneurship, and diminished innovation, the FTC framed the rule as a structural correction for bargaining-power and information asymmetries in labor markets.

After receiving more than 25,000 comments, the Commission voted 3–2, on April 23, 2024, to adopt a final rule that closely tracked the proposal.[3] The rule requires employers to provide notice within 120 days of the rule's effective date that existing noncompetes would not be enforced and prohibits new covenants, except in narrow sale-of-business contexts. Judicial review followed swiftly: on July 3, 2024, the U.S. District Court for the Northern District of Texas in *Ryan LLC v. FTC* enjoined enforcement and ultimately set the rule aside, holding that the agency lacked statutory authority under Section 6(g) of the FTC Act.[4] The decision left employers and workers in limbo and underscored the legal uncertainty surrounding a nationwide administrative ban.

Since then, the litigation has landed in a procedural holding pattern. The FTC appealed and, under the outgoing Biden leadership, filed its opening brief in the Fifth Circuit on January 2, 2025, seeking to revive the rule.[5] The November 2024 election, however, ushered in a new administration that is far less enthusiastic about the project. President Trump elevated then-Commissioner Andrew Ferguson—who had dissented from the original rulemaking—to the chairmanship on Inauguration Day. On March 7, 2025, the government asked the appellate court for a 120-day stay while the agency "reconsider[ed]" whether continued defense of the noncompete rule is in the public interest, and Chairman Ferguson publicly questioned the wisdom of pressing forward.[6] For now, the district-court vacatur remains in effect, and the prospect of a nationwide administrative ban appears remote unless a future Commission with a different majority revives the initiative.

Well before the FTC acted, however, state legislatures had begun rewriting the noncompete landscape. For example, Colorado's 2024 amendments to its statute render covenants presumptively void unless they protect trade secrets and bind only workers earning more than the annually indexed threshold of $127,091, subject to a sale-of-business exception.[7] Illinois amended its Freedom to Work Act, effective January 1, 2022, to bar noncompetes for employees earning $75,000 or less (with scheduled increases) and to impose a fourteen-day review period plus a private right of action for fees.[8]

Washington's 2020 statute allows enforcement only against employees and independent contractors who exceed inflation-adjusted earnings thresholds—$123,394 and $308,485, respectively, for 2025—and generally caps post-employment duration of a noncompete at eighteen months.[9] Massachusetts anticipated these moves with the 2018 Noncompetition Agreement Act, which requires "garden-leave" pay or equivalent consideration and prohibits covenants for non-exempt employees.[10] Minnesota went further in 2023, voiding virtually all post-employment restraints, subject only to narrow sale-of-business and dissolution exceptions.[11]

The result is a patchwork in which identical employment relationships receive markedly different treatment depending on geography. Multistate employers must monitor evolving wage thresholds, notice periods, and consideration requirements, while employees face real uncertainty about which forum's law will govern. That mosaic supplied much of the empirical and anecdotal evidence the FTC relied upon to justify federal intervention in its 2024 Final Noncompete Rule, even as the litigation in *Ryan* leaves the scope of federal authority unresolved.

A growing empirical record undergirds the modern regulatory campaign. The first nationally representative study of restrictive-covenant prevalence found that roughly eighteen percent of U.S. workers are currently bound by a noncompete, and thirty-eight percent have signed at least one during their careers.[12] Separate modeling from the Department of Treasury concluded that narrowing or eliminating unenforceable covenants could raise aggregate wages by reallocating labor to higher-productivity uses.[13] Natural-experiment analyses, canvassed by the FTC in its rulemaking record, consistently detect statistically significant wage gains after state-level constraints tighten.[14] Journalistic profiles, such as a 2024 *Financial Times* series, personalize the data by illustrating how nurses and bartenders earning modest salaries were blocked from lateral moves despite lacking trade-secret access, underscoring the breadth of contractual language relative to legitimate employer interests.[15]

Innovation concerns supply a second policy pillar. California's longstanding prohibition has been linked to higher rates of venture-capital formation, entrepreneurial entry, and patenting compared with states that enforce covenants.[16] Drawing on that literature, the FTC projected that a nationwide ban would yield new firm formation in the thousands each year, enhancing consumer choice and downstream price competition.[17]

Against this evidentiary backdrop, the Commission's final rule draws an explicit boundary around franchising. While a "worker" includes an individual employed by a franchisee or franchisor, the definition does not treat the franchisee itself—a licensed business entity—as a covered party.[18] Practitioners quickly emphasized the point: franchisors may still protect system goodwill through post-term covenants signed by franchisees, although noncompetes executed with the franchisee's individual employees now fall within the putative federal ban.[19] The agency anchored that demarcation in the sale-of-business analogy long recognized at common law, reasoning that post-termination restraints in franchising resemble seller covenants that protect an acquirer's purchase of intangible assets, not employment restrictions on wage earners.[20]

Although the 2024 Final Noncompete Rule left franchise covenants intact, the labor-market rhetoric driving the FTC's approach has begun to permeate franchise oversight. In February 2025, NASAA issued an advisory urging registration states to scrutinize post-term franchise noncompetes for reasonableness in scope, territory, and duration.[21] But the document repeatedly invokes themes of fair exit and "livelihood" protection—language that appears rooted in the FTC's own findings related to labor mobility. The NASAA Advisory essentially assumes franchisees are akin to economically dependent workers, yet offers scant empirical evidence for this claim. Without meaningful data showing franchisees resemble wage-dependent employees, the NASAA Advisory's labor-market rationale for regulating franchise noncompetes rests on a notably thin evidentiary foundation.

This conceptual borrowing overlooks structural realities. Franchisees are sophisticated business owners who negotiate territory, term, royalty, and renewal rights, often with counsel. They recoup their sunk costs by leveraging brand equity that franchisors build through system-wide advertising and innovation. If a departing operator could immediately redeploy confidential know-how in a competing format, the incentive for both franchisor and network peers to invest would erode. Courts applying the traditional "reasonableness" test have long acknowledged this alignment, routinely upholding covenants that are limited in space and time.

The NASAA Advisory also downplays the competitive upside of tightly drafted covenants: by assuring prospective operators that system value will not be diluted by copycat outlets, noncompetes can stimulate entry into the franchise system and expand inter-brand consumer choice. In that sense, post-term restraints in franchising serve the same pro-competitive function as seller covenants in mergers and acquisitions.

In short, while empirical evidence of wage suppression and mobility constraints may justify aggressive intervention in labor markets, the adoption of the same advocacy in a broader sense risks conflating distinct legal categories and distorting franchise law doctrine. After examining the NASAA Advisory in greater detail, the remainder of this article articulates that boundary, contending that post-term franchise noncompetes should continue to be judged under the familiar "reasonableness" standard—one applied through a broader commercial, not a narrower employment, lens.

NASAA Advisory's Labor Style Shift and Its Implications for Franchise Noncompetes

NASAA issues guidelines and policy statements that influence franchise sales and disclosure practices in the United States. While NASAA's recommendations are not inherently binding, many franchise registration states adopt some of these standards into law or use them as benchmarks when reviewing disclosure documents. As a result, NASAA's guidelines are often influential—sometimes being codified as legal requirements, and other times simply shaping best practices—depending on how each state chooses to implement them.[22]

The NASAA Advisory begins by cataloguing franchisee comments that describe post-term covenants as “inherently unfair,” “restraint[s] on leaving a franchise,” and impediments to “earning a living wage,” language imported almost verbatim from the FTC’s worker mobility discourse.[23] It reiterates that theme when it warns that broadly worded restraints may “prevent a [departing] franchisee from earning a living wage” and therefore should be “narrowly drafted” to balance the parties’ interests.[24] The stated objective—leveling the playing field so that former operators can pursue their livelihoods—fits comfortably within employment law, where courts and regulators are accustomed to redressing power asymmetries between firms and workers. The NASAA Advisory, however, applies that same objective to a relationship in which both counterparties are commercial actors that negotiated, invested, and allocated risk ex ante. By foregrounding the ex-franchisee’s personal livelihood, NASAA effectively imports a labor policy rationale into what is, doctrinally, a commercial licensing regime. Practitioners who prepare disclosure documents have long fielded examiner questions about scope and duration; what is new is the framing, which recasts the inquiry as worker protection rather than contractual reasonableness. That rhetorical pivot shapes every subsequent recommendation.

To justify its labor-inflected perspective, the NASAA Advisory invokes the concept of economic dependence, noting that many franchisees “incur debt” to enter the system and “cannot exercise total control” over operations because they must comply with brand standards.[25] Dependence on the licensor’s goodwill is undeniable, but the FTC itself has acknowledged that a franchise relationship is not an employment relationship. In the Proposed Noncompete Rule the agency expressly excluded covenants contained in a franchise agreement, explaining that franchisees operate as independent businesses rather than as workers.[26] By collapsing dependence into employment, the NASAA Advisory obscures the feature that places franchising outside the FTC's proposed worker rule: a franchisee purchases a discrete bundle of rights, runs its own profit and loss statement, bears entrepreneurial risk, and—critically—may sell the business for capital gain. Some practitioners have already highlighted this doctrinal misstep, observing that the NASAA Advisory borrows labor-market rhetoric to regulate agreements between sophisticated business entities.[27] Remedies that make sense for employees—gap-filling consideration rules, mandatory rescission periods, or fee shifting—can unsettle incentives when grafted onto an arm's-length license.

The NASAA Advisory devotes substantial space to franchisee concerns yet compresses franchisor interests into a single paragraph that lists "trade secrets" and "the franchise system" in general terms.[28] It omits the doctrinal insight, repeatedly recognized by courts, that the franchisor's goodwill is a specific licensed asset that reverts to the licensor upon termination.[29] A restraint that averts an immediate, brand-confusing pivot by the outgoing operator therefore functions less like an employer's attempt to shackle labor and more like a seller's covenant not to erode the very goodwill just transferred to a buyer. Courts have enforced noncompetes ancillary to the sale of a business since *Mitchell v. Reynolds* in 1711, reasoning that a buyer paying consideration for goodwill deserves protection against its immediate dilution.[30] Modern franchise decisions extend that logic. For example, in *Jiffy Lube International, Inc. v. Weiss Brothers, Inc.*, the court analogized the franchisor's post-term covenant to a seller's promise not to recapture goodwill and upheld a ten-month, five-mile restraint as reasonably necessary to allow Jiffy Lube to reestablish its brand presence.[31] Likewise, in *Meineke Car Care Centers, Inc. v. Bica*, the court enforced a one-year, six-mile post-term restraint, finding that Meineke had a legitimate interest in recapturing location-specific goodwill, echoing the protective logic long afforded to buyers in traditional sale-of-business jurisprudence.[32]

NASAA cites the historical buyer-seller doctrine only to disclaim its relevance, stating that "buyer-seller rationale supporting a post-term noncompete is strained when applied to franchising."[33] That assertion overlooks the authority just described and discussed further later and ignores empirical evidence discussed below that post-term restraints signal to prospective franchisees that their capital will not be undercut by brand imitation, thereby encouraging system growth. Ignoring the well-established analogy between franchising and business sales therefore risks severing noncompete analysis from its common-law foundations and, in practical terms, chilling the very investment that fuels competitive entry and consumer choice.

NASAA repeatedly claims it is not calling for a ban but is merely urging regulators to insist on "reasonableness" in scope, duration, and geography.[34] Yet reasonableness is already the universal test applied by courts. As a result, NASAA's emphasis may lead state examiners to take it upon themselves to enforce that standard during the franchise-registration process—long before any factual record about local market conditions, customer migration, or brand-relaunch timelines can be developed.

While some states—such as California[35] and Washington[36]—explicitly require franchisors to include detailed noncompete disclosures in their franchise disclosure documents or state-specific addenda, other states lack such statutory or regulatory mandates. Nevertheless, there are anecdotal reports of state examiners in these jurisdictions scrutinizing or even demanding substantive changes to noncompete provisions as part of the registration process in the wake of the NASAA Advisory.[37] Absent clear statutory authority, such demands arguably exceed the examiners' statutory mandate, as their typical role is to enforce disclosure requirements rather than dictate contract terms. Despite this, many franchisors feel compelled to acquiesce in order to obtain registration, effectively resulting in informal regulation that bypasses the legislative or rulemaking process.[38] The result is a regulatory ratchet that moves only one way: permissible restraints steadily contract because few franchisors are willing to risk stalled registrations merely to preserve language that examiners are signaling they will challenge.

The resulting practical effects fall on both sides of the franchise relationship. Post-term noncompetes protect the franchisor, small and large franchisees, and the franchised brand overall. Franchisees who sign personal guarantees and invest significant sums in build-out costs view a measured post-term covenant as an insurance policy that the brand they bought into will remain distinctive, rather than being diluted by an immediate look-alike down the street. Likewise, private-equity investors and multiunit developers price enforceable covenants into their valuations; if post-term safeguards become unpredictable, they will demand higher risk discounts or deploy capital elsewhere. The stakes are substantial: franchised businesses are projected by the International Franchise Association (IFA) to employ more than nine million people in 2025 after adding approximately 210,000 new jobs, and that growth depends, in part, on investor confidence in the integrity of franchise systems.[39] Undermining that confidence could chill unit expansion, slow hiring, and reduce the very economic dynamism that well-tailored franchising can deliver.

Balanced regulation therefore requires more than a front-end administrative screen. Franchisees plainly have an interest in reasonable mobility if a unit fails or if an owner wishes to pursue another concept; the common-law reasonableness test already mediates that tension by trimming restraints that outstrip the franchisor's demonstrable needs. What the NASAA framework threatens to do is displace that fact-sensitive, case-by-case inquiry with a prophylactic presumption that tighter is always better—an approach that erodes brand equity and, paradoxically, may leave all stakeholders worse off. A more even-handed path would preserve space for examiners to flag truly abusive provisions—system-wide, perpetual covenants, for example—while leaving ordinary disputes over months or miles to courts, where discovery, expert evidence, and blue-penciling can yield calibrated results. Such an approach protects the integrity of franchising as a distribution model that depends simultaneously on brand consistency and entrepreneurial opportunity, without importing a labor-law template ill-suited to business-to-business licensing.

Franchise Noncompetes Are Distinctive and Pro-Competitive

A franchise agreement is, at bottom, a limited license that grants defined rights in trademarks, proprietary methods, and system goodwill. Franchisees are often framed as independent entrepreneurs who purchase access to intellectual property and then bear the residual risk of operating the outlet. That structure contrasts sharply with employment, where a worker is a natural person who works for an employer.[40] The FTC acknowledged the distinction in its 2024 Final Noncompete Rule, expressly excluding franchisor-franchisee covenants from its general prohibition on worker noncompetes because, in franchising, the franchisor and franchisee's relationship is "more analogous to the relationship between two businesses" rather than being within a single firm hierarchy.[41] Treating the relationship as if it were employment obscures the fact that the franchisee has acquired an asset of enduring value—permission to trade under the brand—that must revert to the licensor when the contract ends.

Because the right to use marks and methods is temporary, the franchise agreement's termination or expiration functions much like closing a sale-of-business transaction: the seller (the departing franchisee) must step aside so the buyer (the franchisor or a successor operator) can continue to maintain brand goodwill in the same market. Federal courts have therefore imported sale-of-goodwill logic when evaluating post-term noncompete restraints.[42] In *Jiffy Lube*, the court treated the franchise as a time-bound conveyance of goodwill and upheld a restrictive covenant—after tailoring its reach—because it was necessary to protect that goodwill once the franchise ended. The court explained:

One can view a franchise agreement, in part, as a conveyance of the franchisor's good will to the franchisee for the length of the franchise. When the franchise terminates, the good will is, metaphysically, reconveyed to the franchisor. A restrictive covenant, reasonably crafted, is necessary to protect the good will after that reconveyance.[43]

This passage summarizes the philosophical underpinning for post-term franchise covenants: they are not designed to shackle labor but to ensure that the goodwill temporarily licensed to a franchisee flows back to its owner unencumbered.

Similarly, in *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, the Sixth Circuit enforced a two-year covenant that barred the ex-franchisee from providing restoration dry-cleaning services in and around its former territory, holding that the restraint was narrowly drawn to prevent the misuse of the franchisor's confidential information, preserve the franchisor's customer goodwill, and prevent unfair competition.[44]

It bears emphasis that copy-cat risk is concrete, not theoretical, in franchising. The NASAA advisory itself concedes that misuses of a franchised brand's proprietary assets—marks, trade dress, confidential manuals, and other assets—can erode system value. [45] Case law supplies vivid illustrations. In *AAMCO Transmissions v. Dunlap,* the franchisor alleged that its former operator continued servicing vehicles under virtually identical branding, prompting an injunction grounded partly on the covenant.[46] By blocking that instantaneous pivot, a post-term noncompete restraint protects both the franchisor and the remaining franchisees who rely on brand differentiation to maintain market position.

Empirical evidence shows that franchising expands faster when investors trust that system equity will be shielded from imitation. The IFA's 2025 *Franchising Economic Outlook* projects that franchise output will exceed $936 billion this year and that unit growth will outpace the broader economy by roughly 2.5%.[47] Those projections assume that franchisors can share recipes, software, and marketing playbooks with hundreds of entrepreneurs without fearing that those entrepreneurs will rebrand and compete in the same trade area the day the relationship ends.[48] In response to the FTC's Proposed Noncompete Rule, the IFA warned that banning franchise non-compete covenants would be "extremely damaging to the franchise business model, encourage breaches of contract, and hurt small-business owners."[49]

A Framework for Evaluating Franchise Noncompetes

The policy conversation often poses a false binary: either post-term covenants are presumptively void, or they survive under a nebulous "reasonableness" rubric. Yet American contract law already contains a three-factor test sophisticated enough to separate legitimate system protection from naked restraint. The task is not to invent a new rule but to apply the existing one with franchise-specific markers in mind. What follows is a four-part framework—grounded in trademark licensing, territorial exclusivity, and goodwill reconveyance—that courts, regulators, and deal counsel can deploy to reach consistent, economically sound outcomes.

The first step is a franchise-adjusted reasonableness test. Classic reasonableness asks whether a restraint

(i) protects a legitimate interest, (ii) is no broader than necessary in scope, territory, and duration, and (iii) avoids public harm.[50] That tripartite inquiry is flexible enough to cover everything from the sale of a dental practice to an executive severance package, and franchising fits comfortably within the same doctrinal lineage. What commentators often miss is that the facts feeding those prongs look different when the contract is a trademark license backed by a uniform operating system. A modern franchisee typically gains proprietary recipes, store layouts, national advertising, point-of-sale analytics, and regional purchasing power—a composite bundle that the franchisor must reclaim at termination. Judges and regulators deciding whether a covenant is "no broader than necessary" must therefore weigh that aggregate value, not merely a discrete inventory of trade secrets.

The second step requires a granular audit of what the franchisee actually received. Was an exclusive territory granted? Did the franchisor disclose proprietary algorithms or back-of-house software? Did the operator tap into multimillion-dollar brand campaigns? The wider and deeper that access, the stronger the franchisor's post-term interest in a transitional buffer. Courts that perform this asset-specific analysis routinely uphold covenants that look facially stringent. In *Boulanger v. Dunkin' Donuts, Inc.*, the Massachusetts Supreme Judicial Court upheld a two-year, five-mile post-term covenant after finding that the former franchisee had enjoyed extensive access to Dunkin's trade secret recipes, operating manuals, marketing playbooks, and site selection data—intangible assets the court deemed "confidential and proprietary."[51] Conversely, where the franchise is advisory rather than brand-forward—such as a consulting network with no walk-in trade—courts trim covenants aggressively, reasoning that the customer relationship is personal and thus not properly protectable by system-wide restraints.[52] "Necessary," in short, cannot be judged in the abstract; it must be tethered to the contours of the licensed intangible assets.

The third step asks what duration and geographic radius are actually needed to install a successor and refresh consumer perception that the outlet is still in-system. Duration and territory form the heart of this analysis, but both metrics carry different economic meaning in franchising than in labor markets. One of the franchisor's objectives is a commercially reasonable period to recruit, train, and install a successor while restoring consumer association with the brand. Judicial practice tracks relaunch timelines in decision-making. In *Jiffy Lube*, a federal court reduced a three-year nationwide covenant to ten months within a five-mile radius—the market actually served—explicitly linking duration to the time needed to recruit and train a replacement licensee.[53] The opinion offers a template: rather than invalidate a covenant, slice time and space[54] until the restraint matches documented brand-relaunch needs. However, duration must also reflect the economic reality that a successor franchisee faces a meaningful ramp-up curve after the relaunch. Early head-to-head competition from the outgoing franchisee during this probationary window would cannibalize business and deter customers from engaging with the new franchisee. Where statutory or common-law blue-penciling is unavailable, a covenant long enough to encompass the successor franchisee's ramp-up horizon protects both the franchisor and the franchisee. Because courts are already well-capable of such evaluations under existing law, regulators should not get involved and should defer to courts.

Territorial tailoring likewise ought to start with empirical, not abstract, boundaries. Restraints measured from corporate headquarters or spanning the entire system with no evidence of overlap often draw judicial skepticism.[55] Attention should therefore focus on the radius within which brand dilution poses a concrete threat, not on arbitrary lines.

In addition to scrutinizing the reasonableness of duration and territory given the particular circumstances, courts also evaluate the scope of the prohibited conduct. For example, *Hacienda Mexican Restaurant of Kalamazoo Corp. v. Hacienda Franchise Group, Inc.* invalidated a prohibition on operating any Mexican restaurant, holding that there was no evidence that such a scope was necessary to protect the goodwill of the franchisor.[56] Likewise, in *ICENY USA v. M&M's LLC*, the court narrowed a covenant that barred the sale of all desserts, limiting it instead to the category of "frozen desserts" that had been the focus of the franchise.[57] These decisions confirm that the common-law reasonableness test remains a meaningful check: where a franchisor cannot tie the breadth of the restraint to protectable goodwill or confidential know-how, courts will trim—or refuse to enforce—the covenant. The point is not that every franchise noncompete is defensible, but that carefully tailored restraints preserve the competitive bargain struck at signing, whereas overbroad provisions still run the risk of judicial invalidation.

The final step widens the lens from the individual dispute to system-wide incentives. When franchisors can rely on post-term covenants (subject to blue-penciling, not categorical invalidation), they may be more willing to disseminate technology, marketing assets, and volume discounts that would otherwise remain in-house. Franchisees, in turn, may be more likely to invest in leasehold improvements and local advertising knowing defectors cannot erode brand distinctiveness overnight. Some state examiners, citing the NASAA Advisory, refuse registrations unless covenants are slashed to six-month, single-digit-mile limits—regardless of system footprint or particularities—forcing franchisors either to risk dilution or litigate every exit.[58] A court-driven reasonableness test is therefore preferable to preemptive administrative second-guessing: litigation builds a record, allows discovery, and permits partial trimming, tools that registration gatekeeping lacks.

The urge to align franchise covenants with worker-mobility norms is understandable in the current policy climate, but it is doctrinally and economically mistaken. The FTC's Final Noncompete Rule expressly carves out franchisor-franchisee agreements because the parties' relationship is "more analogous" to a relationship between separate business entities, which entities stand in a different bargaining position than an employer and its employees.[59] Dependence on the brand—even economic dependence—does not convert a licensee into an employee any more than it makes a supplier an employee. Courts that encounter the conflation have rejected it. The Nebraska Supreme Court in *H & R Block Tax Services v. Circle A Enterprises* cited *Jiffy Lube* approvingly and held that a franchise covenant more closely resembles the goodwill component of a business sale than an employee restraint, thus requiring a different balance of equities.[60] Regulators who ignore that precedent risk analytical inconsistency, forum shopping, and destabilized contract planning.

Properly applied, the common-law standard weighs the franchisor's legitimate interest in retrieving licensed goodwill against the departing operator's right to reenter commerce, calibrates duration and territory to brand-relaunch cycles, and fills doctrinal gaps that IP law leaves open. Regulatory schemes that ignore these franchise-specific calibrations flatten the contractual landscape, treat entrepreneurial licensees as wage workers, and erode the network trust that fuels franchising's contribution to retail diversity and job creation. A calibrated, court-centric framework preserves contractual freedom, ensures brand consistency, and sustains capital formation—outcomes squarely aligned with the pro-competitive policy goals.

Conclusion

The debate over noncompete agreements often blurs important differences between employment and franchise contexts. While employment noncompetes restrict worker mobility without clear public benefit, post-term franchise covenants serve a different function: they are negotiated to protect franchisors' goodwill and investments, supporting small-business growth. Treating franchise noncompetes like employment restrictions risks undermining the competitive dynamism that reformers seek to promote.

Carefully drafted franchise noncompetes actually support competition by preventing departing franchisees from exploiting confidential know-how or brand equity, which reassures investors and maintains system integrity. Courts recognize this objective, applying standards that focus on legitimate interests, tailored scope, and public-benefit tools that can curb abuse without blunt prohibitions.

Regulators should avoid imposing rigid employment-style rules on franchises. For example, strict limits on duration and geography ignore the realities of brand relaunch cycles. Franchisors faced with chronically insufficient post-term protection will respond by shortening franchise terms, increasing royalties to offset risk, or favoring company-owned growth. Each response diminishes opportunities for independent entrepreneurs and narrows consumer choice.

A balanced, case-by-case approach preserves contractual freedom, encourages investment, and protects competition—benefiting both franchisors and franchisees without harming labor markets or undermining a vital sector of the economy. Accordingly, regulators and courts referencing the February 2025 NASAA Advisory should interpret its emphasis on "reasonableness" in a way that maintains the traditional fact-intensive balancing test historically applied to franchise noncompetes, rather than adopting rigid, bright-line standards derived from employment law, which may not adequately reflect the unique dynamics of franchising.

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[1] Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 14, 2021).

[2] Noncompete Clause Rule, Notice of Proposed Rulemaking, 88 Fed. Reg. 3482 (Jan. 19,1. Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 14, 2021). 2. Noncompete Clause Rule, Notice of Proposed Rulemaking, 88 Fed. Reg. 3482 (Jan. 19, 2023) (to be codified at 16 C.F.R. § 910) [hereinafter Proposed Noncompete Rule].

[3] Noncompete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (codified at 16 C.F.R. § 910.1) [hereinafter Final Noncompete Rule].

[4] *See* Ryan, LLC v. Fed. Trade Comm'n, 739 F. Supp. 3d 496, 514 (N.D. Tex. 2024) (citing 15 U.S.C. § 46) (enjoining enforcement); Ryan, LLC v. Fed. Trade Comm'n, 746 F. Supp. 3d 369, 387 (N.D. Tex. 2024) (setting aside Final Noncompete Rule because (i) the FTC exceeded its statutory authority; and (ii) the rule is arbitrary and capricious).

[5] Opening Brief for Appellant at 3, Ryan LLC v. Fed. Trade Comm'n, No. 24-10951 (5th Cir. Tex. Jan. 2, 2025), ECF No. 41.

[6] Mot. to Hold Appeal in Abeyance for 120 Days, Ryan LLC v. Fed. Trade Comm'n, No. 24-10951 (5th Cir. Mar. 7, 2025), ECF No. 205.

[7] COLO. REV. STAT. § 82113 (2024); 7 COLO. CODE REGS. § 1103-14-1 (2024).

[8] 820 ILL. COMP.STAT. 90/10 (2021).

[9] WASH. REV. CODE § 49.62.020 (2023); *see also NonCompete Agreements*, WASH. DEP'T OF LAB. & INDUS., https://www.lni.wa.gov/workers-

rights/workplace-policies/non-compete-agreements
(last visited July 11, 2025).

[10] MASS. GEN. LAWS ch. 149, § 24L (2018).

[11] MINN. STAT. § 181.988 (2023).

[12] *See* Evan P. Starr, J.J. Prescott & Norman D. Bishara, *Noncompete Agreements in the U.S. Labor Force*, 64 J. L. & ECON. 53, 60 (2021).

[13] *See Noncompete Contracts: Economic Effects and Policy Implications*, U.S. DEP'T OF THE TREASURY, 15 (Mar. 1, 2016),
https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Econimic_Effects_and_Policy_Implications_MAR2016.pdf
(last visited July 11, 2025).

[14] Proposed Noncompete Rule, supra note 2, at 3486–87.

[15] Amelia Pollard, James Fontanella-Khan & Anjli Raval, *Millions of Workers Are Caught in a "Non-Compete" Trap*, FIN. TIMES (Apr. 18, 2024),
https://www.ft.com/content/d39a04ae -9e09-49cd-8fe9-90ba5c825fa7.

[16] *Id.*

[17] Press Release, Federal Trade Commission, FTC Announces Rule Banning Noncompetes (Apr. 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces -rule-banning-noncompetes.

[18] Final Noncompete Rule, *supra* note 3, at 1,846.

[19] *See* Scott Opincar, *FTC Excludes a Franchisee in the Context of a Franchisee-Franchisor Relationship from Its Final Rule Banning Non-Competes,* MCDONALD HOPKINS (May 6, 2024),
https://www.mcdonaldhopkins.com/insights/news/ftc-excludes-a-franchisee-in-the-context-of-a-fran

chisee-franchisor-relationship-from-its-final-rule-banning-non-competes.

[20] Final Noncompete Rule, *supra* note 3, at 1,857.

[21] *See NASAA Franchise Advisory: Post-Term, Non-Compete Provisions Should Be Reasonable, NASAA FRANCHISE AND BUS. OPPORTUNITIES PROJET GRP. (Feb. 21, 2025), https://www.nasaa.org/wp-content/uploads/2025/02/NASAA_Franchise_Advisory_Noncompetes_2-21-2025.pdf [hereinafter NASAA Advisory].*

[22] For a deeper discussion of NASAA's role in shaping law and policy at the state level, see Caroline B. Fichter & Frank J. Sciremammano, *The North American Securities Administrators Association's Statement of Policy Regarding the Use of Franchise Questionnaires and Acknowledgments*, 42 FRANCHISE L.J. 351 (2023).

[23] *See* NASAA Advisory, *supra* note 21, at 1–2.

[24] *Id.* at 2–3.

[25] *Id.* at 4.

[26] Proposed Noncompete Rule, supra note 2, at 3,511.

[27] See Tal Grinbalt, *NASAA Guidance for Franchise Non-Competes*, LEWITT HACKMAN (Feb. 10, 2025), https://www.lewitthackman.com/nasaa-guidance-for-franchise-non-competes.

[28] NASAA Advisory, *supra* note 21, at 1–2.

[29] *See* Part IV *infra*.

[30] Mitchel v. Reynolds (1711) 24 Eng. Rep. 347 (KB).

[31] Jiffy Lube Int'l, Inc. v. Weiss Bros., Inc., 834 F. Supp. 683, 691–92 (D.N.J. 1993); *see also* Domino's Pizza, Inc. v. El-Tan, Inc., No. 95-C0180-B, 1995 WL

367893, at *3 (N.D. Okla. Apr. 28, 1995) (franchise agreement satisfied sale of goodwill exception to Oklahoma statute invalidating most restraints of trade).

[32] Meineke Car Care Centers, Inc. v. Bica, No. 3:11cv369FDWDCK, 2011 WL 4829420, at *4 (W.D.N.C. Oct. 12, 2011) ("Here, enforcement of the covenant not to compete is necessary to protect the legitimate business interests of Meineke. Meineke has expended substantial resources developing its processes, manuals, advertising materials, etc. and on building goodwill and obtaining a national reputation as a provider of automotive services.").

[33] NASAA Advisory, *supra* note 21, at 3.

[34] NASAA Advisory, *supra* note 21.

[35] CAL. CODE REGS., tit. 10 § 310.114.1(c)(5)(B)(ii).

[36] Wash. Rev. Code § 49.62.020 (2023).

[37] *See* Eleanor V. Gerhards, *Noncompetes Under the Microscope: NASAA's Latest Guidance for Franchisors*, FOX ROTHSCHILD FRANCHISE LAW UPDATE (Feb. 18, 2025), https://franchiselaw .foxrothschild.com/2025/02/articles/regulatory-compliance/non-competes-under-the-micro scope-nasaas-latest-guidance-for-franchisors.

[38] *Cf.* Chorley Enters., Inc. v. Dickey's Barbecue Rests., Inc., 807 F.3d 553, 571 (4th Cir. 2015) (holding that a franchisor who agreed to changes at the urging of regulators during registration is bound by those changes and cannot later claim they were involuntary).

[39] Ashley Rogers et al., 2025 *Franchising Economic Outlook*, INT'L FRANCHISE ASS'N at v (Mar. 2025), https://indd.adobe.com/view/41aaf895-c7f7-43ff-9004-9455305199f3.

[40] Proposed Noncompete Rule, *supra* note 2, at 3,511.

[41] Final Noncompete Rule, *supra* note 3, pmbl.

[42] *See supra* Part III.

[43] Jiffy Lube Int'l, Inc. v. Weiss Bros., Inc., 834 F. Supp. 683, 691 (D.N.J. 1993).

[44] Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp., 511 F.3d 535, 548 (6th Cir. 2007) ("Indeed, an employee who establishes client contacts and relationships as the result of the goodwill of his employer's business is in a position to unfairly appropriate that goodwill and thus unfairly compete with a former employer upon departure.") (internal quotation marks and citation omitted).

[45] NASAA Advisory, *supra* note 21, at § III.

[46] AAMCO Transmissions, Inc. v. Dunlap, No. CIV.A. 11-4009, 2011 WL 3586225, *7–8 (E.D. Pa. Aug. 16, 2011) (enforcing franchise agreement's post-term restrictive covenant, finding "the covenant relates to a contract for the sale of goodwill or other property and was supported by adequate consideration," its one-year period was reasonable, but reducing its geographic scope to ten miles from the former franchised location).

[47] *See* Jonathan Maze, *Led by FastFood Restaurants, Franchising Is Expected to Have a Big Year,* REST. BUS. (Feb. 5, 2025), https://www.restaurantbusinessonline.com/financing/led-fast-food -restaurants-franchising-expected-have-big-year (citing Rogers et al, supra, note 39).

[48] *Id.* ¶ 2.

[49] *See International Franchise Association Statement on Final FTC Noncompete Rule*, INT'L FRANCHISE ASS'N (Apr. 25, 2024),

https://www.franchise.org/2024/04/international-franchise -association-statement-on-final-ftc-noncompete-rule-2.

[50] RESTATEMENT (SECOND) OF CONTRACTS § 188(1) (A.L.I. 1981).

[51] Boulanger v. Dunkin' Donuts, Inc., 815 N.E.2d 572, 578 (Mass. 2004) ("The judge found that the defendant's confidential information included operating manuals and similar information contained in videotapes, CD–ROMs, and websites; recipes for coffee and baked goods; financial information and data; marketing and promotion strategy; new product development; and the location of sites for new stores and building plans. The judge also found that district meetings were held several times a year, often involving the dissemination of confidential information such as financial data and profitability of particular stores, new product development, and marketing and promotion strategies.").

[52] *See* RE/MAX of New England, Inc. v. Prestige Real Est., Inc., No. CIV.A. 14-12121-GAO, 2014 WL 3058295, at *2–3 (D. Mass. July 7, 2014) (denying preliminary injunction; court questioned whether any goodwill belonged to franchisor, noting it likely stemmed from the agents' personal relationships rather than the RE/MAX brand).

[53] Jiffy Lube Int'l, Inc. v. Weiss Bros., Inc., 834 F. Supp. 683, 692 (D.N.J. 1993).

[54] Many states authorize, by statute or common law, courts to blue pencil overbroad non-competes. *See, e.g.,* Tex. Bus. & Com. Code Ann. § 15.51(c) (2024).

[55] *See Jiffy Lube*, 834 F. Supp. at 692.

[56] Hacienda Mex. Rest. of Kalamazoo Corp. v. Hacienda Franchise Grp., Inc., 569 N.E.2d 661, 668 (Ind. Ct. App. 1991) ("Because there is no evidence in the record to support the portion of the trial court's

order enjoining franchisees from ‘operating a Mexican restaurant in general’ we reverse and order the trial court to dissolve that portion of the preliminary injunction.”).

[57] ICENY USA, LLC v. M & M’s LLC, 421 F. Supp. 3d 204, 219–21 (D. Md. 2019).

[58] *See* Gerhards, *supra* note 37.

[59] Final Noncompete Rule, *supra* note 3, at 38451.

[60] H & R Block Tax Servs., Inc. v. Circle A Enters., Inc., 693 N.W.2d 548, 554–56 (Neb. 2005) (“Based on the evidence and our interpretation of the applicable law, we conclude that the franchise agreement in this case is analogous to a sale of a business for purposes of determining the enforceability of the posttermination covenant not to compete.”).
