14 Fla. Coastal L. Rev. 365

Florida Coastal Law Review
Spring, 2013

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

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 surrounding ***366** 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.

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***368 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]

***369** 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 ***370** 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 ***371** 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 ***372** 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 stance [34] 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]

***373** 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]

***374** 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 ***375** 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 ***376** 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 courtshave 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 ***377** 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]

***378** 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 employee [65] 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 ***379** 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 ***380** 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 employee's ***381** 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 location [89] and the potential reach of the employee's contacts gained through employment can affect the reasonableness ***382** 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 ***383** 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]

*384 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]

*385 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 ***386** 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 nonexhaustive 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 customers" ***387** [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 ***388** 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 ***389** 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 secrets [130] 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

> ***390** 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 information [138] have constituted trade secrets, [139] and ***391** 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 ***392** 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-- ***393** 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, ***394** 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 responsibilities--without ***395** 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 ***396** 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 employment [164] 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, Texas [167] and Rhode Island [168] specifically provide for this extra requirement. Essentially, this ancillary ***397** 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 ***398** 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 ***399** 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]

***400** 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 ***401** 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 bluelines) the provision relating to the Earth, there is still a valid provision covering the state. [202] Similarly, if the Earth and state are bluelined, 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-expansive ***402** 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.

***403** 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, ***404** 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]

*405 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]

***406** 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 ***407** number will vary[237] 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 contracting[238] 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]

***408** 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. ***409** 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 ***410** 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 territory [260] 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, ***411** 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 information ***412** 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 noncompetes[272] or have potentially limitless durations.[273] North Carolina takes ***413** a similar approach to California[274] 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 Nevada[277] and Massachusetts.[278] The ***414** 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 ***415** 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 sales[286] 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] ***416** 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 ***417** 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]

***418** 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.

Footnotes

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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.

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).

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).

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 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.").

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 Costal 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).

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.

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.

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").

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).

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).

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]").

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).

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.

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).

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 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).

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.

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.

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 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 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.

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).

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%Äct (last visited July 14, 2013) (showing only three states have yet to adopt the Act).

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 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).

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).

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.

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.").

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.

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)).

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).

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.

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.

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.

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").

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").

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).

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).

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.

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 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.

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).

250 See Fla. Stat. § 542.335(1)(f) (indentifying 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 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. Bymoen, 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.").

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 nonsoliciation 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) (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).

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 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 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-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).

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.

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.

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