

**DRAFTING EFFECTIVE NONCOMPETE CLAUSES AND OTHER
RESTRICTIVE COVENANTS: CONSIDERATIONS ACROSS
THE UNITED STATES**

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ABSTRACT

Businesses are increasing their use of noncompete clauses and other restrictive covenants.¹ In response, each state has taken a different stance on the enforceability of restrictive covenants.² Fortunately, an in-depth, fifty-state survey is not required; if one knows what to search for in a particular state’s law, research and subsequent drafting become much simpler tasks.³ This Article focuses on the considerations necessary to draft an effective restrictive covenant, presents questions and issues, provides examples of typical state responses and how those responses may differ from state to state, and contains sample clauses as a starting point.⁴

The key to drafting effective clauses is in knowing the correct questions and considerations. Considerations include a covenant’s sur-

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¹ See *infra* note 7 and accompanying text; see also Frank J. Cavico, “*Extraordinary or Specialized Training*” as a “*Legitimate Business Interest*” in *Restrictive Covenant Employment Law: Florida and National Perspectives*, 14 ST. THOMAS L. REV. 53, 107 (2001) (“Clearly, restrictive employment covenants may be necessary in today’s fluid, high-tech, entrepreneurial business environment, and it appears that they are not only here to stay, but also to proliferate . . .”).

² See *infra* notes 13-23 and accompanying text.

³ See *infra* notes 24-25 and accompanying text.

⁴ See discussion *infra* Parts II-IX.

rounding circumstances; duration and geography; protected interests; consideration; severability and reformation; remedies; beneficiaries, successors, and assigns; and choice of law.⁵ These considerations arise in every state and constitute the basis of an enforceable restrictive covenant.⁶ When drafting with these considerations as a lens, one can be assured of drafting an effective, fully enforceable noncompete or restrictive covenant.

This Article is written to be instructive in nature; the reader will encounter numerous advisory sentences throughout the Article. In addition, throughout the Article the reader will find numerous sample clauses, some of which are the author's own creation, while others are taken from a variety of sources.

⁵ See Ralph Anzivino, *Drafting Restrictive Covenants in Employment Contracts*, 94 MARQ. L. REV. 499, 501 (2010) (explaining that some of the general principles in drafting a restrictive covenant are "requiring that a contract be supported by consideration" and "(1) be reasonably necessary for the protection of the employer . . . (2) provide a reasonable time limit; (3) provide a reasonable territorial limit; (4) not be harsh or oppressive as to the employee; and (5) not be contrary to public policy"); see also William G. Porter II & Michael C. Griffaton, *Using Noncompete Agreements to Protect Legitimate Business Interests*, 69 DEF. COUNS. J. 194, 198-202 (2002) (discussing drafting considerations such as severability, geographic restrictions, choice of law, and remedies for breach).

⁶ See *infra* Parts II-IX (discussing how different states handle these considerations).

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I. INTRODUCTION

A noncompete clause or agreement (“noncompete”) is becoming an ever-increasing standard in the business and employment arena.⁷ Currently, every state allows for their use under the appropriate circumstances.⁸ A noncompete can, and usually does, encompass multiple facets: noncompetition, nondisclosure, nonsolicitation, antipiracy, and protection of trade secrets (collectively, “restrictive covenants”).⁹ Through these restrictive covenants, employers seek to protect their customer lists, trade secrets, goodwill, and livelihood, among many other virtuous—and not so virtuous—interests.¹⁰ On the other hand, employees seek to utilize their skills and talents in the most rewarding and beneficial environment, often in contravention of these restrictive covenants.¹¹ Both seek, mostly, legitimate ends; often these ends conflict.¹²

⁷ See Ken Matheny & Marion Crain, *Disloyal Workers and the “Un-American” Labor Law*, 82 N.C. L. REV. 1705, 1744-46 (2004) (discussing increasing use of noncompetes); see also Anzivino, *supra* note 5, at 500 (advising practitioners how to draft effective noncompete clauses and other restrictive covenants given their regular commercial use).

⁸ See Marlo D. Brawer, Note, *Switching Stations: The Battle Over Non-Compete Agreements in the Broadcasting Industry*, 27 OKLA. CITY U. L. REV. 693, 696-98 (2002) (discussing state protections). Even states that explicitly prohibit noncompetes and other restrictive covenants still allow for their occasional use. See, e.g., CAL. BUS. & PROF. CODE § 16600 (West 2012) (declaring noncompetes illegal); CAL. BUS. & PROF. CODE §§ 16601, 16602.5 (listing exceptions to general prohibition of noncompetes); COLO. REV. STAT. § 8-2-113(2) (2012) (restrictive covenants are *facially void* in Colorado); COLO. REV. STAT. § 8-2-113(2)(a)-(d) (listing exceptions).

⁹ See Laurence H. Reece, III, *Employee Noncompetition Agreements: Recent Developments and Trends*, 88 MASS. L. REV. 24, 24-25, 34 (2003) (listing nonsolicitation and antipiracy as other forms of restrictive covenants and discussing trade secrets under the inevitable disclosure doctrine); Kenneth J. Vanko, “*You’re Fired! And Don’t Forget About Your Non-Compete . . .*”: *The Enforceability of Restrictive Covenants in Involuntary Discharge Cases*, 1 DEPAUL BUS. & COM. L.J. 1, 2 (2002) (“In the employee context, restrictive covenants generally span four different areas: (1) general non-competition; (2) customer (or client) non-solicitation; (3) employee non-solicitation; and (4) non-disclosure.”).

¹⁰ See Anzivino, *supra* note 5, at 509-23 (discussing protectable interests).

¹¹ See, e.g., *Med. Specialists, Inc. v. Sleweon*, 652 N.E.2d 517, 518-22 (Ind. Ct. App. 1995) (detailing facts of a noncompete case).

¹² See, e.g., *id.* at 522-25 (adjudicating noncompete litigation and recognizing the opposing legitimate interests of the parties).

In response, each state has taken a different stance on the enforceability of restrictive covenants.¹³ Some states are employer friendly,¹⁴ while others are, clearly, more employee friendly.¹⁵ Some states create express time and geographic constraints,¹⁶ while most hide behind the idea of reasonableness.¹⁷ Some treat goodwill and customer lists as protectable,¹⁸ while others focus more on trade secrets.¹⁹ Some

¹³ Vanko, *supra* note 9, at 9 (“Courts have taken three approaches to analyzing whether general non-competition clauses are enforceable in discharge cases.”).

¹⁴ *See, e.g.*, FLA. STAT. § 542.335(1)(g)(1) (2012) (in determining enforceability, a Florida court may not consider individualized economic hardship to the person against whom enforcement is sought); FLA. STAT. § 542.335(1)(h) (mandating that, when interpreting a noncompete, a Florida court *must* construe the covenant “in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement” and that a Florida court *may not* “employ any rule of contract construction that requires the court to construe a restrictive covenant narrowly, against the restraint, or against the drafter of the contract”); MICH. COMP. LAWS § 445.774a(1) (2011) (allowing employers to utilize restrictive covenants to “prohibit[] an employee from engaging in employment or a line of business after termination of employment”).

¹⁵ *See, e.g.*, CAL. BUS. & PROF. CODE § 16600 (West 2012) (restrictive covenants are otherwise invalid); COLO. REV. STAT. § 8-2-113(2) (2012) (restrictive covenants are *facially void* in Colorado with limited exceptions); NEV. REV. STAT. § 613.200(1) (2011) (gross misdemeanor, punishable by up to five thousand dollars, for an in-state entity, officer, or agent, or anyone on their behalf, to *willfully* do “anything intended to prevent any person who for any cause left or was discharged from his, her or its employ from obtaining employment elsewhere in this State”); *Cranston Print Works Co. v. Pothier*, 848 A.2d 213, 219 (R.I. 2004) (explaining that in Rhode Island, noncompetes are “disfavored and subject to strict judicial scrutiny.” (citing *Durapin, Inc. v. Am. Prods., Inc.*, 559 A.2d 1051, 1053 (R.I. 1989))).

¹⁶ *See, e.g.*, FLA. STAT. § 542.335(1)(d)-(e) (detailing presumptions and acceptable restraints regarding time and area).

¹⁷ *See, e.g.*, MICH. COMP. LAWS § 445.774a(1) (covenant enforceable to extent it is reasonable); TEX. BUS. & COM. CODE ANN. § 15.50(a) (West 2011) (allowing noncompete agreements if “time, geographical area, and scope of activity to be restrained . . . are reasonable and do not impose a greater restraint than is necessary”); *Boulanger v. Dunkin’ Donuts, Inc.*, 815 N.E.2d 572, 577 (Mass. 2004) (“Covenants not to compete are valid if they are reasonable in light of the facts of each case.” (citing *Marine Constr. Co. v. Hurley*, 310 N.E.2d 915, 920 (Mass. 1974); *Saltman v. Smith*, 46 N.E.2d 550, 555-56 (Mass. 1943))). For a general discussion of noncompete agreements under Massachusetts law, see *Reece, supra* note 9, at 24-25.

¹⁸ *See, e.g.*, FLA. STAT. § 542.335(1)(b)(4) (listing “[c]ustomer, patient, or client goodwill” as protectable); *Boulanger*, 815 N.E.2d at 578-79 (discussing protectable interests); *United Labs., Inc. v. Kuykendall*, 370 S.E.2d 375, 381 (N.C. 1988) (“[P]rotection of customer relationships and good will against misappropriation by

states allow judicial reformation on a large scale,²⁰ while others expressly limit any judicial reformation and call for wholesale invalidation of restrictive covenants.²¹ And, some states explicitly control noncompete requirements,²² while others offer a dearth of guidance on the subject.²³

Consequently, drafting or reviewing a restrictive covenant is difficult and daunting.²⁴ But, if one knows what to search for in a particular state's restrictive covenant laws, it makes this task more manageable and will provide employers and employees alike the lens through which

departing employees is well recognized as a legitimate protectable interest of the employer."); *Martin v. Credit Prot. Ass'n*, 793 S.W.2d 667, 670 n.3 (Tex. 1990) (finding goodwill and customer information protectable).

¹⁹ See, e.g., COLO. REV. STAT. § 8-2-113(2)(b) (focusing on trade secrets).

²⁰ See John A. Grant, Jr. & Thomas T. Steele, *Restrictive Covenants: Florida Returns to the Original "Unfair Competition" Approach for the 21st Century*, FLA. B.J., Nov. 1996, at 53, 56 ("In enacting F.S. § 542.335, the Florida Legislature directed the courts of this state to evaluate restrictive covenants under the 'unfair competition' analysis."). See generally FLA. STAT. § 542.335(1)(g)(1), (1)(h) (detailing considerations court should take into account in broad terms).

²¹ See, e.g., *Olliver/Pilcher Ins., Inc. v. Daniels*, 715 P.2d 1218, 1220-21 (Ariz. 1986) (en banc) (explaining the entire covenant is unenforceable unless the covenant indicates, by its terms, an unreasonable portion is severable); *Cent. Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 36-37 (Tenn. 1984) (discussing the preference for an interpretation of reasonableness rather than judicial modification); *Vantage Tech., L.L.C. v. Cross*, 17 S.W.3d 637, 647 (Tenn. Ct. App. 1999) (same).

²² See, e.g., FLA. STAT. § 542.335 (setting out an extensive statute regulating restrictive covenants).

²³ See Elham Roohani, Note, *Covenants Not to Compete in Nevada: A Proposal*, 10 NEV. L.J. 260, 269 (2009) ("However, this lack of controlling law [regarding restrictive covenants in Nevada], and the corresponding lack of *stare decisis*, is positive in one regard."). Roohani discusses the dearth of case law in Nevada on this issue; according to him, because Nevada does not have an intermediate appellate court, the Nevada Supreme Court issues very few full opinions. *Id.* at 269-70. This does seem to be the case as most of the Nevada Supreme Court citations are to the courts of other states, and there are, overall, very few Nevada cases. See, e.g., *Traffic Control Servs., Inc. v. United Rentals Nw., Inc.*, 87 P.3d 1054, 1058 n.10 (Nev. 2004) (per curiam) (citing outside jurisdictions); *Ellis v. McDaniel*, 596 P.2d 222, 224 (Nev. 1979) (same); *Hansen v. Edwards*, 426 P.2d 792, 793 (Nev. 1967) (same).

²⁴ See Anzivino, *supra* note 5, at 500 ("[T]here is no reprieve for a poorly drafted restrictive covenant.").

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to properly inspect any restrictive covenant.²⁵ As a result, this Article focuses on the standard aspects of restrictive covenants more so than the exact specifics of each individual state's law.²⁶ This Article presents questions, considerations, and issues present in drafting any restrictive covenant, along with examples of state responses, how those responses differ, and some sample clauses as starting points.²⁷ Knowing the right question comes first; the answer is secondary.²⁸

II. THE CIRCUMSTANCES INFLUENCING THE RESTRICTIVE COVENANT

A. *Circumstances Surrounding the Agreement, the Industry, and the Employee*

The idea in many states is to separate restrictive covenants based on the surrounding circumstances.²⁹ Circumstances surrounding entry into a restrictive covenant vary: the sale of a business, the sale of part of a business, the sale of some or all business assets, the addition of a new member to a limited liability company or partner to a partnership, the retirement of a member or partner, or the release or termination of a member or partner (whether voluntary or not).³⁰ Legislatures treat these

²⁵ *See id.* (advising practitioners and others how to draft effective noncompete clauses and other restrictive covenants considering Wisconsin's statute and how the courts have interpreted and applied it).

²⁶ *See infra* Parts III-IX.

²⁷ *See infra* Parts II-X.

²⁸ Thank you to a great mentor and one of my former law professors at Florida Coastal School of Law, Jerry Moran, for this brilliant "Moranism." Professor Moran received his J.D. from Catholic University Law School and his L.L.M. from George Washington University's Graduate School of Public Law. He has been a professor at Florida Coastal School of Law since 1999.

²⁹ *See, e.g.*, CAL. BUS. & PROF. CODE § 16602.5 (West 2012) (allowing noncompete clauses when tied to the sale of a business or interest therein); *see also* FLA. STAT. § 542.335(1)(d)(1), (3) (2012) (differentiating between sale-of-a-business restrictive covenants and those not tied to a sale); *Chelo's of Woonsocket, Inc. v. Chelo*, No. PB 03-4646, 2004 WL 603417, at *1, *4 (R.I. Super. Ct. March 8, 2004) (implying five years and fifty miles would be acceptable in sale-of-business noncompete, but not in employee-employer noncompete).

³⁰ *See, e.g.*, *Harvey Barnett, Inc. v. Shidler*, 143 F. Supp. 2d 1247, 1253 (D. Colo. 2001) (discussing Colorado's narrowly defined categories for noncompete contracts); FLA. STAT. § 542.335(1)(d).

circumstances differently because of the differences between selling a business, only for the seller to begin directly competing with the buyer; a partner or member (i.e., owner) leaving the business and doing the same; and merely terminating an employee-employer relationship.³¹

For example, California is one of the most employee-friendly states when it comes to restrictive covenants.³² But, this does not hold true when the restrictive covenant is tied to the sale of a business or part thereof.³³ Similarly, Colorado takes an anti-restrictive-covenant stance³⁴ unless the circumstances fit into one of its statutory exceptions.³⁵ Or, take Florida. Florida is an interesting state with an entire statutory scheme laying out exact durations that courts will consider presumptively reasonable or unreasonable.³⁶ But, the Florida Legislature created different presumptively reasonable time periods based on the circumstances surrounding the covenant (i.e., sale, no sale, and trade-secret protection).³⁷

³¹ See, e.g., FLA. STAT. § 542.335(1)(d)(1), (3) (showing restrictive covenants for the sale of a business are different than those involved with employee termination).

³² CAL. BUS. & PROF. CODE § 16600 (West 2012) (“[E]very contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.”); see also NEV. REV. STAT. § 613.200(1) (2011) (gross misdemeanor, punishable by up to five thousand dollars, to *willfully* do “anything intended to prevent any person . . . from obtaining employment elsewhere in this State”); COLO. REV. STAT. § 8-2-113(2) (2012) (restrictive covenants are *facially void* with limited exceptions).

³³ CAL. BUS. & PROF. CODE §§ 16601, 16602.5.

³⁴ COLO. REV. STAT. § 8-2-113(2); *Harvey Barnett, Inc.*, 143 F. Supp. 2d at 1253-54; *Phoenix Capital, Inc. v. Dowell*, 176 P.3d 835, 840 (Colo. App. 2007); *Mgmt. Recruiters of Boulder, Inc. v. Miller*, 762 P.2d 763, 765-66 (Colo. App. 1988); see also *King v. PA Consulting Grp., Inc.*, 485 F.3d 577, 586 (10th Cir. 2007) (explaining Colorado has a fundamental policy against restrictive covenants).

³⁵ COLO. REV. STAT. § 8-2-113(2)(a)-(d) (listing four circumstances where the prohibition on restrictive covenants is inapplicable: (1) “contract[s] for the purchase and sale of a business or the assets of a business;” (2) “protection of trade secrets;” (3) “recovery of the expense of educating and training an employee who has served an employer for a period of less than two years;” and (4) “[e]xecutive and management personnel and officers and employees who constitute professional staff to executive and management personnel”).

³⁶ See FLA. STAT. § 542.335(1)(d)-(e).

³⁷ See *id.*

Additionally, the type of industry is a circumstance that creates issues.³⁸ For example, courts and legislatures treat restrictive covenants covering physicians differently.³⁹ Attorney restrictive covenants are similarly separated from other industries.⁴⁰ Different policy concerns underlie restricting these individuals from performing their chosen profession and cause different outcomes based solely on the profession.⁴¹ Similarly, the type of employee could affect whether a restrictive covenant is appropriate; for example, courts or legislatures could view restrictive covenants with senior management, corporate officers, or other high-level employees differently.⁴²

In sum, considering these circumstances is the first step in drafting an appropriate and effective agreement.⁴³ The attendant circumstances surrounding entry into the agreement, the profession itself, and the status of the particular employee could determine whether a restrictive covenant is appropriate, and to what extent.⁴⁴

³⁸ See, e.g., *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1281 (Ariz. 1999) (discussing the strong disfavor of restrictive covenants involving physicians).

³⁹ See COLO. REV. STAT. § 8-2-113(3) (creating different rules for physicians); *Valley Med. Specialists*, 982 P.2d at 1278-79, 1281 (holding that a physician noncompete restricting the practice of medicine within a five-mile radius of any of three specific clinic locations for a period of three years was unreasonable).

⁴⁰ See, e.g., R. REGULATING FLA. BAR 4-5.6 (2012-2013) (eliminating ability of attorneys to enter into restrictive covenants, except in connection with the sale of a law practice or benefits upon retirement); accord GA. RULES OF PROF'L CONDUCT R. 5.6 (2013) (same); ABA MODEL RULES OF PROF'L CONDUCT R. 5.6 (2013) (same); see also *Jackson v. Bellsouth Telecomm.*, 372 F.3d 1250, 1259 n.11 (11th Cir. 2004) (discussing, in general, the right to restrict lawyers from practicing).

⁴¹ See generally *Valley Med. Specialists*, 982 P.2d at 1281 (discussing healthcare and patient access to qualified physicians as a relevant concern with physician noncompetes); ABA MODEL RULES OF PROF'L CONDUCT R. 5.6 cmt. 1 (2013).

⁴² COLO. REV. STAT. § 8-2-113(2)(d) (allowing restrictive covenants where an employee constitutes "[e]xecutive and management personnel and officers and employees who constitute professional staff to executive and management personnel").

⁴³ See, e.g., *Valley Med. Specialists*, 982 P.2d at 1281 (discussing the need to balance the employer's legitimate interests against the public policy interests when assessing the validity of restrictive covenants between physicians).

⁴⁴ See *id.*

B. Sample Clauses

- “Leaves” or “Leaving” means to no longer be employed by [Company], regardless of the circumstances surrounding the end of employment, whether by mutual agreement, quitting, unilateral termination, release, retirement, or otherwise.
- WHEREAS, Employee is either executive or management personnel, an officer, or professional staff to executive and management personnel.
- WHEREAS, [Company] has decided to make Employee privy to various trade secrets, including, but not limited to, confidential and highly sensitive information regarding [Company], its clients and suppliers, client contracts, and pricing information, as well as [Company’s] marketing strategies, research and development efforts, and systems and operations.

III. REASONABLE IN DURATION AND GEOGRAPHY

All states, even those with a stated policy or law against noncompetes, allow them in various circumstances, but *only if* the durational and geographic terms of the restrictive covenant are *reasonable* or *no more restrictive than necessary*.⁴⁵ Therefore, if the state allows

⁴⁵ See, e.g., FLA. STAT. § 542.335(1)(c) (2012) (the restraint must be reasonably necessary in duration, territory, and otherwise); NEV. REV. STAT. § 613.200(4) (2011) (allowing restrictive covenants if the covenant is “otherwise reasonable in its scope and duration”); *Mgmt. Recruiters of Boulder, Inc. v. Miller*, 762 P.2d 763, 766 (Colo. App. 1988) (explaining a Colorado court will ask two questions: (1) whether the restrictive covenant is justified at all in light of the facts; and (2) whether the specific terms are reasonable); *Boulanger v. Dunkin’ Donuts, Inc.*, 815 N.E.2d 572, 577 (Mass. 2004) (citing *Marine Constr. Co. v. Hurley*, 310 N.E.2d 915, 920 (Mass. 1974); *Saltman v. Smith*, 46 N.E.2d 550, 555-56 (Mass. 1943)) (finding noncompetes are legal in the State of Massachusetts so long as the agreement is “necessary to protect a legitimate business interest, reasonably limited in time and space, and consonant with the public interest”).

the noncompete under the circumstances, the next step is to consider the duration and geographic limitations of the restriction.⁴⁶

A. Duration

The idea of reasonableness in duration, and, more broadly, what is “reasonable,” is a never-ending question and quest. In the realm of restrictive covenants, courts have suggested that, with appropriate surrounding circumstances, durations of as few as fourteen weeks may be appropriate.⁴⁷ On the other hand, some courts have upheld durations of five years.⁴⁸ There is no magic timeframe for a reasonable durational restriction.⁴⁹ And, in quite a few states, the idea of a sliding duration and geographic scale comes into play—where the longer the duration, the shorter the geographic period, and vice versa.⁵⁰ Specifically, courts

⁴⁶ See, e.g., *Boulanger*, 815 N.E.2d at 578-82 (discussing whether covenant restrictions in a franchise agreement were reasonable in time and space).

⁴⁷ See, e.g., *Bryceland v. Northey*, 772 P.2d 36, 40 (Ariz. Ct. App. 1989) (suggesting, in dicta, that a reasonable durational restriction under the circumstances should not exceed fourteen weeks); see also *Amex Distrib. Co. v. Mascari*, 724 P.2d 596, 604 (Ariz. Ct. App. 1986) (asserting, in dicta, that a period of “several months” is likely a reasonable durational restriction for the typical sales representative).

⁴⁸ See, e.g., *Fuller v. Brough*, 411 P.2d 18, 21-22 (Colo. 1966) (forty-five miles and five years); *Freudenthal v. Espey*, 102 P. 280, 286 (Colo. 1909) (city limits and five years); *Harrison v. Albright*, 577 P.2d 302, 305 (Colo. App. 1977) (fifty miles and five years); *Flower Haven, Inc. v. Palmer*, 502 P.2d 424, 426 (Colo. App. 1972) (City of Boulder and five years).

⁴⁹ See *Whirlpool Corp. v. Burns*, 457 F. Supp. 2d 806, 813 (W.D. Mich. 2006) (stating Michigan courts “have upheld non-compete agreements covering time periods of six months to three years”); *Stone v. Griffin Commc’ns & Sec. Sys., Inc.*, 53 S.W.3d 687, 696 (Tex. Civ. App. 2001) (“[T]wo to five years has repeatedly been held a reasonable time restriction in a non-competition agreement.”) (citing *AMF Tuboscope v. McBryde*, 618 S.W.2d 105, 108 (Tex. Civ. App. 1981); *Arevalo v. Velvet Door, Inc.*, 508 S.W.2d 184 (Tex. Civ. App. 1974); *Elec. Data Sys. Corp. v. Powell*, 508 S.W.2d 137 (Tex. Civ. App. 1974); *Weber v. Hasse Envelope Co.*, 342 S.W.2d 652 (Tex. Civ. App. 1960))).

⁵⁰ See, e.g., *Mkt. Am., Inc. v. Christman-Orth*, 520 S.E.2d 570, 578 (N.C. Ct. App. 1999) (finding noncompete agreement reasonable where no geographical restriction existed on the face of the agreement and was likely intended to cover the entire United States, but was only six months in duration); *Aim High Acad., Inc. v. Jessen*, No. KC-2008-1384, 2008 R.I. Super. LEXIS 152, at *27 (R.I. Super. Ct. Dec. 10, 2008) (approving one-year duration restriction, but modifying radius restriction from anywhere in the state to fifteen-mile radius restriction).

have enforced restrictive covenants covering periods of one year,⁵¹ two years,⁵² three years,⁵³ and five years.⁵⁴ At the same time, some courts have refused to enforce similar durational requirements.⁵⁵

Essentially, the durational period needs to relate to the type of work the employee performed or the business of the employer.⁵⁶ For example, if employee training takes six months, and thus it will take six

⁵¹ Sprague's Aetna Trailer Sales, Inc. v. Hruz, 474 P.2d 216, 218 (Colo. 1970); Wagner v. A & B Pers. Sys., Ltd., 473 P.2d 179, 179-80 (Colo. App. 1970) (clause spanning fifty miles for one year); Cereva Networks, Inc. v. Lieto, No. CIV.A. 01-3835, 2001 WL 1228040, at *6 (Mass. Super. Ct. Oct. 12, 2001) (finding one-year restriction reasonable).

⁵² Philips Elecs. N. Am. Corp. v. Halperin, No. 005251, 2000 WL 33171040, at *3-6 (Mass. Super. Ct. Dec. 12, 2000) (finding two-year restriction reasonable); Bowne of Boston, Inc. v. Levine, No. CIV.A. 97-5789A, 1997 WL 781444, at *4 (Mass. Super. Ct. Nov. 25, 1997) (finding two-year restriction reasonable).

⁵³ Zeff, Farrington & Assocs., v. Farrington, 449 P.2d 813, 814 (Colo. 1969); Ferrofluidics Corp. v. Advanced Vacuum Components, Inc., 968 F.2d 1463, 1467, 1469, 1471 (1st Cir. 1992).

⁵⁴ Fuller v. Brough, 411 P.2d 18, 20-21 (Colo. 1966). *But see* Hartman v. W.H. Odell & Assocs., 450 S.E.2d 912, 919 (N.C. Ct. App. 1994) (discussing Masterclean of N.C., Inc. v. Guy, 345 S.E.2d 692, 696 (N.C. Ct. App. 1986)) (“[F]ive-year covenant purporting to cover any county in the United States where the employer worked ‘patently unreasonable.’”).

⁵⁵ *Ferrofluidics Corp.*, 968 F.2d at 1469, 1471 (affirming reduction of duration from five years to three years); IKON Office Solutions, Inc. v. Belanger, 59 F. Supp. 2d 125, 129 (D. Mass. 1999) (two years not appropriate under the circumstances); *Hartman*, 450 S.E.2d 912, 915, 919 (holding clause spanning five years, covering eight states, not reasonable); Bryceland v. Northey, 772 P.2d 36, 40 (Ariz. Ct. App. 1989) (suggesting, in dicta, that a reasonable durational restriction under the circumstances should not exceed fourteen weeks).

⁵⁶ *See* Am. Express Fin. Advisors, Inc. v. Scott, 955 F. Supp. 688, 693 (N.D. Tex. 1996) (noting that a one-year duration where former employee could sell services anywhere he chose but not to customers he served while affiliated with former employer was reasonable); Superior Consulting Co. v. Walling, 851 F. Supp. 839, 847 (E.D. Mich. 1994) (upholding noncompete clause prohibiting a former employee of a healthcare management consulting business from engaging in any healthcare information consulting business for a period of six months); Rooyakker & Sitz, P.L.L.C. v. Plante & Moran, P.L.L.C., 742 N.W.2d 409, 418 (Mich. Ct. App. 2007) (upholding an agreement with a two-year limitation that did not prevent former employees from performing accounting services and only prevented former employees from rendering the same services to firm's clients but not different services); All Stainless, Inc. v. Colby, 308 N.E.2d 481, 487 (Mass. 1974) (finding that a two-year agreement limited to sales area served by former employee was acceptable).

months to train a replacement, a five-year restriction is, likely, unreasonable.⁵⁷ Similarly, where the employee's knowledge and position puts him in control of customer lists that fluctuate on a yearly basis, a one-year restriction would likely be appropriate.⁵⁸ Further, courts often focus on the type of employee,⁵⁹ the amount of customer contact,⁶⁰ the length of employ,⁶¹ or the closing of the former company.⁶²

⁵⁷ See *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1284 (Ariz. 1999) (“[D]uration is reasonable only if it is no longer than necessary for the employer to put a new man on the job and for the new employee to have a reasonable opportunity to demonstrate his effectiveness to the customers.” (quoting *Amex Distrib. Co. v. Mascari*, 724 P.2d 596, 604 (Ariz. Ct. App. 1986))).

⁵⁸ See *Stone v. Griffin Commc'ns & Sec. Sys., Inc.*, 53 S.W.3d 687, 696 (Tex. App. 2001) (finding a five-year duration reasonable because it would take five years for customer information obtained by former employees to become outdated).

⁵⁹ See *Amex Distrib. Co.*, 724 P.2d at 604 (asserting, in dicta, that a period of a few months is likely the maximum appropriate durational restriction for a sales representative).

⁶⁰ See *James C. Greene Co. v. Arnold*, 145 S.E.2d 304, 305-07 (N.C. 1965) (finding a four-year restriction with heavy customer contact reasonable); *Welcome Wagon Int'l, Inc. v. Pender*, 120 S.E.2d 739, 742-43 (N.C. 1961) (stating that a five-year restriction with heavy customer contact is reasonable); *Orkin Exterminating Co. v. Wilson*, 40 S.E.2d 696, 698-99 (N.C. 1946) (finding a two-year restriction with heavy customer contact reasonable); *Moskin Bros. v. Swartzberg*, 155 S.E. 154, 155, 157 (N.C. 1930) (declaring a two-year restriction with heavy customer contact reasonable).

⁶¹ See *Anich Indus., Inc. v. Raney*, 751 So. 2d 767, 770-71 (Fla. Ct. App. 2000) (holding that an employer was not entitled to injunctive relief or damages when, after being employed for less than three months, the employee resigned and accepted a new position in violation of noncompete because the employer failed to prove that the employee “possessed trade secrets,” that she “had learned valuable confidential information” during employment, or that “there were substantial relationships with specific customers derived from her work . . . that [she] sought to use to her advantage in her new position,” or that there was any other “legitimate business interest”); see also *IKON Office Solutions, Inc. v. Belanger*, 59 F. Supp. 2d 125, 129 (D. Mass. 1999) (“[T]he court does not believe that two years is categorically appropriate here when the time of employ, during which the restrictive covenants were in place, was only slightly greater than one year.”).

⁶² *Bob Nicholas Enter., Inc. v. Nicholas/Earth Printing, L.L.C.*, 358 B.R. 693, 706-07 (Bankr. S.D. Tex. 2007) (finding unenforceable under Texas law a covenant prohibiting the principal of a printing company “from engaging in the printing business in competition with [the company] beyond the time [that company] ceased operating . . . [because the covenant] impose[d] a greater restraint than necessary to protect the goodwill or business interests of [the company]”).

Florida is one of the most interesting states when it comes to reasonableness of duration.⁶³ Florida sets out statutorily mandated rebuttable timeframes that will be considered reasonable or unreasonable.⁶⁴ If not connected to trade secrets or the sale of the business and the noncompete is drafted for an employee⁶⁵ at any level, Florida statute mandates that six months or less is presumed reasonable and more than two years is presumed unreasonable.⁶⁶

In short, each employee, and his or her specific tasks, must be taken into account.⁶⁷ Each employee's duties, training, contact with sensitive information, and way of fitting into the business must be reviewed before determining an appropriate durational restriction.⁶⁸

B. Tolling Clauses

Related to the idea of an effective durational period is that of a tolling clause.⁶⁹ In the event of litigation (potentially prolonged) over the validity of a restrictive covenant, a short durational period may become obsolete while the litigation is ongoing.⁷⁰ Or, if the employee is

⁶³ See generally FLA. STAT. § 542.335(1)(d)-(e) (2012) (establishing time frames for various circumstances that operate as rebuttable presumptions of reasonableness or unreasonableness).

⁶⁴ *Id.*

⁶⁵ "Employee," as used here, is broad and includes any level of employee, as well as independent contractor or agent. § 542.335(1)(d)(1). Former distributors, dealers, franchisees, and licensees of trademarks or service marks are considered separately. § 542.335(1)(d)(2) (requiring courts to presume that durational limit of one year or less is reasonable and three years or more is unreasonable); see also § 542.335(1)(d)(3) (stating separate presumptions when connected to the sale of a business); § 542.335(1)(e) (noting separate presumptions—five years reasonable but ten years unreasonable—in connection with trade secrets).

⁶⁶ § 542.335(1)(d)(1).

⁶⁷ See *supra* notes 56-62 and accompanying text.

⁶⁸ See *supra* notes 56-62 and accompanying text.

⁶⁹ See *Manpower of Guilford Cnty., Inc. v. Hedgecock*, 257 S.E.2d 109, 115 (N.C. Ct. App. 1979) (recognizing that a breach of the noncompete agreement at issue tolled the restrictive period, which meant "that the restriction continues for a maximum of one year after a breach of the covenant ceases").

⁷⁰ See *All Stainless, Inc. v. Colby*, 308 N.E.2d 481, 487 (Mass. 1974) (stating that the restrictive agreement was enforceable, but because the durational period of the restrictive agreement had expired, the party seeking to enforce the agreement could no longer obtain injunctive relief).

violating the restrictive covenant unbeknownst to the employer, a short durational period may lapse; thus, the employer is left without continuing recourse, as the durational period had expired.⁷¹ Consequently, the employer may win the court battle in either situation but be left with no further ability to restrict the employee from competing, soliciting, or pirating.⁷² For an employer to receive the true, uninterrupted benefit of its restrictive covenant and minimize the potential damage of breach, some states specifically allow for the use of tolling clauses.⁷³

In fact, in North Carolina, using such a tolling clause is reasonable.⁷⁴ As the North Carolina court opined, “The result is that plaintiff is entitled to one continuous year without competition from plaintiff. This is not unreasonable.”⁷⁵ This ensures the employer gets the full benefit of the bargain with the employee.⁷⁶ However, while useful, careful drafting is required.⁷⁷ A court may consider broad tolling provisions purporting to start periods anew in the event of any violation or litigation as overly broad and invalid.⁷⁸

C. Sample Tolling Clause

- Employee shall not compete for a period of one (1) year from the date employee leaves company (such period not to include any period(s) of violation or any

⁷¹ *See id.*

⁷² *See id.* (noting that even though the court would have upheld the agreement preventing the opposing party’s competition, the durational period of the restrictive agreement had expired and, therefore, the only relief available to the plaintiff was monetary damages).

⁷³ *See Manpower of Guilford Cnty., Inc.*, 257 S.E.2d at 115 (recognizing that the tolling clause in the restrictive agreement was reasonable).

⁷⁴ *See id.*

⁷⁵ *Id.*

⁷⁶ *See id.* (“[T]he time required for litigation to enforce the covenants necessarily terminates upon enforcement of a decree prohibiting a continued violation of the covenant.”).

⁷⁷ *See Hartman v. W.H. Odell & Assocs.*, 450 S.E.2d 912, 918 (N.C. Ct. App. 1994) (finding that a provision in the restrictive agreement that would start the restrictive five-year period over after any judgment was “patently unreasonable,” invalid, and not a tolling provision).

⁷⁸ *See id.*

time required for litigation to enforce the agreement or any of its provisions).⁷⁹

D. Geographic Scope

Similar to the durational requirement, there is no standard for a reasonable geographic limitation.⁸⁰ Courts have upheld—and conversely rejected—distances from a few miles,⁸¹ to cities,⁸² entire states,⁸³ countries,⁸⁴ and the world.⁸⁵ Courts tend to focus on the em-

⁷⁹ See *Manpower of Guilford Cnty., Inc.*, 257 S.E.2d at 115.

⁸⁰ See *supra* notes 47-55 and accompanying text; see *infra* notes 81-88 and accompanying text.

⁸¹ See *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1285-86 (Ariz. 1999) (finding unreasonable physician noncompete restricting practice of medicine within a five-mile radius of any of three specific clinic locations for a period of three years); see also *Gulick v. A. Robert Strawn & Assocs.*, 477 P.2d 489, 490, 493 (Colo. App. 1970) (restriction reduced from within thirty-five miles of any of plaintiff's offices to within ten miles of Denver); *Hansen v. Edwards*, 426 P.2d 792, 793-94 (Nev. 1967) (an agreement of a one hundred-mile radius of Reno and no time limitation "warrant[ed] a confinement" to Reno city limits and one-year time limit).

⁸² *Griggs & Browne Co. v. Healy*, 453 A.2d 761, 762 (R.I. 1982) (holding that the trial court did not abuse its discretion by modifying an existing seventy-five-mile radius noncompete agreement to enjoining the employee from operating in three local municipalities).

⁸³ See *Elec. Distrib., Inc. v. SFR, Inc.*, 166 F.3d 1074, 1085-86 (10th Cir. 1999) (upholding covenant covering entire State of Utah). *But see Non-compete Agreements*, ROWLEY CHAPMAN & BARNEY, LTD., <http://www.azlegal.com/business-lawyer-arizona/noncompete-agreement.html> (last visited June 2, 2013) (stating that "no Arizona court has upheld a non-compete agreement for the entire State of Arizona").

⁸⁴ See *Proudfoot Consulting Co. v. Gordon*, 576 F.3d 1223, 1237-39 (11th Cir. 2009) (finding a six-month noncompete, prohibiting working for a direct competitor or client of former employer in the United States or Canada, enforceable because employer showed it had clients in Canada and marketed itself there); see also *Vais Arms, Inc. v. Vais*, 383 F.3d 287, 295-96 (5th Cir. 2004) (applying Texas law, nationwide noncompete agreement to sell business found to be reasonable and enforceable because seller had engaged in nationwide marketing efforts and had enjoyed sales throughout the United States); *AutoNation, Inc. v. O'Brien*, 340 F. Supp. 2d 1332 (S.D. Fla. 2004), *amended by* 347 F. Supp. 2d 1299, 1307-08 n.9 (S.D. Fla. 2004) (limiting, at the employer's request, nationwide noncompete to eighteen states and issuing preliminary injunction to employer-owner of vehicle dealerships in eighteen states).

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ployee's geographic location of responsibility.⁸⁶ Other relevant considerations also include what the employee did for the employer,⁸⁷ where the employee worked, and where the contacts the employee gained through his or her employment are located.⁸⁸

Because the employer's location⁸⁹ and the potential reach of the employee's contacts gained through employment can affect the reasona-

⁸⁵ See *Cranston Print Works Co. v. Pothier*, 848 A.2d 213, 220 (R.I. 2004) (noncompete agreement with no geographic scope not per se invalid, but former employer must show business has international character and worldwide competitive activities to support; otherwise, court needs to reform); *Cereva Networks, Inc. v. Lieto*, No. CIV.A. 01-3835, 2001 WL 1228040, at *6 (Mass. Super. Ct. Oct. 12, 2001) (enforcing noncompete worldwide in scope).

⁸⁶ See *TransPerfect Translations, Inc. v. Leslie*, 594 F. Supp. 2d 742, 753-54 (S.D. Tex. 2009) (defining reasonable as, generally, "the territory in which the employee worked for the employer"); *Kelly Servs., Inc. v. Marzullo*, 591 F. Supp. 2d 924, 929-30, 939-40 (E.D. Mich. 2008) (upholding one-year noncompete covering the employee staffing business in any state where the employee had responsibility during three years prior to his termination); *Milner Voice & Data, Inc. v. Tassy*, 377 F. Supp. 2d 1209, 1217 (S.D. Fla. 2005) (upholding one-year noncompete "limited to the 'geographic area or areas where the [employees] conducted such activities at or within a two (2) year period of time prior to termination'" and "to restricting 'activity that [was] competitive with the activities the [employees] conducted for [the employer]'""); *Varsity Gold, Inc. v. Porzio*, 45 P.3d 352, 356 (Ariz. Ct. App. 2002) (explaining that, because employee worked in only one portion of one city, geographical provision encompassing the entire state and contiguous states was unreasonable); *Speech Works Int'l, Inc. v. Cote*, No. 024411BLS, 2002 WL 31480290, at *4 (Mass. Super. Ct. Oct. 11, 2002) ("An unlimited or world-wide area is not acceptable. At most, [employee] should not be restrained from any area except that which he covered for [employer].").

⁸⁷ See *Austin v. Mid State Fire Equip.*, 727 So. 2d 1097, 1098 (Fla. Dist. Ct. App. 1999) (finding nondisclosure of customer lists and pricing acceptable, but agreement could not restrict fire equipment sales and servicing employee from working as *technician* at competing company).

⁸⁸ See *Hartman v. W.H. Odell & Assocs.*, 450 S.E.2d 912, 917-18 (N.C. Ct. App. 1994) (holding that a restriction of every city (whether or not defendant did business there) in eight states for five or more years was not reasonable where former employer had one office in one city, and former employer handled only twenty to twenty-five clients per year).

⁸⁹ *O'Brien*, 347 F. Supp. 2d at 1307-08 (finding reasonable geographic restriction preventing employee from "working in any geographic space in which [employer] operates" where employer had interest in confidential information). Compare *AutoNation, Inc. v. Hankins*, No. 03-14544 CACE (05), 2003 WL 22852206, at *12 (Fla. Cir. Ct. Nov. 24, 2003), and *AutoNation, Inc. v. Maki*, No. 03-18896 CACE (03), 2004 WL 1925479, at *6 (Fla. Cir. Ct. Aug. 25, 2004) (enjoining employee from

bleness determination,⁹⁰ the larger the employer's business, the greater the acceptable geographic restriction.⁹¹ The more the business is national, international, or transnational in scope, the greater the potential for national, international, or transnational repercussions, and the greater the necessity for a larger geographic restriction.⁹² Furthermore, as the District Court for the Eastern District of Pennsylvania explained, the widespread use and acceptance of the Internet in modern society and business has expanded the potential reach of services, customers, contacts, and goodwill; thus, the appropriate geographic scope of restrictive covenants also expands.⁹³ And, the sliding scale concept works here as

competing within fifty miles of his former auto dealership and within ten miles of any other dealerships owned by his former employer anywhere in the United States where employer established interests in confidential information and training, and former employee failed to show that geographic area was overbroad), *aff'd per curiam*, 895 So. 2d 453 (Fla. Ct. App. 2005), *with Camco, Inc. v. Baker*, 936 P.2d 829, 833-34 (Nev. 1997) (finding unreasonable restriction of "targeted" areas former employer wanted to go into).

⁹⁰ *See, e.g.*, *Proudfoot Consulting Co. v. Gordon*, 576 F.3d 1223, 1237-41 (11th Cir. 2009) (holding that a six-month noncompete that prohibited working for a direct competitor or client of former employer in the United States or Canada was enforceable because employer showed it had clients in Canada and marketed itself there); *Intermetro Indus. Corp. v. Kent*, No. 3:CV-07-0075, 2007 WL 1140637, at *7 (M.D. Pa. Apr. 17, 2007) (explaining that "knowledge of [former employer's] top accounts and prospective customers outside the areas [employee] serviced, as well as his knowledge of [former employer's] discounts, pricing strategy, product margins, and product development" made noncompete extending to all areas employer competed reasonable); *Camco, Inc.*, 936 P.2d at 834 (quoting *Snelling & Snelling, Inc. v. Dupay Enters.*, 609 P.2d 1062, 1064 (Ariz. Ct. App. 1980)) (explaining reasonable geographic limitation is "the territory in which appellants [former employers] established customer contacts and good will").

⁹¹ *Broadway & Seymour, Inc. v. Wyatt*, No. 91-2345, 1991 WL 179084, at *5-6 (4th Cir. Sept. 13, 1991) (explaining nationwide or worldwide restrictive covenants are not per se invalid, and North Carolina courts may uphold these restrictions when employer does business nationwide); *Marcam Corp. v. Orchard*, 885 F. Supp. 294, 299-300 (D. Mass. 1995) (enforcing noncompetition covenant covering the entire United States); *Philips Elecs. N. Am. Corp. v. Halperin*, No. 005251, 2000 WL 33171040, at *3-5 (Mass. Super. Ct. Dec. 12, 2000) (same).

⁹² *Cereva Networks, Inc. v. Lieto*, No. CIV.A. 01-3835, 2001 WL 1228040, at *6 (Mass. Super. Ct. Oct. 12, 2001) (enforcing noncompete worldwide in scope); *Harwell Enters., Inc. v. Heim*, 173 S.E.2d 316,320 (N.C. 1970) ("business activities throughout the United States" supported reasonableness of nationwide restriction).

⁹³ *Nat'l Bus. Servs., Inc. v. Wright*, 2 F. Supp. 2d 701, 708 (E.D. Pa. 1998).

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well: a very narrow restriction with broader geographic reach or even *infinite* geographic reach could be appropriate.⁹⁴

Attention to detail in drafting a specific definition can prove critical.⁹⁵ Whether it is in drafting a geographic term or the scope of prohibited activity, careful drafting and particular attention to detail is necessary.⁹⁶

⁹⁴ See *Sigma Chem. Co. v. Harris*, 794 F.2d 371, 374 (8th Cir. 1986) (upholding geographic restriction of the entire world but narrowly restricted to a particular competitor); see also *Bus. Intelligence Servs., Inc. v. Hudson*, 580 F. Supp. 1068, 1073 (S.D.N.Y. 1984); *Envtl. Servs., Inc. v. Carter*, 9 So. 3d 1258, 1264 (Fla. Dist. Ct. App. 2009) (citing *Health Care Fin. Enters., Inc. v. Levy*, 715 So. 2d 341 (Fla. Dist. Ct. App. 1998)) (explaining that a “relatively narrow restriction, such as the one here, is not invalid because it fails to contain a geographic limitation”); *Sentient Jet, Inc. v. Lambert*, No. 025071BLS, 2002 WL 31957009, at *5 (Mass. Super. Ct. Nov. 18, 2002) (enforced noncompetition covenant that was effectively unlimited in geographic scope); *Mkt. Am., Inc. v. Christman-Orth*, 520 S.E.2d 570, 578 (N.C. Ct. App. 1999) (finding a noncompete agreement reasonable where no geographical restriction existed on the face of the agreement but was only six months in duration). *But see* *Nutting v. RAM Sw., Inc.*, 106 F. Supp. 2d 1121, 1127 (D. Colo. 2000) (finding a worldwide, perpetual agreement was unreasonable in scope and duration); *Prof'l Liab. Consultants, Inc. v. Todd*, 468 S.E.2d 578, 582-83 (N.C. Ct. App.) (Smith, J., dissenting), *rev'd per curiam*, 478 S.E.2d 201 (N.C. 1996) (North Carolina Supreme Court accepted the reasoning of the dissent in the court of appeals decision, finding five-year noncompete and nondisclosure unreasonable because it lacked geographic scope).

⁹⁵ See *Butts Retail, Inc. v. Diversifoods, Inc.*, 840 S.W.2d 770, 774 (Tex. App. 1992) (holding that “metropolitan area” is insufficient geographic limitation where “metropolitan area” is not defined).

⁹⁶ See, e.g., *VisionAir, Inc. v. James*, 606 S.E.2d 359, 362 (N.C. Ct. App. 2004) (invalidating the traditional language “own, manage, be employed by or otherwise participate in, directly or indirectly, any business similar to Employer’s” as overbroad). According to the court, the language prohibited performing unrelated work at a firm similar to the former employer or working in a different capacity (e.g., engineering versus sales). *Id.* Further, the language prohibited the employee from even owning an interest in a mutual fund invested in a competing firm. *Id.* See *Womble, Carlyle, Sandridge & Rice, P.L.L.C., Trends of the Day*, 16 No. 2 N.C. EMP. L. LETTER 1, Mar. 2006, and *Womble, Carlyle, Sandridge & Rice, P.L.L.C., Time to Pull Out Your Noncompete*, 15 No. 1 N.C. EMP. L. LETTER 2, Feb. 2005, for further discussion of North Carolina noncompete clauses.

E. Conclusion

In sum, the specific geographic location and geographic reach of the employer's business, the geographic responsibilities of the employee, and the geographic locale of the employee's contacts should be reviewed before determining an appropriate durational restriction.⁹⁷ While potentially more expansive given the global economy and broad reach of services, a legitimate tie to the employee, employer, and customers will be required for reasonableness.⁹⁸

Reasonableness (of duration or geography) cannot be defined.⁹⁹ But, analysis of each employee's specific tasks, duties, training, and contact with clients and sensitive information, as well as the geographic locale and reach of the employee, employer, and clients will provide a clearer answer to the reasonableness determination.¹⁰⁰ And finally, because this duration and geographic scope may turn out to be small and limited, consider the use of a tolling clause.¹⁰¹

IV. LEGITIMATE PROTECTABLE INTERESTS

The idea of what courts consider legitimate and protectable by a restrictive covenant also varies and guides the determination of the breadth for a valid restrictive covenant.¹⁰² Each state differs and protects various interests, ranging from confidentiality and goodwill to customer lists and trade secrets.¹⁰³ Thus, identifying what is protectable (i.e., what interest creates the legitimate need for a restrictive covenant) helps to define the outer reaches of a valid restrictive covenant.¹⁰⁴

⁹⁷ See *supra* Part III.D.

⁹⁸ See *supra* notes 89-94 and accompanying text.

⁹⁹ See *supra* Parts III.A, D.

¹⁰⁰ See *supra* Parts III.A, D.

¹⁰¹ See *supra* Part III.B.

¹⁰² See Greg T. Lembrich, *Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants*, 102 COLUM. L. REV. 2291, 2301-02 (2002).

¹⁰³ See *infra* notes 108-17.

¹⁰⁴ See Anzivino, *supra* note 5, at 508-09.

A. *In General*

“The legitimate purpose of post-employment restraints is ‘to prevent competitive use, for a time, of information or relationships which pertain peculiarly to the employer and which the employee acquired in the course of the employment.’”¹⁰⁵ In fact, using a broad interpretation, some courts have classified the anticompetitive use of certain information as a legitimate business interest.¹⁰⁶ Further, some states follow the Restatement (Second) of Contracts approach to restrictive covenants and factor in the hardship to the employee and public.¹⁰⁷

Specifically, protecting customer bases,¹⁰⁸ confidential business information,¹⁰⁹ “contacts and inside information gained during . . . employment,”¹¹⁰ the goodwill of the business,¹¹¹ “special relationship[s] . . . developed with customers,”¹¹² and “the integrity and viability of the

¹⁰⁵ *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1281 (Ariz. 1999) (quoting Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960)).

¹⁰⁶ *Superior Consulting Co. v. Walling*, 851 F. Supp. 839, 847 (E.D. Mich. 1994).

¹⁰⁷ *See, e.g., Saban v. Caremark Rx, L.L.C.*, 780 F. Supp. 2d 700, 711 (N.D. Ill. 2011) (applying Rhode Island law) (citing *R.J. Carbone Co. v. Regan*, 582 F. Supp. 2d 220, 225 (D.R.I. 2008); RESTATEMENT (SECOND) OF CONTRACTS § 188(1)(a), (b), cmt. c (1981)). *But see* FLA. STAT. § 542.335(1)(g)(1) (2012) (in determining enforceability, a Florida court may not consider individualized economic hardship to the person against whom enforcement is sought).

¹⁰⁸ *Valley Med. Specialists*, 982 P.2d at 1284 (citing *Bryceland v. Northey*, 772 P.2d 36, 40 (Ariz. Ct. App. 1989)).

¹⁰⁹ *Boulanger v. Dunkin’ Donuts, Inc.*, 815 N.E.2d 572, 578 (Mass. 2004).

¹¹⁰ *Osborn v. Bell Helicopter Textron, Inc.*, 828 F. Supp. 446, 450 (N.D. Tex. 1993).

¹¹¹ *Boulanger*, 815 N.E.2d at 578; *United Labs., Inc. v. Kuykendall*, 370 S.E.2d 375, 381-82 (N.C. 1988) (“[P]rotection of customer relationships and good will against misappropriation by departing employees is well recognized as a legitimate protectable interest of the employer.”).

¹¹² *Astro-Med, Inc. v. Nihon Kohden Am., Inc.*, 591 F.3d 1, 17 (1st Cir. 2009) (citing *R.J. Carbone Co.*, 582 F. Supp. 2d at 225; *Nestle Food Co. v. Miller*, 836 F. Supp. 69, 74-75 (D.R.I. 1993); *Dial Media, Inc. v. Schiff*, 612 F. Supp. 1483, 1489 (D.R.I. 1985); *Rego Displays, Inc. v. Fournier*, 379 A.2d 1098, 1102 (R.I. 1977)); *see also* *Milner Voice & Data, Inc. v. Tassy*, 377 F. Supp. 2d 1209, 1218 (S.D. Fla. 2005) (finding “substantial relationships with specific prospective or existing customers, patients, or clients” was a legitimate business interest); *Durapin, Inc. v. Am. Prods., Inc.*, 559 A.2d 1051, 1057 (R.I. 1989) (where the employee “has become aware of the specific and otherwise unknown needs of a nonconfidential list of customers,” he has

business”¹¹³ have all qualified as legitimate interests.¹¹⁴ Further, some states attempt to list, via statute, what they will consider legitimate and what they will not.¹¹⁵ For example, the Florida statute provides a non-exhaustive list of legitimate interests,¹¹⁶ and the Nevada statute lists protectable interests as well.¹¹⁷

Additionally, “programs, coaching, and training information; information on . . . management and organization; and proprietary programs” of an employer are protectable as “confidential business information.”¹¹⁸ And, where an employee “would be gaining and taking an unfair advantage in competition with [former employer] after years of acquiring a unique insight into various business operations thanks to her employment with [former employer],” a restrictive covenant is legitimate.¹¹⁹ Moreover, prohibiting “direct solicitation of existing custom-

formed a special relationship with the customer that is protectable by the employer) (citing *Rego Displays, Inc.*, 379 A.2d at 1101).

¹¹³ *Market Am., Inc. v. Christman-Orth*, 520 S.E.2d 570, 579 (N.C. Ct. App. 1999).

¹¹⁴ See *supra* note 108-113.

¹¹⁵ See FLA. STAT. § 542.335(1)(b)(1)-(5) (2012); NEV. REV. STAT. § 613.200(4) (2011).

¹¹⁶ FLA. STAT. § 542.335(1)(b)(1)-(5) (listing as legitimate interests “1. Trade secrets, as defined in s. 688.002(4). 2. Valuable confidential business or professional information that otherwise does not qualify as trade secrets. 3. Substantial relationships with specific prospective or existing customers, patients, or clients. 4. Customer, patient, or client goodwill associated with: a. An ongoing business or professional practice, by way of trade name, trademark, service mark, or ‘trade dress’; b. A specific geographic location; or c. A specific marketing or trade area. 5. Extraordinary or specialized training.”).

¹¹⁷ NEV. REV. STAT. § 613.200(4) (listing two legitimate interests: “(a) Pursuing a similar vocation in competition with or becoming employed by a competitor of the person, association, company or corporation; or (b) Disclosing any trade secrets, business methods, lists of customers, secret formulas or processes or confidential information learned or obtained during the course of his or her employment with the person, association, company or corporation”).

¹¹⁸ *Aim High Acad., Inc. v. Jessen*, No. KC-2008-1384, 2008 R.I. Super. LEXIS 152, *23 (R.I. Super. Ct. Dec. 10, 2008) (citing *Nestle Food Co. v. Miller*, 836 F. Supp. 69, 76 (D.R.I. 1993)); see *EMC Corp. v. Arturi*, No. 10-40053-FDS, 2010 WL 5187764, at *6 (D. Mass. Dec. 15, 2010) (finding “confidentiality of information about [employer’s] employees, customers, products, business plans, and strategy” is a legitimate interest).

¹¹⁹ *Edwards Publ’ns, Inc. v. Kasdorf*, No. 281499, 2009 WL 131636, at *4 (Mich. Ct. App. Jan. 20, 2009); see *Intermetro Indus. Corp. v. Kent*, No. 3:CV-07-0075, 2007

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ers”¹²⁰ and customer lists could be protectable in some states.¹²¹ However, while these interests might be protectable, the duration of employment could make the acquisition of protected items merely speculative, thus precluding relief.¹²²

Conversely, courts have considered “menu items, price structure, and [a] restaurant’s look and feel” unprotected.¹²³ Likewise, “unrestricted use of general information acquired during the course of . . . employment or information generally known in the trade or readily ascertainable” may not be protectable.¹²⁴ Furthermore, courts generally do not protect former customers.¹²⁵

In sum, legitimate interests vary and are determined by both court and legislative mandate.¹²⁶ Courts and legislatures recognize a

WL 1140637, at *7 (M.D. Pa. Apr. 17, 2007) (explaining existing customer information, prospective customer information, and knowledge of detailed information regarding former employer, was protectable as it may be “competitively harmful” to former employer).

¹²⁰ *Atomic Tattoos, L.L.C. v. Morgan*, 45 So. 3d 63, 65 (Fla. Dist. Ct. App. 2010) (quoting *Dyer v. Pioneer Concepts, Inc.*, 667 So. 2d 961, 964 (Fla. Dist. Ct. App. 1996)); *Advantage Digital Sys., Inc. v. Digital Imaging Servs., Inc.*, 870 So. 2d 111, 114 (Fla. Dist. Ct. App. 2003).

¹²¹ *Durapin, Inc. v. Am. Prods., Inc.*, 559 A.2d 1051, 1057 (R.I. 1989) (recognizing “protectable interest in customer lists only if [the] list is confidential in nature”) (citing *Callahan v. R.I. Oil Co.*, 240 A.2d 411, 413 (R.I. 1968)); *Aim High Acad., Inc.*, 2008 R.I. Super. LEXIS 152, at *22 (same).

¹²² *Anich Indus., Inc. v. Raney*, 751 So. 2d 767, 770-71 (Fla. Dist. Ct. App. 2000) (holding an employer was not entitled to injunctive relief or damages when, after being employed for less than three months, employee resigned and accepted new position in violation of noncompete because employer failed to show employee possessed any specified legitimate business interest, e.g., trade secrets, “had learned valuable confidential information” during employment, or “that there were substantial relationships with specific customers derived from her work . . . that [she] sought to use to her advantage in her new position”).

¹²³ *Chelo’s of Woonsocket, Inc. v. Chelo*, No. PB 03-4646, 2004 WL 603417, *5 (R.I. Super. Ct. 2004).

¹²⁴ *Whirlpool Corp. v. Burns*, 457 F. Supp. 2d 806, 812 (W.D. Mich. 2006).

¹²⁵ *Envtl. Servs., Inc. v. Carter*, 9 So. 3d 1258, 1265 (Fla. Dist. Ct. App. 2009) (citing *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So. 2d 812, 815 (Fla. 1994)) (“[P]rotection of former customers generally does not qualify as a legitimate business interest where no identifiable agreement exists with such customers establishing that they would return with future work.”).

¹²⁶ *See supra* notes 102-25 and accompanying text.

host of interests as legitimate and protectable, such as customers, livelihood, relationships, confidential information, training, and goodwill.¹²⁷ The legitimate interest specific to the employee and employer should therefore be included in any recitals section.¹²⁸ Track the language of the specific case law or statutes and tie the language into the employer's business.

B. Sample Clauses for Legitimate Interests

- WHEREAS, [Employee] will be, throughout the term of his or her employment, privy to trade secrets and other confidential and highly sensitive information regarding [Employer], its clients and suppliers, client contracts, and pricing information, as well as [Employer] marketing strategies, research and development efforts, business plans, and systems and operations.
- WHEREAS, [Employer] has, and continues to create and expand on, its considerable amount of goodwill with respect to [industry].
- WHEREAS, [Employer] has a significant interest in protecting, and seeks to prevent the anticompetitive use of, its confidential, inside, and sensitive information.
- WHEREAS, [Employer] seeks to protect and preserve its goodwill and customer base, as well as the integrity and viability of its continued operations.
- "It is recognized and understood by the parties hereto that [Employee], through his association with [Employer], has acquired a considerable amount of

¹²⁷ See *supra* notes 102-25 and accompanying text.

¹²⁸ See FLA. STAT. § 542.335 (2012) (A person who is seeking to enforce a restrictive covenant must show that the interest was protected in writing); *Chelo*, 2004 WL 603417, at *5 (the court focused on the agreement in writing and whether the agreement identified the interests to be protected to determine the enforceability of the restrictive covenant agreement).

knowledge and goodwill with respect to the business of [Employer] which are extremely detrimental to [Employer] if used by [Employee] to compete with [Employer]. It is therefore, understood and agreed by the parties hereto that, because of the nature of the business of [Employer] and [Employee], it is necessary to afford fair protection to [Employer] from competition by [Employee].”¹²⁹

C. Trade Secrets

Finally, some states separate the idea of protecting trade secrets¹³⁰ from that of other legitimate interests.¹³¹ In states where the policy is against restrictive covenants, an employer can still use a restrictive covenant to protect the employer’s interest in trade secrets.¹³² Further, even in states that generally favor restrictive covenants, trade secret restrictive covenants could still be treated distinctly and differently.¹³³

Most states follow the Uniform Trade Secrets Act in defining “trade secret.”¹³⁴ In general terms, a trade secret is defined as

¹²⁹ See, e.g., *F.S. New Prods., Inc. v. Strong Indus., Inc.*, 129 S.W.3d 606, 612-13 (Tex. App. 2004).

¹³⁰ The specifics of trade-secret law and its application, process, and intricacies are beyond the scope of the present Article. However, the idea of trade-secret protection overlaps with restrictive covenants, as many employers, as well as courts and legislatures, decide to address the issues simultaneously and within the same agreement, statute, or opinion. See *infra* notes 131-33 and accompanying text.

¹³¹ See, e.g., COLO. REV. STAT. § 8-2-113(2)(b) (2012); FLA. STAT. § 542.335(1)(d), (e).

¹³² See, e.g., COLO. REV. STAT. § 8-2-113(2)(b) (listing “protection of trade secrets” as one of only four exceptions to prohibition against restrictive covenants).

¹³³ If in connection with a trade secret, Florida statute provides that a five-year or less duration is presumed reasonable and more than ten years is presumed unreasonable. FLA. STAT. § 542.335(1)(e).

¹³⁴ UNIF. TRADE SECRETS ACT, (amended 1985); see also *Trade Secrets Act*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Trade%20Secrets%20Act> (last visited July 14, 2013) (showing only three states have yet to adopt the Act).

information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) [d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (ii) [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.¹³⁵

Further, a trade secret is

the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses, or telephone numbers, or other information relating to any business or profession which is secret and of value. To be a “trade secret” the owner thereof must have taken measures to prevent the secret from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.¹³⁶

More specifically, courts vary on what constitutes a trade secret under these definitions.¹³⁷ For example, confidential marketing, pricing, and customer information¹³⁸ have constituted trade secrets,¹³⁹ and

¹³⁵ R.I. GEN. LAWS § 6-41-1(4) (2011).

¹³⁶ COLO. REV. STAT. § 7-74-102(4). For the entire Colorado Trade Secrets Act (CUTSA), see COLO. REV. STAT. §§ 7-74-101 to -110. For further discussion on CUTSA requirements, see *Saturn Sys., Inc. v. Militare*, 252 P.3d 516, 521-25 (Colo. App. 2011).

¹³⁷ See *infra* note 138-39.

¹³⁸ *Hertz v. Luzenac Grp.*, 576 F.3d 1103, 1114 (10th Cir. 2009) (finding that “[a] customer list can be a trade secret when it is the end result of a long process of culling the relevant information from lengthy and diverse sources, even if the original sources are publicly available”); see also *Mgmt. Recruiters of Boulder, Inc. v. Miller*, 762 P.2d 763, 766 (Colo. App. 1988) (finding that a clause restricting an employee of recruiting agency from contacting any job candidates “with whom he had actual contact during his final year” at the agency was valid because it “was tailored to prevent the misappropriation of trade secrets”).

¹³⁹ See *Astro-Med, Inc. v. Nihon Kohden Am., Inc.*, 591 F.3d 1, 18-19 (1st Cir. 2009); see also *R & D Bus. Sys., Inc. v. Xerox Corp.*, 152 F.R.D. 195, 197 (1993) (finding

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whether a fiduciary relationship exists could play a potential role.¹⁴⁰ Further, a hotel's "detailed customer profiles" constituted trade secrets, "as the information has economic value, is not generally known by or readily available [to] others, and is the subject of reasonable efforts by [the hotel] to preserve its secrecy."¹⁴¹

Conversely, details concerning a customer's needs and that a company may be "urgently" seeking answers are not trade secrets.¹⁴² And, the more readily available or easily ascertainable the information is also factors into the trade secret determination.¹⁴³

Thus, careful determination of whether the information an employer attempts to protect with the restrictive covenant fits into the trade

marketing strategies, "research and development efforts," and lists of customers and suppliers constituted trade secrets); *Saturn Sys., Inc.*, 252 P.3d at 527 (affirming the trial court's determination that "confidential client and debtor information (including 'client lists, customer contracts, pricing information, detailed debtor information, client information and customer log-in codes') qualified as trade secrets").

¹⁴⁰ *McFarland v. Brier*, 769 A.2d 605, 613-14 (R.I. 2001) (considering the fiduciary obligation of the defendant to his client in determining whether the defendant disclosed trade-secret information).

¹⁴¹ *Four Seasons Hotels & Resorts B.V. v. Consorcio Barr, S.A.*, 267 F. Supp. 2d 1268, 1325 (S.D. Fla. 2003), *aff'd in part, rev'd in part* by 138 Fed. Appx. 297 (11th Cir. 2005) (unpublished table decision); *see also* *Ovation Plumbing, Inc. v. Furton*, 33 P.3d 1221, 1224 (Colo. App. 2001) (stating that contract bid pricing information, involving "the bid itself, rather than the methods of calculating the bid or the constituent elements of the bid," could meet the definition of a trade secret).

¹⁴² *See* *APG, Inc. v. MCI Telecomms. Corp.*, 436 F.3d 294, 307 (1st Cir. 2006) (holding that a drug store chain's needs with respect to its proposed resale of prepaid telephone cards and imminence of its selection of card supplier were not "trade secrets").

¹⁴³ *Liberty Am. Ins. Grp. v. Westpoint Underwriters, L.L.C.*, 199 F. Supp. 2d 1271, 1285-87 (M.D. Fla. 2001) (mobile home insurance company's list of mobile home parks and data file were not trade secrets because the list and file consisted of publicly available information which was easily obtainable and the company shared the information with others); *Sethscot Collection, Inc. v. Drbul*, 669 So. 2d 1076, 1078 (Fla. Dist. Ct. App. 1996) ("trade secrets," excluded prospective customer lists developed by a clothing company, as the lists could be "compiled from information . . . readily ascertainable to the public" and were not the product of any great effort, but included active customer lists containing a detailed purchasing history for each customer).

secret category is critical.¹⁴⁴ Therefore, factor the existence of trade secrets, or lack thereof, into any drafting determination as the reasonableness guidelines for the restrictive covenant may change.¹⁴⁵

V. CONSIDERATION

A restrictive covenant is nothing more than a contract.¹⁴⁶ Thus, the agreement must contain the elements of a valid contract.¹⁴⁷ Most important, in terms of a restrictive covenant in the employment context, is consideration.¹⁴⁸ The idea of consideration lies in the concept that both parties are giving up something in exchange for something else—

¹⁴⁴ See *Porter Indus., Inc. v. Higgins*, 680 P.2d 1339, 1342 (Colo. App. 1984) (trade secret did not exist, so noncompete could therefore not be necessary to protect trade secrets and was invalid); *Colo. Accounting Machs., Inc. v. Mergenthaler*, 609 P.2d 1125, 1126 (Colo. App. 1980) (“The separate trade-secret nondisclosure provision adequately protects plaintiff’s interests, and the restrictive covenant is not limited to enhancing this protection. Consequently, the trade secret provision is valid; the restrictive covenant is not.”).

¹⁴⁵ See *supra* note 144 and accompanying text.

¹⁴⁶ See *Rao v. Rao*, 718 F.2d 219, 222-23 (7th Cir. 1983) (analyzing restrictive covenants in employment agreements as contracts requiring good faith); *Moore v. Curtis 1000, Inc.*, 640 F.2d 920, 921-24 (8th Cir. 1981) (analyzing the enforceability of a restrictive covenant in an employment contract); *Milner Voice & Data, Inc. v. Tassy*, 377 F. Supp. 2d 1209, 1217 (S.D. Fla. 2005) (explaining that a restrictive covenant that prohibits competition to protect a legitimate business interest is a valid contract).

¹⁴⁷ See *Kinesis Adver., Inc. v. Hill*, 652 S.E.2d 284, 292-94 (N.C. Ct. App. 2007) (“Formation of a valid contract ‘requires an offer, acceptance and consideration.’ A covenant-not-to-compete further requires five conditions to be valid and enforceable: (1) in writing; (2) made a part of the employment contract; (3) based on valuable consideration; (4) reasonable as to time and territory; and (5) designed to protect a legitimate business interest of the employer.”) (citation omitted).

¹⁴⁸ See *generally* *Am. Hot Rod Ass’n v. Carrier*, 500 F.2d 1269, 1277 (4th Cir. 1994) (noting that one essential element of a valid restrictive covenant is consideration); *Curtis 1000, Inc. v. Suess*, 24 F.3d 941, 945 (7th Cir. 1994) (noting that continued employment was valid consideration for a noncompete contract); *Bradford v. N.Y. Times Co.*, 501 F.2d 51, 58 (2d Cir. 1974) (citing the valid consideration employer provided in exchange for a noncompete covenant); *Amex Distrib. Co. v. Mascari*, 724 P.2d 596, 601-02 (Ariz. Ct. App. 1986) (consideration is required for a valid restrictive covenant); *Freudenthal v. Espey*, 102 P. 280, 283-84 (Colo. 1909) (consideration required for a restrictive covenant, and mere sham, recited consideration was insufficient).

that the agreement constitutes a bargained for exchange.¹⁴⁹ As a basic tenet of contract law, without consideration from both sides, no contract exists.¹⁵⁰

Normally, before beginning work, an employee signs a contract as a condition of employment.¹⁵¹ This contract may include one or more restrictive covenants.¹⁵² If the contract does include restrictive covenants, voila, consideration.¹⁵³ Employer exchanges money and the employment opportunity, while employee exchanges his time and freedom—simultaneous detriments and a bargained-for exchange.¹⁵⁴ But,

¹⁴⁹ See *Porter v. Bowen*, 518 F.3d 1181, 1183 (9th Cir. 2008); *United States v. Habegger*, 370 F.3d 441, 444-45 (4th Cir. 2004); *Carter v. United States*, 102 Fed. Cl. 61, 66 (2011); *J. Cooper & Assocs. v. United States*, 53 Fed. Cl. 8, 18 (2002); RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981). See generally *Hamer v. Sidway*, 27 N.E. 256, 256-57 (N.Y. 1891) (consideration may exist when one party forebears something, and the other party accrues some right or benefit).

¹⁵⁰ See RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981). See generally *Suess*, 24 F.3d at 947 (explaining that valid consideration is required to enforce a noncompete covenant); *Carter*, 102 Fed. Cl. at 66-67 (invalidating parts of a contract for lack of consideration); *Hamer*, 27 N.E. at 256-57 (consideration may exist when one party forebears something, and the other party accrues some right or benefit).

¹⁵¹ See generally *Suess*, 24 F.3d at 943 (noting that employee signed an employment contract at the beginning of employment); *Ferrofluidics Corp. v. Advanced Vacuum Components, Inc.*, 968 F.2d 1463, 1465 (1st Cir. 1992) (noting that employee signed employment contract before his first day of work); *Barnes Grp., Inc. v. Harper*, 653 F.2d 175, 176 (5th Cir. 1988) (recognizing initial employment contract salesmen signed with employer); *Freudenthal*, 102 P. at 281 (explaining that employee signed employment agreement prior to employment).

¹⁵² See *Ferrofluidics Corp.*, 968 F.2d at 1465 (noting that a restrictive covenant was a part of the employment contract); *Barnes Grp., Inc.*, 653 F.2d at 176-77 (noting that employee signed the restrictive covenant within initial employment agreement); *Rao v. Rao*, 718 F.2d 219, 222 (7th Cir. 1983) (explaining that part of the employment contract contained restrictive covenants).

¹⁵³ See *Reynolds & Reynolds Co. v. Tart*, 955 F. Supp. 547, 553 (W.D.N.C. 1997) (“Where the covenant is entered into in connection with an employee’s being hired for a job, it is generally held that ‘mutual promises of employer and employee furnish valuable considerations each to the other for the contract,’ and thus for a covenant contained therein.” (quoting *James C. Greene Co. v. Kelly*, 134 S.E.2d 166, 167 (N.C. 1964))); *Freudenthal*, 102 P. at 284 (explaining the promises each party was obligated to perform were adequate legal consideration sufficient to validate the existence of a contract).

¹⁵⁴ See *supra* note 153 and accompanying text.

what if the restrictive covenant comes after the acceptance of employment?

A. *Past Consideration*

The insufficiency of past consideration rests on the principle that something a party has already agreed to do cannot constitute consideration for a separate and distinct future act.¹⁵⁵ The party has already provided consideration; thus, to contract for something new, that party must provide new or additional consideration.¹⁵⁶ Consequently, the issue becomes whether a prior employment agreement or acceptance of employment will serve as consideration for a subsequently agreed to restrictive covenant.¹⁵⁷ Or, will a bonus, raise, or new responsibili-

¹⁵⁵ See *Thomas v. Astrue*, 359 F. App'x 968, 973 (11th Cir. 2010) (invalidating a fee agreement because promisee rendered services prior to promisor's promise to pay); *McMullen v. Meijer, Inc.*, 355 F.3d 485, 490 (6th Cir. 2004) (invalidating an arbitration clause because no new consideration supported the agreement); *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1013 (10th Cir. 2002) (invalidating a services agreement because promisee rendered services prior to an exchanged set of promises); *Virchow Krause & Co. v. Schmidt*, No. 266271, 2006 WL 1751835, at *2 n.2 (Mich. Ct. App. June 27, 2006) (per curiam) (noting that consideration did not support an agreement signed three weeks after the employee began her employment and was thus invalid (citing *Yerkovich v. AAA*, 610 N.W.2d 542, 545-46 (Mich. 2000))); *Hejl v. Hood, Hargett & Assocs.*, 674 S.E.2d 425, 428-29 (N.C. Ct. App. 2009) (acknowledging necessity of new consideration if restrictive covenant not signed as part of original employment agreement).

¹⁵⁶ See *McMullen*, 355 F.3d at 490; *Perthou v. Stewart*, 243 F. Supp. 655, 658 (D. Or. 1965) (holding that consideration did not support a noncompete covenant signed after employment began, and thus the covenant was invalid); *Virchow Krause & Co.*, 2006 WL 1751835, at *2 n.2; *Hejl*, 674 S.E.2d at 428-29.

¹⁵⁷ Compare *Hejl*, 674 S.E.2d at 428-29 (acknowledging necessity of new consideration if restrictive covenant not signed as part of employment agreement), and *Perthou*, 243 F. Supp. at 658 (holding that consideration did not support a noncompete covenant signed after employment began, and thus the covenant was invalid), with *Balasco v. Gulf Auto Holding, Inc.*, 707 So. 2d 858, 860 (Fla. Dist. Ct. App. 1998) (finding continued employment sufficient consideration for noncompete signed after the employee starts working (citing *Coastal Unilube, Inc. v. Smith*, 598 So. 2d 200 (Fla. Dist. Ct. App. 1992))), and *Camco, Inc. v. Baker*, 936 P.2d 829, 832 (Nev. 1997) (“[A]n at-will employee’s continued employment is sufficient consideration for enforcing a non-competition agreement.”).

ties—without additional salary or other benefits—likewise qualify as consideration for a subsequently agreed to restrictive covenant?¹⁵⁸

Similar to other aspects of restrictive covenants, states are divided.¹⁵⁹ Some states will allow *continued* employment to suffice for consideration of an after-signed restrictive covenant.¹⁶⁰ These courts generally opine that the continuation of employment, especially in an at-will employment state, *is* new and continued consideration.¹⁶¹ Even

¹⁵⁸ See *Hejl*, 674 S.E.2d at 428-29 (“[T]he following benefits all meet the ‘new’ or ‘separate’ consideration required for a non-compete agreement entered into after a working relationship already exists: continued employment for a stipulated amount of time; a raise, bonus, or other change in compensation; a promotion; additional training; uncertificated shares; or some other increase in responsibility or number of hours worked.”) (footnotes omitted); *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 766-67 (Tex. 2011) (finding stock options sufficient consideration for subsequently signed restrictive covenant); *Amex Distrib. Co. v. Mascari*, 724 P.2d 596, 598-602 (Ariz. Ct. App. 1986) (finding that consideration supported an ancillary noncompete because written employment agreement contemplated a substantial raise and promotion for employee).

¹⁵⁹ Compare *Balasco*, 707 So. 2d at 860 (holding continued employment is sufficient consideration for noncompete signed after the employee starts working (citing *Coastal Unilube, Inc. v. Smith*, 598 So. 2d 200 (Fla. Dist. Ct. App. 1992))), and *Camco, Inc.*, 936 P.2d at 832 (“[A]n at-will employee’s continued employment is sufficient consideration for enforcing a non-competition agreement.”), and *Wilkinson v. QCC, Inc.*, No. 99-P-1854, 2001 WL 1646491, at *1 (Mass. App. Ct. 2001) (unpublished opinion) (continued employment is sufficient consideration), with *Virchow Krause & Co.*, 2006 WL 1751835, at *2 n.2 (consideration did not support an agreement signed three weeks after the employee began work and was consequently invalid (citing *Yerkovich v. AAA*, 610 N.W.2d 542, 545-46 (Mich. 2000))), and *Hejl*, 674 S.E.2d at 428-29 (acknowledging necessity of new consideration if restrictive covenant not signed as part of employment agreement).

¹⁶⁰ See, e.g., *Balasco*, 707 So. 2d at 860 (holding continued employment is likely sufficient consideration for noncompete signed after the employee starts working (citing *Coastal Unilube, Inc. v. Smith*, 598 So. 2d 200 (Fla. Dist. Ct. App. 1992))); *Criss v. Davis, Presser & LaFaye, P.A.*, 494 So. 2d 525, 527 (Fla. Dist. Ct. App. 1986) (validating a noncompete covenant because continued employment was valid consideration); *City of S. Miami v. Dembinsky*, 423 So. 2d 988, 989-90 (Fla. Dist. Ct. App. 1982) (validating a noncompete agreement because continued employment constituted valid consideration); *Camco Inc.*, 936 P.2d at 832 (“[A]n at-will employee’s continued employment is sufficient consideration for enforcing a non-competition agreement.”); *Wilkinson*, 2001 WL 1646491, at *1 (continued employment is sufficient consideration).

¹⁶¹ See *supra* note 160 and accompanying text.

further, the employer may have to *actually* continue the employment for a period of time before continued employment is sufficient consideration.¹⁶²

On the other hand, some states strictly construe the consideration requirement and find that continued employment is merely past consideration, which is not sufficient to support the new restrictive covenant.¹⁶³ Therefore, it is imperative to consider this issue and, to be safe, address any restrictive covenants at the beginning of employment¹⁶⁴ as part and parcel of accepting employment; or, run the risk of an invalid agreement.¹⁶⁵

B. Ancillary

Further related to the consideration issue is the idea that a restrictive covenant may have to be ancillary to an otherwise valid transaction or relationship.¹⁶⁶ For example, Texas¹⁶⁷ and Rhode Island¹⁶⁸ specifically provide for this extra requirement. Essentially, this ancil-

¹⁶² See *Mattison v. Johnston*, 730 P.2d 286, 289-91 (Ariz. Ct. App. 1986) (promise of continued employment, and actual continued employment for period of time, of at-will employee was sufficient).

¹⁶³ See, e.g., *Virchow Krause & Co.*, 2006 WL 1751835, at *2 n.2 (explaining that consideration did not support an agreement signed three weeks after the employee began her employment, and was consequently invalid (citing *Yerkovich v. AAA*, 610 N.W.2d 542, 545-46 (Mich. 2000)); *Hejl*, 674 S.E.2d at 428-29 (acknowledging necessity of new consideration if restrictive covenant not signed as part of employment agreement); *Kinesis Adver., Inc. v. Hill*, 652 S.E.2d 284, 292-93 (N.C. Ct. App. 2007) (acknowledging that new consideration is required to support restrictive covenant signed separately from an employment agreement)).

¹⁶⁴ See *Wade S. Dunbar Ins. Agency v. Barber*, 556 S.E.2d 331, 335 (N.C. Ct. App. 2001) (verbal noncompete part of an original employment contract is sufficient consideration for an after-executed written contract reflecting the same (citing *Robins & Weill, Inc. v. Mason*, 320 S.E.2d 693, 697 (N.C. Ct. App. 1984))).

¹⁶⁵ See generally *Wade S. Dunbar Ins. Agency*, 556 S.E.2d at 335 (recognizing that an oral agreement to a restrictive covenant as part of the employment contract prior to beginning employment constituted a valid agreement).

¹⁶⁶ See, e.g., TEX. BUS. & COM. CODE ANN. § 15.50(a) (West 2011) (requiring the restrictive covenant be “ancillary to or part of an otherwise enforceable agreement”).

¹⁶⁷ *Id.*; see also *EMS USA, Inc. v. Shary*, 309 S.W.3d 653, 658 (Tex. App. 2010); *Am. Fracmaster, Ltd. v. Richardson*, 71 S.W.3d 381, 386-87 (Tex. App. 2001).

¹⁶⁸ *Durapin, Inc. v. Am. Prods., Inc.*, 559 A.2d 1051, 1053 (R.I. 1989) (citing RESTATEMENT (SECOND) OF CONTRACTS § 187 (1981)).

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lary requirement is two pronged: “(1) the consideration given by the employer in the otherwise enforceable agreement must give rise to the employer’s interest in restraining the employee from competing; and (2) the covenant must be designed to enforce the employee’s consideration or return promise in the otherwise enforceable agreement.”¹⁶⁹ Satisfaction of this requirement may come from the promise to give confidential information to the employee as part of employment.¹⁷⁰ Moreover, stock options given in exchange for a restrictive covenant satisfy this requirement, as they are “reasonably related to the company’s interest in protecting its goodwill, a [protectable] business interest.”¹⁷¹ Therefore, consider carefully whether the jurisdiction requires a restrictive covenant to be ancillary to an otherwise valid transaction or relationship, thus avoiding potentially costly future litigation.¹⁷²

C. Conclusion

While the idea of consideration (i.e., a bargained for exchange) is nothing new, additional issues arise in the employment restrictive covenant.¹⁷³ Consequently, analyze the requirements regarding continued employment, additional benefits, stock options, bonuses, raises, and responsibilities.¹⁷⁴ Additionally, determine the ancillary issues: “whether the consideration given by the employer . . . give[s] rise to the employer’s interest in restraining the employee,” and whether the covenant is designed to enforce the employee’s consideration in the otherwise enforceable agreement.¹⁷⁵

VI. BLUE-PENCIL DOCTRINE AND SEVERABILITY

Of course, every restrictive covenant will be carefully drafted, be tailored specifically to the immediate employer and employee, and

¹⁶⁹ *Light v. Centel Cellular Co. of Tex.*, 883 S.W.2d 642, 647 (Tex. 1994).

¹⁷⁰ *Am. Fracmaster*, 71 S.W.3d at 387-88; *see also* *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 648-49 (Tex. 2006).

¹⁷¹ *Marsh USA, Inc. v. Cook*, 354 S.W.3d 764, 766 (Tex. 2011).

¹⁷² *See, e.g., id.* (involving a legal question that was litigated twice in the Texas Supreme Court).

¹⁷³ *See supra* note 148 and accompanying text.

¹⁷⁴ *See supra* notes 157-58 and accompanying text.

¹⁷⁵ *See Light v. Centel Cellular Co. of Tex.*, 883 S.W.2d 642, 647 (Tex. 1994).

comport with every aspect of the law.¹⁷⁶ However, in the off chance a court determines a restrictive covenant (or any provision therein) to be invalid, the next step is critical: what will the court do in terms of reformation or the extent of invalidation?¹⁷⁷ The process of invalidating certain provisions or reforming them to the extent allowed by law comes under the broad heading of the blue-pencil doctrine.¹⁷⁸ States have developed competing theories as to the application of the blue-pencil doctrine.¹⁷⁹

A. *Application of the Blue-Pencil Doctrine*

In general, there are three opposing views.¹⁸⁰ First, the entire agreement is invalid.¹⁸¹ Second, strike only the offending provision.¹⁸² Third, the court may—or must—reform the offending provision.¹⁸³ But, as an initial matter, even if a state favors the blue-pencil doctrine, this may not be automatic.¹⁸⁴ Therefore, important to the blue-pencil consideration is severability—the idea that offending, invalid, or illegal

¹⁷⁶ See Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 675 (2008).

¹⁷⁷ See *id.* at 673.

¹⁷⁸ See, e.g., *Raimonde v. Van Vlerah*, 325 N.E.2d 544, 546 (Ohio 1975) (“The ‘blue[-]pencil’ test provides that if unreasonable provisions exist in such a contract, they may be stricken, if devisable, but not amended or modified.”).

¹⁷⁹ See *Durapin, Inc. v. Am. Prods., Inc.*, 559 A.2d 1051, 1058 (R.I. 1989) (discussing three competing views before deciding the proper application in Rhode Island); Pivateau, *supra* note 176, at 673.

¹⁸⁰ *Durapin, Inc.*, 559 A.2d at 1058.

¹⁸¹ *Id.* (quoting *Cent. Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 36 (Tenn. 1984) (explaining earlier courts “employed the ‘all or nothing’ rule, which simply voided an unreasonable restraint in its entirety”); see also *Olliver/Pilcher Ins., Inc. v. Daniels*, 715 P.2d 1218, 1221 (Ariz. 1986) (en banc) (explaining the entire covenant is unenforceable unless the covenant indicates, by its terms, an unreasonable portion is severable).

¹⁸² See *Winston Research Corp. v. Minn. Mining & Mfg. Co.*, 350 F.2d 134, 140 n.4 (9th Cir. 1965) (affirming the district court’s decision that “under California law the void provision was severable and the remainder of the contract fully enforceable”); *Durapin, Inc.*, 559 A.2d at 1058.

¹⁸³ See *Durapin, Inc.*, 559 A.2d at 1058 (“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.” (citing *Wood v. May*, 438 P.2d 587, 591-92 (Wash. 1968))).

¹⁸⁴ See *id.*

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portions of an otherwise valid agreement may be removed from the agreement without affecting the valid portions.¹⁸⁵ Without a severance clause, courts may be limited in their ability to employ the blue-pencil doctrine and remove offending portions of an otherwise valid agreement.¹⁸⁶

Invalidating the entire paragraph is an older approach and not favored in modern restrictive-covenant jurisprudence.¹⁸⁷ But, this all-or-nothing approach is particularly relevant in two circumstances, where the agreement does not include a severability clause,¹⁸⁸ or where the terms are deliberately overreaching (secure in the [mistaken] belief a court will just reform the agreement to the fullest extent reasonable).¹⁸⁹ In each of these cases, it is likely a court will refuse to enforce the entire agreement, not just the part it finds unreasonable.¹⁹⁰

¹⁸⁵ See generally *Olliver/Pilcher Ins., Inc.*, 715 P.2d at 1221 (discussing the application of a severability clause and its necessity before a court may permissibly strike offending portions of an agreement and save the remainder).

¹⁸⁶ See *id.* (holding that the blue-pencil doctrine would not apply in the absence of a severability clause).

¹⁸⁷ *Cent. Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 36 (Tenn. 1984) (“The recent trend, however, has been away from the all or nothing at all rule in favor of some form of judicial modification. Several courts have explicitly overruled their own prior case law and adopted judicial modification. Our research indicates some form of judicial modification has now been adopted by the majority of jurisdictions.” (citations omitted)).

¹⁸⁸ *Olliver/Pilcher Ins., Inc.*, 715 P.2d at 1220-21 (explaining the entire covenant is unenforceable unless the covenant indicates, by its terms, an unreasonable portion is severable).

¹⁸⁹ See *Vantage Tech., L.L.C. v. Cross*, 17 S.W.3d 637, 647 (Tenn. Ct. App. 1999) (“To protect against employers drafting overly broad language secure in the knowledge that the sole sanction would be modification to the maximum extent allowed, courts will hold the entire covenant invalid if credible evidence supports a finding that the covenant is deliberately unreasonable and oppressive.”); *Cent. Adjustment Bureau, Inc.*, 678 S.W.2d at 37 (addressing “the objection that judicial modification could permit an employer to insert oppressive and unnecessary restrictions into a contract knowing that the courts can modify and enforce the covenant on reasonable terms,” the court noted that “[i]f there is credible evidence to sustain a finding that a contract is deliberately unreasonable and oppressive, then the covenant is invalid.”).

¹⁹⁰ See *supra* notes 188-89 and accompanying text.

More likely, however, is the second or third approach. For example, California takes the second approach (i.e., strike the offending provision).¹⁹¹ Where a provision offends California's strict law and public policy against noncompetes, the court must strike that offending provision.¹⁹² But, the remainder of the agreement, if otherwise valid, still stands.¹⁹³ Similarly, North Carolina follows the strict "severability, not reformation" view.¹⁹⁴

Interestingly, this second approach could raise significant problems in a "strict severance" jurisdiction.¹⁹⁵ The problem comes when, for example, an offending duration or geographic term is removed from the agreement.¹⁹⁶ Now, the parties are left with a restrictive covenant that completely lacks a durational or geographic term.¹⁹⁷ And, the complete lack of a durational or geographic term will likely be invalid; thus, the entire restrictive covenant will be unenforceable.¹⁹⁸ Moreover, even provisions specifically granting a court the power to

¹⁹¹ See *Winston Research Corp. v. Minn. Mining & Mfg. Co.*, 350 F.2d 134, 146 (9th Cir. 1965) (providing that provisions of contracts between employers and employees, void because they restricted right of employees to work for competitors after termination of employment, were severable, and other provisions precluding employees from disclosing confidential information and such remained enforceable).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Hartman v. W.H. Odell & Assocs.*, 450 S.E.2d 912, 920 (N.C. Ct. App. 1994) ("A court at most may choose not to enforce a distinctly separable part of a covenant in order to render the provision reasonable. It may not otherwise revise or rewrite the covenant.").

¹⁹⁵ Arizona provides a good example of this principle. See, e.g., *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1286 (Ariz. 1999); *Olliver/Pilcher Ins. v. Daniels*, 715 P.2d 1218, 1220-21 (Ariz. 1986) (discussing that Arizona courts may only strike, not reform); *Varsity Gold, Inc. v. Porzio*, 45 P.3d 352, 356 (Ariz. Ct. App. 2002); Ali J. Farhang & Ray K. Harris, *Non-Compete Agreements With Step-Down Provisions: Will Arizona Courts Enforce Them*, ARIZ. ATT'Y, Dec. 2005, at 26.

¹⁹⁶ See *Valley Med. Specialists*, 982 P.2d at 1286; *Olliver/Pilcher Ins.*, 715 P.2d at 1220-21 (discussing that Arizona courts may not reform); *Varsity Gold, Inc.*, 45 P.3d at 356 (finding that the court did not need to consider the durational limitation because after severing the unreasonable geographic limitation, the entire covenant was unenforceable); *Hartman*, 450 S.E.2d at 920 ("A court at most may choose not to enforce a distinctly separable part of a covenant in order to render the provision reasonable. It may not otherwise revise or rewrite the covenant.").

¹⁹⁷ See *supra* note 196.

¹⁹⁸ See *supra* note 196.

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reform an invalid provision to the “fullest extent allowed by law” have been rejected in “strict severance” jurisdictions.¹⁹⁹

Thus, attorneys have attempted creative solutions; for instance, a “step-down” (or “waterfall”) provision.²⁰⁰ A waterfall provision could provide:

Restricted Area means the geographic region of the Earth; provided that, if that is found unreasonable by a court of law, *Restricted Area* means the geographic region of the State of Arizona; provided that, if that is found unreasonable by a court of law, *Restricted Area* means the geographic region of Maricopa County; provided that, if that is found unreasonable by a court of law, *Restricted Area* means the geographic region of the City of Tempe, Arizona.²⁰¹

In this manner, if a court strikes (or blue-lines) the provision relating to the Earth, there is still a valid provision covering the state.²⁰² Similarly, if the Earth and state are blue-lined, a valid provision exists covering the city.²⁰³ Where the employer continues this to the lowest possible duration or geographic term, there will always be a valid term left as part of the agreement.²⁰⁴ But, however intriguing this type of waterfall provision may be, using it could have adverse—and unintended—consequences.²⁰⁵ For instance, a court could determine an employer has no legitimate interest to protect, thus precluding any legitimate need for the restrictive agreement; after all, the employer could not even determine the true extent of the necessary durational or geographic limits to protect its own interest.²⁰⁶ While such expansive waterfall provisions may not prove beneficial, a narrower, less-expan-

¹⁹⁹ See Farhang & Harris, *supra* note 196, at 28 n.28.

²⁰⁰ See *id.* at 26-27.

²⁰¹ See *id.* at 27.

²⁰² See *id.*

²⁰³ See *id.*

²⁰⁴ See *id.* at 28.

²⁰⁵ See *id.* at 28-30.

²⁰⁶ See *id.* at 30-31 (suggesting not to use a step-down provision, even in light of the blue-pencil doctrine, because including multiple options could lead a court to find the clause is “unreasonable” or that it is “unnecessary to protect employer’s interest”).

sive approach may be appropriate, and necessary, to save the entire agreement from failing.²⁰⁷

And last, some states follow the third approach—reformation.²⁰⁸ Specifically, if a Michigan court, for example, finds a restrictive covenant “unreasonable in any respect,” the 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.”²⁰⁹ This idea of reforming—as well as enforcing—gives an added benefit to the employer: no first breach for free.²¹⁰ Texas takes this idea further and statutorily *requires* reformation.²¹¹ Moreover, if the court does reform the restrictive covenant, to what extent,²¹² and upon what guidelines,²¹³ must be considered.

²⁰⁷ See *id.* at 30 (citing *Data Mgmt., Inc. v. Greene*, 757 P.2d 62, 66 (Alaska 1988)).

²⁰⁸ See *supra* notes 8, 183 and accompanying text.

²⁰⁹ MICH. COMP. LAWS § 445.774(a)(1) (2011). Similarly, Colorado allows reformation but does not require it. See *Whittenberg v. Williams*, 135 P.2d 228, 228-29 (Colo. 1943) (worldwide restriction reduced to section of Colorado); *Nat'l Graphics Co. v. Dilley*, 681 P.2d 546, 547 (Colo. App. 1984) (trial court could have rewritten an agreement that was missing duration and geographic limitations, but it did not abuse its discretion by refusing to do so); *Gulick v. A. Robert Strawn & Assocs.*, 477 P.2d 489 (Colo. App. 1970) (restriction reduced from within thirty-five miles of any of plaintiff's offices to within ten miles of Denver).

²¹⁰ See *Astro-Med, Inc. v. Nihon Kohden Am. Inc.*, 591 F.3d 1, 14-15 (1st Cir. 2009) (explaining a Rhode Island court should modify the agreement, if not deliberately overreaching or in bad faith, and should impose damages on any breach of the as-modified agreement to guard against the employee receiving a “free breach”).

²¹¹ TEX. BUS. & COM. CODE ANN. § 15.51(c) (West 2011) (notwithstanding, “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”).

²¹² See FLA. STAT. § 542.335(1)(h) (2012) (when interpreting a noncompete, a Florida court *must* construe the covenant “in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement”).

²¹³ *Id.* (mandating a Florida court *may not* “employ any rule of contract construction that requires the court to construe a restrictive covenant narrowly, against the restraint, or against the drafter of the contract”); FLA. STAT. § 542.335(1)(g)(1) (in determining enforceability, a Florida court may not consider “individualized economic or other hardship . . . to the person against whom enforcement is sought”).

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In sum, determine whether courts will reform, sever, or in any way enforce restrictive covenants in light of invalid provisions.²¹⁴ Additionally, determine the extent and on what guidelines a court will reform—if it will at all.²¹⁵ Finally, a severability clause should be included in every agreement, and a realistic waterfall provision could prevent an entire agreement from failing as a result of one invalid provision.²¹⁶

B. Sample Severability Clauses

- “In the event that this provision shall be determined by any court of competent jurisdiction to be unenforceable by reason of its extending to too great a period of time, over too large a geographical area, or over too great a range of activities, it shall be interpreted to extend only over the maximum period of time, geographic area or range of activities as to which it may be enforceable.”²¹⁷
- Should any provision(s) of this Agreement be deemed unreasonable and unenforceable under [State] law, said provision(s) shall be reformed and remain in force and effect to the full extent allowable by law.
- Should any portion of this Agreement be deemed unenforceable under [State] law, such provision shall be reformed to extent necessary so as to still fully protect and preserve the legitimate interests expressed herein; provided that this determination and reformation shall have no effect on the remainder of the Agreement, which shall remain intact, unaltered, and in full force and effect.
- Should any provision of this Agreement be deemed unreasonable and unenforceable under [State] law,

²¹⁴ See *supra* notes 179-86 and accompanying text.

²¹⁵ See *supra* notes 179-213 and accompanying text.

²¹⁶ See *supra* notes 185-207 and accompanying text.

²¹⁷ *Aim High Acad., Inc. v. Jessen*, No. KC-2008-1384, 2008 WL 5325586 (R.I. Super. Ct. Dec. 10, 2008).

said provision shall be severed from the Agreement, and the remainder of the Agreement shall remain in full force and effect. Notwithstanding however, should any portion or provision be found to be unreasonable and unenforceable, it is the express intent of each Party the Agreement not be rendered unenforceable as a result. Both Parties acknowledge the necessity of protecting the Employer's legitimate business interests, and therefore, Employee and Employer shall (i) cooperate to reform any such severed provision to comply with existing law, and (ii) modify the Agreement to include the new provision. Any such modification under this paragraph shall be binding on Employee as if incorporated from the date of his or her signature.

VII. REMEDIES

States differ on the existence of certain remedies, as well as the extent thereof.²¹⁸ From traditional injunctions and damages to interesting application of liquidated damages, disgorgement of monies, and attorneys' fees, states offer a variety of remedies in the restrictive covenant realm.²¹⁹ While mainly an employer issue, remedies are not only available to employers; *employees* may assert damages surrounding an overreaching restrictive covenant.²²⁰

²¹⁸ See *infra* Part VII.A.

²¹⁹ See *infra* Part VII.A.

²²⁰ See, e.g., *Osborn v. Bell Helicopter Textron, Inc.*, 828 F. Supp. 446, 449 (N.D. Tex. 1993) (employee suit to invalidate restrictive covenant). The *Osborn* court decided in favor of the employer as the employee failed to allege damages (harm suffered from employer's restrictive covenant). *Id.* at 449-50. However, the idea of an employee bringing an action to invalidate an allegedly overreaching restrictive covenant is not novel. See, e.g., *id.*; *Application Grp., Inc. v. Hunter Grp., Inc.*, 61 Cal. App. 4th 881, 884 (1998).

**A. Injunctions, Damages, Liquidated Damages, and
Other Remedies**

Injunctive relief is one of the most utilized remedies in employment restrictive covenants.²²¹ This is because injunctive relief promotes the purpose behind the restrictive covenant—to restrict the employee’s ability to compete, solicit, pirate, etc.²²² Therefore, injunctive relief simply fulfills the premise of the restrictive covenant.²²³ In general, injunctive relief is appropriate where a party shows “irreparable injury for which [the party] has no adequate legal remedy.”²²⁴ This irreparable injury arises where “the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard.”²²⁵ Moreover, in considering injunctive relief, some states prove more strict than others.²²⁶ For example, Colorado injunctions must be narrowly drawn, and may only operate based on the terms of the restrictive covenant (i.e., if the restrictive covenant says one year after termination, then the injunction cannot extend one year, toll one year, or otherwise alter one year from termination).²²⁷ North Carolina, however, specifically allows broader injunctive relief (and injunction clauses) that may include tolling for periods of breach or pending litigation.²²⁸

²²¹ *E.g.*, TEX. BUS. & COM. CODE ANN. § 15.51(a) (West 2011); *DBA Enters., Inc. v. Findlay*, 923 P.2d 298, 302 (Colo. App. 1996) (injunctions are the *preferred* remedy).

²²² *See DBA Enters., Inc.*, 923 P.2d at 302.

²²³ *See id.*

²²⁴ *Reach Grp., L.L.C. v. Angelina Grp.*, 173 S.W.3d 834, 837-38 (Tex. App. 2005) (citing *Tom James Co. v. Mendrop*, 819 S.W.2d 251, 253 (Tex. App. 1991)); *see also* ARIZ. REV. STAT. ANN. § 12-1808 (2011) (utilizing the same “necessary to prevent irreparable injury to property or to a property right of the party making the application and when there is no adequate remedy at law” standard for injunctive relief).

²²⁵ *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002); *see* *Cardinal Health Staffing Network, Inc. v. Bowen*, 106 S.W.3d 230, 235 (Tex. App. 2003) (quoting *Butnaru*, 84 S.W.3d at 204).

²²⁶ *See, e.g., infra* notes 227-28 and accompanying text.

²²⁷ *See Phoenix Capital, Inc. v. Dowell*, 176 P.3d 835, 843 (Colo. App. 2007); *Atmel Corp. v. Vitesse Semiconductor Corp.*, 30 P.3d 789, 796 (Colo. App. 2001).

²²⁸ *See supra* notes 69-76 and accompanying text.

In addition, injunctive relief, which is often simultaneous to monetary loss, should be taken into account.²²⁹ Enjoining the offending behavior might be a first step; but, an employer may also suffer by way of lost customers, lost profits,²³⁰ loss of goodwill, and training expenses, to mention a few.²³¹ Thus, monetary damages should be addressed in any restrictive covenant.²³² Specifically, because these types of monetary damages may prove difficult, if not impossible, to prove, the use of a liquidated-damages clause may be uniquely appropriate with restrictive covenants.²³³ Any liquidated-damages number must be reasonably related to the harm to be suffered,²³⁴ reflect a tie to compensation or the value the former employee could or would obtain from competing,²³⁵ or be based on suspected or anticipated losses.²³⁶ While an appropriate

²²⁹ See *Bed Mart, Inc.*, 45 P.3d at 1220 (employer sought both injunctive relief and monetary damages); *Amex Distrib. Co.*, 724 P.2d at 598 (employer sought both injunctive relief and monetary damages); *Truly Nolen Exterminating, Inc.*, 610 P.2d at 483 (employer sought monetary damages and enforcement of liquidated damage clause in noncompete agreement); *Hansen*, 426 P.2d at 794 (upholding modified injunction issued by lower court and acknowledging right to also pursue damages without further supreme court direction).

²³⁰ *But see* *Proudfoot Consulting Co. v. Gordon*, 576 F.3d 1223, 1245 (11th Cir. 2009) (disgorgement of profits *not* a remedy in Florida).

²³¹ See *supra* notes 108-22 and accompanying text.

²³² See 9 LISA C. THOMPSON & BRENT A. OLSEN, *ARIZ. PRAC., BUSINESS LAW DESKBOOK* § 12:14 (2012-13 ed.).

²³³ See *id.* (citing *Bed Mart, Inc.*, 45 P.3d at 1219).

²³⁴ See *id.* (citing *Pima Sav. & Loan Ass'n v. Rampello*, 812 P.2d 1115 (Ariz. Ct. App. 1991)); see, e.g., *Calhoun v. WHA Med. Clinic, P.L.L.C.*, 632 S.E.2d 563, 567-73 (N.C. Ct. App. 2006) (finding \$1.5 million liquidated damage provision valid because was reasonable estimate of anticipated losses—actual losses were figured at over \$1.6 million—and employee could pay amount, thus not against public policy as restraint on ability to perform profession).

²³⁵ See *BDO Seidman Fin. Servs. v. Gorman*, No. 927785E, 1994 WL 879698, at *1 (Mass. Super. Ct. Apr. 8, 1994) (upholding liquidated damages of “one and one-half times the fees charged to each client . . . over the last full fiscal year” for breach of noncompete).

²³⁶ See *Amex Distrib. Co. v. Mascari*, 724 P.2d 596, 599 (Ariz. Ct. App. 1986) (liquidated-damages clause of “75% of [employee’s] billings of [employer’s customers] during the first year, 60% the second year, and 50% the third year”); *Wojtowicz v. Greeley Anesthesia Servs., P.C.*, 961 P.2d 520, 523 (Colo. App. 1997) (contract requirement that physician pay former employer fifty percent of his fees for two years provided for damages that were not “reasonably related to the injury suffered” by the former employer because future lost profits did not measure net

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number will vary²³⁷ based on the employee and his responsibilities, the employer and type of business, and other attendant circumstances, the number must approximate losses at the time of contracting²³⁸ and may not be a penalty.²³⁹

Moreover, attorneys' fees may be appropriate.²⁴⁰ For example, Colorado allows for recovery of attorneys' fees and costs, even where the actual damages award is minimal.²⁴¹ And Texas, in the context of a personal-services contract with an ancillary noncompete, allows a court to award costs and attorneys' fees if the employee establishes that the former employer *knew at the time of execution* that the noncompete was not reasonable, the restrictions were greater than necessary to protect legitimate business interests, and the employer attempted to enforce the agreement to a greater extent than necessary.²⁴² Florida moves one step further, allowing courts the discretion to award attorneys' fees and costs to the prevailing party—even where not specifically authorized in the agreement.²⁴³ And, the parties may not limit the ability of the court to award these fees and costs.²⁴⁴

earnings, and fee percentage set as liquidated-damages provision was not proportionate to any possible loss the employer incurred).

²³⁷ See, e.g., *Pima Sav. & Loan Ass'n v. Rampello*, 812 P.2d 1115, 1118 (Ariz. Ct. App. 1991) (finding a \$290,000 liquidated-damages provision, which was equivalent to six percent of the contract price, reasonable and not a penalty); see also *Bed Mart, Inc. v. Kelley*, 45 P.3d 1219, 1220-24 (Ariz. Ct. App. 2002) (deciding noncompete was reasonable but not addressing reasonableness of liquidated-damages provision of "\$1,000 for each week or part of each week that such breach continues").

²³⁸ See RESTATEMENT (SECOND) OF CONTRACTS § 356 cmt. b (1981) (advising liquidated-damages provision is reasonable if it "approximates the loss anticipated at the time of the making of the contract, even though it may not approximate the actual loss").

²³⁹ See *Checkers Eight Ltd. P'ship v. Hawkins*, 241 F.3d 558, 561-62 (7th Cir. 2001) (citing *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1289 (7th Cir. 1985)); *JMD Holding v. Cong. Fin. Corp.*, 828 N.E.2d 604, 606 (N.Y. 2005).

²⁴⁰ See *Saturn Sys., Inc. v. Militare*, 252 P.3d 516, 529-30 (Colo. App. 2011).

²⁴¹ See *id.* (granting attorney's fees when the damages award was only \$525).

²⁴² TEX. BUS. & COM. CODE ANN. § 15.51(c) (West 2011).

²⁴³ FLA. STAT. § 542.335(1)(k) (2012).

²⁴⁴ *Id.*

Finally, there may be a statutory regime in place to govern litigation, penalties, and remedies surrounding restrictive covenants.²⁴⁵ Florida, in continuing its broad statutory regulation of restrictive covenants, mandates the full procedure for restrictive covenant litigation.²⁴⁶ Nevada statutes provide for penalties, monetary and otherwise, over and above damages, attorneys' fees, and injunctions.²⁴⁷ Nevada provides for a gross misdemeanor criminal violation and a \$5,000 fine, and permits the Labor Commission to impose an additional administrative penalty of up to \$5,000 and to recoup investigative costs and attorneys' fees for "willfully do[ing] anything intended to prevent any person who for any cause left or was discharged from his, her[,] or its employ from obtaining employment elsewhere in [Nevada]."²⁴⁸

B. Sample Damages Clauses

- "I agree that if I breach this covenant that [former employer] shall be entitled to a restraining order in a court of competent jurisdiction and I shall be liable to pay no less than \$2,000.00 in damages per breach and legal cost."²⁴⁹
- Employee agrees to pay liquidated damages in the amount of \$10,000.00 if he or she violates the Agreement, and further agrees that said amount is a fair valuation of the potential losses as a result of Employee's violation of the Agreement, understanding that the ability to evaluate the damages caused by Employee will be difficult in the event of a breach.

²⁴⁵ See, e.g., FLA. STAT. § 542.335.

²⁴⁶ See generally *id.* First, the party seeking enforcement must prove the restrictive covenant is reasonably necessary to protect an identified legitimate interest. § 542.335(1)(c). If so, then the opposing party "has the burden of establishing that the contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the established legitimate business interest or interests." *Id.* Further, the party seeking enforcement must put up an appropriate bond, and this requirement cannot be waived. § 542.335(1)(j).

²⁴⁷ See NEV. REV. STAT. § 613.200 (2011).

²⁴⁸ NEV. REV. STAT. § 613.200(1)-(3). *But see* § 613.200(4) (listing exceptions, thus allowing restrictive covenants in designated circumstances).

²⁴⁹ *Mkt. Am., Inc. v. Christman-Orth*, 520 S.E.2d 570, 574 (N.C. Ct. App. 1999).

Notwithstanding, nothing herein shall limit [Employer's] right to seek injunctive relief as an additional remedy, understanding that the injury from Employee's violation is immediate, difficult to measure by pecuniary standards, and irreparable.

VIII. BENEFICIARIES, SUCCESSORS, AND ASSIGNS

After the idea of *whether* a restrictive covenant is appropriate under the circumstances, reasonable, based on legitimate interests, and supported by consideration, and *what* the appropriate damages could be, *who* may enforce a restrictive covenant must be determined.²⁵⁰ For example, where Company A and Employee enter into an otherwise valid restrictive covenant, but Company B purchases—or merges with—Company A, what happens to the restrictive covenant? Must the employee expressly agree to an assignment of the otherwise valid restrictive covenant? Or, may a parent company even benefit from a restrictive covenant of its subsidiary?

A. Successors, Assigns, and Third-Party Beneficiaries

Florida, utilizing its broad statutory scheme, addresses the issue and expressly *requires* courts to enforce restrictive covenants against third-party beneficiaries, assignees, and successors.²⁵¹ But, the terms of the restrictive covenant must *expressly* identify the party as a third-party beneficiary and state the restrictive covenant was intended for that third party's benefit.²⁵² Or, the restrictive covenant must “expressly authorize[] enforcement” by assignors or successors.²⁵³ Additionally, some states may separate the idea of an assignment resulting from a sale from the situation of a merger.²⁵⁴ The latter makes the covenant enforceable

²⁵⁰ See FLA. STAT. § 542.335(1)(f) (identifying the rights of third-party beneficiaries to enforce restrictive covenants); see also Kendall B. Coffey & Thomas F. Nealon, III, *Noncompete Agreements Under Florida Law: A Retrospective and a Requiem?*, 19 FLA. ST. U. L. REV. 1105, 1121 (1992) (discussing the trends in allowing third-party beneficiaries to enforce restrictive covenants).

²⁵¹ FLA. STAT. § 542.335(1)(f).

²⁵² FLA. STAT. § 542.335(1)(f)(1).

²⁵³ FLA. STAT. § 542.335(1)(f)(2).

²⁵⁴ *Corporate Express Office Prods., Inc. v. Phillips*, 847 So. 2d 406, 413 (Fla. 2003) (holding that “when the sale of the assets includes a personal service contract that

by the new entity by operation of law, without consent, consideration, or otherwise.²⁵⁵ Moreover, employees must, in some cases, consent to the assignment.²⁵⁶

Similar to this idea concerns which entity should seek enforcement of the restrictive covenant—assignee, successor, third-party beneficiary, etc.²⁵⁷ For instance, an employer may legitimately draft a restrictive covenant tied geographically to its parent or main entity—thereby obtaining a larger geographic scope than if only based on the subsidiary or branch office.²⁵⁸ But, beware. A North Carolina court invalidated a restrictive covenant based on this exact situation, where a franchisee sought to enforce a restrictive covenant with a geographic scope related to the franchisor’s office locations, rather than its own.²⁵⁹ The court took exception with the smaller franchisee seeking enforcement of the franchisor’s larger territory²⁶⁰ but explicitly left open the possibility that the covenant would have been enforceable if the franchisor sought enforcement.²⁶¹

In sum, as an employer seeking the largest breadth possible for a restrictive covenant, the idea of third-party beneficiaries, successors,

contains a noncompete agreement, the purchaser can enforce its terms only with the employee’s consent to an assignment”); *HD Supply Facilities Maint., Ltd. v. Bymoan*, 210 P.3d 183, 183-84 (Nev. 2009) (finding that in asset purchase sale, nonassignability is the rule, but merger is different than asset purchase and therefore restrictive employment covenants are assignable in merger situation).

²⁵⁵ *Corporate Express Office Prods., Inc.*, 847 So. 2d at 413; *HD Supply Facilities Maint., Ltd.*, 210 P.3d at 183-84.

²⁵⁶ *Corporate Express Office Prods., Inc.*, 847 So. 2d at 413; *Traffic Control Servs., Inc. v. United Rentals Nw., Inc.*, 87 P.3d 1054, 1060 (Nev. 2004) (requiring separate consideration for the assignment).

²⁵⁷ See FLA. STAT. § 542.335(1)(f); Coffey & Nealon, *supra* note 250, at 1121-22.

²⁵⁸ See *Manpower of Guilford Cnty., Inc. v. Hedgecock*, 257 S.E.2d 109, 115 (N.C. Ct. App. 1979).

²⁵⁹ *Id.*

²⁶⁰ *Id.* (finding “within a 25 mile radius of any city where there is a [franchisor] office or [franchisor] licensed business” was unreasonable geographic limitation where employer—and party to agreement—was regional subsidiary, not parent).

²⁶¹ *Id.* (“We express no opinion concerning whether the covenant restrictions concerning territory would be reasonable if the franchisor . . . were seeking to enforce the covenant in its capacity as perhaps a third party beneficiary of the contract.”).

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and assignees is a necessary consideration.²⁶² Attention to detail, express provisions, and even consent are likely necessary to accomplish this end—if the state law allows for third-party, successor, or assignee enforcement.²⁶³

B. Sample Assignment and Third-Party Beneficiary Clause

- Employee agrees this Agreement may also be enforced by [Employer’s] successor(s) or assigns to the same and full extent as [Employer], and that nothing herein or otherwise shall limit [Employer’s] ability to assign this Agreement or its rights herein. [Employer] shall not be required to seek prior consent of Employee, and by his or her signature Employee hereby consents to any such future assignment or succession.

IX. OTHER RESTRICTIVE COVENANTS

A noncompete clause provides for just that: not competing—however that is defined—with the former employer.²⁶⁴ But, oftentimes, employers seek more from their employees, such as an agreement to not call upon, take, or otherwise interact with, former customers (nonsolicitation);²⁶⁵ or, an agreement to not utilize or distribute certain informa-

²⁶² See *supra* notes 250-261.

²⁶³ See *supra* notes 250-261.

²⁶⁴ See *Mohanty v. St. John Heart Clinic, S.C.*, 866 N.E.2d 85, 88 (Ill. 2006) (discussing “a ‘non-compete’ clause, or restrictive covenant, which provided that, upon termination, [the employee doctor] ‘shall not’ practice medicine within a two-mile radius of any Clinic office or any of the four hospitals where the Clinic operated”); *Ticheli v. John H. Carter Co.*, 996 So. 2d 437, 440 (La. Ct. App. 2008) (stating that the employee’s new business was similar enough to ex-employer’s business to render it prohibited by a noncompete provision in a previous employment agreement).

²⁶⁵ See *H&R Block E. Enters., Inc. v. Morris*, 606 F.3d 1285, 1293 (11th Cir. 2010) (holding as valid a nonsolicitation covenant which prohibited “‘directly or indirectly’ soliciting or attempting to solicit any Company Clients for the purpose of offering, among other things, tax preparation services”); *USI Ins. Servs. L.L.C. v. Miner*, 801 F. Supp. 2d 175, 187-88 (S.D.N.Y. 2011) (stating the employee violated an enforceable nonsolicitation restriction that barred soliciting former and active prospective USI clients); *Alpha Tax Servs., Inc. v. Stuart*, 761 P.2d 1073, 1075 (Ariz. Ct. App. 1988)

tion gained during employment (nondisclosure);²⁶⁶ or, an agreement to not call upon, hire, or otherwise take away other employees (antipiracy).²⁶⁷ States, just as with noncompetes, have varying views on the use of and restrictions on these agreements as well.²⁶⁸

A. *Nonsolicitation, Nondisclosure, and Antipiracy Agreements*

Some states consider nonsolicitation agreements outside the scope of noncompetes.²⁶⁹ California, a state with one of the strictest policies *against* noncompetes, essentially provides employers the *unfettered* ability to draft agreements not tied to noncompetition (i.e., noninterference, nondisclosure, nonsolicitation, and antipiracy agreements).²⁷⁰ California courts specifically approved these devices because they were not prohibiting employment.²⁷¹ Moreover, these devices could be fairly broad and utilize longer durations than noncompetes²⁷² or have potentially *limitless* durations.²⁷³ North Carolina takes

(stating that an agreement “designed to prevent former employees from using information learned during their employment to divert or to steal customers from the former employer” is known as an “antipiracy or hands-off agreement [and] is less restrictive than a covenant not to compete”).

²⁶⁶ See *Metso Minerals Indus., Inc. v. FLSmidth-Excel L.L.C.*, 733 F. Supp. 2d 980, 984-85 (E.D. Wis. 2010) (noting that nondisclosure provisions can be used to protect trade secrets).

²⁶⁷ See *CDI Corp. v. Hough*, 9 So. 3d 282, 288-89 (La. Ct. App. 2009) (stating that a contractual provision that prevents the solicitation of employees for hire by an ex-employee is valid and enforceable).

²⁶⁸ See David L. Johnson, *The Parameters of “Solicitation” in an Era of Non-Solicitation Covenants*, 28 ABA J. LAB. & EMP. L. 99, 127 (2012).

²⁶⁹ See *infra* notes 270-76.

²⁷⁰ See *Muggill v. Reuben H. Donnelley Corp.*, 398 P.2d 147, 149 (Cal. 1965) (noting that nondisclosure agreements that protect trade secrets are valid); *Gordon v. Landau*, 321 P.2d 456, 458-59 (Cal. 1958) (en banc) (allowing nonsolicitation clause); *Loral Corp. v. Moyes*, 174 Cal. App. 3d 268, 274, 276, 278-79 (1985) (approving restrictions prohibiting disclosure of confidential information and disruption, damage, impairment or interference by interfering with or raiding employees, disrupting relationships with customers, vendors, and others).

²⁷¹ See *Loral Corp.*, 174 Cal. App. 3d at 274 (“You are not however, restricted from being employed by or engaged in a competing business.”).

²⁷² *Id.* at 278-80; see also *Hilb, Rogal & Hamilton Co. of Ariz. v. McKinney*, 946 P.2d 464, 467 (Ariz. Ct. App. 1997) (explaining Arizona courts have generally directed more scrutiny to noncompetition covenants than nondisclosure or nonsolicitation).

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a similar approach to California²⁷⁴ and expressly allows “client-based restrictions.”²⁷⁵ Going further, a state may require the restriction relate only to customers the employee had contact with.²⁷⁶

On the other hand, some states undertake the same analysis for all restrictive covenants, such as Nevada²⁷⁷ and Massachusetts.²⁷⁸ The

²⁷³ “[A] nondisclosure contract provision may ‘be upheld even [though] the agreement is unlimited as to time and area [citation omitted] upon a showing that it protects a legitimate business interest’ of the employer.” *Static Control Components, Inc. v. Darkprint Imaging, Inc.*, 135 F. Supp. 2d 722, 730 (M.D.N.C. 2001) (quoting *Chemimetals Processing, Inc. v. McEneny*, 476 S.E.2d 374, 377 (N.C. Ct. App. 1996)).

²⁷⁴ *See id.*; *Triangle Leasing Co. v. McMahon*, 393 S.E.2d 854, 856 (N.C. 1990) (finding the clause reasonable because it did not restrict all competition throughout North Carolina but only prohibited the direct or indirect solicitation of employer’s customers and accounts for two years); *United Labs., Inc. vs. Kuykendall*, 370 S.E.2d 375, 378, 385-86 (N.C. 1988) (finding it reasonable to prohibit employee for eighteen months “from calling upon accounts which he serviced while employed”).

²⁷⁵ *See Wade S. Dunbar Ins. Agency, Inc. v. Barber*, 556 S.E.2d 331, 333 (N.C. Ct. App. 2001) (affirming a two-year nonsolicitation prohibiting former employee from soliciting customers with active accounts at termination or customers that former employee solicited up to six months prior to termination). *But see Farr Assocs. v. Baskin*, 530 S.E.2d 878, 882-83 (N.C. Ct. App. 2000) (prohibiting former employee from working for any of former employer’s clients for 5 years, across 461 offices, in 41 states, and 4 foreign countries was unreasonable).

²⁷⁶ *Rimkus Consulting Grp., Inc. v. Cammarata*, 255 F.R.D. 417, 435-36 (S.D. Tex. 2008) (finding nonsolicitation covenants that cover clients with whom employee had no contact are overbroad and not reasonably necessary to protect employer’s legitimate business interest in maintaining its client base); *Stone v. Griffin Commc’ns & Sec. Sys., Inc.*, 53 S.W.3d 687, 694 (Tex. App. 2001) (citing, as an example of the same proposition, *John R. Ray & Sons, Inc. v. Stroman*, 923 S.W.2d 80, 85 (Tex. App. 1996)).

²⁷⁷ *See, e.g., HD Supply Facilities Maint., Ltd. v. Bymoen*, 210 P.3d 183, 184-85 (Nev. 2009) (discussing the effects of merger on nonsolicitation, confidentiality, and noncompete agreements); *Camco, Inc. v. Baker*, 936 P.2d 829, 830 (Nev. 1997) (explaining the agreement “contained provisions regarding noncompetition, preservation of trade secrets, diversion of . . . employees, and preservation of goodwill”).

²⁷⁸ *See, e.g., Filmore & Stern, Inc. v. Frankel*, No. 020821, 2002 WL 31678307, at *2 (Mass. Super. Ct. Sept. 17, 2002) (enforcing a two-year antipiracy clause); *Modis, Inc. v. Revolution Grp., Ltd.*, No. 991104, 1999 WL 1441918, at *9 (Mass. Super. Ct. Dec. 29, 1999) (enforcing 180-day nonsolicitation agreement, in part, because “each of the individual employees is still able to compete against their former employer immediately,” and the employees “are in no way being forced out of their chosen line

idea of reasonableness might change slightly as the basis for the restriction changes; but, essentially, the same reasonableness concerns of duration, geography, and interests to be protected exist.²⁷⁹ Some states specifically refuse to find any distinction and require the same limited exceptions to use a nonsolicitation, nondisclosure, or antipiracy agreement.²⁸⁰ Thus, sometimes an agreement not to solicit an employer's customers is enforceable only where its purpose is to protect an employer's legitimate interests—and not merely for general use.²⁸¹

Draft carefully and expressly. Determine what conduct to prohibit.²⁸² Some clauses attempt to prohibit both passive and active solicitation, for example.²⁸³ However, attempting to prohibit the passive form of solicitation—merely accepting business from a former client—may be unreasonable.²⁸⁴ After all, clients have the right to choose with

of work”); *State St. Corp. v. Barr*, No. 99-4291-F, 1999 Mass. Super. LEXIS 432, at *12-14, 23 (Mass. Super. Ct. Oct. 25, 1999) (one-year antipiracy clause enforced); *Browne v. Merkert Enters., Inc.*, No. 98-386, 1998 WL 151253, at *6 (Mass. Super. Ct. Mar. 30, 1998) (enforcing a six-month antipiracy clause).

²⁷⁹ See *Atomic Tattoos, L.L.C. v. Morgan*, 45 So. 3d 63, 64-66 (Fla. Dist. Ct. App. 2010) (reasonable to prohibit employee from “soliciting, accepting, diverting, or otherwise having any business relationships” with respect to providing the same or similar services to existing customers of the former employer for one year within a fifteen-mile radius from employee’s work location).

²⁸⁰ See, e.g., *Phoenix Capital, Inc. v. Dowell*, 176 P.3d 835, 844 (Colo. App. 2007) (“[A]n agreement not to solicit customers is a form of an agreement not to compete.”).

²⁸¹ See, e.g., *Saturn Sys., Inc. v. Militare*, 252 P.3d 516, 526 (Colo. App. Feb. 17, 2011) (citing *Gold Messenger, Inc. v. McGuay*, 937 P.2d 907, 910-11 (Colo. App. 1997)); *Mgmt. Recruiters of Boulder, Inc. v. Miller*, 762 P.2d 763, 766 (Colo. App. 1988).

²⁸² As a tale of caution, see *People’s Security Life Insurance Co. v. Hooks*, 367 S.E.2d 647, 651-52 (N.C. 1988), where the court found an agreement that only specifically restricted the employee from soliciting existing customers or interfering with business did not prevent the former employee from soliciting the employer’s employees.

²⁸³ Active solicitation requires the overt act of an employee contacting (in some way) the former client or employee, whereas passive solicitation essentially involves the mere acceptance of business from a former client or employment of employee. See *Oceanair, Inc. v. Katzman*, No. Civ. A. 003343BLS, 2002 WL 532475, at *6-7 (Super. Ct. Mass. Jan. 22, 2002) (discussing the difference between “solicit” and “accept” in nonsolicitation agreement).

²⁸⁴ See, e.g., *J.B. Prata, Ltd. v. Bichay*, 468 A.2d 266, 268 (R.I. 1983) (distinguishing between direct (active) solicitation of customers or orders and the acceptance of

whom they do business. Next, draft specifically. Determine what type of business to prohibit the former employee from obtaining. It may be unreasonable for a computer software company to prohibit a former employee from soliciting or accepting *any* business from *any* former client.²⁸⁵ That agreement would cover ice cream sales²⁸⁶ and clients the employee did not know about. Instead, consider prohibiting the acceptance of *similar* business from *clients the employee worked with*.²⁸⁷ Further, consider whether to use multiple agreements covering each concept, one agreement covering them all, or even one clause encompassing each concept—as this may be determinative of validity.²⁸⁸

unsolicited customers or orders and explaining that restricting the unsolicited taking is invalid because it infringes too much on the right to make a living); *see also Phoenix Capital, Inc.*, 176 P.3d at 844 (finding there is no difference between “active” or “passive” solicitation; either is an invalid restraint of trade and, therefore, a form of noncompete).

²⁸⁵ *See, e.g., VisionAir, Inc. v. James*, 606 S.E.2d 359, 362-63 (N.C. Ct. App. 2004) (finding typical “own, manage, be employed by or otherwise participate in, directly or indirectly, any business similar to [e]mployer’s” as overbroad and invalid).

²⁸⁶ *See generally VisionAir, Inc.*, 606 S.E.2d at 362-63 (finding invalid a broad clause and explaining the clause would prohibit unrelated work, work in a different capacity, or possibly owning an interest in a mutual fund invested in a former client). *But see Lloyd v. S. Elevator Co.*, No. COA06-944, 2007 WL 1892500, at *1, 7 (N.C. Ct. App. July 3, 2007) (finding reasonable a two-year agreement stating former employee could not “directly or indirectly, as an individual, under contract for, or on behalf of or as an owner, agent, consultant, employee, officer, director, stockholder, or partner of any business organization, compete”).

²⁸⁷ *See, e.g., Rimkus Consulting Grp., Inc. v. Cammarata*, 255 F.R.D. 417, 435-36 (S.D. Tex. 2008) (finding nonsolicitation covenants that cover clients with whom employee had no contact are overbroad and not reasonably necessary to protect employer’s legitimate business interest in maintaining its client base); *Stone v. Griffin Commc’ns & Sec. Sys., Inc.*, 53 S.W.3d 687, 695 (Tex. App. 2001) (citing, as an example of the same proposition, *John R. Ray & Sons, Inc. v. Stroman*, 923 S.W.2d 80, 85 (Tex. App. 1996)); *Mgmt. Recruiters of Boulder v. Miller*, 762 P.2d 763, 765-66 (Colo. App. 1988) (upholding a one-year agreement which prohibited an employee of a recruiting agency from contacting any candidate with whom he had actual contact during his final year of employment because it was properly tailored to prevent misappropriation of trade secrets).

²⁸⁸ *Compare Saturn Sys., Inc. v. Militare*, 252 P.3d 516, 527-28 (Colo. App. 2011) (finding a combined trade-secret, confidentiality, and nondisclosure clause to be valid because it was combined), *with Colo. Accounting Machs., Inc. v. Mergenthaler*, 609 P.2d 1125, 1126 (Colo. App. 1980) (finding an agreement with separate clauses invalid because clauses not combined). In *Colorado Accounting Machines*, the trade-secret provision was separate from the noncompete provision; therefore, the trade-

Consideration of what is being protected, why it is being protected, and the exact language necessary to protect only these things is essential to a valid prohibition.²⁸⁹

B. Sample Clauses

- “Agent agrees that any client lists, sales materials and proprietary information will be considered confidential and not revealed to outside persons with the exception of clients and prospective clients during the sales or service of Company’s services and that he will not solicit Company clients on behalf of himself or herself or any other entity. This provision is to last for the duration of this agreement and for 1 year following the termination of this agreement.” [Combined provision]²⁹⁰
- “that [Employee] will not solicit any customers of [Employer] who have an active account with [Employer] at the time of termination or any prospective client whom [Employee] has solicited within six months preceding the date of termination”²⁹¹
- “Solicit” means, whether directly or indirectly, any act or instance of requesting or seeking to obtain the business of, whether for Employee’s direct pecuniary benefit or otherwise; provided that, prohibited solicitation is limited to solicitation of services related to those services provided by [Employer], including, but

secret provision might have been valid, but the noncompete could not be. *Colo. Accounting Machs., Inc.*, 609 P.2d at 1126.

²⁸⁹ Even the best drafted provision may not lead to success in the courts. *See People’s Sec. Life Ins. Co. v. Hooks*, 367 S.E.2d 647, 650-51 (N.C. 1988) (finding valid a nonpiracy agreement and violation of the agreement but recognizing that employee is *still privileged* to hire away current employees as advancement of business is a legitimate and privileged interference; thus, employee cannot be liable for tortious interference).

²⁹⁰ *Saturn Sys., Inc.*, 252 P.3d at 520.

²⁹¹ *Wade S. Dunbar Ins. Agency, Inc. v. Barber*, 556 S.E.2d 331, 333 (N.C. Ct. App. 2001).

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not limited to, [description of specific services Employer provides].

X. CHOICE OF LAW

A *best practices* guide of considerations concerning restrictive covenants must include the law to govern any agreement, especially in the restrictive covenant context, considering the disparity between states in certain aspects of this area.²⁹² A choice-of-law clause generally eliminates the question of whether California's strict employee-friendly regime, Florida's statutory regime, Michigan and Texas' more employer-friendly regime, or something else altogether applies.²⁹³

Unfortunately, this rather simple concept contains different considerations in the restrictive covenant world.²⁹⁴ For example, take a California company, with offices and customers in Florida and the United States, that wishes to utilize a noncompete. This company, not wanting the restrictive regime California law provides, drafts a noncompete agreement with a choice-of-law provision directing that Florida law applies. It is likely, if litigation arises in California, a California court would be *hesitant* to apply Florida law, even with the express choice of law provision.²⁹⁵ Interestingly, California has taken the position that because of its strong public policy against restrictive covenants, the state has a heightened interest in applying California law to protect California businesses and permit them to hire employees without restraint.²⁹⁶

²⁹² See 9 SPARBER, COFER, RITCHIE, SOUTHEAST TRANSACTION GUIDE § 160.252 (Matthew Bender).

²⁹³ See *id.*; CAL. BUS. & PROF. CODE § 16600 (West 2012); FLA. STAT. § 542.33 (2012); MICH. COMP. LAWS § 445.774a (2011); TEX. BUS. & COM. CODE ANN. § 15.50 (West 2011).

²⁹⁴ See *infra* notes 295-300.

²⁹⁵ See *Application Grp., Inc. v. Hunter Grp., Inc.*, 61 Cal. App. 4th 881, 894-905 (1998) (finding California law applicable to a restrictive covenant between a Maryland company and a Maryland employee which directed that Maryland law apply).

²⁹⁶ See *id.* at 899-905 (invalidating Maryland noncompete between Maryland employer and Maryland employer based on California public policy against restrictive covenants). By invalidating the restrictive covenant, the *Application Group* court found in favor of a California employer seeking to hire the former Maryland employee. *Id.*

Thus far, only California has utilized its own law to invalidate a restrictive covenant that contained terms directing another state's law to apply.²⁹⁷ But, while specifically discussing only an individual seeking employment inside California, the potential expansion of this decision raises full faith and credit issues beyond the scope of the current Article.²⁹⁸ Nevertheless, include and carefully draft choice-of-law provisions.²⁹⁹ In the end, this should lead to more certainty for both employer and employee.³⁰⁰

XI. CONCLUSION

Noncompetes and restrictive covenants come in various forms and are utilized for various reasons.³⁰¹ Drafters and signers must pay particular attention to their respective state's temperament and laws regarding noncompetes and other restrictive covenants.³⁰² Employers (both prospective and current) and employees have a host of interests properly protected through restrictive covenants; to accomplish this, however, each must know the questions, considerations, and issues present in drafting any restrictive covenant.³⁰³ A good analysis must consider the state's law regarding: the surrounding circumstances; geographic scope and duration; protectable interests of the covenant; consideration; reformation and severability; remedies; beneficiaries, successors, and assigns; and choice of law.³⁰⁴ With this analysis, each party involved can properly inspect and scrutinize the noncompete or other restrictive covenant.

²⁹⁷ See *id.* at 885.

²⁹⁸ For example, a valid judgment from a Florida court directing the permissible scope of a noncompete to include California. See *Baker by Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998) (quoting *Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939)) (holding that "[t]he Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'").

²⁹⁹ See 9 SPARBER, COFER, RITCHIE, SOUTHEAST TRANSACTION GUIDE § 160.252 (Matthew Bender).

³⁰⁰ *Id.*

³⁰¹ See *supra* Parts III, IV, IX.

³⁰² See *supra* Parts II-X.

³⁰³ See *supra* Parts II-X.

³⁰⁴ See *supra* Parts II-X.