FREEDOM TO WORK VS. PROTECTION OF BUSINESS INTERESTS: RETHINKING EMPLOYMENT NON-COMPETES IN INDIA

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ABSTRACT

This paper examines the uncertain legal framework on non-compete clauses in Indian employment contracts. Section 27 of the Indian Contract Act, 1872 declares all restraints of trade void, with only narrow exceptions. Indian courts have developed a distinction between restraints during employment, which may be upheld, and restraints after employment, which are generally struck down. However, decisions such as Niranjan Golikari v Century Spinning and Superintendence v Krishan Murgai reveal inconsistencies over whether resignation or termination brings employment to an end. This

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ambiguity has left the scope for employers to use long fixed-term contracts or omit termination clauses to restrict employee mobility. The current framework does not differentiate between senior employees who may have greater bargaining power than employees at a junior level. Therefore, treating both of them equally may not be an equitable approach.

The paper argues that the current approach is inadequate for a modern, knowledge-based economy where skilled employees and confidential information constitute core business assets. Comparative analysis of the United Kingdom, United States, Australia, and South Africa show that post-employment non-competes are permitted in limited form, subject to conditions such as wage thresholds, duration caps, and tests of reasonableness. Drawing from these models, the paper proposes legislative reform in India. A statutory framework should set clear standards for enforceability, introduce salary-linked protections for employees with weaker bargaining power, limit the duration of non-competes, and exclude the blue-pencil test.

Such a design would balance employee freedom with the legitimate interests of employers.

Keywords: *Non-Competes, Enforceability, Section 27, Reasonability*

INTRODUCTION

Non-Compete agreement in Employment Contracts (hereinafter referred to as **"Non-competes"**) is an agreement by which the employer restricts the employee from working for a competitor or from starting a competing business for a specified period of time.[1] The enforceability of non-competes has been subject to strict judicial scrutiny for being violative of Section 27 of the Indian Contract Act.[2] Section 27 of the Indian Contract Act makes all restraints of trade void, subject to an exception for the sale of goodwill.[3] However, Courts have

[1] Cornell Law School Legal Information Institute, "Covenant Not to Compete (Non-Compete Agreement)" (Cornell Law School) <https://www.law.cornell.edu/wex/covenant_not_to_compete> accessed 7 September 2025; Federal Trade Commission, "Non-Compete Clause Rulemaking" (FTC, 2023) <https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking> accessed 10 September 2025.

[2] *Niranjan Shankar Golikari v The Century Spinning & Manufacturing Co Ltd* AIR 1967 SC 1098; *Superintendence Company of India (P) Ltd v Krishan Murgai* [1980] 2 SCR 988; G*ujarat Bottling Co Ltd & Ors v Coca-Cola Co & Ors* (1995) 5 SCC 545.

[3] The Indian Contracts Act, 1872 (09 of 1872) s27.

allowed for some restraints if they are reasonable and during the course of employment.[4] The common law position has evolved, with many countries considering legislation to govern non-competes and other employment restraints.[5] Employers in some countries have also evolved to use different instruments as alternatives to non-compete clauses.[6] One of them is a garden leave clause. A Garden Leave clause requires the employee to serve a comparatively long notice period during which the employee is taken off confidential projects and is usually paid the same or a fraction of the salary.[7] The use of such clauses in India is rare, and there is hardly any judicial or legislative guidance on such instruments. In the Indian context, the Indian courts have usually enforced non-competes in Employment contracts if it is during the term of employment and reasonable. Post-employment non-competes are not enforceable in India.[8]

Non-Compete Agreements have a wide range of applications in different business contexts. The Supreme Court has already distinguished between non-competes in Employment contracts and

4 *Niranjan Golikari* (n 2).

5 Non-Compete Clauses: Response to the Government consultation on measures to reform post-termination non-compete clauses in contracts of employment (Department for Business & Trade, May 12, 2023).

6 Greg T. Lembrich, "Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants" 102(8) Columbia Law Review 2291.

7 ibid; *VFS Global Services Pvt. Ltd v Suprit Roy* 2008 (3) Mh.L.J 266.

8 *Nilanjan Golikari* (n 2); *Sociedade de Fomento Industrial Ltd. V. Ravindranath Subraya Kamat* 2000 (1) Mh.L.J 148.

those between other parties.[9] For the purposes of this paper, I shall focus solely on non-competes in employment contracts. Therefore, in this paper, the word *"non-compete"* shall mean non-compete agreements in employment contracts. The enforceability of non-competes in India has attracted abundant litigation. However, most of the cases have restricted the analysis to a few cases of the Supreme Court. Simultaneously, secondary literature on this topic has largely focused on unequal bargaining power and employment mobility as concerns against the enforceability of non-competes or negative covenants.[10] However, the justification for the enforceability of non-competes has not been adequately explored in India. This paper argues that with the development of technologies and the requirement for highly skilled employees, a limited enforceability of post-employment covenant is desirable. The conditions for enforceability should consider, among other things, the seniority and compensation received by the employee. To that extent, legislative guidance is required, and the general restraint of trade provision in the Indian Contract Act is insufficient.

This paper is divided into five parts: Part I argues for a legislative intervention arguing that the position of law in India is ambiguous and unfair; Part II analyses the history and development of non-compete clauses in the USA and other common law countries; Part III argues for

[9] *Gujarat Bottling Company v Coca Cola* (1995) 5 SCC 545.

[10] Guy Davidov, "The (Changing) Idea of Labour Law" (2007) 146 International Labour Review 311.

a limited enforcement of non-competes and suggests a legislative design that balances the interests of all stakeholders; Part IV draws the strings together and concludes.

II. AMBIGUOUS POSITION ON NON-COMPETES: NEED FOR LEGISLATIVE REFORM

The right to practice any trade or profession is protected by fundamental rights in India.[11] This right is at the heart of section 27 of the Indian Contract Act. Another exception to section 27 is present in the Partnership Act, whereby non-compete agreements with a partner of a firm are enforceable.[12] However, no explicit exception is present in the context of Employment. In this context, the courts have made a distinction between negative covenants that are applicable during the term of employment and ones that are post-employment.[13] Reasonable negative covenants during the term of employment have been enforced.[14] Negative covenants operating post-employment have been held as void, except for a few terms like confidentiality.[15] However, the distinction between during and post-employment is not very clear. In this part, I shall firstly discuss the landmark case of *Niranjan Golikari*

[11] The Constitution of India, 1950 art 19(1)(g).
[12] The Indian Partnership Act, 1932 (09 of 1932) s11(2).
[13] *Niranjan Golikari* (n 2).
[14] ibid; *Vijaya Bank v Prashant B Narnaware* 2025 SCC OnLine SC 1107.
[15] *Anindya Mukherjee v Clean Coats Pvt. Ltd*. 2011 (1) Mh.L.J. 573.

v. Century Spinning ("*Niranjan Golikari*");[16] *Secondly*, analyse the interpretation of *Niranjan Golikari* and the enforcement of non-competes in subsequent cases in India; Thirdly, argue for legislative intervention as the present position of law is ambiguous and unfair.

A. EMPLOYMENT TERM OR TERMINATION: THE AMBIGUITY IN THE WORDS OF NIRANJAN GOLIKARI

The Supreme Court in *Niranjan Golikari*,[17] laid down the law on the enforceability of non-competes in Employment Contracts. The Court here was concerned with the enforceability of the following clause:

> *"In the event of the employee leaving, abandoning or resigning the service of the company in breach of the terms of the agreement before the expiry of the said period of five years he shall not directly or indirectly engage in or carry on of his own accord or in partnership with others the business at present being carried on by the company and he shall not serve in any capacity, whatsoever or be associated with any person, firm or*

[16] *Niranjan Golikari* (n 2).
[17] ibid.

> *company carrying on such business for the remainder of the said period..”*[18]

The employee in this case joined the company in March 1963 and received special training for about 9 months. The overall term of employment as mentioned in the contract was for a period of five years, which was also reiterated in the non-compete clause. After receiving training, the employee worked properly for another 9 months. In October 1964, he started taking leave and worked for only 9 days, for which he received a proportionate salary. Thereafter, he tendered his resignation on November 07, 1964, effective from October 31, 1964. The company rejected his resignation, to which the employee stated that he had already taken up employment with another company, which was a competitor of the initial employer.[19] The Company sought to enforce the non-compete clause quoted above while the employee challenged the clause as being in restraint of trade.[20] The Supreme Court, in this case, enforced the non-compete clause. The court held that negative covenants applicable during the period of the contract are not void unless unconscionable or unreasonable.[21] The ruling in *Niranjan Golikari,*[22] seems to suggest that a non-compete agreement can operate during the period of employment agreed upon by the parties, irrespective of whether the employee had resigned. The

[18] ibid [3].
[19] ibid [5].
[20] ibid [6].
[21] ibid [17-18].
[22] ibid.

ambiguity arises from the fact that the court has mentioned that negative covenants are not enforceable after the *"termination"* of the contract. However, the resignation of the employee should effectively mean the termination of the contract of employment. But the court did not deal with this contention.

There are only two possible explanations for the approach taken by the court: (i) The resignation was not valid since the contract of employment did not contain a clause for resignation or termination by the employee, (ii) A reasonable non-compete clause can validly operate beyond resignation or termination if it is within the period of employment initially agreed upon. This case has been cited in almost all cases on negative covenants in employment contracts and is still the position of law in India.[23]

B. JUDICIAL SCRUTINY OF NON-COMPETES: AN AMBIGUOUS POSITION

The controversy of whether the period of employment ends with a resignation or termination has plagued the judiciary on multiple occasions. In *VFS Global v Suprit Roy*,[24] the Bombay High Court had held that Garden Leave Clauses operating after a resignation or termination are in restraint of trade and void. In this case, the contract

[23] *Wipro Limited v Beckman Coulter International* 2006(3) ARBLR 118 (Delhi); *Polaris Software Laboratory v Suren Khiwadkar* 2003 SCCOnLine Mad 584.
[24] VFS Global (n 7).

had a termination clause by which either party could terminate the contract with one month's notice. However, upon termination, the employee was required not to join any other organization engaged in a similar trade as the employer for a period of three months. The company had agreed to pay the employee three months' salary for not joining any other organization and for sitting idle. However, the employee decided to join before the completion of the garden leave period. The company sued for damages and an injunction. The Bombay High Court relied on *Niranjan Golikari* to hold that the garden leave clause is void as the period of operation was after the termination.[25] In this case, the resignation by the employee was considered as the termination of the contract. The only difference with *Niranjan Golikari* was that the contract in this case contained a termination clause. There are multiple other cases where the Courts have held that a valid resignation will terminate the employment contract, and any post-employment non-compete could not be enforced.[26] The same line of reasoning was also followed by Justice A.P. Sen in his concurring opinion in *Superintendence v. Krishan Murgai.*[27] In *Krishan Murgai*, the Supreme Court had to decide the enforceability of the following clause:

"That you will not be permitted to join any firm of our competition or run a business of your own in similarity as directly and/or indirectly,

[25] ibid [8].

[26] VFS Global (n 7); *Percept D'Mark (India) Pvt.Ltd v. Zaheer Khan* AIR 2006 SC 3426.

[27] *Superintendence Company of India v Krishan Murgai* AIR 1980 SC 1717.

for a period of two years at the place of your last posting after you leave the company".[28]

In this case, the employment was terminated by the company. It was not a case of voluntary resignation. The company sought to enforce the non-compete after the employee started his own business in violation of the non-compete. The majority opinion refused to go into the question of enforceability. The majority opinion focused on the words *"after you leave"* and held that the clause would only operate in case of a voluntary resignation.[29] Justice A.P. Sen, in his concurring opinion, held that the non-compete is unenforceable as the termination of the employee had the effect of terminating the contract.[30] It is important to note here that the case of *Niranjan Golikari* was a 2-Judge Bench, whereas the judgment in *Krishan Murgai* was a 3-judge bench of the Supreme Court. However, the Court in *Krishan Murgai* did not overrule *Niranjan Golikari* even after discussing it.[31]

The fallout of the above discussion points towards a very complicated position on the distinction between during and post-employment. The following situations would trigger the beginning of the post-employment stage: (i) When the employee validly resigns as per the terms of the agreement, (ii) When the employee is terminated. However, when the employee resigns in the absence of a resignation

[28] ibid [8-10].
[29] ibid.
[30] ibid [32, 42, and 53].
[31] ibid [15].

clause in the employment contract, the post-employment phase does not begin. The case of *Nirajan Golikari,*[32] can be distinguished from *Krishan Murgai,*[33] by the fact that the employee in *Nirajan Golikari,*[34] had voluntarily left the company. Similarly, *Niranjan Golikari,*[35] is different from the High Court cases, where the contract itself provided for a procedure for resignation. This position is further supported by the recent judgment of the Supreme Court in *Vijaya Bank,*[36] where the Court was concerned with the enforceability of an employment bond. In this case, a bank manager was promoted on condition that he would have to serve the bank for a minimum period of 3 years, failing which, damages to the tune of Rs. 2 Lakhs would have to be paid by the employee. Similar to the *Niranjan Golikari,*[37] case, the employment contract in this case also did not contain a termination or resignation clause. The only difference was the presence of liquidated damages. The employee in this case resigned to join another bank and was forced to pay the liquidated damages. The employee filed a writ petition alleging that the employment bond was void. The Supreme Court in this case held that the ruling in *Niranjan Golikari,*[38] is applicable since the employment bond was supposed to operate during the term of the employment. Therefore, the Supreme Court enforced the employment

[32] *Niranjan Golikari* (n 2).
[33] *Krishan Murgai* (n 27).
[34] *Niranjan Golikari* (n 2).
[35] ibid.
[36] *Vijaya Bank* (n 15).
[37] *Niranjan Golikari* (n 2).
[38] ibid.

bond. In this case, the period of employment did not end with the resignation. The absence of a resignation clause and the fact that the employee had resigned have ensured the enforcement of the negative covenant. In the next sub-part, I shall argue for a legislative intervention.

C. NEED FOR LEGISLATIVE INTERVENTION TO REGULATE NON-COMPETES

Section 27 and the judicial approach may seem to be in favour of the employees. However, the position of law emerging from the discussion in the previous sub-part is detrimental to the employees. Employment contracts are usually marked by unequal bargaining power.[39] An average employee usually lacks the resources or the opportunity to negotiate employment contracts effectively.[40] Hence, employment contracts are usually drafted by the employers, and employees get very little opportunity to negotiate.[41] The jurisprudence on non-competes discussed in the previous sub-part leaves out at least two loopholes that employers can use to control employee mobility. First, employers can draft employment contracts that do not contain a termination clause;

[39] Hugh Collins, *Employment Law* (OUP, 2010) 3-16.
[40] Hugh Collins, "Legal Responses to the Standard Form Contract of Employment" (2007) 36 (1) Industrial Law Journal 2.
[41] Patrick Elias, "Changes and Challenges to the Contract of Employment" (2018) 38(4) Oxford Journal of Legal Studies 869.

Second, employers can keep the term of employment sufficiently long and renew it periodically.

The above two ways are detrimental to the employees. In the absence of a termination clause, the employer can refuse to accept the resignation of an employee, which can affect the payment of bonuses, experience letters, among others. Further, a long-term employment contract with a non-compete would mean that the employee has to compulsorily serve the employer for the entire period. This can lead to the enforcement of very long non-competes. For example, if an employee is on a four-year-long contract and resigns after a period of six months, they would have to serve a non-compete for as long as three and a half years. This would effectively force the employee to be idle or serve the same employer. This is the exact problem that the restraint of trade provision sought to cure. The test of reasonability is also not adequately clear.[42] There is no clear guidance as to what constitutes a reasonable restraint during employment. The courts in other contexts have held that non-competes should be reasonably restricted by time, geography, etc.[43] However, the varying levels of power dynamics operating at various levels of employment have not been considered. Further, the position of law is too complex for a person without a legal background. This will deter employees from breaking non-competes even if they are not enforceable in law.

[42] *Zaheer Khan* (n 26).
[43] *Coca Cola* (n 9).

From the above discussion, it is clear that the jurisprudence on the enforceability of non-competes is complex, subjective, and does not adequately address the concerns of the employees. Therefore, a legislative intervention is the need of the hour. In the next part, I shall explore the law on the enforceability of non-competes in foreign jurisdictions.

III. ENFORCEABILITY OF NON-COMPETES: THE EVOLUTION OF NON-COMPETES IN FOREIGN JURISDICTIONS

The distinction between during and post-employment non-competes does not exist in other countries. Restrictions during the course of employment are generally accepted due to the duties of fidelity and confidence of the employee.[44] The concept of restraint of trade only comes in when there is a negative covenant post-employment. Therefore, in this section, I shall focus solely on how foreign statutes and courts have dealt with post-employment non-competes and similar negative covenants. The jurisprudence on non-competes has been shaped by a tension between freedom of trade and the need to protect legitimate business interests. One of the first cases on restraint of trade is the case of *Mitchel v. Reynell,*[45] in 1711. Here, the Queen's Bench in England observed that agreements in restraints of trade are permissible

[44] *Greg* (n 6); Iain Ross, "Non-Compete Clauses in Employment Contracts: The case for regulatory response" (2024) 35 The Economic and Labour Relations Review 806.
[45] *Mitchel v Reynell* (1711) 1 PWms 181.

if they are reasonable. The principle matured in *Nordenfelt v. Maxim Nordenfelt,*[46] where the House of Lords enforced a 25-year-long non-compete clause as a huge sum of money was paid as consideration, and the non-compete was restricted by duration, geography, and scope. The position in the United Kingdom has largely remained the same. The Courts in the UK have generally enforced non-competes if they are reasonable. The Courts have also used a *"Blue pencil test"* whereby, if the reasonable parts can be severed from the unreasonable parts, then the courts can enforce the reasonable parts without declaring the entire clause as void.[47] Courts have also generally enforced garden leave clauses where the employee is bound to serve a longer notice period.[48] Recently, the Government in the UK has also proposed to limit non-competes to a period of three months. However, no statutory guidance exists as of now.[49]

Across the Atlantic in the USA, the position of law is far more complex. The enforceability of non-competes varies from state to state due to the federal structure. Initially, the US courts had imported the English position of law through cases like *Mitchell v Reynell* until the Sherman Antitrust Act outlawed all restraints of trade in 1890.[50] However, the

[46] *Nordenfelt v Maxim Nordenfelt* [1894] AC 535.
[47] *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 (HL); ibid; Angie Davis et al, "Developing Trends in Non-Compete Agreements and Other Restrictive Covenants" (2015) 30(2) Journal of Labour & Employment Law 255.
[48] Greg (n 6); *Euro Brokers Ltd. v Rabey*, [1995] I.R.L; *Credit Suisse Asset Management Ltd. v Armstrong* [1996] ICR 882.
[49] Laurie Ollivent, "New Consultation on use of non-competes in the UK" (Linklaters Blog, July 24, 2025).
[50] Sherman Antitrust Act, 1890, ch 647, 26 Stat 209.

courts carved out exceptions to the Sherman Act and enforced non-competes in limited circumstances.[51] Thereafter, the position of law began to diverge as different states adopted varying positions through statutes. However, most states generally enforce non-competes and are subject to varying levels of restrictions, except California and Minnesota, which ban all forms of non-competes.[52] The statutes of other states generally lay down certain criteria that need to be fulfilled for non-competes to be enforceable.[53] For example, Florida has a list of legitimate business interests like trade secrets, customer goodwill, etc, which employers can use to justify a non-compete.[54] Non-competes for less than 6 months are presumed to be enforceable, while non-competes beyond a period of 2 years are presumed to be unreasonable.[55] However, the presumption can be rebutted if the employer can show a legitimate business interest.[56] Recently, Florida has also come up with the CHOICE Act that explicitly allows garden leave clauses and non-competes up to a period of 4 years for employees

[51] *Standard Oil Co. v United States* 221 US 1 (1911); *Chicago Board of Trade v United States* 246 US 231 (1918).

[52] California Business and Professions Code § 16600; Minnesota Revisor of Statutes § 181.988; Norman D Bishara, Kenneth J Martin and Randall S Thomas, 'An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants' (2015) 68(1) *Vanderbilt Law Review* 1.

[53] Rhode Island Noncompetition Agreement Act, R.I. Gen. Laws ch.28-59; Massachusetts Noncompetition Agreement Act, 2018.

[54] *Florida Statutes* ch. 542, § 542.335(1)(b).

[55] ibid § 542.335(1)(d).

[56] ibid.

earning at least twice the average wage in the state.[57] A few states also provide safeguards, such as a minimum wage level for the enforcement of non-competes, which is sufficiently high to protect the general workforce with low bargaining power.[58] A few states also mandate a minimum time and consultation with a registered attorney before signing of a non-compete by a potential employee.[59] Similar to the UK, courts in the US have also generally used the blue pencil test.[60]

The blue pencil test is also used in countries like Australia.[61] The Restraint of Trade Act, 1976, in New South Wales, explicitly allows Courts to read down unreasonable non-competes to make them enforceable.[62] The Courts in other states of Australia have also favoured reading down and enforcing non-competes to a limited extent rather than declaring the whole clause void.[63] The preference towards the enforcement of non-competes is followed in a developing economy

[57] Florida Contracts Honoring Opportunity, Investment, Confidentiality, and Economic Growth (CHOICE) Act, 2025, §542.43(3), §542.44(2)(a).

[58] Revised Code of Washington (RCW) 49.62.020; Illinois Freedom to Work Act, 820 ILCS 90/10(a).

[59] Florida Contracts Honoring Opportunity, Investment, Confidentiality, and Economic Growth (CHOICE) Act, 2025, §542.43(1)(b).

[60] *Beverage System of the Carolinas, LLC v. Associated Beverage Repair, LLC*, COA14-185 (N.C. Ct. App. Aug. 5, 2014).

[61] *Del Casale v Artedomus (Aust) Pty Ltd* (2007) 165 IR 148, 132; *Attwood v Lamont* [1920] 3 KB 571, 578; *SST Consulting Services Pty Ltd v Rieson* (2006) 225 CLR 516, 44–48.

[62] The Restraint of Trade Act, 1976 (New South Wales), s4(3).

[63] *Wright v Gasweld Pty Ltd* (1999) 22 NSWLR 317, 339; *Iain Ross* (n 44).

like South Africa as well.[64] South Africa goes a step further and presumes non-competes to be valid.[65] However, it is a rebuttable presumption, and courts have tested non-competes against the Basson test.[66] The Basson test looks at the following four factors: (a) legitimate proprietary interest of the employer, (b) whether that interest is being threatened by the acts of the employee, (c) A balancing test of protection of legitimate interest of the employer and the right to free trade of the employee, (d) Whether enforcement would be contrary to public policy.[67]

The above discussion points towards an increased move towards the enforcement of non-compete clauses around the world. The push towards enforcement is backed by reasons ranging from the protection of the legitimate interests of the Employer to a push towards a business-friendly regulatory environment. In the next part, I shall argue for a limited enforcement of non-competes and provide factors that need to be considered while drafting a legislative scheme on non-competes.

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[64] Dr. Avinash Govindjee and Dr.Sairam Bhat, "Restrictive Covenants in Employment Contracts: A Comparison between the Legal Positions in India and South Africa" (2008) 20(1) National Law School of India Review 46.

[65] Magna Alloys and Research (SA) (Pty) Ltd v. Ellis, 1984 (4) SA.

[66] *Basson v Chilwan & Ors* 1993 (3) SA 742.

[67] ibid; Sairam Bhat (n 64).

IV. STRIKING A BALANCE: NEED FOR A LIMITED ENFORCEMENT OF NON-COMPETES

The advancement of technology in the world is increasing the demand for highly skilled employees.[68] A company dealing in advanced technology today is primarily worth and run by the highly skilled employees who work there.[69] At the same time, these companies also invest actively in training their own employees after hiring them.[70] Against this backdrop, the limited enforceability of post-employment non-compete agreements is essential to ensure predictability. This part is divided into two sub-parts: *First*, I shall argue that senior-level employees possess significant negotiating power. The traditional power dynamics operating between an employer and an employee are not true for senior-level employees, especially in technology-driven industries. *Second*, the enforceability of employment non-competes is essential for

[68] Riya Tandon, "81% of organisations witnessing a shortage of skilled tech workers, says EY and iMocha's report" (Economic Times, May 31, 2023) <economictimes.indiatimes.com/jobs/hr-policies-trends/81-of-organisations-witnessing-a-shortage-of-skilled-tech-workers-says-ey-and-imochas-report/articleshow/100638724.cms> accessed September 8, 2025.

[69] Lilli Johanknecht, "How The FTC May Reshape M&A Transactions By Banning Non-Compete Agreements" (2025) 76 Washington University Journal of Law & Policy 237.

[70] Tata Consultancy Services, www.tcs.com/careers/india/xplore#:~:text=TCS%20Xplore%20is%20a%20post%20offer%20learning%20and,offered%20candidates%20to%20the%20TCS%20values%20and%20culture.

limiting risks in Mergers and Acquisitions (hereinafter referred to as M&A) transactions and protecting legitimate business interests.

A. SENIOR EMPLOYEES: ABILITY TO NEGOTIATE EMPLOYMENT CONTRACTS

Employment contracts are usually marked by power differentials between the employer and the employee.[71] However, the same is not true for all kinds of employees. A general employee of a company has significantly less bargaining power than a top-level executive in the company. A top-level executive is usually the representative of the company in front of its clients and other stakeholders. They may also have access to trade secrets and other confidential information of the company. These factors make their services highly valuable to the company, which is not the case for a general employee.[72] The value of a top executive to a company can be understood by the Jatin Dalal case. Jatin Dalal resigned from the position of CFO in Wipro sometime in September 2023, with effect from November 30, 2023. Jatin Dalal had a post-employment non-compete of 12 months, which was also restricted in terms of geography and competitor. However, Mr. Dalal joined Cognizant as the CFO in December 2023 in violation of the non-compete. Wipro sued for damages worth Rs. 25.15 Crore for violating

[71] *Guy Davidov* (n 10).

[72] Tina K Stephen and Arun Sasi, "Federal Trade Commission's rule on non-compete ban: Relevance for a common law jurisdiction- India" (2025) 54(2) Common Law World Review 75.

the non-compete. The value of Jatin Dalal to the two companies is further showcased by the fact that one of the major clients of Wipro, Takeda Pharma, also moved to Cognizant from Wipro in January 2024. Later on, Wipro and Jatin Dalal reached a settlement with Cognizant, funding the settlement amount.[73]

It is important to note that the non-compete in question would have probably been unenforceable as its operation was post-employment. However, that did not stop Cognizant from paying off the settlement amount. This shows the value and negotiating power that a CFO of a large company held, where he could force the new employer to pay off the damages. In the absence of the settlement, Cognizant would have gained not only from Jatin Dalal's expertise but also the client contacts and other confidential information. In today's world of big tech companies, the value of a company often depends on the value of the employees that it possesses.[74] Therefore, there is a need to enforce post-employment non-competes at least for a limited set of key employees. In the absence of such employment, a bigger player can poach away key employees out of a startup or nascent company and destroy its growth potential.

B. EMPLOYEE NON-COMPETES: LEGITIMATE BUSINESS INTERESTS AND MITIGATING RISKS IN M&A

[73] ibid [76-78].
[74] *Lilli Johanknecht* (n 69).

The Indian judiciary has not been oblivious to the presence of legitimate interests of the Employers. The courts have acknowledged that employees in possession of sensitive information may unfairly affect the company if they divulge the same to a new employer.[75] At the same time, companies may have extensively invested in training the employee, which can be exploited by their competitors. However, in spite of acknowledging the presence of these legitimate interests, courts have refused to enforce non-competes beyond the term of employment. This is primarily because of the statutory scheme of the Indian Contract Act, which does not allow any kind of post-employment restraints. The only recourse provided to the employer is to enforce a confidentiality clause. A confidentiality clause is one of the few clauses that have been held to be valid post-employment.[76] However, a breach of confidentiality after the employee has left the service becomes extremely difficult to prove. This leaves employers with no protection against the breach of their privileged information by a competitor who can easily hire their key employees. A confidentiality clause also does not account for the cost of training that had been undertaken by the firm.

The adverse effects of not enforcing non-competes are not limited to retention of talent alone; they also affect business. M&A is not restricted to a merger or an acquisition of another company anymore.

[75] *Star India Pvt Ltd v Laxmiraj Seetharam Nayak* (2003) 3 Mh.L.J.726.
[76] *Anindya Mukherjee* (n 16).

Tech companies have realised the value of employees and frequently engage in acquihires.[77] An acquihire is an acquisition whose predominant purpose is to obtain the people working in the firm rather than the firm or its market share.[78] Acquihires are becoming increasingly common in India. A few notable examples would be Ola's acquihire of Pickup.ai. As part of the deal, the entire team of Pickup.ai was supposed to join Ola.[79] Similar deals have also been signed between Swiggy and Kint.io,[80] and Instamojo and Showman, among others.[81] The purpose of these deals is solely to hire the employees, and huge considerations are paid out to the employees for signing these deals. An enforceable non-compete would reduce the risk associated with the acquihire. It would prevent the employees from moving to a different firm for higher compensation after receiving consideration as part of the acquihire. This would defeat the entire purpose of the

[77] "Acquihiring rises among startups as talent becomes real differentiator" (*The Economic Times*, August 27, 2021) <economictimes.indiatimes.com/tech/startups/acquihiring-rises-as-talent-becomes-real-differentiator/articleshow/85675004.cms> Accessed September 8, 2025.

[78] "Acquihire" (Cambridge Dictionary) <dictionary.cambridge.org/dictionary/english/acqui-hire> accessed September 8, 2025.

[79] FE Bureau, "Ola 'acquihires' artificial intelligence start-up Pikup.ai" (*Financial Express*, August 14, 2019) <www.financialexpress.com/business/industry-ola-acquihires-artificial-intelligence-start-up-pikup-ai-1674983/> accessed September 8, 2025.

[80] Varsha Bansal, "Swiggy acquires AI start-up Kint.io" (*LiveMint*, February 4, 2019) <www.livemint.com/companies/start-ups/swiggy-acqui-hires-ai-start-up-kint-io-1549274944344.html> accessed September 9, 2025.

[81] Staff Writer, "Instamojo acquihires entertainment startup Showman" (*Livemin*t, 22 April, 2021) www.livemint.com/companies/start-ups/instamojo-acquihires-entertainment-startup-showman-11619101788647.html.

acquihire transaction, and the only way to protect it is the enforcement of negative covenants like Employment bonds or structures like ESOPs, Earn-Out, or similar incentives. In the next sub-part, I shall look at ways of structuring legislation for regulating non-competes that adequately balance the interests of both the employer and the employees.

C. LIMITED ENFORCEMENT: A TEST OF SENIORITY AND REASONABILITY

The 13th Law Commission Report in 1958 had recommended an amendment to allow all negative covenants if they are reasonable.[82] However, the recommendations never saw the legislative light. In this paper, I have already shown how the prevailing position is detrimental for employees, employers, and other stakeholders. The discussion on foreign jurisdictions primarily brings out four broad principles and tools relating to the enforcement of non-competes: (1) A minimum wage floor for employees, (2) Presumption of reasonability, (3) Codified ceiling on duration of non-competes, and (4) The blue pencil test.

A minimum wage requirement will ensure that general employees with lower bargaining power do not get trapped in a non-compete. A non-compete should ideally only cover highly skilled employees, like the ones who are subject to acquihires and top-level executives. These

[82] 13th Law Commission Report (Ministry of Law, 1958) 26, 27.

employees not only have high bargaining power but also have access to high resources to get legal advice. However, the same is not true for general employees. The same principle is also captured in multiple other labour statutes that limit certain employment benefits to workers or employees below a certain wage.[83] The foreign statutes that put a minimum wage usually put it around twice or three times the average salary in the state.[84] The Government can conduct a study and come up with a suitable salary that is revised from time to time.

As discussed earlier, South Africa has a presumption of reasonability for non-competes. However, the presumption may prove to be excessively harsh on the employee. An employer generally has greater resources to prove reasonability. Therefore, India should either not have a presumption or put a rebuttable presumption on post-employment non-competes. The Employer may use the legitimate business interests to prove the reasonability and necessity of the clause. The legislature should provide an inclusive list of factors that the courts may consider while deciding on reasonability. These factors should inter alia include seniority of the employee, the costs incurred in training the employee, access to confidential information, duration of the non-compete, geographical restriction on the operation of non-competes, and any other relevant factor that the court may deem fit. Apart from these, the court should also look at the length of the notice

[83] Employees' State Insurance Act, 1948 (34 of 1948) s2(9) r/w Employees' State Insurance (Central) Rules, 1950, Rule 50.
[84] Florida Contracts Honoring Opportunity, Investment, Confidentiality, and Economic Growth (CHOICE) Act, 2025, §542.45.

period and whether there is any garden leave clause in the contract. A combination of a garden leave or long notice period may excessively increase the duration of overall negative covenants on the employee.

The post-employment non-competes should ideally be judged on the basis of reasonability, which will vary based on the factors mentioned above. However, the Government can also provide a statutory limit on the operation of non-competes. The statutory limit will provide certainty. In the absence of a statutory limit, employees may be deterred if the employer successfully puts in an excessively long non-compete. This is especially true because of the judicial delays in India. To supplement this, the blue pencil test should also not be adopted in India. The blue pencil test guarantees enforceability of all non-competes to a reasonable extent. This will incentivise employers to draft excessively long non-competes, which will unfairly affect the employees. The fear of litigation may in itself deter employees from breaching an unreasonable or unfair non-compete.[85] Therefore, a statutory limit on the duration of non-competes and a prohibition of the blue-pencil test are essential to safeguard the rights of the employees.

V. CONCLUSION

The jurisprudence on non-compete agreements in India illustrates the persistent tension between the constitutional guarantee of freedom of

[85] Naomi Kodama, et. al, "Non-compete Agreements: Human Capital Investments or Compensated Wages?" (Institute of Labor Economics, 2025).

trade under Section 27 of the Indian Contract Act and the recognition of legitimate business interests of employers. Indian courts have generally upheld restraints operating during the subsistence of employment, while consistently invalidating post-employment covenants. However, the case law demonstrates that this distinction is unstable in practice. The judgments in *Niranjan Golikari* and *Krishan Murgai*, as well as their interpretation in subsequent decisions, reveal considerable ambiguity regarding whether resignation or termination constitutes the end of the employment relationship. This ambiguity has enabled employers to draft contracts that exclude termination clauses or provide for long fixed-term arrangements, thereby limiting employee mobility in ways that are inconsistent with the original rationale of Section 27.

A comparative analysis of jurisdictions such as the United Kingdom, the United States, Australia, and South Africa show that a complete prohibition of post-employment non-competes is not the only regulatory approach. Many common law countries have developed legal or statutory frameworks that permit the limited enforcement of such restraints, provided that they are reasonable and proportionate, and that they adequately safeguard employees with weaker bargaining power. In contemporary technology-driven industries, the protection of legitimate employer interests, particularly with respect to key employees and acquihire transactions, makes the case for reform in India compelling. Accordingly, legislative intervention is necessary to replace the current reliance on uncertain judicial interpretation. A statutory scheme should establish clear criteria for assessing reasonableness, introduce wage-linked thresholds to protect employees at lower levels, impose explicit limits on the permissible duration of non-competes, and prohibit doctrines such as the blue-pencil test which encourage overbroad drafting. Such a calibrated legislative design would ensure that employee freedom and mobility are preserved while protecting the substantial investments and confidential information of employers. In an economy increasingly driven by knowledge and innovation, a model of limited enforceability of non-competes, grounded in legislation, is both justified and necessary.