Dissolving Bonds

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Orly Lobel, *Gentlemen Prefer Bonds: How Employers Fix the Talent Market*, **Santa Clara L. Rev.** __ (forthcoming, 2019), available at SSRN.

Professor Lobel begins by analyzing the various mechanisms by which employers diminish their workers' options—and thus limit worker bargaining power for better compensation and benefits—by circumscribing their post-employment freedom of action. Of course, formal noncompetes are old news (even as a number of jurisdictions are taking steps to rein them in), and the use of horizontal wage-fixing and no-poaching agreements has gotten the renewed attention of the antitrust folk. But Lobel reminds us that employers can be incredibly creative in attempting to limit the mobility of their workers. Thus, she identifies restraints in the franchise setting and among sports and other associations. For example, class actions are pending against a range of fast food franchises whose agreements bar one franchisee from hiring another's employees. She also stresses that customer nonsolicitation clauses can often be as effective as formal noncompetes since it may well be impossible to compete in a given geographic area without soliciting your former employer's customers. Similarly, nondisclosure agreements are often drafted to protect far more information than trade secret law would reach, and "holdover" clauses— giving an employer the right to a former employee's inventions made *after* the employment has terminated—reduce the value of creative workers to prospective new employers.

The effect of these and other "mobility penalties" is to decrease employee options, which not only restrains workers from taking higher paid jobs with competitors but thereby also reduces their bargaining power with their current employer. Needless to say, reducing competition among employers tends to depress compensation. On a macro level, Professor Lobel argues that these kinds of competition-dampening mechanisms may be partly to blame for the failure of wages to keep up with improving economic conditions and thus contribute to growing income inequality. Even more interestingly, she explores the effects of such employer tactics to lower wages on certain groups, most saliently the perpetuation of the gender gap in compensation. For a variety of reasons ("the need to coordinate dual careers, family geographic ties, and job market re-entry after family leave" (P. 18)),women are less mobile than men. That means that artificial restraints are likely to have disproportionately adverse effects on them since an already limited range of choices is further narrowed, perhaps to zero. Similar points can be made about older workers and minorities. While wages tend to be depressed for all workers by agreements that limit their ability to vote with their feet, some groups are more likely than others to suffer worse consequences.

The last part of Lobel's article surveys possible solutions. Most of the current reform efforts rely on declaring certain varieties of restraints to be against public policy, but *Gentlemen Prefer Bonds* argues that such "defensive voidance" is inadequate. One more proactive approach would require employers to give "advance notice" that a job offer will entail a restrictive covenant. This is Jotwell, so I'll agree that this would be helpful in some subset of cases, but I am unconvinced that it would change the landscape substantially. True, any given employee, having left her prior position, wouldn't be faced with the Hobson's choice of signing or quitting. But such a requirement would result in substantially fewer mobility restrictions only if employers generally began to compete on this aspect of employment, and all the reasons that led us to where we are suggest reason for pessimism on this point.

Professor Lobel also urges a requirement that employers inform workers of their right to mobility. Where there is such a right (California, mostly, but, for at least some classes of workers, other states also), such a requirement would tend to overcome the *in terrorem* effect of clauses that, if litigated, would be held unenforceable. But any such rule would, in turn, have to entail meaningful sanctions since employers who currently ignore the law in requiring workers to sign

unenforceable agreements are not likely to comply with a notice requirement without substantial motivations sanctions. The MOVE bill she cites, which is currently before Congress (and bars noncompetes for “lower-wage workers” and requires advance notice for such agreements for other employees), provides for $5000 fines for each employee, which should get employer attention should it or similar measures be passed at the state level.

Lobel also urges the use of class actions to challenge sweeping restraints, but that is a tactic that will prevail only for those workers whose employers have not required mandatory individual arbitration.

The most theoretically promising but perhaps the least likely solution at least in the short run is more robust regulatory action such as a proposed FTC rule (Professor Lobel was involved in a pending petition) to ban noncompetes as “unfair methods of competition” under section 5 of the Federal Trade Commission Act. Such a dramatic proposal at least has the benefit of shifting the discussion from individual unfairness or overreaching (bad as that can sometimes be) to the broader economic effects of the constellation of practices she identifies.

Even more so than usual, a “jot” such as this can only scratch the surface of the piece it is reviewing and Lobel’s article is required reading for those concerned about competition in the labor markets and the concomitant effects on economic welfare of workers.

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