

Reforming non-competes to support workers

Matt Marx (BU), 2019 ASSA





JIMMY JOHN'S

SWICH DELIVERY SPECIALISTS

DELIVERING

**FREE
SMELLS**



Policy Proposals

1. End “ambushing” by requiring notice
2. Require consideration for asking existing employees to sign NCs
3. Insist that judge make up-or-down decisions on validity
4. Empower attorneys general to bring civil suits against abusive firms

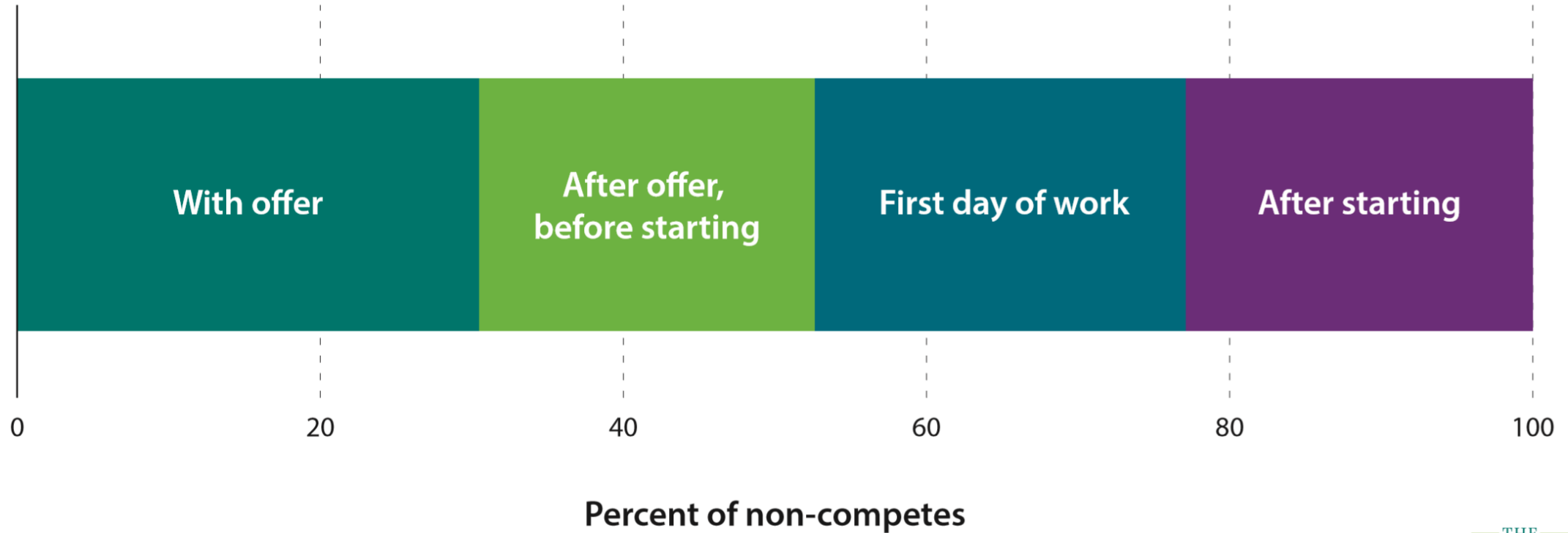
Policy recommendation: notice

- *“the non-compete issue is really about choice for both individuals and employers, who should be free to negotiate contracts of mutual benefit.”*

Brad MacDougall

Vice President of Government Affairs
Associated Industries of Massachusetts

Share of Non-Compete Agreements, by Time of Signing



Source: Marx 2011.

Note: Results are from a survey of the Institute of Electrical and Electronics Engineers with 1,029 respondents and restricted to workers who have signed a non-compete agreement.

Policy recommendation: notice

- Workers must be told *in the offer letter* that they will be asked to sign
- Copy of the agreement must be furnished upon request
- Post-hire “afterthought” non-competes
 - Must be accompanied by material consideration (not just keeping your job)
 - Worker must have time to review w/legal counsel
 - Worker must be allowed to decline and keep job

Policy recommendation: end so-called “judicial reformation”

Ballot Summary of Proposed 2010 Amendment to Georgia Constitution

Shall the Constitution of Georgia be amended so as to make Georgia more economically competitive by authorizing legislation to uphold reasonable competitive agreements?

Mr. Marx agrees not to work for any company in the speech recognition industry, anywhere in the world, for a period of three years after leaving SpeechWorks International.

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Policy recommendation: end “reformation”

- Judges should make up-or-down decisions regarding validity
- So-called “reformation” enables firms to be
 - Sloppy
 - Strategic
- when drafting non-competes because the judge can always “fix” overbroad agreements
- Meanwhile, worker may *think* broader contract is valid

Policy recommendation: the
“chilling effect”

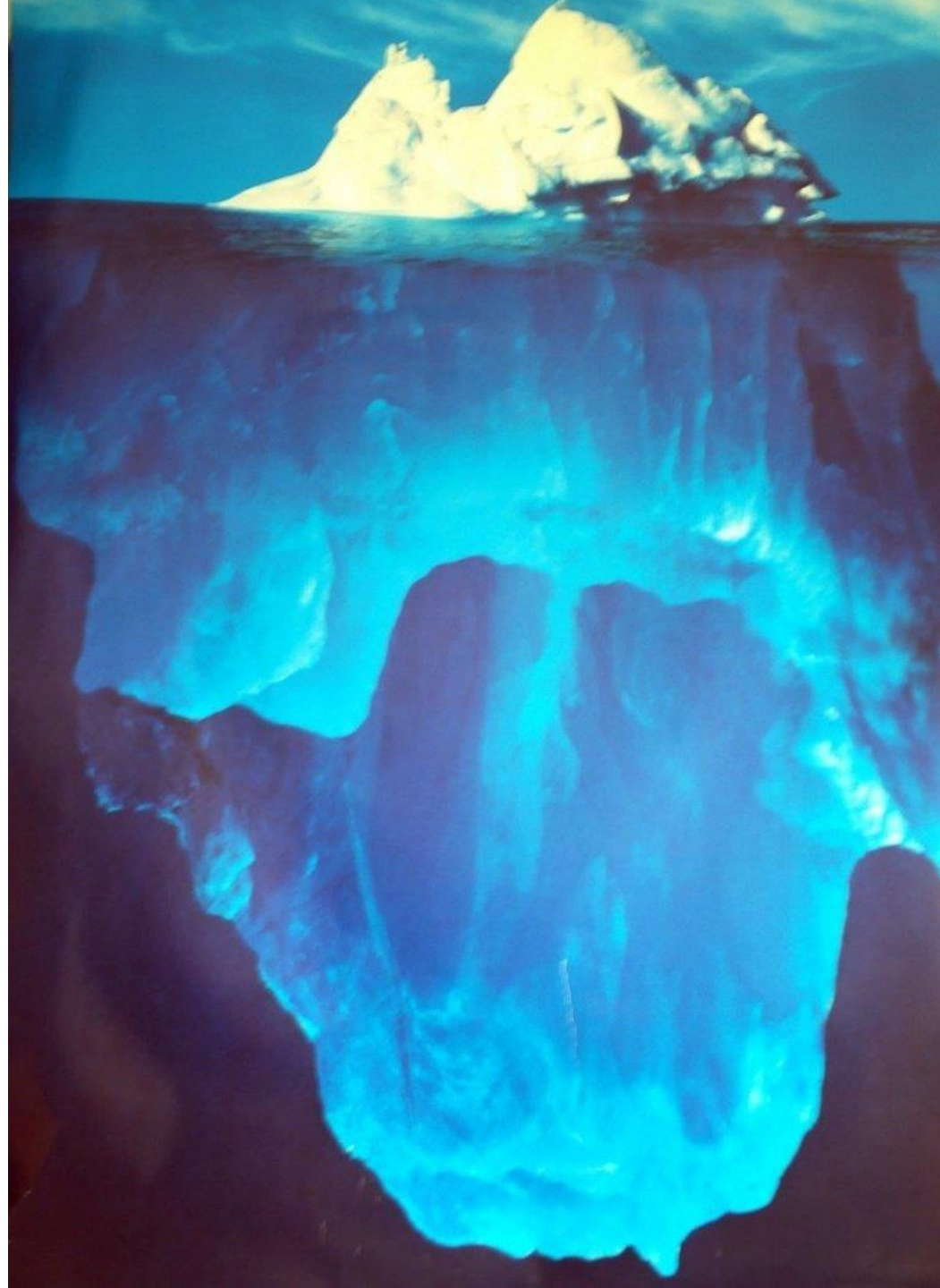
published non-compete decisions



court
cases →

**Unlitigated
threats →**

**Voluntary
compliance →**



Policy recommendation: the “chilling effect”

- Most reforms focus on whether non-compete can be enforced in a court of law (duration, breadth, etc.)
- Reforms re: notice and reformation begin to address chilling effect
- Still, little incentive for firms not to act badly
- Illinois reform: *No employer **shall enter into** a covenant not to compete with any low-wage employee of the employer.*
 - Empowered AG Lisa Madigan to sue Check Into Cash LLC for violation
 - Anonymous reports from employees → high-profile actions → civil penalties

Utah

- HB0251 by State rep. Mike Schultz
- Requires notice
- 1-year limit
- Attorneys' fees if employer sues ex-employee and loses



Hawaii

- Entirely banned in IT industry by Act 158
- *“driving skilled workers to other jurisdictions”*
- *“have a chilling effect [on] highly specialized professionals”*
- *“forces spinoffs of existing technology companies to choose places other than Hawaii.”*



Massachusetts

- Fmr. Governor Deval Patrick called for reform April 2014
- Seven hearings in three subcommittees
- July 2016 compromise deadlocked over garden-leave payment
 - “We just ran out of time”
– Senator Dan Wolf

