

VOID AGREEMENTS, KNOCKED-OUT TERMS, AND BLUE PENCILS: JUDICIAL AND LEGISLATIVE HANDLING OF UNREASONABLE TERMS IN NONCOMPETE AGREEMENTS

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I. INTRODUCTION

It's a common scenario, played out numerous times every business day:

Sam Salesperson is very excited. He has just been offered a position by ABC Corp., a promising start-up company, to be their salesperson for their brand new medical software system in the territories of Pennsylvania and New Jersey. The head of human resources hands him a document entitled "Noncompete Agreement" and tells him he will need to sign it before he can officially be hired. Excited about the opportunity ahead, Sam signs the document, which prohibits him from working for a competitor in Pennsylvania or New Jersey for one year after he leaves ABC Corp.

Sam starts work and does a good job for ABC Corp., but then one day he has a dispute with his boss and leaves to work for a competitor. . .

Section II of this article will provide a brief introduction to employer-employee noncompete agreement¹ analysis and explore the preliminary issue of consideration. Section III will analyze the criteria

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1. These types of agreements are known by several terms, including "Covenant Not to Compete" and "Noncompetition Agreement." This article will use the term "noncompete agreement."

and differing approaches courts use to determine the validity of a noncompete agreement, including the requirement of an employer's legitimate business interest and the reasonableness of the occupational limitations as well as the geographic and temporal scope of the agreement. Section IV will survey the current judicial and statutory responses to unreasonable terms in a noncompete agreement. Sections V and VI critique the varying approaches and suggest a model statute to address unreasonable terms in noncompete agreements. This model will take into account a factor heretofore generally ignored by jurisdictions in their approach to unreasonable noncompete terms: the relationship between consideration and the reasonableness of the agreement.

II. OVERVIEW OF NONCOMPETE AGREEMENTS

This section first provides a brief introduction to the framework of noncompete agreement analysis and then explores the differing approaches jurisdictions use when addressing the preliminary issue of consideration for a noncompete agreement.

A. Introduction

Noncompete agreements between employers and employees have been commonplace for over a century.² While the precise laws

2. See *Bendinger v. Marshalltown Trowell Co.*, 994 S.W.2d 468, 471 (Ark. 1999) (noting that litigation over noncompete agreements has been around for over 500 years); Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 629-46 (1960) (surveying the development of English common law on noncompete agreements). For a historical perspective of noncompete agreements in the United States up through the early 1950s, see *Arthur Murray Dance Studios of Cleveland v. Witter*, 105 N.E.2d 685, 687-88 (Ohio Ct. Com. Pl. 1952) providing a thorough survey of secondary source materials, which the court colorfully refers to as various "seas" of periodicals, annotations, encyclopedias, and restatements. See also *Zabota Cmty. Ctr. v. Frolova*, No. 061909BLS1, 2006 WL 2089828, at *1 (Mass. Super. Ct. May 18, 2006).

The legal history of these kinds of situations or agreements dates back at least to 19th Century England. Lord Macnaughten reminded his readers that enforcement of these kinds of agreements is an exception to the general rule. He said:

The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade [sic] themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable [sic] reasonable,

controlling the enforceability of these agreements vary from state to state,³ the following generic standard, applicable in most jurisdictions,⁴ provides a useful framework for surveying the basic principles courts used to determine if a noncompete agreement between an employer and employee will be upheld:

The test applied is whether or not the restraint is necessary for the protection of the business or good will of the employer, and if so, whether the stipulation has imposed upon the employee any greater restraint than is reasonably necessary to protect the employer's business, regard being had to the nature and character of the employment, the time for which the restriction is imposed, and the territorial extent of the locality to which the prohibition extends.⁵

Most courts also note that the law looks at these contracts with "disfavor"⁶ and subjects them to careful scrutiny.⁷ This type of verbiage

that is, in reference to the interest of the parties concerned and reasonable in reference to the interest of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all of the authorities.

Id. (citation omitted) (quoting *Nordenfelt v. Nordendelt Guns and Ammunition Co.*, [1894] A.C. 535, 565 (H.L.) (appeal taken from C.A.)).

3. For a thorough compilation of the laws applicable to noncompete agreements and each jurisdiction, see BRIAN MALSBERGER, *COVENANTS NOT TO COMPETE: A STATE BY STATE SURVEY* (4th ed. 2004). Throughout this article, general propositions will be presented and representative case law will be cited. This article does not purport to capture the subtle nuances of every component of noncompete agreement analysis (many of which are based upon the myriad factual scenarios that develop in employer-employee relationships), particularly in sections two and three, where each of the sub-sections could be its own subject of a law review article. The Malsberger book and the ALR articles cited herein provide literally thousands of pages of case law and citations exploring every facet of noncompete agreement analysis and provide a good starting point for research on a particular jurisdiction's standards.

4. *But see* Peter J. Whitmore, *A Statistical Analysis of Noncompetition Clauses in Employment Contracts*, 15 J. CORP. L. 483, 485 (1990) (contending that the variations amongst the legal precedents make predictability difficult).

5. *Bennett v. Storz Broad. Co.*, 134 N.W.2d 892, 899 (Minn. 1965); *see, e.g.*, TEX. BUS. & COM. CODE ANN. § 15.50(a) (Vernon 2002):

Notwithstanding Section 15.05 of this code, and subject to any applicable provision of Subsection (b), a covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.

6. *See, e.g.*, *Sysco Food Servs. of E. Wis., L.L.C. v. Zicarelli*, 445 F. Supp. 2d 1039, 1043

is common in noncompete cases and makes it clear that courts will not treat these types of contracts under the same freedom of contract type of analysis found elsewhere in contract law.⁸ Many courts have characterized these agreements as one of "adhesion."⁹

B. Consideration

As a preliminary matter, a noncompete agreement must, as with all other contracts, be supported by consideration.¹⁰ Issues regarding consideration arise when the noncompete agreement is signed shortly after, but not at or prior to commencement of employment and also when a noncompete is signed well into an established employment relationship.

If the noncompete agreement is signed ancillary to the commencement of employment, the employment itself is sufficient consideration.¹¹ Some jurisdictions enforce the ancillary requirement

(E.D. Wis. 2006) ("[C]ovenants not to compete are generally disfavored in the law." (quoting *Equity Enters., Inc. v. Milosch*, 633 N.W.2d 662,668 (Wis. Ct. App. 2001))); *Intermountain Eye and Laser Cts., P.L.L.C. v. Miller*, 127 P.3d 121, 127 (Idaho 2005) ("Covenants not to compete in employment contracts are 'disfavored'"); *Cranston Print Works Co. v. Pothier*, 848 A.2d 213, 219 (R.I. 2004) ("It is well settled that covenants not to compete are disfavored and subject to strict judicial scrutiny."); *Murfreesboro Med. Clinic, P.A. v. Udom*, 166 S.W.3d 674, 678 (Tenn. 2005) ("In general, covenants not to compete are disfavored in Tennessee."); *Trilogy Software, Inc. v. Callidus Software, Inc.*, 143 S.W.3d 452, 459 (Tex. App. 2004) ("A covenant not to compete is a disfavored contract in restraint of trade").

7. *Bennett*, 134 N.W.2d at 898; *see also* *Superior Consulting Co. v. Walling*, 851 F. Supp. 839, 848 (E.D. Mich. 1994) ("[P]ublic policy disfavoring restraints on trade and interference with a person's livelihood warrants strict examination of noncompetition covenants."); *Vortex Protective Serv., Inc. v. Dempsey*, 463 S.E.2d 67, 69 (Ga. Ct. App. 1995) (noting that noncompete agreements injure the employees by diminishing their ability to make a livelihood and provide for their family); *Herring Gas Co., v. Whiddon*, 616 So. 2d 892, 894 (Miss. 1993) ("The law requires a strict construction of covenants not to compete").

8. *See, e.g., Albee Homes, Inc. v. Caddie Homes, Inc.*, 207 A.2d 768, 772 (Pa. 1965) (noting that restrictive covenants ancillary to an employment contract are subject to a more stringent test of reasonableness than those ancillary to a buy-sell agreement).

9. *See, e.g., Prudential Sec., Inc. v. Plunkett*, 8 F. Supp. 2d 514, 519 (E.D. Va. 1998). *See generally* J. W. Looney & Anita K. Poole, *Adhesion Contracts, Bad Faith, and Economically Faulty Contracts*, 4 DRAKE J. AGRIC. L. 177, 179 (1999) (defining adhesion contracts as "standard form" contracts offered on a "take it or leave it" basis).

10. *E.g., Moore Bus. Forms, Inc. v. Wilson*, 953 F. Supp. 1056, 1063 (N.D. Iowa 1996) (holding that because noncompetes are contractual agreements, "they must be supported by consideration"); *RHIS, Inc. v. Boyce*, No. Civ.A. 18924, 2001 WL 1192203, at *3 (Del. Ch. Sept. 26, 2001) ("Of course, a covenant to compete must be supported by consideration."); *NBZ, Inc. v. Pilarski*, 520 N.W.2d 93, 95-96 (Wis. Ct. App. 1994) ("[R]estrictive covenants in employment contracts [are] to be supported by consideration").

11. *Faw, Casson & Co. v. Cranston*, 375 A.2d 463, 466 (Del. Ch. 1977) ("It is generally

strictly and require signing prior to the commencement of employment,¹² while other jurisdictions will consider an agreement ancillary even if signed after the employee begins work.¹³ In the latter jurisdictions, the analysis still uses the employee's hiring as the consideration for the agreement. However, the court finds a factual basis for determining that the employment had not legally commenced or that the noncompete agreement was agreed to but not signed before employment commenced.¹⁴ For example, if an employer and employee have yet to agree on all important terms of employment, such as pay or commission structure, the court may not consider employment to have commenced, even though the employee has begun work.¹⁵ In other instances, if an employee and employer have agreed on a noncompete agreement ancillary to employment, consideration will be found even though the employee does not sign until after commencement.¹⁶

If the noncompete agreement is signed after commencement of employment, jurisdictions are split as to whether additional consideration is required.¹⁷ Those holding that no additional

agreed that mutual promises of employer and employee furnish valuable considerations each to the other for the contract." (quoting *James C. Greene Co. v. Kelley*, 134 S.E.2d 166, 167 (N.C. 1964))).

12. *E.g.*, *Nat'l Recruiters, Inc. v. Cashman*, 323 N.W.2d 736, 738, 741 (Minn. 1982) (illustrating an instance where a noncompete agreement presented and signed three days after commencement of employment is not supported by consideration because the employee receives no benefit); *C.S.C.S., Inc. v. Carter*, 129 S.W.3d 584, 587-90 (Tex. Ct. App. 2003) (demonstrating an instance where a noncompete agreement signed four days after the commencement of employment was not ancillary).

13. *E.g.*, *Nat'l Bus. Servs., Inc. v. Wright*, 2 F. Supp. 2d 701, 707 (E.D. Pa. 1998) (illustrating an instance where an agreement signed 10 days after starting work was considered ancillary because the employee knew of the requirement prior to commencement of employment).

14. *Id.* at 707-08.

15. *Van Dyck Printing Co. v. DiNicola*, 648 A.2d 898, 901 (Conn. Super. Ct. 1993), *aff'd*, 648 A.2d 877, 878 (Conn. 1994).

16. *Young v. Mastrom, Inc.*, 392 S.E.2d 446, 448 (N.C. Ct. App. 1990) (finding a noncompete agreement signed after commencement of employment to be ancillary, reasoning that "[i]t is immaterial that the written contract is executed after the employee starts to work. However, the terms of a verbal covenant which is later reduced to writing must have been agreed upon at the time of employment in order for the later written covenant to be valid and enforceable.") (citation omitted).

17. In *Lake Land Employment Group of Akron, L.L.C. v. Columber*, 804 N.E.2d 27 (Ohio 2004), the Ohio Supreme Court discussed the current divergent approaches to the issue of whether consideration is required for a noncompete agreement signed after commencement of employment:

Jurisdictions throughout the country are split on the issue presented by the certified question. As summarized by the Supreme Court of Minnesota, "cases which have held that continued employment is not a sufficient consideration stress the fact that an employee frequently has no bargaining power once he is employed and can easily be coerced. By signing a noncompetition agreement, the employee gets no more from his

consideration is necessary generally focus on the fact that the employee could have otherwise been terminated.¹⁸

Jurisdictions which require additional consideration¹⁹ to support a noncompete agreement signed after the commencement of employment point to the fact that the employee receives no benefit as a result of signing the agreement because the employee already has the position, and the agreement itself provides no benefit.²⁰ Those jurisdictions reject the notion that continued employment alone can support a noncompete

employer than he already has, and in such cases there is a danger that an employer does not need protection for his investment in the employee but instead seeks to impose barriers to prevent an employee from securing a better job elsewhere. Decisions in which continued employment has been deemed a sufficient consideration for a noncompetition agreement have focused on a variety of factors, including the possibility that the employee would otherwise have been discharged, the employee was actually employed for a substantial time after executing the contract, or the employee received additional compensation or training or was given confidential information after he signed the agreement.

Id. at 30-31 (citations omitted) (quoting *Davies & Davies Agency, Inc. v. Davies* 298 N.W.2d 127, 130 (Minn. 1980)).

18. *See Camco, Inc. v. Baker*, 936 P.2d 829, 832 (Nev. 1997) (“Today we adopt the majority rule which states that an at-will employee’s continued employment is sufficient consideration for enforcing a non-competition agreement.”). The *Camco* court reasoned that “[t]here is ‘no substantive difference between the promise of employment upon initial hire and the promise of continued employment subsequent to ‘day one.’” *Id.* (quoting *Copeco, Inc. v. Caley*, 632 N.E.2d 1299, 1301 (Ohio Ct. App. 1992)). The *Camco* court further noted that “[a] contrary holding might leave the employer in a position of having to fire an at-will employee and then rehire that same employee with the restrictive covenant in place, or have the covenant held unenforceable for want of consideration.” *Id.*; *see also, e.g., Compass Bank v. Hartley*, 430 F. Supp. 2d 973, 978 (D. Ariz. 2006) (“[T]he promise of continued employment validates a covenant executed after the employment relationship has commenced”); *Daughtry v. Capital Gas Co.*, 229 So. 2d 480, 483 (Ala. 1969); *Farm Bureau Serv. Co. of Maynard v. Kohls*, 203 N.W.2d 209, 212 (Iowa 1972); *Ehlers v. Iowa Warehouse Co.*, 188 N.W.2d 368, 370 (Iowa 1971); *Smith, Batchelder & Rugg v. Foster*, 406 A.2d 1310, 1312 (N.H. 1979); *M. S. Jacobs & Assocs. v. Duffley*, 303 A.2d 921, 923 (Pa. 1973).

19. *See generally Hopper v. All Pet Animal Clinic, Inc.*, 861 P.2d 531, 541 (Wyo. 1993) (debating between the choice of finding continued employment as consideration and the requirement for additional consideration and holding that requiring additional consideration “recognizes the increasing criticism of the at-will relationship, the usually unequal bargaining power of the parties, and the reality that the employee rarely ‘bargains for’ continued employment in exchange for a potentially onerous restraint on the ability to earn a living”).

20. *E.g., Nat’l Recruiters, Inc. v. Cashman*, 323 N.W.2d 736, 741 (Minn. 1982) (holding that a noncompete agreement presented and signed three days after commencement of employment was not supported by consideration because the employee received no benefit); *Cox v. Dine-A-Mate, Inc.*, 501 S.E.2d 353, 356 (N.C. Ct. App. 1998) (finding no consideration where the plaintiff did not receive any change in compensation, commission, duties or other consideration, but rather signed the agreement to keep his job); *Poole v. Incentives Unlimited, Inc.*, 548 S.E.2d 207, 209 (S.C. 2001) (“[T]here is no consideration when the contract containing the covenant is exacted after several years employment and the employee’s duties and position are left unchanged.”).

agreement, finding any claimed consideration to be “illusory”²¹ since the employer retained the right to terminate the employee at any time.²² These jurisdictions will look for an intangible benefit to support the agreement, such as “increased wages, a promotion, a bonus, a fixed term of employment, or perhaps access to protected information.”²³ Still, in other jurisdictions, courts will look to the specific employment relationship after the signing of the agreement and allow factors such as a promotion or lengthy employment history to provide the consideration.²⁴

The above principles are malleable enough that a court can use them to find consideration even when strict contract principles would otherwise lead to an alternative conclusion. One such example is the Connecticut Supreme Court case of *Van Dyck Printing Co. v. DiNicola*.²⁵ Connecticut is a state that requires that the noncompete agreement be signed ancillary to the commencement of employment; otherwise additional consideration is needed for a valid agreement.²⁶ In *Van Dyck*, the employee was hired by the employer as a printing

21. *E.g.*, *Poole v. Incentives Unlimited, Inc.*, 525 S.E.2d 898, 900 (S.C. Ct. App. 1999), *aff'd*, 548 S.E.2d 207 (S.C. 2001).

22. *Id.*

23. *Labriola v. Pollard Group, Inc.*, 100 P.3d 791, 794 (Wash. 2004) (en banc).

24. *See Lake Land Employment Group of Akron, L.L.C. v. Columer*, 804 N.E.2d 27, 31 (Ohio 2004).

More recently, some courts have found sufficient consideration in an at-will employment situation where a substantial period of employment ensues after a noncompetition covenant is executed, especially when the continued employment is accompanied by raises, promotion, or similar tangible benefits. These courts thereby implicitly find that the execution of a noncompetition agreement changes the prior employment relationship from one purely at will. In effect, these courts infer a promise on the part of the employer to continue the employment of his previously at-will employee for an indefinite yet substantial term. Under this approach, however, neither party knows whether the agreement is enforceable until events occur after its execution.

Id. (citations omitted); *see also Curtis 1000, Inc. v. Suess*, 24 F.3d 941, 945 (7th Cir. 1994) (finding consideration existed for a noncompete agreement signed after commencement of employment because the employee worked for eight years after signing); *Lawrence & Allen, Inc. v. Cambridge Human Res. Group, Inc.*, 685 N.E.2d 434, 441 (Ill. App. Ct. 1997) (“Continued employment for a substantial period of time is sufficient consideration to support an employment agreement.” (citing *McRand, Inc. v. Van Beelen*, 486 N.E.2d 1306, 1313 (Ill. App. Ct. 1985))).

25. 648 A.2d 898, 901 (Conn. Super. Ct. 1993), *aff'd*, 648 A.2d 877, 878 (Conn. 1994).

26. *Artman v. Output Techs. Solutions E. Region, Inc.*, No. CV 00595362S, 2000 WL 992166, at *3 (Conn. Super. Ct. June 30, 2000). The *Van Dyck* court distinguished the facts of its case from those of a situation where employment had commenced and the employee was asked to sign a noncompete agreement one year after beginning work; in that situation, there was no consideration for the contract. *Van Dyck*, 648 A.2d at 901.

salesman – a new career for the employee.²⁷ Prior to starting work, the parties orally agreed that the employee would receive a \$150 weekly draw against commission, a 7% commission for sales up to \$100,000, and a higher, undetermined, rate for total sales above \$100,000.²⁸ The parties agreed that eventually a contract would be written up and would include a noncompete agreement.²⁹ Four weeks after the employee commenced work, he signed an employment agreement which included a noncompete agreement and provided commissions slightly higher than 7% for sales of between \$25,000 and \$75,000, and an 8.5% commission on sales over \$75,000.³⁰ The employee worked for the employer for nearly twenty years, after which he left to begin his own company. Within a week, he was calling on his former customers.³¹

The Connecticut Supreme Court found consideration, theorizing that the open terms in the oral agreement meant that the parties really had not agreed and, therefore, employment had not commenced.³² The court rationalized that the employee's presence at work did not signify an employment relationship,³³ nor that the employer would be protected.³⁴ Additionally, the court reasoned that even if employment was to be construed as having commenced, "the enhanced commission rate . . . would constitute new consideration for the covenant not to compete."³⁵

27. *Van Dyck*, 648 A.2d at 900.

28. *Id.*

29. *See id.*

30. *Id.*

31. *Id.* at 901.

32. *Id.*

33. *See id.*

34. *Id.*

35. *Id.* The fine line that courts walk in differentiating between consideration and no consideration is also demonstrated in a pair of Minnesota Supreme Court decisions: *Freeman v. Duluth Clinic, Ltd.*, 334 N.W.2d 626 (Minn. 1983) and *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127 (Minn. 1980). In both, employees signed noncompete agreements after the commencement of employment and neither received money nor other tangible assets at the time of signing. *Davies*, 298 N.W.2d at 129-30; *Freeman*, 334 N.W.2d at 627-28. In *Davies*, the employer argued that consideration existed because the employee was promoted from clerk to salesperson and received training as a result of signing the noncompete agreement. *Davies*, 298 N.W.2d at 129. In *Freeman*, the employer argued that consideration existed because the employee, a doctor who was also a shareholder in the clinic, benefited since the clinic was strengthened due to the majority of physicians signing the agreements. *Freeman*, 334 N.W.2d at 630. The *Davies* court found consideration, while the *Freeman* court did not. *Davies*, 298 N.W.2d at 131; *Freeman*, 334 N.W.2d at 630. In both cases the court looked at how similarly situated employees fared. In *Davies*, a brother of the employee in the family-owned business (owned by their father), refused to sign a noncompete agreement and remained a clerk. *Davies*, 298 N.W.2d at 131. In *Freeman*, the few doctors who refused to sign were not punished in any way and all the doctors, whether they signed

III. ANALYSIS OF THE NONCOMPETE AGREEMENT

Once consideration is found, courts will analyze several components to determine if the noncompete agreement is to be upheld.³⁶ First, the court must determine if the employer has a legitimate business interest that may be protected by a noncompete agreement. If the employer has a legitimate business interest, the court must then determine whether the noncompete agreement is reasonable in terms of time, geography, and prohibited activities.³⁷ While, as noted above,

or not, received the same fringe benefits and were compensated under the same pay scale. *Freeman*, 334 N.W.2d at 630.

36. *Unger v. FFW Corp.*, 771 N.E.2d 1240, 1245 (Ind. Ct. App. 2002); *see also C & L Indus., Inc. v. Kiviranta*, 698 N.W.2d 240 (Neb. Ct. App. 2005).

The degree of inequality in bargaining power; the risk of the covenantee losing customers; the extent of respective participation by the parties in securing and retaining customers; the good faith of the covenantee; the existence of sources or general knowledge pertaining to the identity of customers; the nature and extent of the business position held by the covenantor; the covenantor's training, health, education, and needs of his [or her] family; the current conditions of employment; the necessity of the covenantor changing his [or her] calling or residence; and the correspondence of the restraint with the need for protecting the legitimate interests of the covenantee.

Id. at 250 (quoting *Am. Sec. Servs. v. Votra*, 385 N.W.2d 73, 80 (Neb. 1986)).

37. *Unger*, 771 N.E.2d at 1244. There are two other factors that are often noted by courts: (1) whether the agreement is injurious to the public, and (2) a balancing of the harms between the employer's legitimate interest and the harshness to the employee. If a court finds that either of these factors weighs against enforcement, then the noncompete agreement is void and the analysis in this article is not applicable. *See generally* *Gillespie v. Carbondale & Marion Eye Ctrs., Ltd.*, 622 N.E.2d 1267, 1269 (Ill. App. Ct. 1993) ("In determining the enforceability of covenants not to compete . . . courts have focused on numerous factors, including whether enforcement of the contract would be injurious to the public . . ."); *Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 361 (Minn. 1998) ("In determining whether to enforce a particular noncompete agreement or provision, the court balances the employer's interest in protection from unfair competition against the employee's right to earn a livelihood."); *Chambers-Dobson, Inc. v. Squier*, 472 N.W.2d 391, 400 (Neb. 1991) (noting that the "harshness and oppressiveness on the covenantor employee" is weighed against "protection of the valid business interest" of the covenantee employer).

As to the public policy considerations, such an analysis is most prominent in cases involving physicians. *See, e.g., Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1282 (Ariz. 1999) (en banc) ("Although stopping short of banning restrictive covenants between physicians, the American Medical Association ("AMA") 'discourages' such covenants, finding they are not in the public interest."); *Ohio Urology, Inc. v. Poll*, 594 N.E.2d 1027, 1031 (Ohio 1991) (noting that the disfavor of noncompete agreements restricting physicians is particularly strong because it greatly affects the public); *see also* Paula Berg, *Judicial Enforcement of Covenants Not to Compete Between Physicians: Protecting Doctors' Interests at Patients' Expense*, 45 RUTGERS L. REV. 1, 6 (1992) ("For the past 60 years, the American Medical Association (AMA) has consistently taken the position that noncompetition agreements between physicians impact negatively on patient care."); Serena L. Kafker, *Golden Handcuffs: Enforceability of Non-Competition Clauses in Professional*

courts disfavor noncompete agreements,³⁸ most courts will uphold a noncompete agreement if it protects an employer's legitimate business interest and is reasonable as to temporal and geographic limitations, and as to the scope of the preclusions.³⁹

These reasonableness determinations are almost always fact-intensive in nature.⁴⁰ The determinations are also the focus of the remedy analysis in this article.⁴¹ After reviewing the case law analysis pertaining to the reasonableness factors, this section will take a brief look at employer-employee state statutes.

A. Legitimate Business Interest

Most decisions analyzing noncompete agreements begin with an analysis of whether the employer is protecting a legitimate business interest.⁴² The purpose of the noncompete agreement cannot be to avoid

Partnership Agreements of Accountants, Physicians, and Attorneys, 31 AM. BUS. L.J. 31, 41 (1993). See generally Arthur S. Di Dio, *The Legal Implications of Noncompetition Agreements in Physician Contracts*, 20 J. LEGAL MED. 457, 457-58 (1999) (investigating how restrictive covenants in physician contracts are analyzed under existing law and the difficulties physician-employees face in challenging the restrictive covenants); James W. Lowry, *Covenants Not to Compete in Physician Contracts: Recent Trends Defining Reasonableness at Common Law*, 24 J. LEGAL MED. 215 *passim* (2003) (exploring why courts do and do not uphold physician noncompete agreements).

As with most other occupations, a primary factor the court will look at in determining if a noncompete is injurious to the public is whether the services that will be precluded are still available to the public. *Redd Pest Control Co. v. Foster*, 761 So. 2d 967, 973 (Miss. Ct. App. 2000) (noting that a noncompete agreement limiting an employee from providing pest control services was not injurious to the public, nor did it create a monopoly for the employer, because six or seven other companies were available in the area).

38. See cases cited *supra* note 6.

39. See *infra* Part III.C-D and accompanying text.

40. See *Omniplex World Servs. Corp. v. U.S. Investigation Servs., Inc.*, 618 S.E.2d 340, 342 (Va. 2005) ("Each non-competition agreement must be evaluated on its own merits, balancing the provisions of the contract with the circumstances of the businesses and employees involved.").

41. See *infra* Part IV.

42. *Weber v. Tillman*, 913 P.2d 84, 90 (Kan. 1996); see also M. Scott McDonald, *Noncompete Contracts: Understanding the Cost of Unpredictability*, 10 TEX. WESLEYAN L. REV. 137 (2003). McDonald notes that among the recognized protectable interests for employers are:

- (1) to protect trade secrets and confidential information of the company;
- (2) to protect customer goodwill developed for the company (customer relationships);
- (3) to protect overall business goodwill and assets that have been sold (noncompetes used in the sale of a business);
- (4) to protect unique and specialized training;
- (5) for situations in which the employer has contracted for the services of an individual of unique value because of who they are (*e.g.*, performers, professional athletes); and
- (6) for pinnacle employees in charge of an organization.

ordinary competition;⁴³ rather, the agreement must protect a legitimate business purpose for the employer.⁴⁴ Further, an employer does not have a legitimate interest in protecting against ordinary competition. As one court put it, in order to prevail, an employer must show that, “without the covenant, the employee would gain an unfair advantage in future competition with the employer.”⁴⁵

The ways in which an employer may acquire a legitimate business interest in restraining an employee through a noncompete agreement can be roughly grouped into three categories: through an investment in training, by giving the employee access to trade secrets, and by the employee creating goodwill with customers. Of these, the final category is the most common.

1. Training. The court will look to see if the employer has invested time and money into training the employee and the extent and type of training the employer provided. If the training consists of routine training that is widely available or that takes minimal time or expense, then the employer probably does not have a legitimate business interest in the training.⁴⁶ An employer also does not have a legitimate business interest in protecting against the use of generally available training.⁴⁷ Additionally, “[i]n determining the legitimacy of the interest the employer seeks to protect, the court will take into account the employer’s time and monetary investment in the employee’s skills and

Id. at 143 (footnotes omitted).

43. *Allen, Gibbs & Houlik, L.C. v. Ristow*, 94 P.3d 724, 726 (Kan. Ct. App. 2004); *see also Unger v. FFW Corp.*, 771 N.E.2d 1240, 1244 (Ind. Ct. App. 2002) (“To show a legitimate protectible interest, ‘an employer must show some reason why it would be unfair to allow the employee to compete with the former employer.’” (quoting *Titus v. Rheitone, Inc.*, 758 N.E.2d 85, 92 (Ind. Ct. App. 2001))).

44. *Compass Bank v. Hartley*, 430 F. Supp. 2d 973, 979 (D. Ariz. 2006) (“A covenant not to compete is generally enforceable as long as it is no broader than necessary to protect an employer’s legitimate business interests.”); *Caring Hearts Pers. Home Servs., Inc. v. Hogley*, 130 P.3d 1215, 1222 (Kan. Ct. App. 2006) (“[O]nly legitimate business interests may be protected by a noncompete agreement . . .”).

45. *Vantage Tech., L.L.C. v. Cross*, 17 S.W.3d 637, 644 (Tenn. Ct. App. 1999).

46. *Id.* at 644-45; *See 7’s Enters., Inc., v. Del Rosario*, 143 P.3d 23, 31 (Haw. 2006) (noting that “[s]pecialized or unique training, as distinguished from general skills” is a protectable business interest).

47. *See Moore Bus. Forms, Inc. v. Foppiano*, 382 S.E.2d 499, 501-02 (W. Va. 1989) (“When the skills and information acquired by a former employee are of a general managerial nature, such as supervisory, merchandising, purchasing and advertising skills and information, a restrictive covenant in an employment contract will not be enforced because such skills and information are not protectible employer interests.” (quoting *Helms Boys, Inc. v. Brady*, 297 S.E.2d 840, 841 (W. Va. 1982))).

development of his craft.”⁴⁸ Further, an employer only has a protectable interest in restraining an employee’s unique knowledge and skills that were obtained through training with the employer.⁴⁹ Thus, if the employer spends several weeks or months training an employee on the employer’s own technical products, it probably has a legitimate business interest to protect.⁵⁰

An example of the type of unique training which will create a legitimate business interest can be found in *Aero Kool Corp. v. Oosthuizen*.⁵¹ In *Aero*, the employee had no prior experience in aviation repair when he was hired by the employer, an aviation repair company.⁵² The employer provided him with 195 hours of training, which allowed him to become certified by the FAA.⁵³ After failing a drug test, the employee was fired and then hired shortly thereafter by the employer’s competitor.⁵⁴ The appellate court reversed the trial court’s denial of the employer’s request for a temporary injunction, noting that the employee had no prior experience and received certification by the FAA due to the training.⁵⁵

2. Trade secrets / confidential information. Noncompete agreement analysis occasionally crosses over with analysis of a

48. *Brunswick Floors, Inc. v. Guest*, 506 S.E.2d 670, 673 (Ga. Ct. App. 1998) (quoting *Beckman v. Cox Broad. Corp.*, 296 S.E.2d 566, 568-69 (Ga. 1982)); *see also Orkin Exterminating Co. v. Burnett*, 146 N.W.2d 320, 323 (Iowa 1967) (enforcing a noncompete agreement where the employee had been given eight weeks training in exterminating insects and methods of operation); *Dain Bosworth, Inc. v. Brandhorst*, 356 N.W.2d 590, 593-94 (Iowa Ct. App. 1984) (holding that a \$20,000 training investment created a legitimate business interest).

49. *Vantage Tech. L.L.C. v. Cross*, 17 S.W.3d 637, 645 (Tenn. Ct. App. 1999) (“[W]hether an employer has a protectable interest in its investment in training an employee depends on whether the skill acquired as a result of that training is sufficiently special as to make a competing use of it by the employee unfair.”); *see also Brentlinger Enters. v. Curran*, 752 N.E.2d 994, 999 (Ohio Ct. App. 2001) (noting one factor to consider in determining reasonableness of a noncompete is whether the agreement will stifle pre-existing skills).

50. *Compare 7’s Enters, Inc., v. Del Rosario*, 143 P.3d 23, 32 (Haw. 2006) (holding that a legitimate business interest existed where the sales training included “something secret,” was specifically designed and solely developed by employer over a number of years, and was not being utilized by other companies) *with Moore Bus. Forms*, 382 S.E.2d at 501-02 (finding no legitimate business interest when training was not unique or specialized to the company and the information disseminated was readily available to competitors).

51. 736 So. 2d 25 (Fla. Dist. Ct. App. 1999).

52. *Id.* at 25.

53. *Id.* at 25-26.

54. *Id.* at 26.

55. *Id.* at 26-27. The *Aero* court distinguished the case from *Austin v. Mid State Fire Equipment of Central Florida*, 727 So. 2d 1097 (Fla. Dist. Ct. App. 1999), where an employee already had extensive industry experience prior to being hired and had not received any specialized knowledge from the employer. *See id.* at 1098.

confidentiality agreement protecting trade secrets. This term is oftentimes used loosely by courts in noncompete agreement analysis to refer to items such as customer lists and methods of operation which may or may not be considered “trade secrets” under laws regulating trade secrets.⁵⁶ Of course, if the employee is under a confidentiality agreement, the employee cannot disclose the trade secrets, regardless whether a noncompete agreement is in place.⁵⁷

An example of “trade secret” analysis in the context of a noncompete agreement can be found in *Bed Mart, Inc. v. Kelley*,⁵⁸ in which the employee had access to the company’s “Product Bible,” which contained information about all the merchandise in the stores and the wholesale prices of those items, as well as promotional deals from suppliers.⁵⁹ In reversing the trial court’s decision that a six month restriction was unreasonable, the court reasoned in part that the “Product Bible” was updated every six months, so the employee would have a competitive advantage were he to go work for a competitor while the book was still valid.⁶⁰

3. Customer Contacts. The most common way a legitimate business interest is created is through the employee’s contact with customers. This line of analysis, also referred to as protecting the employer’s “goodwill,” focuses on the relationship between the employee and the employer’s customers. As one court stated: “‘good will’” is broader than simply the names, addresses and requirements of customers, or some pricing information, it also includes the advantageous familiarity and personal contact that employees . . . derive from their dealings with the employer’s customers.”⁶¹ To determine if an employee’s customer contacts are sufficient to create a legitimate business interest for the employer, courts look to see if the employee has become the face of the company in the minds of the employer’s customers.⁶² Perhaps the most common example is the outside

56. See generally *Markovits v. Venture Info Capital, Inc.*, 129 F. Supp. 2d 647, 657 n.6 (S.D.N.Y. 2001) (“A trade secret is any formula or combination of information that is used in business and gives its owner a competitive advantage over others in the marketplace who do not have access to it.”).

57. See generally Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627 (1999) (discussing confidentiality agreements in the context of tobacco litigation).

58. 45 P.3d 1219 (Ariz. Ct. App. 2002).

59. *Id.* at 1222.

60. *Id.* at 1223.

61. *Standard Register Co. v. Cleaver*, 30 F. Supp. 2d 1084, 1095 (N.D. Ind. 1998).

62. *Vantage Tech., L.L.C. v. Cross*, 17 S.W.3d 637, 645 (Tenn. Ct. App. 1999).

salesperson who visits customers at their work places.⁶³ In this situation, the employee is likely to be the only real contact between the employer and the customer.⁶⁴

In determining if an employer has a legitimate business interest to protect under this category, courts will look at the nature and extent of the contact between the employee and the customer, and also the type of product being delivered.⁶⁵ Particularly in a situation where the employer's products are similar to others in the marketplace, "[t]he possibility is present that the customer will regard . . . the attributes of the employee as more important in his business dealings than any special qualities of the product or service of the employer"⁶⁶

Once it is determined that the employer has a legitimate interest to protect, the next issues are the reasonableness of the limitations on the employee as to the potential customers the employee may contact and the types of positions the employee may accept during the tolling of the noncompete agreement. The court also must determine whether the temporal and geographic limitations in the noncompete agreement are reasonable.

B. Reasonableness of Limitations on Customer Contact and Employment Positions

Of course, simply because an employer has a legitimate business interest to protect does not mean the employer may broadly preclude the employee from any type of competition. The agreement must be narrowly tailored to preclude only those positions and customer contacts necessary to protect the employer's legitimate business interests.⁶⁷

63. See, e.g., *Safety-Kleen Sys., Inc. v. Hennkens*, 301 F.3d 931, 933 (8th Cir. 2002); *Standard Register*, 30 F. Supp. 2d at 1096; *Wright Med. Tech., Inc. v. Somers*, 37 F. Supp. 2d 673, 675 (D. N.J. 1999).

64. See, e.g., *N. Am. Prods. Corp. v. Moore*, 196 F. Supp. 2d 1217, 1228 (M.D. Fla. 2002) ("[A]n employer has a legitimate business interest in prohibiting solicitation of its customers with whom the employee [sales representative] has a substantial relationship."); *Am. Fid. Assurance Corp. v. Leonard*, 81 F. Supp. 2d 1115, 1120 (D. Kan. 2000) (upholding an agreement where the employee representative was the sole contact with the customer).

65. *Standard Register Co.*, 30 F. Supp. 2d at 1095-96. The court also noted that "in industries where personal contact between the employee and customer are especially important due to similarity in the product offered by competitors, the advantage acquired through the employee's representative contact with customers is part of the employer's good will, irrespective of whether or not the employee had access to confidential information." *Id.* (quoting *Field v. Alexander & Alexander of Ind. Inc.*, 503 N.E.2d 627, 633 (Ind. Ct. App. 1987)).

66. *Am. Sec. Servs. Inc. v. Vodra*, 385 N.W.2d 73, 78 (Neb. 1986).

67. *Lawrence & Allen, Inc. v. Cambridge Human Res. Group, Inc.*, 685 N.E.2d 434, 442 (Ill.

Agreements may be found to be overly broad when the employer seeks to preclude the employee from any position that competes with the employer, especially if dissimilar to the employee's duties with the employer. For example, a noncompete agreement precluding a dentist from competing with his former employer in both oral surgery and general dentistry was unreasonably broad as to the portion that limited practice of general dentistry because the dentist only practiced oral surgery with the employer.⁶⁸ Similarly, a noncompete agreement precluding a truck parts salesperson from working "in any capacity . . . whatsoever . . . in any business activities . . . competitive with those of [the employer]" was overly broad as the employer's interests exceeded the area in which the employee sold.⁶⁹

Since employers are generally most concerned with protecting customer relationships, a common issue in noncompete agreement litigation is whether the agreement reasonably defines which customers the employee may not solicit. Generally, the employer must be careful to narrowly limit customer preclusion.⁷⁰

Noncompete agreements precluding the employee from contacting any of the employer's customers are usually found unreasonable; the preclusion must generally be limited to only the customers who dealt with the employee.⁷¹ Also, it is generally unreasonable to preclude the

App. Ct. 1997); *see also* Concord Orthopaedics Prof'l. Ass'n. v. Forbes, 702 A.2d 1273, 1276 (N.H. 1997) (adopting the principle that a noncompete agreement must be narrowly tailored "to encompass only legitimate interests of the employer").

68. *See* Karpinski v. Ingrassi, 268 N.E.2d 751, 754 (N.Y. 1971). This is an example of a noncompete agreement term which is "severable." *See infra* notes 139-50 and accompanying text.

69. *McNeilus Cos. v. Sams*, 971 S.W.2d 507, 510 (Tex. Ct. App. 1997); *see also* Ken's Stereo-Video Junction, Inc. v. Plotner, 560 S.E.2d 708, 710 (Ga. Ct. App. 2002) (finding a noncompete agreement overly broad when it precluded a car stereo and security system installer from working for a competitor in any capacity, even as a janitor); *Harville v. Gunter*, 495 S.E.2d 862, 864 (Ga. Ct. App. 1998) (finding it unreasonable to prohibit a speech pathologist from being an officer or director of a company engaged in speech pathology, reasoning that an officer or director is markedly different from a speech pathologist); *Pathfinder Commc'ns Corp. v. Macy*, 795 N.E.2d 1103, 1114 (Ind. Ct. App. 2003) (holding that a term in a radio disc jockey's noncompete agreement that he "will not engage in activities," at a competing station as unreasonably broad because it extended far beyond the employer's interests of the employee as a disc jockey); *Motion Control Sys., Inc. v. East*, 546 S.E.2d 424, 426 (Va. 2001) (finding a noncompete agreement overly broad when the employer defined a "similar business" as "any business that designs, manufactures, sells or distributes motors, motor drives or motor controls," which the court found "could include a wide range of enterprises unrelated to" the employer's business).

70. *See, e.g.,* Prod. Action Int'l, Inc. v. Mero, 277 F. Supp. 2d 919, 926 (S.D. Ind. 2003) (finding a noncompete provision unreasonable where it "fails to impose any reasonable limit in terms of . . . customers").

71. *See* DCS Sanitation Mgmt., Inc. v. Casillo, 435 F.3d 892, 898 (8th Cir. 2006) (finding overbroad a term precluding a former employee from soliciting any customer "having business

employee from contacting former clients of the employer.⁷² However, it may be reasonable to preclude the employee from contacting current customers, if those customers pre-existed the employment relationship.⁷³ Finally, precluding an employee from contacting the employer's potential customers will most often be held unreasonable.⁷⁴

C. Reasonableness of the Temporal Limitation

All noncompete agreements have, or should have, a specific time after which the agreement expires.⁷⁵ Again, the court will carefully scrutinize this term to ensure that it is reasonable, using a fact intensive inquiry based on the employee and the industry.

In analyzing whether a certain temporal limitation is reasonable, courts generally look at two alternative standards: (1) the time necessary to hire and train a replacement; and (2) the time necessary to obliterate the connection between the customer and the departing employee in the minds of the employer's customers.⁷⁶

In short, the employer should be made whole before the departing

dealings" with the employer); *Advance Tech. Consultants, Inc. v. Roadtrac, L.L.C.*, 551 S.E.2d 735, 738 (Ga. Ct. App. 2001) (finding a noncompete agreement to be overly broad where it precluded the employee from contacting any of the employer's customers, even those with whom the employee never worked); *Prof'l. Bus. Servs. Co. v. Rosno*, 680 N.W.2d 176, 186-87 (Neb. 2004) (finding it unreasonable to prohibit a former employee from soliciting customers of the employer with whom the employee did not have substantial or any personal contact).

72. See *Rosno*, 680 N.W.2d at 186-87 (holding it unreasonable to prohibit a former employee from soliciting former customers of the employer); *Philip G. Johnson & Co. v. Salmen*, 317 N.W.2d 900, 904 (Neb. 1982) (noting that a former employer "certainly can have [no interest] in its former clients"); *Equity Enters., Inc. v. Milosch*, 633 N.W.2d 662, 670 (Wis. Ct. App. 2001) (finding unreasonable a noncompete term prohibiting a former employee from contacting any customers of the employer whom the employee serviced at "any time" during his employment, which would have prohibited the employee from doing business with a customer he serviced during the first weeks of his 15-year employment).

73. *Prairie Eye Ctr., Ltd. v. Butler*, 713 N.E.2d 610, 610-11 (Ill. App. Ct. 1999).

74. *Freiburger v. J-U-B Eng'rs, Inc.*, 111 P.3d 100, 107 (Idaho 2005) (finding a noncompete agreement overly broad, in part, because it precluded a former employee from soliciting "pending" customers).

75. *Diversified Fastening Sys., Inc. v. Rogge*, 786 F. Supp. 1486, 1492 (N.D. Iowa 1991) ("The failure to limit the time period and geographical restriction essentially make the contract one imposing a restrictive covenant of unlimited time and space. Such an unlimited covenant is clearly unreasonable and unenforceable."). *But see* C.T. Drechsler, Annotation, *Enforceability of Restrictive Covenant, Ancillary to Employment Contract, as Affected by Duration of Restriction*, 41 A.L.R.2d 15, 41-42 (1955) (listing cases purporting to support the notion that the lack of a time limitation does not render the noncompete agreement ipso facto unenforceable).

76. *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127, 131 (Minn. 1980).

employee is allowed to help a competitor.⁷⁷ Most often, both of the above factors are considered when determining the reasonableness of the time restriction because most contested noncompete agreements involve employees with customer contacts. Noncompetes may, however, be upheld against employees without customer contacts. Most courts will look for an employee whose services are “‘special, unique or extraordinary’ and not merely of ‘high value to his employer.’”⁷⁸ Also, it generally must be shown that the employee’s services are “of such character as to make his replacement impossible or that the loss of such services would cause the employer irreparable injury.”⁷⁹ In *Parma International, Inc. v. Bartos*,⁸⁰ the employee provided the company with special designs and improvements in the manufacturing of model cars.⁸¹ In upholding a one year restriction, the court noted that the employee was also instrumental in taking the company from a cottage industry to five million dollar per year in revenues over the employee’s six years.⁸²

However, the more common point of analysis, especially with regard to positions that would reasonably require a noncompete agreement, is that of the amount of time necessary for the new employee to reasonably replace the departing employee in the minds of the customers. This is a fact-intensive analysis, as demonstrated in *Standard Register Co. v. Cleaver*.⁸³

In *Standard*, the employee sold business forms and specialty printing items, and prior to commencing employment, he signed a noncompete agreement precluding him from selling to the employer’s customers for two years after the employment relationship ended.⁸⁴ The employee developed close relationships with his customers and visited major customers every two weeks, regardless of their ordering schedule.⁸⁵ The employee was generally the sole contact with the

77. See *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1284 (Ariz. 1999) (en banc) (“An employer may also have a legitimate interest in having a “reasonable amount of time to overcome the former employee’s loss, usually by hiring a replacement and giving that replacement time to establish a working relationship.” (citing *Blake*, *supra* note 2, at 659)).

78. *Brentlinger Enters. v. Curran*, 752 N.E.2d 994, 1002 (Ohio Ct. App. 2001) (citing *Parma Int’l, Inc. v. Bartos*, No. 89CA004573, 1990 WL 11716, at *3 (Ohio Ct. App. Feb. 7, 1990)).

79. *Brentlinger*, 752 N.E.2d at 1002 (quoting *Purchasing Assocs. v. Weitz*, 196 N.E. 2d 245, 249 (1963)).

80. 1990 WL 11716 (Ohio Ct. App. Feb. 7, 1990).

81. *Id.* at *3.

82. *Id.* at *2.

83. 30 F. Supp. 2d 1084, 1095 (N.D. Ind. 1998).

84. *Id.* at 1089.

85. *Id.* at 1090.

customers.⁸⁶ Soon after the employment relationship ended, the employee began selling for a competitor in his former territory.⁸⁷

The court framed the temporal limitation legal issue as: “After what period of time will the customer cease to be influenced by the personal relationship the employee was able to establish while in the employ of his employer?”⁸⁸ The court noted that in making this determination, it looked at the regularity and frequency of the contacts between the employee and the customer.⁸⁹ If the employee has frequent contacts with the customer, a shorter duration will be necessary to replace the employee, assuming the new employee commences with a similar visitation schedule.⁹⁰

Since the employee in *Standard* made very frequent visits to his customers, at first blush it would seem that two years would be an unreasonable restraint.⁹¹ However, the court upheld the two year restriction, relying on two points of analysis.⁹² First, the visits themselves could be characterized as progressive, as the employee learned more and more on each visit about how the customer’s business was organized and who the key personnel were.⁹³ He even attended socializing events, and built personal relationships with the customers’ decision-makers.⁹⁴ Secondly, major customers oftentimes used a “test order” process in which the employee had to get to know the customer’s business and the customer determined if it would take the product, a process which usually took several months.⁹⁵ Thus, even though the employee’s contact with the customer was frequent and regular, two years was a reasonable restriction because the new employee would have to make several visits to acquire the knowledge and understanding of the customer’s business to truly replace the departing employee, especially in an industry where the difference between competing projects was “razor thin” and the knowledge of and relationship with the customer

86. *Id.*

87. *Id.* at 1091.

88. *Id.* at 1098 (citing C.T. Drechsler, Annotation, *Enforceability of Restrictive Covenant Ancillary to Employment Contract, as Affected by Duration of Restriction*, 41 A.L.R.2d 15, 34 (1955)).

89. *Id.* (citing C.T. Drechsler, Annotation, *Enforceability of Restrictive Covenant Ancillary to Employment Contract, as Affected by Duration of Restriction*, 41 A.L.R.2d 15, 34 (1955)).

90. *See id.*

91. *See id.*

92. *Id.*

93. *See id.*

94. *Id.*

95. *Id.*

was key to the employer's success.⁹⁶

D. Reasonableness of the Geographic Limitation

A noncompete agreement also usually includes a limitation on where the employee may seek employment.⁹⁷ As with the temporal limitation analysis, the determination of whether a geographic limitation is reasonable is fact intensive.⁹⁸ The general rule is that the "contractual prohibitions must be geographically limited to what is reasonably necessary to protect the employer's business."⁹⁹ The geographic limitation is written either as an actual geographic "line"¹⁰⁰ or in terms of customers.¹⁰¹

A traditional geographic limitation simply precludes the employee from working in a particular county or state or mile radius.¹⁰² In determining reasonableness, there is, however, a focus on customers.¹⁰³ For example in *Herring Gas Co., Inc. v. Magee*,¹⁰⁴ a propane salesman was precluded from working within fifty miles of both existing and

96. *Id.* at 1096.

97. See generally C.T. Drechsler, Annotation, *Enforceability of Restrictive Covenant, Ancillary to Employment Contract, as Affected by Duration of Restriction*, 41 A.L.R.2d 15, 134 (1955) ("[T]he territorial extent of the restraint plays an important role in the consideration of the reasonableness of the restraint.").

98. *Wausau Mosinee Paper Corp. v. Magda*, 366 F. Supp. 2d 212, 220 (D. Me. 2005) ("[T]he reasonableness of a noncompetition covenant . . . must be determined by the facts developed in each case as to its . . . geographic area . . .").

99. *Wolf v. Colonial Life & Accident Ins. Co.*, 420 S.E.2d 217, 222 (S.C. Ct. App. 1992).

100. See, e.g., *King v. Head Start Family Hair Salons, Inc.*, 886 So. 2d 769, 770 (Ala. 2004) (two mile radius); *Deming v. Nationwide Mut. Ins. Co.*, 905 A.2d 623, 637 (Conn. 2006) (twenty-five mile radius); *Jenkins v. Eckerd Corp.*, 913 So. 2d 43, 53-54 (Fla. Dist. Ct. App. 2005) (citing *Emergency Assoc. of Tampa, P.A. v. Sassano*, 664 So. 2d 1000, 1001 (Fla. Dist. Ct. App. 1995) (five square miles); *Maine Eye Care Assocs. P.A. v. Gorman*, 890 A.2d 707, 709 (Me. 2006) (thirty mile radius).

101. *Wolf*, 420 S.E.2d at 222 ("Prohibitions against contacting existing customers can be a valid substitute for a geographic limitation.").

102. *Camco, Inc. v. Baker*, 936 P.2d 829, 834 (Nev.1997) (holding a noncompete agreement too broad where it prohibited former management employees from competing within fifty miles of any location in which the employer targeted expansion, noting that "[t]o be reasonable, the territorial restriction should be limited to the territory in which appellants [former employers] established customer contacts and good will." (quoting *Snelling & Snelling, Inc. v. Dupay Enters.*, 609 P.2d 1062, 1064 (Ariz. Ct. App. 1980))); see also *Weatherford Oil & Tool Co. v. Campbell*, 327 S.W.2d 76, 77 (Tex. Civ. App. 1959) (holding geographical restriction "in any area where [employer] may be operating or carrying on business" void as unlimited regarding territory).

103. See *Stringer v. Herron*, 424 S.E.2d 547, 548 (S.C. Ct. App. 1992) (finding a fifteen mile radius restriction unreasonable when an "overwhelming majority" of employer's clients lived much closer than fifteen miles from the business).

104. 813 F. Supp. 1239 (S.D. Miss. 1993).

future locations.¹⁰⁵ In limiting the noncompete agreement to only those locations in existence at the time the employment relationship ended, the court noted that “[t]he primary right of the employer is that of protecting the business from loss of customers by the activities of the former employees who have peculiar knowledge of and relationships with the employer’s customers.”¹⁰⁶ The court reasoned that such knowledge could not be acquired outside of the areas surrounding the existing employer’s locations.¹⁰⁷ A geographic limitation based on a specific county or state line or mile radius is the easiest to analyze and is more likely to be seen as reasonable when the business is one in which the customers seek out the business.¹⁰⁸

On the other hand, some employment situations, particularly those in which the employee seeks out and/or visits the customer, do not lend themselves to a clear-cut traditional geographic limitation. In many such situations, the so-called geographic limitation is written in terms of customers.¹⁰⁹ For example, the noncompete may be drafted to preclude the employee not from a specific mile radius or other geographic boundary, but in terms of not contacting former customers.¹¹⁰ In *Wolf v. Colonial Life and Accident Insurance Co.*,¹¹¹ the noncompete precluded the former employee insurance agent from contacting existing policy holders and accounts.¹¹² The employee argued that this effectively precluded him from contact with customers throughout the country.¹¹³ The court reasoned that this was appropriate, as the employer did

105. *Id.* at 1245.

106. *Id.* (quoting *Redd Pest Control Co. v. Heatherly*, 157 So. 2d 133, 136 (Miss. 1963)).

107. *Id.*

108. *See Unger v. FFW Corp.*, 771 N.E.2d 1240, 1245 (Ind. Ct. App. 2002) (finding a bank employee’s noncompete agreement reasonable when it extended to the county where the bank was located and to the immediately surrounding counties, as it was not unusual for a bank to have customers from an adjacent county). *But see Klick v. Crosstown State Bank of Ham Lake, Inc.*, 372 N.W.2d 85, 88 (Minn. Ct. App. 1985) (finding a noncompete agreement unenforceable when the bank employee had no special relationships with the bank’s customers).

109. *See Robert S. Weiss & Assocs., Inc. v. Wiederlight*, 546 A.2d 216, 220 (Conn. 1988) (finding the lack of a specific geographic limitation acceptable when the noncompete agreement precluded employee from soliciting employer’s existing accounts for two years); *Norlund v. Faust*, 675 N.E.2d 1142, 1155 (Ind. Ct. App. 1997) (“The use of territorial boundaries is only one method of limiting a covenant’s scope, and when a covenant not to compete contains a restraint which clearly defines a class of persons with whom contact is prohibited, the need for a geographical restraint is decreased.”).

110. *See Crown It Servs., Inc. v. Koval-Olsen*, 782 N.Y.S.2d 708, 710-11 (N.Y. App. Div. 2004).

111. 420 S.E.2d 217 (S.C. Ct. App. 1992).

112. *Id.* at 222.

113. *Id.*

business nationwide and therefore needed such broad protection.¹¹⁴

As with the temporal limitation, the reasonableness of a customer-list “geographic” limitation is very fact intensive and raises interesting questions as to the limits of such a restriction.¹¹⁵ Should the employee be precluded from contacting former customers who were no longer active at the time employment was terminated? How about potential customers the employee was actively soliciting but had not yet successfully sold at the time of termination?¹¹⁶ As to the latter, if the employee is marketing a line of generally available products, then the employee probably cannot be reasonably precluded from entities that were not customers at the time of termination. On the other hand, if the employee sells, for example, consulting and information technology solutions to hospitals and medical clinics that carry a high price tag and take several months or even years between initial contact and implementation of the products and services, then the employer may reasonably preclude the former employee from contacting the potential customer.

E. Statutory Schemes

Several jurisdictions have passed statutes pertaining to noncompete agreements.¹¹⁷ Generally, these statutes do not provide any specific guidelines; rather, they simply codify the basic common law rules requiring reasonable business interests and reasonable geographic and temporal limitations.¹¹⁸ This is certainly not surprising, as the variety of employment situations make drafting specific limitations impossible. The few statutes that do attempt to provide more precise guidance are still too vague or incomplete to provide boiler plate application. For example, the Oklahoma statute proscribes noncompete agreements from

114. *Id.*

115. *Herring Gas Co. v. Magee*, 813 F. Supp. 1239, 1245 (S.D. Miss. 1993) (“Reasonableness as to time and space limitations must be determined from the facts of each case.” (quoting *Tex. Rd. Boring Co. of La.-Miss. v. Parker*, 194 So. 2d 885, 889 (Miss. 1967))).

116. *See UZ Engineered Prods. Co. v. Midwest Motor Supply Co.*, 770 N.E.2d 1068, 1080, 1085 (Ohio Ct. App. 2001) *review denied* 766 N.E.2d 1002 (Ohio 2002) (holding a noncompete agreement precluding employee from contacting potential customers as valid because the employer has a legitimate interest in limiting the former employee from taking advantage of contacts made, customer lists, skills acquired, confidential information and personal relationships developed during the course of the former employee’s employment with the aggrieved employer); *Markovits v. Venture Info Capital, Inc.*, 129 F. Supp. 2d 647, 659 (S.D.N.Y. 2001) (upholding a restrictive covenant precluding employee from contacting even potential customers).

117. *E.g.*, MICH. COMP. LAWS § 445.774a (2002); OR. REV. STAT. § 653.295 (2005); WIS. STAT. ANN. § 103.465 (West 2002).

118. *E.g.*, § 445.774a(1); § 653.295(1), (6)(c); § 103.465.

prohibiting employees from working in the same industry or field, but does allow the agreements to preclude employees from soliciting “established” customers.¹¹⁹ The statute does not, however, define the term “established,” nor does it provide any guidance as to what a court may consider reasonable temporal or geographical limitations. The few statutes that do attempt to address geographic¹²⁰ and temporal¹²¹ limitations only provide broad guidelines.

The only specific language that can be found in a survey of state statutes pertains to limitations on who may be restricted. Some statutes specifically preclude noncompete agreements for certain occupations, such as physician¹²² or broadcast industry employees.¹²³ At least one state limits noncompete agreements to only “[e]xecutive and management personnel and officers and employees who constitute professional staff to executive and management personnel.”¹²⁴

The statutorily mandated terms approach is too rigid. Employment relationships, and the products and services sold and provided, are too varied for fixed terms to operate equitably. These terms are as likely to be inequitable for employees as they are for employers. A one-year limitation would be unreasonable on a salesperson for a distributor of routine office products; that same one-year limitation would be unfair to

119. OKLA. STAT. ANN. tit. 15 § 219A(A) (West Supp. 2007).

A person who makes an agreement with an employer, whether in writing or verbally, not to compete with the employer after the employment relationship has been terminated, shall be permitted to engage in the same business as that conducted by the former employer or in a similar business as that conducted by the former employer as long as the former employee does not directly solicit the sale of goods, services or a combination of goods and services from the established customers of the former employer.

See generally Jeb Boatman, *Contract Law: As Clear as Mud: The Demise of the Covenant Not To Compete in Oklahoma*, 55 OKLA. L. REV. 491 (2002) (discussing Oklahoma’s laws governing non-compete employment contracts, and the ways in which the recent amendments to these laws facilitated employer-employee contractual relations versus the ways in which they restrain the parties from reaching desirable contractual agreements).

120. S. D. CODIFIED LAWS § 53-9-11 (2006) (allowing noncompete agreements that specify an employee may not compete within “within a specified county, first or second class municipality, or other specified area”).

121. *Id.* (allowing a noncompete to extend “for any period not exceeding two years from the date of termination of the agreement”); COLO. REV. STAT. ANN. § 8-2-113(2)(c) (West 2003) (allowing a noncompete agreement to stand as long as an employee has “served an employer for a period of less than two years”).

122. COLO. REV. STAT. ANN. § 8-2-113(3) (West 2003); DEL. CODE ANN. tit. 6 § 2707 (2006).

123. 820 ILL. COMP. STAT. ANN. § 17/10(a) (West Supp. 2002).

124. COLO. REV. STAT. ANN. § 8-2-113(2)(d) (West 2003).

an employer who provides custom products or services that require long-term planning and servicing between initial contact and the finalization of the sale.

IV. JUDICIAL AND STATUTORY APPROACHES TO UNREASONABLE TERMS

While the points of analysis jurisdictions use to determine if the noncompete agreement contains an unreasonable term are fairly consistent, the remedies jurisdictions use vary.¹²⁵ There are three basic approaches jurisdictions use in response to an unreasonable term: voiding the agreement, using the “Blue Pencil” doctrine to eliminate an unreasonable term, and using the “Blue Pencil” doctrine to eliminate an unreasonable term and replace it with a reasonable term.¹²⁶

A. Agreement Void

In several jurisdictions a noncompete agreement is voided if one

125. See generally Ferdinand S. Tinio, Annotation, *Enforceability, Insofar as Restrictions Would be Reasonable, of Contract Containing Unreasonable Restrictions on Competition*, 61 A.L.R.3d 397 (1975) (explaining varying remedies for unreasonable terms in noncompete agreements, including: the view that unreasonable restrictions may be modified and enforced generally; the Restatement’s view; the view requiring strict divisibility; the view not requiring strict divisibility; the view requiring divisibility dependent on the nature of the contract).

126. *Durapin, Inc. v. Am. Prods., Inc.*, 559 A.2d 1051, 1058 (R.I. 1989) (discussing the three approaches, arguing that jurisdictions are moving away from voiding agreements and towards using one of the “Blue Pencil” approaches); GRACE MCLANE GIESEL, 15 CORBIN ON CONTRACTS § 80.15, at 138-41 (Joseph M. Perillo ed., rev. ed. 2003):

[Some] courts interpret or reform the restrictive promise, if possible, so as to make the extent and character of its operation reasonable. Some courts will refuse to enforce any part of the covenant if the covenant was not drafted in the good faith belief that it was valid. Some courts will refuse to enforce any part unless the whole is reasonable. These courts may refuse to partially enforce even when the contract specifically says that it should be partially enforced.

The approach of enforcing the restriction to the extent it is reasonable is the approach preferred by many modern courts and is in fact a superior approach. To refuse to enforce a covenant entirely, even for a minor deviation from the reasonableness standard, is too harsh a result, given the lack of precision of the reasonableness analysis and the recognized benefit of reasonably restrictive covenants . . . Courts that have refused to reform covenants not drafted in the good faith belief that the restraint was valid appropriately safeguarded the legitimate interests of the employee.

Id. (footnote omitted).

term is found to be unreasonable.¹²⁷ In at least one instance this result is statutorily mandated.¹²⁸ The reasoning behind the “all-or-nothing”¹²⁹ rule is consistent with a fundamental philosophy underlying the analysis of noncompete agreements: to limit the agreements to the minimum restriction necessary to protect the employer’s legitimate business interest.¹³⁰ The employer, the reasoning goes, will take great precautions to ensure that it does not include overreaching terms for fear that the entire agreement will be voided.¹³¹

In addition, many decisions adhering to the all-or-nothing rule cite an *in terrorem* effect of noncompete agreements,¹³² as enunciated by Professor Harlan Blake:

Courts and writers have engaged in hot debate over whether severance should ever be applied to an employee restraint. The argument against doing so is persuasive. For every covenant that finds its way to court, there are thousands which exercise an *in terrorem* effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor,

127. *E.g.*, *Quality Liquid Feeds, Inc. v. Plunkett*, 199 S.W.3d 700, 705 (Ark. Ct. App. 2004) (“The contract must be valid as written; the court will not apportion or enforce a contract to the extent that it might be considered reasonable.” (citing *Bendinger v. Marshalltown Trowell Co.*, 994 S.W.2d 468, 473 (Ark. 1999))).

128. WIS. STAT. ANN. § 103.465 (West 2002) (“Any covenant, described in this subsection, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.”).

129. This phrase was used in *Durapin, Inc.*, 559 A.2d at 1058 (citing *Cent. Adjust. Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 36 (Tenn. 1984)).

130. *See Vlasin v. Len Johnson & Co.*, 455 N.W.2d 772, 776 (Neb. 1990) (holding that to be upheld, the “restriction [must be] reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest”); *Mkt. Am., Inc. v. Christman-Orth*, 520 S.E.2d 570, 578 (N.C. Ct. App. 1999) (holding that a “restraint is unreasonable and void if it is greater than is required for the protection of the promise” (quoting *Starkings Court Reporting Servs., Inc. v. Collins*, 313 S.E.2d 614, 615 (N.C. Ct. App. 1984))); *Volt Servs. Group, Div. of Volt Mgmt. Corp. v. Adecco Employment Servs.*, 35 P.3d 329, 334 (Or. Ct. App. 2001) (“The reasonableness of a noncompetition covenant must be determined in view of what is reasonably necessary to safeguard the employer’s protectible interest.” (citing *Mail-Well Envelope Co. v. Saley*, 497 P.2d 364 (1972))).

131. *Tatge v. Chambers & Owen, Inc.*, 579 N.W.2d 217, 227 (Wis. 1998) (noting that the Wisconsin statute requires that a noncompete agreement containing an unreasonable term be declared void and that “[t]his burden was specifically imposed so that ‘employers possessing bargaining power superior to that of the employees’ would not be encouraged ‘to insist upon unreasonable and excessive restrictions, secure in the knowledge that the promise will be upheld in part, if not in full.’” (quoting *Streiff v. Am. Family Mut. Ins. Co.*, 348 N.W.2d 505, 509 (Wis. 1984))).

132. *E.g.*, *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1286 (Ariz. 1999); *White v. Fletcher/Mayo/Assocs., Inc.*, 303 S.E.2d 746, 748 (Ga. 1983).

or who are anxious to maintain gentlemanly relations with their competitors. Thus, the mobility of untold numbers of employees is restricted by the intimidation of restrictions whose severity no court would sanction. If severance is generally applied, employers can fashion truly ominous covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable. This smacks of having one's employee's cake, and eating it too.¹³³

Jurisdictions using the all-or-nothing theory also quote Blake's reasoning that noncompete agreements are quite often akin to contracts of adhesion as the employee oftentimes does not have legitimate bargaining power.¹³⁴

At least one court noted that more recent decisions have rejected the all-or-nothing rule in favor of some form of judicial modification.¹³⁵ In the last twenty years, many courts have utilized one of two forms of the "Blue Pencil" doctrine.¹³⁶ In one form, the doctrine is used to remove an unreasonable term from the noncompete agreement, leaving the remaining terms to be applied. In the other form, the doctrine is used to rewrite the unreasonable term to make it reasonable.

B. The "Blue Pencil" Doctrine Used to Knock-Out Unreasonable Terms

One approach, taken by numerous jurisdictions, is to remove unreasonable terms and enforce the agreement as to the remaining, reasonable provisions.¹³⁷ Within these jurisdictions, there exists a

133. Blake, *supra* note 2, at 682-83 (footnote omitted).

134. *Id.* at 683-94; *see White*, 303 S.E.2d at 748, n.2 (citing Blake, *supra* note 2, at 682-83).

135. *Durapin*, 559 A.2d at 1058.

136. *Id.* This author is unaware of the origin of the term "Blue Pencil," although it is believed to be the color pencil used by editors in the past.

137. *See Licocci v. Cardinal Assocs., Inc.*, 445 N.E.2d 556, 561 (Ind. 1983) ("[I]f the covenant is clearly separated into parts and some parts are reasonable and others are not, the contract may be held divisible."); MICH. COMP. LAWS § 445.774a(1) (2002).

An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. *To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.*

difference as to when the doctrine may be used. While some courts will review an agreement more generally to see if certain prohibitions may be removed,¹³⁸ many require that the unreasonable term or terms be clearly severable from the reasonable terms.¹³⁹ The noncompete agreement in such jurisdictions must be grammatically meaningful after striking out any unreasonable restrictions.¹⁴⁰

The issue in many cases is whether the unreasonable terms are truly severable from the reasonable terms. One aspect courts will look for is whether there is an agreement as to severability in the form of a severability clause.¹⁴¹ Additionally, and more importantly, courts will look for mechanical severability; one court noted that a covenant is severable only where it “is in effect a combination of several distinct covenants.”¹⁴² For example, a noncompete term which precludes the employee from soliciting customers of both the employer (parent company) as well as “affiliated companies” is considered two separate agreements which can be severed to remove the (presumably unreasonable) term “affiliated companies.”¹⁴³ On the other hand, terms such as “100 miles” or “State of South Carolina” are not considered

Id. (emphasis added).

138. *Durapin*, 559 A.2d at 1058 (holding that the best remedy is to allow “unreasonable restraints to be modified and enforced, whether or not their terms are divisible.”).

139. *See, e.g.*, *Prod. Action Int’l, Inc. v. Mero*, 277 F. Supp. 2d 919, 926 (S.D. Ind. 2003) (“[I]f a covenant is clearly separated into parts, and if some parts are reasonable and others are not, the contract may be severed, or “blue penciled,” so that the reasonable portions may be enforced.” (citing *Licocci*, 445 N.E.2d at 561)).

140. *Durapin*, 559 A.2d at 1058 (citing *Wood v. May*, 438 P.2d 587, 591 (Wash. 1968) (en banc)).

141. *See, e.g.*, *Rockford Mfg., Ltd. v. Bennet*, 296 F. Supp. 2d 681, 688-89 (D.S.C. 2003); *Amex Distrib. Co. v. Mascari*, 724 P.2d 596, 604 (Ariz. Ct. App. 1986) (containing the following severability clause: “If any court of competent jurisdiction rules that any portion of this Agreement is invalid for any reasons, the remainder of the Agreement shall remain in full force and effect and shall not be affected thereby”).

142. *Rockford Mfg.*, 296 F. Supp. 2d at 687 (quoting *Somerset v. Reyner*, 104 S.E.2d 344, 348 (S.C. 1958)). The *Somerset* court noted that:

A restrictive covenant which contains or may be read as containing distinct undertakings bounded by different limits of space or time, or different in subject matter, may be good as to part and bad as to part. But this does not mean that a single covenant may be artificially split up in order to pick out some part of it that it can be upheld. Severance is permissible only in the case of a covenant which is in effect a combination of several distinct covenants.

Somerset, 104 S.E.2d at 347-48 (citing *Beit v. Beit*, 63 A.2d 161, 166 (Conn. 1949)).

143. *Rockford Mfg.*, 296 F. Supp. 2d at 688.

severable.¹⁴⁴

This severability analysis means that when the three above delineated categories of reasonableness¹⁴⁵ – restrictions on customers and positions, time, and geography – are analyzed, two of them, time and geography, are rarely going to be subjected to severance because “severing overly broad time and territory provisions would eliminate clauses inherently necessary to a covenant not to compete.”¹⁴⁶

Other jurisdictions have rejected a formal severability analysis in favor of a more flexible approach.¹⁴⁷ “Courts adopting this approach ignore the divisibility aspect and exercise their inherent equity powers to modify and enforce covenants whether their phraseology lends itself to severability or not.”¹⁴⁸

C. The “Blue Pencil” Doctrine Used to Rewrite Unreasonable Terms

Courts which reject a strict severability analysis may also utilize the Blue Pencil doctrine not only to remove an unreasonable term, but also to rewrite the term to make it reasonable.¹⁴⁹ Under this approach, courts

144. *Id.* at 688.

145. See discussion *supra* Part III.B-D.

146. Prof'l Liab. Consultants, Inc. v. Todd, 468 S.E.2d 578, 583 (N.C. Ct. App. 1996) (Smith, J., dissenting), *rev'd per curiam*, Prof'l Liab. Consultants, Inc., v. Todd, 478 S.E.2d 201 (N.C. 1996).

147. Durapin, Inc. v. Am. Prods., Inc., 559 A.2d 1051, 1058 (R.I. 1989).

148. *Id.*

149. See Herring Gas Co., v. Magee, 813 F. Supp. 1239, 1245 (S.D. Miss. 1993) (“If a court finds that the limitations contained in a covenant not to compete are unreasonable, then the court will modify the limitations so that they are reasonable.”); see also TEX. BUS. & COM. CODE ANN. § 15.51(c) (Vernon 2002):

If the covenant is found to be ancillary to or part of an otherwise enforceable agreement but contains limitations as to time, geographical area, or scope of activity to be restrained that are not reasonable and impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee, the court shall reform the covenant to the extent necessary to cause the limitations contained in the covenant as to time, geographical area, and scope of activity to be restrained to be reasonable and to impose a restraint that is not greater than necessary to protect the goodwill or other business interest of the promisee and enforce the covenant as reformed, except that the court may not award the promisee damages for a breach of the covenant before its reformation and the relief granted to the promisee shall be limited to injunctive relief. If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, the promisor establishes that the promisee knew at the time of the execution of the agreement that the covenant did not contain limitations as to time, geographical area, and scope of activity to be restrained that were reasonable and the limitations imposed a greater restraint than necessary to protect the goodwill or other business interest of the promisee, and the promisee sought to enforce the covenant

exercise their inherent equity powers to the extent necessary to protect the employer's legitimate business interest.¹⁵⁰

An example of the use of the Blue Pencil doctrine to rewrite a noncompete agreement can be found in the Minnesota Supreme Court decision of *Davies v. Davies*.¹⁵¹ In *Davies*, the employee was a bail bonds account representative for his father's firm, a position which required a license.¹⁵² The employee signed a noncompete agreement that precluded him from "engaging in the insurance business for a period of five years within a [fifty] mile radius of Minneapolis, St. Paul, or Duluth."¹⁵³ Soon after leaving the agency, the employee began contacting the attorneys he had worked with while at the agency.¹⁵⁴

The court rewrote the noncompete agreement, limiting it to only one year and restricting it to only the county in which the firm did virtually all of its business.¹⁵⁵ The court further edited the agreement to only include actual clients that the employee had contacted.¹⁵⁶

The underlying reasoning for allowing a court to rewrite terms is that the parties have reached a basic agreement that the employee will be restricted in some manner after the employment relationship ends.¹⁵⁷

to a greater extent than was necessary to protect the goodwill or other business interest of the promisee, the court may award the promisor the costs, including reasonable attorney's fees, actually and reasonably incurred by the promisor in defending the action to enforce the covenant.

150. *Durapin*, 559 A.2d at 1058; *Westwind Techs., Inc. v. Jones*, 925 So. 2d 166, 173 (Ala. 2005) ("It is clear from our caselaw that, if a covenant not to compete is overbroad, it is within the power of the courts to narrow it." (citing *Kershaw v. Knox Kershaw, Inc.*, 523 So. 2d 351, 359 (Ala.1988))).

151. 298 N.W.2d 127, 131 n.1, 132 (Minn. 1980).

152. *Id.* at 129.

153. *Id.*

154. *Id.* at 130.

155. *Id.* at 131.

156. *Id.* at 132.

157. See *Alexander & Alexander, Inc. v. Wohlman*, 578 P.2d 530, 540 (Wash. Ct. App. 1978) (citing *Wood v. May*, 438 P.2d 587, 591 (Wash. 1968)). The *Wood* court noted:

If a sharply defined line separated a restraint which is excessive territorially from such restraint as is permissible, there seems no reason why effect should not be given to a restrictive promise indivisible in terms, to the extent that it is lawful. If it be said that the attempt to impose an excessive restraint invalidates the whole promise, a similar attempt should invalidate a whole contract, though the promises are in terms divisible. Questions involving legality of contracts should not depend on form. Public policy surely is not concerned to distinguish differences of wording in agreements of identical meaning.

Id. (footnote omitted) (quoting 5 SAMUEL WILLISTON & GEORGE J. THOMPSON, A TREATISE ON THE

Whether a jurisdiction uses the blue pencil doctrine solely to eliminate an unreasonable term, or it allows a court to rewrite the agreement, the doctrine is generally a discretionary tool.¹⁵⁸ In both types of jurisdictions, courts note that clear overreaching on the part of the employer may preclude a later argument for use of the Blue Pencil doctrine.¹⁵⁹ As one court stated, the Blue Pencil doctrine should be used “unless circumstances indicate bad faith or deliberate overreaching on the part of the [employer].”¹⁶⁰

V. ANALYSIS

Let us return to, and expand upon, our opening hypothetical:

Soon after starting with ABC, Sam Salesperson lands a major account in Philadelphia for his first sale. Soon afterward, he lands several other major Philadelphia accounts due to word of mouth and references within the Philadelphia medical community. Sam is soon spending all of his time maintaining and developing these major accounts and making a good living doing so. ABC hires other salespeople to market in the rest of Pennsylvania and in New Jersey. Three years later, Sam leaves ABC to work for a

LAW OF CONTRACTS, § 1660, at 4683 (rev. ed. 1937)).

158. See, e.g., *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002) (noting that in rejecting the employer’s contention that the doctrine should have been used to make the agreement reasonable, the Blue Pencil Doctrine may be used at the discretion of the court); *Klick v. Crosstown State Bank of Ham Lake, Inc.*, 372 N.W.2d 85, 88-89 (Minn. Ct. App. 1985) (holding that the lower court did not abuse its discretion by refusing to apply the Blue Pencil doctrine to the contract, because the agreement was used to keep the employee from leaving and not to prevent unfair competition).

159. See *Arpac Corp. v. Murray*, 589 N.E.2d 640, 652 (Ill. App. Ct. 1992) (“Although a circuit court is not prohibited from modifying restraints embodied in an employment contract, the fairness of the restraint initially imposed is a relevant consideration of the court in equity.”); *Kayem v. Stewart*, No. M2002-01515-COA-R3-CV, 2003 WL 22309466, at *4 (Tenn. Ct. App. Oct. 9, 2003) (“[U]nless the circumstances indicate bad faith on the part of the employer, a court will enforce covenants not to compete to the extent they are reasonably necessary to protect the employer’s interest” (citing *Cent. Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 37 (Tenn. 1984))).

160. *Durapin, Inc. v. Am. Prods., Inc.*, 559 A.2d 1051, 1058 (R.I. 1989); see also *Data Mgmt., Inc. v. Greene*, 757 P.2d 62, 64 (Alaska 1988) (“The third approach, and the one we adopt, is to hold that if an overbroad covenant not to compete can be reasonably altered to render it enforceable, then the court shall do so unless it determines the covenant was not drafted in good faith. The burden of proving that the covenant was drafted in good faith is on the employer.”); *Estee Lauder Cos. v. Batra*, 430 F. Supp. 2d 158, 180 (S.D.N.Y. 2006) (noting that a court may sever terms and partially enforce the agreement if “the employer demonstrates an absence of overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct, but has in good faith sought to protect a legitimate business interest, consistent with reasonable standards of fair dealing.”).

competitor.

Is it fair to find the geographic limitation in the noncompete unreasonable because Sam only sold in Philadelphia? Would it be fair to Sam to preclude him from selling in all of Pennsylvania and New Jersey?

Even assuming all other terms are reasonable, a close analysis of the geographic limitation in this hypothetical shows the inadequacy of the current approaches. Also, it underscores the need for noncompete agreements to become malleable documents that adjust along with the employee's duties. Each of the three current approaches is addressed below, but first, a preliminary question - one that is rarely ever explicitly addressed by courts - must be raised: At what point do we look at the reasonableness of the terms of the noncompete agreement?

The two options are, of course, to look at the reasonableness of the agreement at the time it was signed or at the time the employment relationship ended. While the question is rarely explicitly addressed, its resolution is critical to an evaluation of the reasonableness of a noncompete agreement.¹⁶¹ It also brings to bear the impact that a jurisdiction's rule should play in the overall remedial scheme, in the context of consideration for noncompete agreements that are signed after commencement of employment.

A. Jurisdictions Using the "Agreement Void" Rule

In jurisdictions utilizing the "all-or-nothing" approach, the point at which the reasonableness of the agreement is determined is crucial. If a court analyzing the above hypothetical were to look at the reasonableness of the agreement at the time the employment relationship ended, it would certainly find the agreement unreasonable, as the

161. Compare TEX. BUS. & COM. CODE ANN. § 15.50(a) (Vernon 2002) ("[A] covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made . . ."), with MICH. COMP. LAWS § 445.774a (2002) ("An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business."), and WIS. STAT. ANN. § 103.465 (West 2002) (noting that a noncompete is lawful and enforceable only if the restrictions imposed are reasonably necessary). Both the Michigan and Wisconsin statutes, while not explicitly directing, indicate that the agreement is to be analyzed as to the applicable facts at the time of termination of employment.

geographic limitation is far greater than necessary to protect its legitimate business interests. In an all-or-nothing jurisdiction, Sam Salesperson would be free to call on his current customers immediately.

If a court were to look at the reasonableness of the agreement at the time it was signed, it would find the geographic term reasonable, as ABC and Sam certainly envisioned sales throughout the territory. The result would be that Sam would not only be barred from calling on his Philadelphia customers, but would also be unfairly precluded from selling in the rest of Pennsylvania and New Jersey.

These divergent outcomes underscore the need to incorporate a jurisdiction's rule on consideration for noncompete agreements signed after commencement of employment into the overall remedy analysis. If the reasonableness of the agreement as of the time the employment relationship ended no longer exists, which is common, then employers must have the ability to easily alter the noncompete agreement so that the terms reflect an employee's current duties and responsibilities. It is unrealistic in many employment situations to expect the employer to be able to accurately predict the scope of an employee's duties in five, ten, or more years down the road. Territories and customer bases may expand or shrink, new products may be added or the employee may end up focusing on only a few of the employer's products, and technologies and general duties may change. It is unrealistic to require new consideration each time a change takes place. A better approach, as presented below, is to foster a system in which the employer and employee, with adequate safeguards, are encouraged to regularly review and update the noncompete agreement to accurately reflect the employee's duties.

B. Jurisdictions Employing the Blue Pencil "Knockout" Rule

The Blue Pencil "knockout" method is also problematic, as it is unclear how this approach can work as a practical matter with many key noncompete terms. Courts using this method often emphatically state that they do not have the power to rewrite contractual provisions.¹⁶² However, if key terms are simply knocked out, the agreement itself may

162. See, e.g., *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1286 (Ariz. 1999) (en banc) ("[T]he court cannot create a new agreement for the parties to uphold the contract."); *Moore v. Midwest Distrib., Inc.*, 65 S.W.3d 490, 494 (Ark. Ct. App. 2002) ("Our supreme court further stated 'that the court would not vary the terms of a written agreement between the parties; to do so would mean that the court would be making a new contract, and it has consistently held that this will not be done.'" (quoting *Bendinger v. Marshalltown Trowell Co.*, 994 S.W.2d 468, 473 (Ark. 1999))).

be unenforceable as a practical matter. For example, in our hypothetical a court could not simply knock out the geographical limitation because the noncompete would then read so as to preclude Sam Salesperson from selling anywhere for two years. Certainly the intended consequence of finding a geographic limitation unreasonable is not to extend the prohibition indefinitely. The agreement is simply unenforceable without the geographic limitation.

Of the three primary terms in a noncompete agreement (temporal, geographic, and occupational), the temporal and geographic limitations are required terms. While, occasionally, a portion of the occupational limitation can be knocked out, the temporal and geographic terms must be included. For example, if ABC's noncompete agreement precluded Sam Salesperson from marketing software and hardware to ABC's customers, the term "and hardware" could be eliminated and the agreement can still be enforced. However, the parties must know for how long and in what territory Sam is precluded from selling software for the agreement to be workable and enforceable.

C. Jurisdictions Using the Blue Pencil "Rewrite" Rule

On the surface, allowing a court to rewrite in reasonable provisions to make them usable seems to be the most equitable as to the final outcome. Employers receive the protection they contracted for and employees are only restricted to the extent necessary to protect the employer's legitimate business interest. However, there are legitimate concerns over this approach.

First of all, the rewrite approach does nothing to discourage employers from seeking the broadest possible protections at the commencement of the noncompete agreement because the employer can rely on the court to rein in any excesses. While an employer's fervor can be tempered by a rule requiring good faith in the drafting, the reality is that many of the occupations in which noncompete agreements are most common and needed—sales and "customer contact" positions—begin without either the employer or employee knowing where the sales and customer contact leads and developments will take the employee. As such, most employers would have at least a reasonable argument for a fairly broad noncompete agreement.

This "good faith" analysis also brings us back to the initial question posed in this section: at what point do we judge the reasonableness of the agreement? If we are to look at the reasonableness at the time of drafting then we must give employers leeway in predicting the scope of

the employee's duties at some time in the future. Further, when reasonableness at the time of drafting is the issue, an analysis of the "good faith" of the employer is rife with potential problems of proof, particularly with regard to those employees who have been with the employer for a significant period of time. It is easy to conceive of a situation where an experienced salesperson/customer contact employee who has been with an employer for ten years was initially trained and managed by employees that have long since left the company. As such, it often may be difficult to determine whether the original limitations in the noncompete agreement were reasonable based upon the employer's expectation of the employee at the time of hire.

Further, the *in terrorem* effect of a noncompete agreement, espoused by Professor Blake¹⁶³ and noted by numerous courts, should not be discounted. Many employees will, when faced with even unreasonable noncompete agreement terms, choose simply to honor the agreement due to their lack of legal knowledge and/or fear of lawsuits and accompanying expenses. As such, employers should be discouraged from overreaching in the initial drafting of the noncompete agreement.

Finally, the hesitancy of courts to create terms of an agreement that differ from those agreed upon by the parties is well-founded. Courts should interpret contracts, not create them. A better policy, as discussed above, is to create a system that encourages employers and employees to regularly review and update noncompete agreements.

In sum, each of the three responses to unreasonable terms is flawed. Voiding an entire agreement for an unreasonable term, while the best method to discourage overreaching by employers, is potentially unfair, particularly to employers who act in good faith at the time of drafting but are unable to precisely determine the scope of the employee's duties as they evolve over the employment relationship. Eliminating an unreasonable term is unworkable for too many agreements because some terms are necessary for the agreement to function; it is inequitable to allow some agreements to be "saved" simply because the employer was fortunate enough to overreach on a term that can be severed. Finally, allowing judicial modification of the agreement rests too much power in the employer's drafting; it allows the employer to seek maximum protection with the knowledge that the court will cure any deficiencies.

163. See Blake, *supra* note 2 at 682.

VI. PROPOSED NONCOMPETE AGREEMENT REMEDY STATUTE

The following proposed scheme is designed to encourage employers and employees to reach noncompete agreements at the commencement of employment and then regularly review and update the agreement to reflect the employee's duties. This scheme also takes into account the important role that the rules pertaining to consideration should play in creating a fair and equitable remedy for unreasonable terms in a noncompete agreement.

1. Consideration

- a. If signed prior to the commencement of employment, no additional consideration is required.¹⁶⁴
- b. If the noncompete agreement is signed after the commencement of employment, consideration beyond continued employment must be given by the employer.
- c. This consideration must be directly linked to the signing of the noncompete agreement and must include one or more of the following:
 - i. A one-time bonus equaling or exceeding 5% of the employee's salary;
 - ii. A permanent pay raise equaling or exceeding 3% of the employee's salary;
 - iii. For a salesperson: an expanded territory or other marketing opportunities, including additional products or services, which carry a reasonable expectation for a permanent pay increase equaling or exceeding 3% of the employee's salary; or
 - iv. A promotion which includes a significant

¹⁶⁴. This is the standard rule, followed by all jurisdictions. *E.g.*, *Modern Controls, Inc. v. Andreadakis*, 578 F.2d 1264, 1267 (8th Cir. 1978).

increase in title and responsibility.¹⁶⁵

2. Alteration of an Existing Noncompete Agreement

- a. If a valid noncompete agreement is in place between employer and employee, no additional consideration is necessary for the parties to agree to alter the terms of the agreement.
- b. If an employer wishes to alter a noncompete agreement, the employer must present the noncompete agreement in writing to the employee, with the employee's rights and responsibilities clearly stated and the changes clearly identified.¹⁶⁶
- c. Once the employee is presented with the altered noncompete agreement, the employee has twenty-one days to:
 - i. Sign the noncompete agreement as presented;
 - ii. Present a counter-proposal to the employer; or
 - iii. Refuse to sign the altered noncompete

165. The reasoning behind section 1(b) is to strongly encourage employers to present noncompete agreements to prospective employees for signing prior to commencement of employment. This rule recognizes that an employee who is presented with a noncompete agreement after commencement of employment is in a very difficult predicament in which the employee has very little bargaining power. This rule requires a significant financial outlay on the part of the employer to support an agreement after commencement of employment.

The rule does, however, provide a reasonable alternative for the employer who wants to promote an employee in-house. Such might be the case with an administrative employee or factory or warehouse employee who wants to move into a sales or executive position. The rule allows for the significant promotion itself to provide the required consideration. In addition, such a promotion would almost always entail a significant pay raise (or at least the possibility of a pay raise due to commissions).

166. While it may, at first blush, seem unreasonable to require a new agreement, creating the new agreement should be relatively straightforward and require little supervision from the attorney who originally drafted the agreement. The manager would only need to alter the pertinent provisions of the documents to coincide more accurately with the employee's current duties. This may require, for example, altering the geographic term to coincide with current geographic territory or customer list, or adding or deleting product lines, any of which can be accomplished by a manager. Further, the document itself can be incorporated into the employee's regular performance review, so as to make the experience less confrontational.

agreement.¹⁶⁷

3. Remedy for an Unreasonable Term

- a. If the parties have a signed agreement and the court finds a term to be unreasonable, the agreement is VOID, subject to section (b) of this subdivision.¹⁶⁸
- b. If the parties have a signed agreement, the employer has presented an altered agreement to the employee and the employee refused to sign the agreement or the parties were unable to reach an agreement following a counter-proposal from the employee, the court may, in its discretion, use the Blue Pencil doctrine to cross out an unreasonable term(s) and replace it with a reasonable term. In determining if it should utilize the Blue Pencil doctrine, the court should consider:
 - i. The reasonableness of the signed agreement;
 - ii. The reasonableness of the un-signed, altered agreement; and/or
 - iii. The reasonableness of the employee's counter-proposal, if any.¹⁶⁹

167. This section allows an employer to alter the terms of an existing noncompete agreement without the need for additional consideration. The reasoning behind this rule is twofold. First, the employer and the employee have already agreed upon some protection for the employer at the termination of the employment relationship. Second, and in conjunction with the terms in subdivision 3, the employer has the ability and the obligation to regularly monitor the noncompete agreement to ensure that it is reasonable in light of the employee's current duties.

168. This rule provides the maximum protection for employees, as employers must craft noncompete agreements that are not overly broad, protect only legitimate business interests and monitor those agreements regularly to ensure that an employee's changing work duties are accurately reflected in the agreement.

169. This section allows for court flexibility in situations where an employer attempts to alter an existing noncompete agreement, but the employee and employer are not able to agree on altered terms. The court may take into consideration an employer's attempt to alter the terms of a noncompete agreement to coincide with an employee's current duties. This section also encourages employees to actively work to reach an agreement with their employer. If an employer has acted in good faith and attempted to update the agreement to coincide with the employee's duties, the court should use the Blue Pencil doctrine to revise any unreasonable terms to make them reasonable.

CONCLUSION

Employer-employee noncompete agreement litigation is not going away. The agreements are too important to employers, too burdensome on employees, and too fact intensive to be eliminated. Courts—and in particular, legislative bodies—should consider the important policy considerations when choosing a remedy for unreasonable terms in a noncompete agreement. Furthermore, the role of consideration in the remedy scheme should be considered to create a scheme that encourages regular review and updating of the noncompete agreement between employers and employees.