

# FTC's Non-Compete Ban

May 4, 2023

## TODAY'S SPEAKERS

### **Miriam O'Sullivan**

*Group VP, HRBP, Cardiology*  
**Boston Scientific Corporation**

### **Paul Covaleski**

*Antitrust & Competition Counsel*  
**Accenture**

### **Gregory Hoff**

*Associate Counsel, Director, Labor & Employment Policy*  
**HR Policy Association**

### **Ani Huang**

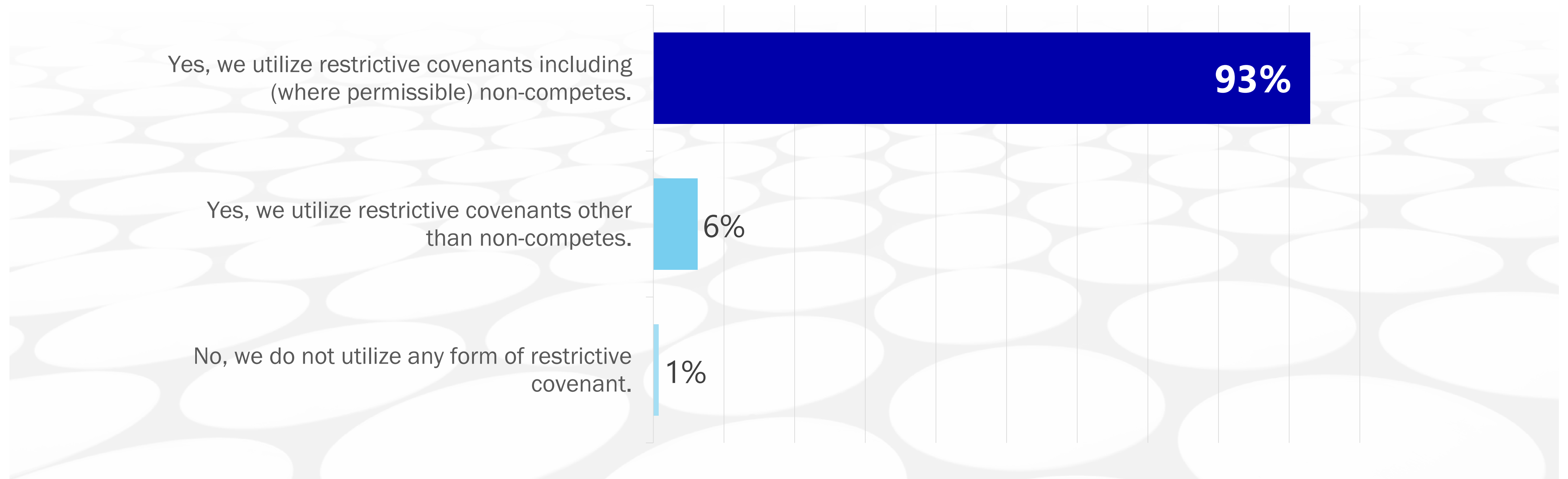
*President and CEO, **Center On Executive Compensation***  
*Senior Vice President, **HR Policy Association***

# Agenda

- Survey results
- FTC Proposed Rule
- HRPA comments
- What's next?
- Discussion

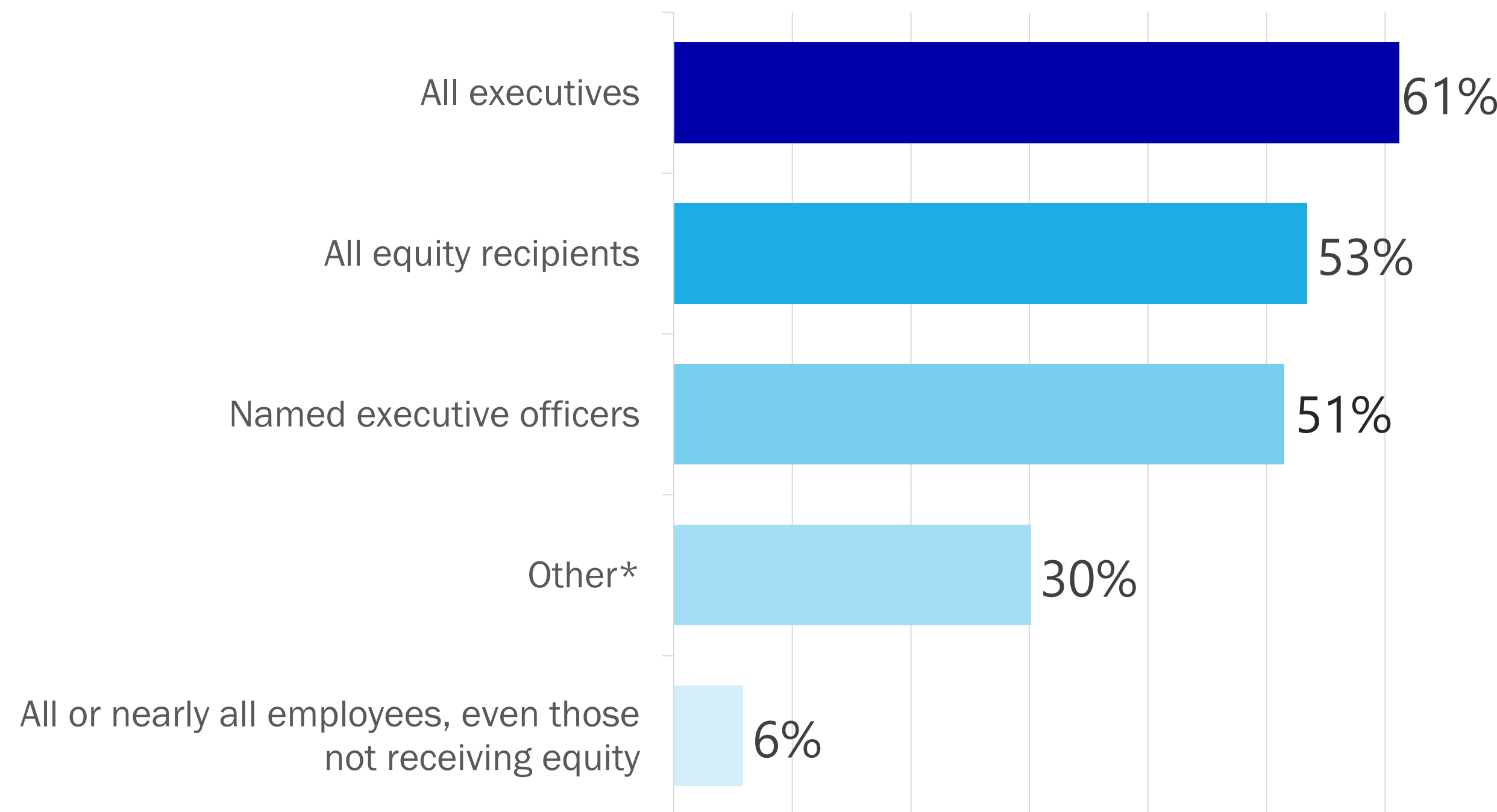
# NON-COMPETE SURVEY RESULTS (128 RESPONDENTS)

Q: Does your company utilize restrictive covenants such as non-competes, non-solicitations or forfeiture provisions in equity award agreements, severance agreements or employment agreements in the U.S.?



# EXECUTIVES, EQUITY RECIPIENTS SUBJECT TO NON-COMPETES

Q: Which employees are subject to non-competes?



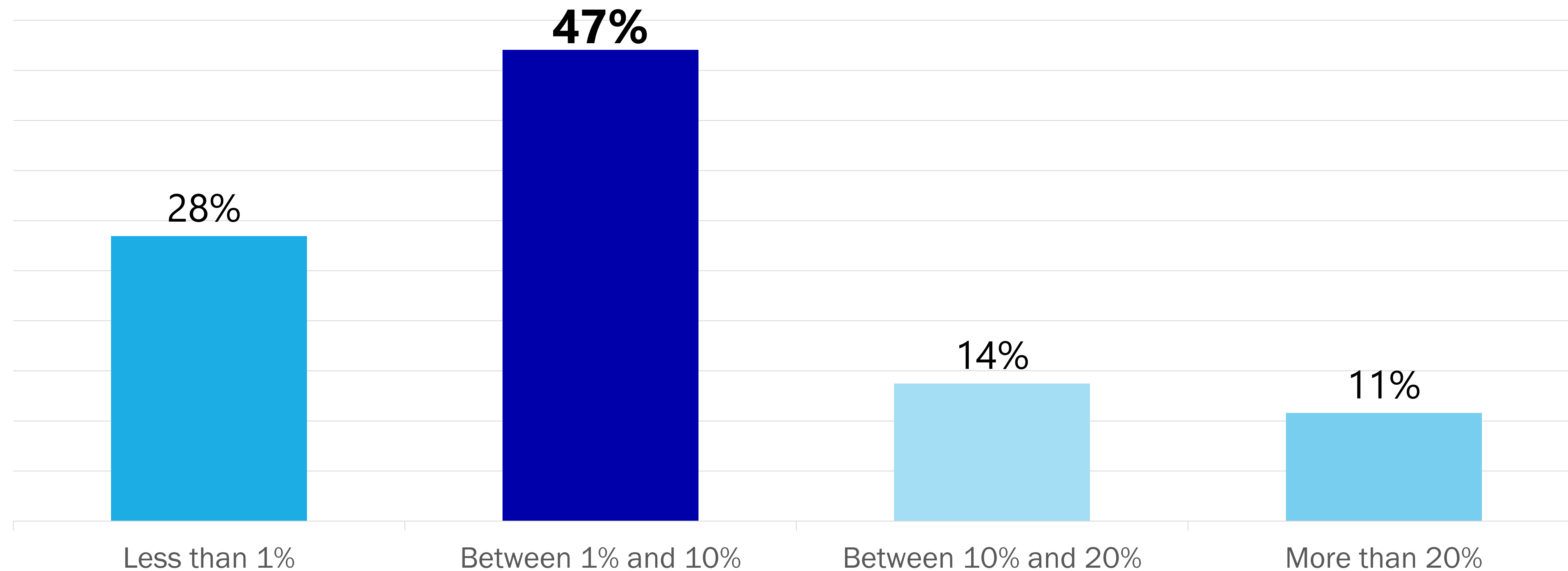
**NOTE:** Respondents could select more than one choice; totals may not equal 100%

**\*Please specify other employees:**

- Sales employees/ executives (11)
- Employees at or above specific leadership levels (e.g., VP and above) (9)
- On a selective basis (5)
- All officers (3)
- Positions with access to confidential and proprietary information (2)

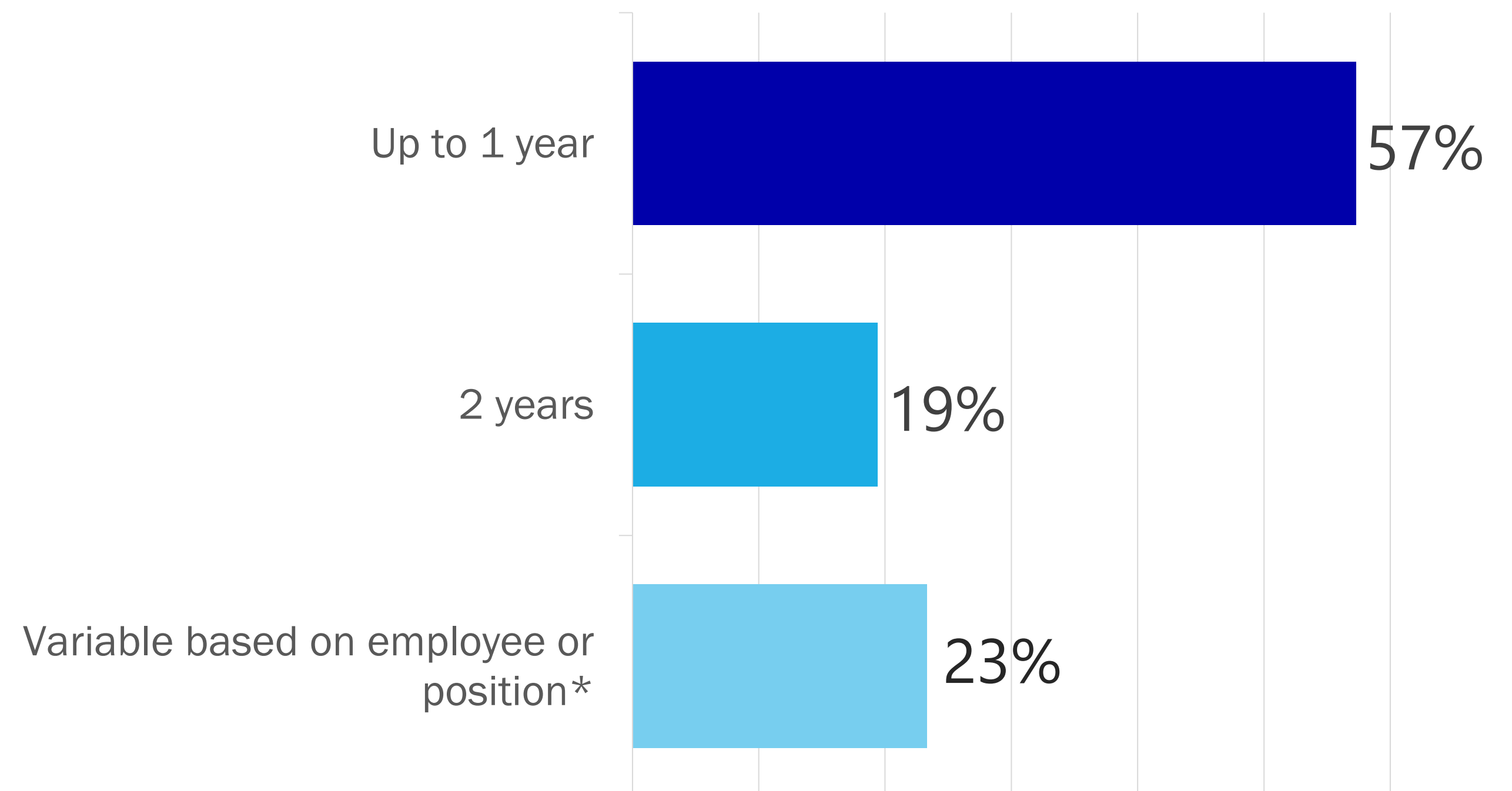
# 75% HAVE LESS THAN 10% OF EMPLOYEES ON NON-COMPETES

Q: Approximately what percentage of your U.S. workforce is subject to non-compete restrictions?



# NON-COMPETE COMMONLY IN EFFECT UP TO 1 YEAR AFTER DEPARTURE

Q: How long is the non-compete agreement in effect following the employee's departure?



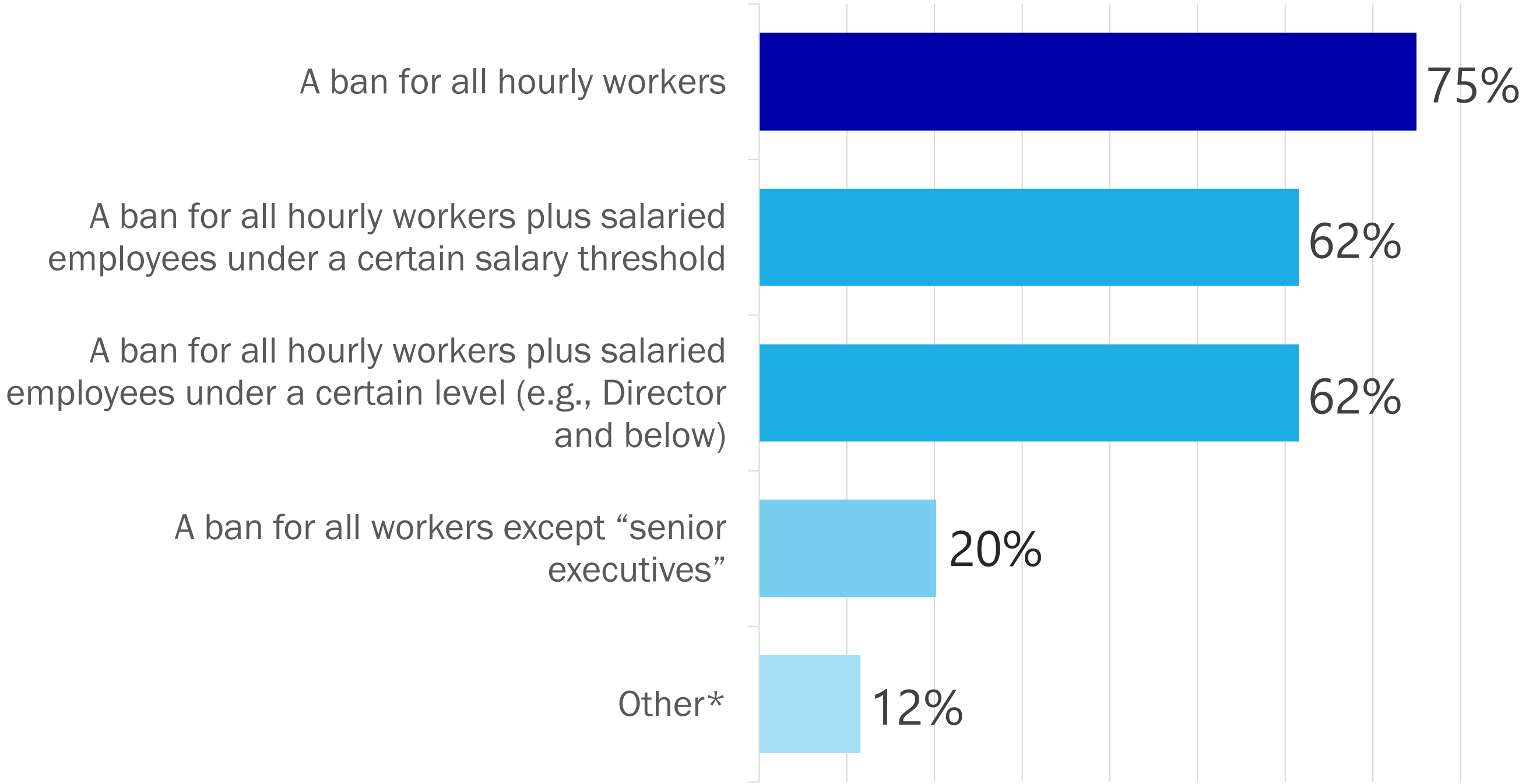
**\*Variable based on position, other factors:**

- 6 to 24 months, depending on position (e.g., 2 years for NEOs/C-Suite; 1 year for other officers; 6 months below officer level;) **(19)**
- Subject to terms of separation agreement and vesting of equity **(6)**



# WHERE DO WE DRAW THE LINE?

Q: With which of the following provisions of a final rule on non-competes would you be comfortable?



**NOTE:** Respondents could select more than one choice; totals may not equal 100%

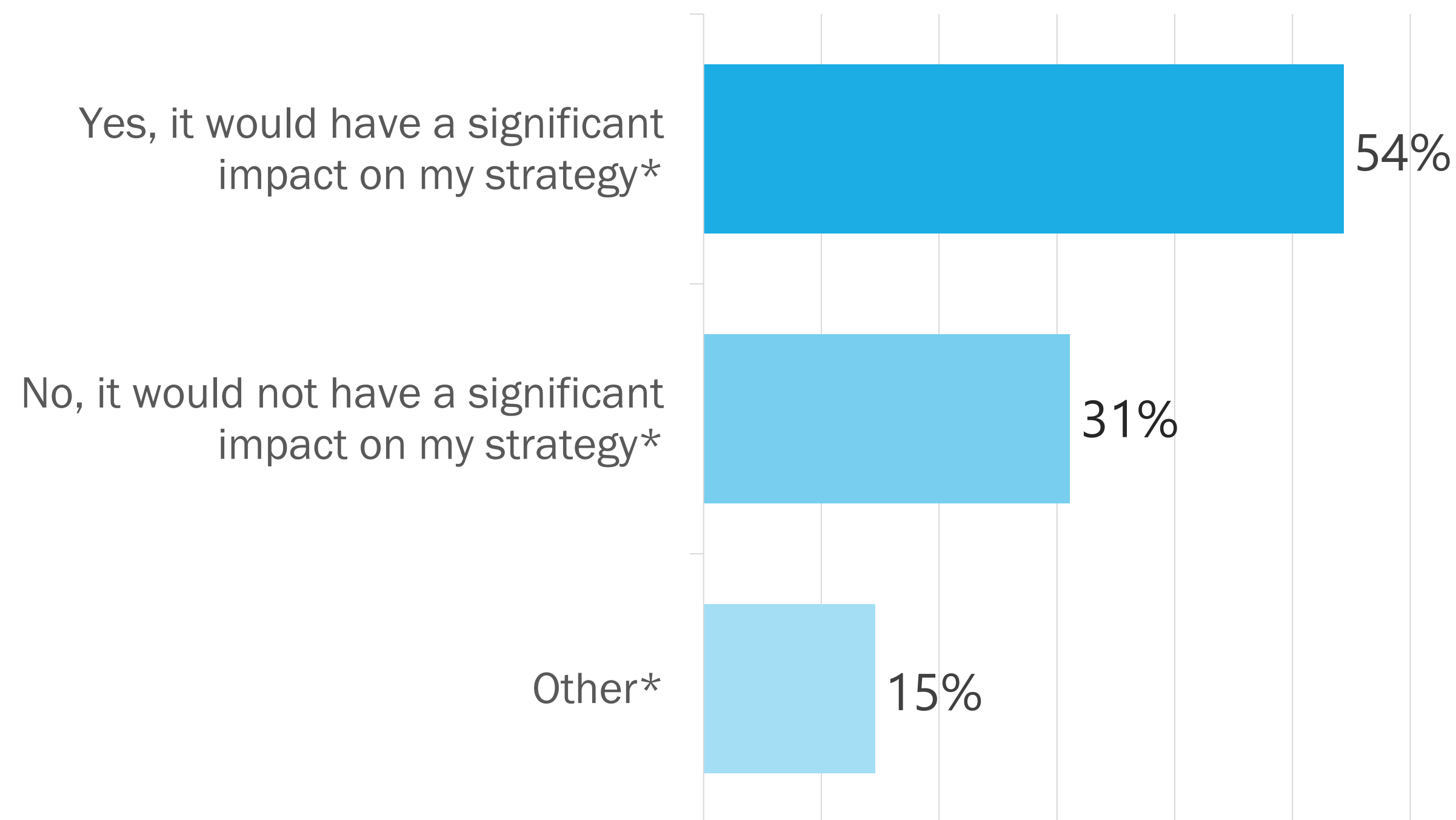
**\*Other, please specify:**

- We do not believe the FTC has the legal authority to prohibit non-competes on a national basis. (4)
- A ban on non-competes for all workers not in specific, company identified roles where access to proprietary knowledge exists (e.g., executives, unique scientific roles). (3)
- A ban on non-competes for anyone who does not receive equity/LTI.
- Ban on skilled, direct workforce.



# IMPACT ON TALENT AND COMPENSATION STRATEGY

Q: Would a total ban on non-competes have a negative impact on your talent or compensation strategy?



## \*Please explain your answer:

- The restriction would impact both talent and compensation strategies as well as our ability to protect proprietary information. (25)
- We use non-competes very sparingly (12)
- We would examine both our talent and compensation strategies and consider modifying them to retain talent. (7)
- We may need to explore changing our STI/LTI vesting approach for senior executives (3)
- Ban would have an initial ripple effect within a highly competitive industry. Once common, playing field would level to focus on talent retention strategy. (2)
- While it would have an impact on talent strategy, “significant” seems too strong a word. (2)
- Losing the non-compete provision would likely force us to more aggressively pursue clawbacks and forfeitures.

# The FTC Proposed Rule

- Prohibits all non-compete agreements
  - Narrow exception for business sales
- **“De facto non-compete clauses”**: Other restrictive covenants such as NDAs could also be prohibited if “written so broadly that [they] effectively preclude a worker from working in the same field”
- Forfeiture clauses – covered?

# HRPA Comments

- **Rulemaking unlawful/without authority:**
  - FTC lacks statutory authority or clear congressional authorization
  - Arbitrary and capricious in violation of APA
- **Mischaracterization of use of non-competes:**
  - Flawed and inconclusive data
  - Reasonable use limited for specific purposes and employee groups
  - Essential for protecting trade secrets and employee investments
- At minimum, **exemptions for executive-level employees** and those with access to trade secrets or proprietary information

# What's Next?

- FTC must review every comment (30,000 filed)
- Final rule could come before the end of the year
- Legal challenge:
  - Could temporarily suspend implementation and if successful permanently suspend
- Legislative efforts:
  - Workforce Mobility Act (S.220) (total ban similar to FTC rule)
  - Freedom to Compete Act (S.379) (ban for lower-wage workers only)
  - Bipartisan support

# What's Next? (Cont.)

- State activity:
  - 47 states currently allow non-competes, with certain overlapping conditions/limitations
  - 3 states prohibit non-competes, with limited exceptions: CA, ND, OK
  - Wage thresholds: CO, IL, ME, MD, MA, NV, NH, OR, RI, VA, WA
    - \$75k and up: WA, CO, IL, OR
  - Several states considering legislation that would impose stricter limitations/bans: CT, IN, NY, RI, UT, e.g.



# Discussion



# FTC's Non-Compete Ban

THANK YOU!