Title:  It's So Hard To Say Goodbye - Enforcing Restrictive Covenants Against Former Employees

Date: Friday, September 4, 2015

Time: 10:15 AM - 11:30AM

Moderator

Miguel Pozo
Deputy General Counsel
Mercedes-Benz USA
Atlanta, GA

Panelists

Anna Maria Tejada
Partner
Kaufman Dolowich & Voluck, LLP Hackensack, NJ

Abad Lopez
Associate
Seyfarth Shaw
Chicago, IL
Tab 1 – Biographies or CVs
Anna Maria Tejada concentrates her practice in employment practices liability, labor and employment law on behalf of management, directors and officers liability, professional liability and education law. Ms. Tejada represents employers, attorneys, school boards, parents and municipalities in state and federal courts as well as in administrative proceedings before the Equal Employment Opportunity Commission, Division on Civil Rights and the Office of Administrative Law.

Prior to joining KDV, Ms. Tejada practiced with a large New Jersey law firm and served as an Equal Justice Works Fellow for the Education Law Center where she assisted in enforcement proceedings of the landmark decisions of Abbott v. Burke. Ms. Tejada served as an Appellate Clerk for the Honorable John E. Wallace, Jr., now retired, from the Supreme Court of New Jersey and interned in law school for the Honorable John W. Bassell, United States District of New Jersey.

Ms. Tejada frequently participates in mentoring programs for inner city youths in her home town of Passaic, as well as other locations in New Jersey. Ms. Tejada is also KDV's most enthusiastic New York Yankee fan.

Representative Matters
- El-Hewie v. Corzine, et al. (U.S. District Court, District Court of New Jersey) Lead Counsel on Section 1981 Claim.
- Leonard v. Bergen County Special Services, et al. (Superior Court of New Jersey, Law Division) Lead Defense Counsel on Employment Discrimination under the NJLAD.
- Zhang v. Juiju Properties/Observer Plaza Condo Ass'n (Superior Court of New Jersey, Appellate Division) Lead Counsel on Dismissal Matter. Successfully Obtained a Dismissal of the Appeal.
- Bogota, et al. v. The University Club, et al. (New York Supreme Court) Served on Trial Team for Defendants of Major Sexual Harassment Lawsuit.

Publications and News
- NJ High Court Creates New Worries For Whistleblower Attys, Law360, 8, Anna Maria Tejada - Jun 26, 2015
- NJ High Court Throws Up Roadblock For Harassment Plaintiffs, Law360, 8, Anna Maria Tejada - Feb 12, 2015
- NJ High Court Raises Bar For Independent Contractor Status, Law360, 8, Anna Maria Tejada - Jan 14, 2015
- Anna Maria Tejada ’90: Drawn to Employment Law and Empowering Young People, Rutgers Law School Spotlight - Dec 16, 2014
- Minority Powerbrokers Q&A: Kaufman’s Anna Maria Tejada, LawCrossing - Jun 6, 2014
- EEOC’s Honeywell Suit Draws Protest, Human Resource Executive R. Anna Maria Tejada - Oct 30, 2014
- SHCC-NJ names Anna Maria Tejada “Attorney of the Year” - Oct 28, 2014
- Wellness Goes Wild, Human Resource Executive R. Anna Maria Tejada - Sep 11, 2014
- Pressure Grows For Statewide Paid Sick Leave In N.J, Law360, 8, Anna Maria Tejada - Aug 28, 2014
- Revisions Take Bite Out Of Proposed NJ Hiring Restrictions, Law360, 8, Anna Maria Tejada - Jul 11, 2014
- Education and Employment Law Attorney Anna Maria Tejada Discusses Lawsuit Over Princeton’s Actions Against Suicidal Student, LawCrossing - Jun 30, 2014
- Anna Maria Tejada quoted in “Suit Over Princeton’s Actions Against Suicidal Student Raises Tough,” New Jersey Law Journal - Jun 6, 2014
- Anna Maria Tejada quoted by the Star Ledger & NJ.com - Nov 10, 2013
- PRESS RELEASE: Anna Maria Tejada, President of the Hispanic Bar Association of New Jersey, Rejoins Kaufman Dolowich & Voluck as Partner in Firm’s Hackensack, New Jersey Office - Nov 4, 2013
- Anna Maria Tejada Quoted in The Jersey Journal regarding her work with the HNBA, March 31, 2012 - Mar 31, 2012
- Anna Maria Tejada Interviewed for The Metropolitan Counsel - Jan 18, 2012

Presentations
- 14th Annual Sun, Surf, and Seminars - Recent Trends and Developments in Employment Law - May 6, 2015
- 13th Annual HBA-NJ Sun, Surf & Seminars - Hot Topics and Trends in Employment Law - May 1, 2014
- 13th Annual HBA-NJ Sun, Surf & Seminars - Top Ten Ethical Complaints and Best Practices in Avoiding Them - May 1, 2014
- HNBA 2014 Corporate Counsel Conference - Saying Good-Bye is Hard to Do: Challenges of Employment Termination - Mar 19, 2014
- New Jersey Hispanic Bar Association Seminar - Top Ten Ethics Complaints and How to Avoid Them - Oct 11, 2012
- HBA’s 11th Annual Sun, Surf & Seminars - Should Employers Use Social Media To Screen Job Applicants or Monitor Employees? - May 9, 2012
- HBA/NJ 2011 Women’s Conference - Tips to Attaining Work-Life Balance - Sep 1, 2011

Affiliations and Accolades
- Hispanic Bar Association of New Jersey - Past President (2014)
- Attorney of the Year, Statewide Hispanic Chamber of Commerce of NJ - 2014
- Good Scout Award, Northern Jersey Boy Scouts Council - Committee Chair for the Scouting Initiative Program aimed at bringing scouting to the inner cities.
- Women of Achievement Award, Women of Tri-County Luncheon - 2014
- HNBA - 2013 Top Lawyer Under Forty Award
- New Leader of the Bar, New Jersey Law Journal - August 2012
- Assembly Speaker Sheila Oliver Shirley Chisholm Award for Service In the Law - April 2012
- 14th Annual Association of Latin American Law Students - Honoree, February 2011
- HNBA Commission on the Status of Latinas in the Legal Profession - Latina Commissioner
- HNBA Executive Leadership Program for Latina Attorneys
- American Bar Association
- New Jersey State Bar Association
- New Jersey Association of School Board Attorneys
- New Jersey Hispanic Chamber of Commerce
2015 Campeon de la Justicia Award - Alianza, Rutgers School of Law-Camden
Diversity in the Profession Award - Bergen County Bar Association and the Women Lawyers in Bergen

Education
Rutgers School of Law, Newark - J.D.
Rutgers University - B.A.

Community Service
HBA-NJ American Dream Pipeline Program - Chair (2013 – Present)
HBA-NJ Women's Empowerment, Leadership and Law Conference - Chair (2013)
Latinas United for Political Empowerment (“LUPE”) - Board Member of the Political Action Committee
Association of Latin American Law Students - Community Service Award (March 7, 2013)
Mr. Lopez is an experienced trial attorney in Seyfarth Shaw’s Labor & Employment Department. He focuses on representing management in litigation in federal and state courts and other tribunals throughout the United States. He has represented employers in a wide array of state and federal matters, including litigation of wrongful discharge claims, various tort based common law claims, harassment claims, and discrimination and retaliation claims brought pursuant to Title VII, the FMLA, the ADA, the ADEA and various other state and local statutes.

Mr. Lopez is also a member of the Wage and Hour Litigation Practice Group, where he focuses a significant share of his practice on the defense of complex wage and hour claims, including collective actions under the federal Fair Labor Standards Act and class actions under the laws of many different states.

Trial Experience

Mr. Lopez serves as an experienced trial lawyer that multiple Fortune 50 companies turn to for their defense. Mr. Lopez is a member of the Trial Bar and has tried cases in numerous forums, from federal and state court to several administrative agencies. His jury trial experience includes the defense of federal civil rights violations and state law retaliation claims. When appropriate, Mr. Lopez has also been able to resolve cases favorably prior to trial.

Wage and Hour Experience

Mr. Lopez has also successfully defended against wage and hour claims through all phases of litigation, from early-stage motion practice, through summary judgment, class or collective action certification, jury trials and appeals. He has defended claims involving the alleged misclassification of independent contractors, exempt status classification, reimbursement of business expenses, failure to provide benefits contributions, detention of tips and gratuities, Sunday and holiday premium pay, missed meal breaks, and off-the-clock work.

Employment Practices Counseling

Mr. Lopez also advises employers on compliance measures, including reviewing employment policies, counseling on disciplinary actions and investigations, negotiating severance and release agreements, and conducting employment practices training and reviews.

Experience as Corporate Counsel
Prior to joining Seyfarth, Mr. Lopez was Assistant General Counsel for Class Actions and Employment Litigation for a Fortune 1 company. In this role, Mr. Lopez managed complex wage and hour and employment lawsuits. His role included managing all aspects of litigation in multi-state wage and hour and discrimination cases. Mr. Lopez has also conducted discrimination and harassment prevention training to corporate managers.

Mr. Lopez is fluent in Spanish.

**Education**
- J.D., University of Illinois
- B.A., University of Illinois, Champaign-Urbana

**Admissions**
- Illinois

**Courts**
- U.S. Court of Appeals Seventh Circuit
- U.S. District Court for the Northern District of Illinois (Trial Bar)
- U.S. District Court for the Southern District of Illinois
- U.S. District Court for the Central District of Illinois
- U.S. District Court for the Eastern District of Michigan
- U.S. District Court for the Southern District of Indiana
- U.S. District Court for the Southern District of Ohio

**Affiliations**
- American Bar Association
- Hispanic Lawyers Association of Illinois

**Representative Engagements**
- *Costco Wholesale Corporation, adv. Robles* (N.D. IL) (defense of nationwide Title III of the ADA class action)
- *Costco Wholesale Corporation, adv. Soto* (Jackson County, MO) (trial counsel for retaliation claim)
- *TJX Companies, Inc., adv. Milot* (S.D. Ohio) (obtained complete dismissal of Tittle VII discrimination claim)
- *Rangel v. Commonwealth Hospitality*, (successfully defended wage hour class and collective action under federal and state law)
- *United Healthcare Services, Inc. adv. Beevers*, (S.D. Tex.) (successfully defended nationwide FLSA alleging misclassification of nurses)
- *United Healthcare Services, Inc. et al. adv. Cohen*, (C.D. Cal.) (successfully defended nationwide FLSA collective action and California-wide class action alleging unpaid pre- and post-shift work and missed meal periods by telesales employees)
- *UnitedHealth Group, Inc. et al. adv. Peters*, (D. Kan.) (successfully defended nationwide FLSA collective action alleging unpaid pre- and post-shift work by customer service
Hyatt Corporation adv. Underwood, (M.D. Fla.) (successfully defended company against FLSA off-the-clock and tip credit claims by restaurant servers)

GC Services LP, adv. Gardner, (S.D. Cal.) (successfully defended company against class action claim that call center employees performed off-the-clock pre- and post-shift work and work during their meal periods)

Aldi, Inc. adv. McNelley, et al., (N.D. Ohio.) (successfully defended company against nationwide collective action claiming that Store Managers are misclassified as exempt under the executive exemption)


Zimmerman, et al. v. Rush Hour Event, LLC, (N.D. IL) (limited putative collective action alleging misclassification of independent contractors to nominal settlement of individual claims)

Pontrelli v. Tax Airfreight, Inc., (N.D. IL) (successfully defended Americans with Disabilities Act claim)

Hendersen v. TJX Companies, Inc., (E.D. Mich) (successfully defended Title VII discrimination claim)

Odneal v. TJX Companies, Inc., (E.D. Mich.) (obtained dismissal of Title VII race discrimination claim)

Tosti v. NBC Merchants, Inc., (S.D. Ind.) (defended FMLA retaliation case, resulting in favorable settlement)


Laramore v. Security Consultants Group, Inc. (Circuit Court of Cook County, IL) (obtained nominal settlement in race, age, and religious discrimination and retaliation case under Illinois Human Rights Act)

Sliger v. Prospect Mortgage, LLC, (E.D. CA) (successfully defended nation-wide wage and hour misclassification case brought by mortgage loan officers)

DeBerry v. Ann & Robert H. Lurie Children’s Hospital of Chicago(N.D. IL) (obtained complete dismissal of race discrimination claim)

Presentations

- Hispanic National Bar Association, “Issues Involving Social Media in Employment Law Disputes” (presented at 2014 Annual Convention, September 2014)
- Seyfarth Shaw at Work, “Harassment and Discrimination Prevention in the Workplace: Training for Managers” (2013-present)

Publications

- Co-Author, “Bittersweet Victory: Court Affirms $3.4 Million Attorney’s Fee Award Despite Plaintiffs’ Defeat on Majority of Claims,” Wage and Hour Litigation Blog, Seyfarth Shaw LLP (2014)

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Miguel Alexander Pozo, Esq.
Deputy General Counsel at Mercedes-Benz USA
Greater Atlanta Area | Law Practice

Previous
Lowenstein Sandler LLP, Hispanic National Bar Association (HNBAA), Hispanic National Bar Association
Education
Hofstra University

Send a message | Endorse ▼ 500+ connectors

Last Conversation 1 year ago
Relationship
Contact info
friends

Note
Reminder
How you met
Tag

Miguel Alexander shared a link '2014 Corporate Counsel Conference and Most Court Competition' with you.
I found this and thought you might be interested. -Miguel Alexander 1/9/2014 via LinkedIn

See More

Background

Experience

Deputy General Counsel
Mercedes-Benz USA
July 2015 – Present (1 month)
Head of Litigation

Partner, Litigation Department
Lowenstein Sandler LLP
September 2006 – July 2015 (9 years 11 months)

Miguel is a national leader, trusted advisor, strategist, and a connector based in DC and the New York City metro area.

In 2015, the New Jersey Law Journal honored Miguel with its first-ever "Lifetime Achievement Award," for his professional accomplishments and work advancing the legal profession. In 2014, he was named to the Lawyers of Color "Power List," a comprehensive catalog of the nation's most influential minority attorneys. Additionally, in 2013, he was featured on Hispanic Business’ List of "Top 50 Hispanic Influentials" in the United States.

He is a homegrown partner at Lowenstein Sandler with more than 15 years of experience. He works to enhance and protect some of the world’s most iconic brands by advising companies on trademark and employment law issues and representing clients in business litigation. His strategic approach also helps his luxury brand clients expand their businesses within a market or extend to new markets.

Miguel also has experience helping clients to protect their critical intellectual property rights from attack and infringement from competitors and counterfeiters in the context of social media platforms. Whether he is counseling a client, litigating a dispute in court or arbitrating his client’s claim in an ADR forum, Miguel is constantly focused on how to maximize the value of his client’s brands.

In business and employment law disputes, Miguel recognizes that the resolution of a specific matter can often create a ripple effect across the enterprise. Accordingly, a successful representation turns on his unique ability to fully understand the client’s short- and long-term business goals in the context of the client’s specific industry. His clients also value his ability to listen to their needs, as well as his passion for advancing their objectives.

For full bio visit www.lowenstein.com.

Note
Attorney advertising pursuant to RPC 7.1. Prior successful results do not guarantee future or similar outcomes.

* 10 recommendations, including:

HNBA National President (2013-14)
Hispanic National Bar Association (HNBAA)
Miguel is a top notch lawyer, problem solver, and a great human being. You can count on him to deliver the goods. In my 20 years of practicing in the legal profession, I have done many of it without your support.

We are especially proud of our advocacy efforts in light of our nation’s celebration of the 50th Anniversary of the Civil Rights Act of 1964. The attached letter goes into further detail but here are just a few highlights:

In 2014, we watched as a paralyzed Congress failed to pass immigration reform and at the same time funded an opportunity to restore the effectiveness of the Voters Rights Act of 1965. At the same time, we witnessed the passage of a law in Arizona that discriminated against the LGBT community, even as civil rights advocates were winning victories in courts across the country. We also saw the gap widen and the number of practicing Latina lawyers continue to shrink. We also saw a crisis unfold at our Southern border. The attached letter explains how we addressed each of these issues.

We expanded some of our core programs, while creating other opportunities for our members. For example, in March 2014, we announced a groundbreaking new program and strategic partnership with longtime partner Walmart. The HNBA/Walmart “Latino Leadership Academy” is designed to equip Latinos to succeed in the legal profession by removing barriers and obstacles to their success. The inaugural class of HNBA/Walmart “Latino Leadership Academy” included 20 Latinos from across the country.

In short, as I promised, in 2014 we built on our foundation—brick by brick—focusing on our members, our finances, our programs, and our sponsor relationships. Today, thanks to our sponsors, we enjoy greater financial stability than in recent years. Indeed, in 2014, we raised over $2 million dollars, the highest amount we have ever raised in one year.

Thanks again. Together, we can accomplish anything!

Miguel Alexander Pozo
HNBA, 36th National President (2013-14)

= 1 recommendation

Alexander May
Vice President & General Counsel US Real Estate at Walmart

Miguel showed leadership and created a strategic vision for the HNBA that will serve it well for years to come. He is focused and tireless in his advocacy for youth development and pipeline projects. View

HNBA President’s Letter to Membership... HNBA’s "NOTICIAS" FALL 2014 EDITION - ...

HNBA National President-Elect (2012-13)
Hispanic National Bar Association
August 2012 – September 2013 (1 year 2 months) | Washington D.C. Metro Area

Founded in 1972, the HNBA has changed the face of the legal profession by helping thousands of Latino lawyers to pursue successful careers in the law. The HNBA turned 40 years old in 2012, and while it has accomplished much in those 40 years, much more remains to be done.

As HNBA National President, and after 10 years on the Board, I am thrilled and humbled to have the opportunity to continue to serve. As National President, I will focus on the HNBA’s core mission and advance the five goals set forth in our 2012-2015 Strategic Plan.

Our theme in 2013-2014 will be “Building On Our Foundation: Brick by Brick.” We will focus on four bricks: (1) our members, (2) our finances, (3) our programs, and (4) our board. I have developed a four-point plan to guide our efforts.

I call my four-point plan the four “Es”:

1. Establish strategic partnerships with corporate America on co-branded programs and other initiatives.
2. Expand or evolve our current portfolio of programs such as “Su Casa,” “Su Negocio,” and “Su Futuro.”
3. Empower our board members through leadership training, and
4. Energize our membership base through targeted initiatives and a member benefits program.

Stay tuned in the coming weeks for details.

= 8 recommendations, including:

Suzette T. Rodriguez, Esq.
Attorney

Melinda Colon Cox
Of Counsel at PB Law specializing in m...

It's with great pride that I enthusiastically support Miguel Pozo for President-Elect of the HNBA. I have known Miguel for... View

Miguel Alexander Pozo is the best candidate for the HNBA National President-Elect position. Quite candidly, not only will... View

6 more recommendations
Diversity and the Bar - Lawyers’ Lantern Article

HNBA National Finance Director (2011-12)
Hispanic National Bar Association
September 2011 – August 2012 (1 year) | Washington, D.C. metro area
As National Finance Director, Miguel chaired the National Finance Committee, which consisted of 12 lawyers from across the country. The National Finance Committee was responsible for maintaining contact with the Association’s supporters and sponsors and developing processes to ensure the financial viability and sustainability of the HNBA.

Judicial Law Clerk
Superior Court of New Jersey
August 1998 – August 1999 (1 year 1 month) | Monmouth County
* Judicial law clerk for Assignment Judge Lawrence M. Lawson, A.J.S.C. in Monmouth County.

Chapter President
Alpha Phi Alpha Fraternity, Inc.
1993 – 1994 (1 year) | Hofstra University, Hempstead, New York
Initiated into Xi Phi Fall 1991.
Elected Xi Phi President in Spring 1993.
Affiliated with Alpha Gamma Lambda since 1992.

Fellow, Corporate Law Program
Sponsors for Educational Opportunity
May 1998 – September 1999 (5 months)

Publications
Watch my HNBA Campaign Video on YouTube.com and Learn More About My Platform and Vision for the HNBA.
The Campaign to Elect Miguel Alexander Pozo as HNBA President-Elect
May 21, 2012
The 2012 HNBA National Elections are underway! Log onto to www.HNBA.com before May 31 to join the HNBA and vote in this year’s elections. Electronic ballots go out the week of June 8. Don’t forget to vote. Together, we can make a difference - “Brick by Brick”!

Skills
- Commercial Litigation
- Employment Law
- Trademarks
- Strategic Partnerships

Education

Hofstra University
Bachelor of Arts, Political Science
Activities and Societies: President, Alpha Phi Alpha Fraternity, Inc., Xi Phi Chapter

Rutgers University School of Law - Newark
Juris Doctor
Activities and Societies: Managing Editor, Rutgers Race and the Law Review

Additional Info
Honors & Awards

Additional Honors & Awards

Recent Accomplishments Include—

**2015:** "Lifetime Achievement Award" Recipient, New Jersey Law Journal (NJLJ)

**2013:** "Top 50 Hispanic Influentials, Hispanic Business"

**2013:** Bloomfield College (Honorary Degree) Doctor of Laws & Commencement Speaker

**2012:** Arizona Summit School of Law (Honorary Degree) Juris Doctor & Commencement Speaker


**2015 & 2013:** Named to "Super Lawyer" list by New Jersey Super Lawyers magazine (business litigation).

**2009:** Recognized as one of New Jersey's top "40 Under 40" lawyers by the NJ Law Journal magazine.

**2009:** Named to the NJBIZ "Forty Under 40" list honoring men and women who are making headlines in their fields.

**2009:** Recognized on Latino Trends Magazine's "Latino Trendsetter List."

**2008:** Featured in Essence magazine, as one of 50 men (nationally) for my community service efforts (only attorney honored on 2008 list).

Recommendations

Juan, would you like to recommend Miguel Alexander Pozo, Esq.?

Recommend Miguel Alexander Pozo »

Pat Whalen
Owner at Patrick J Whalen Attorney at Law LLC

"Miguel is a top notch lawyer, problem solver, and just a very trustworthy person. You can count on him to aggressively represent your interests and get the deal done."

I highly recommend Miguel.

November 5, 2013. Pat worked directly with Miguel Alexander at Lowenstein Sandler LLP

Vince Sweeney
HR executive and business consultant with a special expertise in global pension, health and employee benefit programs.

"Miguel is a "best in class" in all matters ERISA and Employment Law related. He helped guide our effort in numerous legal matters as we worked our way through various participant and beneficiary matters related to our savings programs. Miguel delivers results in clear and concise narrative (both written and orally), delivers opinions that can be trusted and provides... more"

September 7, 2011. Vince was Miguel Alexander's client.

Mikeishu Anderson
VP | Associate General Counsel with 15+ years of Commercial Experience, including 10 Years as In-House Counsel

"I attended law school with and later worked with Miguel at Lowenstein, so have known him for more than a decade. He is a great legal mind, with incredible networking skills, and is adept at getting the best results for his clients quickly and effectively. I recommend him without reservation."

June 6, 2011. Mikeishu worked with Miguel Alexander at Lowenstein Sandler LLP

Pat Whalen
Owner at Patrick J Whalen Attorney at Law LLC

"Miguel is someone I have trusted and will continue to trust with complicated and personally important matters... He is hard working and always gets great results in my experience...... I highly recommend him as an attorney."

Pat Whalen
Tab 2 – Course Materials (articles, publications, other materials)
Restrictive covenants are essential part of the employment relationship. However, they are often given scant attention during the early, happy days of the relationship, when employers and employees are in their courtship phase. If the parties think of the covenants at all, employers may consider their restrictive covenants to be inviolable, while employees may consider the same covenants to be unenforceable. Unfortunately, at the end of the employment relationship, restrictive covenants are often a sticking point in the negotiation of the parties’ separation agreement and, with increased frequency, the subject of litigation. As such, it benefits both employers and employees to consider carefully the scope of the most common restrictive covenants and the criteria for their enforcement.

I. Common Restrictive Covenants

Common restrictive covenants include non-competition provisions, restrictions against solicitation of employees and clients or customers, and confidentiality provisions. Other clauses may require employees to acknowledge an employer’s ownership of documents, inventions and trade secrets. Employers may also require that new employees acknowledge that their employment relationship does not breach any restrictive covenants imposed by a prior employer.
Non-competition and non-solicitation provisions typically bind the employee both during the term of the employment relationship and for a set period thereafter. Confidentiality or non-disclosure obligations typically do not expire.

Restrictive covenants must be included in written agreements in order to be enforceable. Employers most frequently include restrictive covenants in employment agreements and/or policies presented to and signed by employees at the outset of the employment relationship. Most if not all courts consider employment to be adequate consideration for restrictive covenants although, as discussed below, they may find the provisions to be unenforceable on other grounds. Employers also may include restrictive covenants in agreements or policies that are presented to and signed by employees during the course of the employment relationship. In New York, unlike some other states, the continued employment of an at-will employee may be considered adequate consideration for those restrictions. Employers also may include restrictive covenants in deferred compensation or equity award plans. Finally, parties to asset purchase agreements may include restrictive covenants as conditions to the purchase of a business and its goodwill.

II. **Enforceability of Restrictive Covenants**

As a general rule, restrictive covenants entered into voluntarily will be enforced where the covenant is “reasonable in time and area, necessary to protect the employer’s legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee.” *Reed, Roberts Associates, Inc. v. Strauman*, 40 N.Y.2d 303, 307 (1976). The determination of whether or not a restrictive covenant is enforceable is a “case-specific inquiry.” *USI Ins. Services LLC v. Miner*, 801 F. Supp.

A. Non-Competition Provisions

Non-competition provisions are intended to prevent an employee from working for a competitor within a geographic area (which can range from a city to the world) for a set amount of time (which can range from weeks to years) after the employment relationship ends. The reasonableness of the time and geographic scope of the restriction may be determined by considering factors such as the standard restrictive covenants in the applicable industry, the rate of changes and developments in the technology of that industry, and the geographic reach of the employer.

When balancing the competing legitimate interests of the employer and employee, the courts may enforce non-competition provisions where necessary to protect an employer’s trade secrets or confidential customer information. In two recent cases, the Northern District of New York granted temporary and preliminary injunctions to an employer who sought to enforce non-competition provisions against employees who allegedly removed their employer’s confidential information before leaving the company. Ayco Co. v. Frisch, 795 F. Supp. 2d 193, 209 (N.D.N.Y. 2011); Ayco Co. v. Feldman, No. 1:10-CV-1213, 2010 WL 4286154 (N.D.N.Y. Oct. 22, 2010). The court enjoined the employees from working for any competitor for 90 days and from ever disclosing the employer’s confidential information. Id.

Motions for injunctions to enforce non-competition provisions may invoke the “inevitable disclosure” doctrine, under which an employer seeks an injunction on the
ground that a former employee, who had access to the employer’s trade secrets and is now working for the employer’s direct competitor, “could not reasonably be expected to fulfill his new job responsibilities without utilizing the trade secrets of her former employer.” *EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299, 310 (S.D.N.Y. 1999), aff’d, 2000 WL 1093320 (2d Cir. May 18, 2000). In two relatively recent cases, New York federal courts granted injunctions to the employers, finding that it was inevitable that a high-ranking former employee who had access to his former employer’s trade secrets would use or disclose that information in his new job working for a competitor. *Liebowitz v. Aternity, Inc.*, No. 10 CV 2289, 2010 WL 2803979, at *20 (E.D.N.Y. July 14, 2010) (decided under Massachusetts law); *International Business Machines Corp. v. Papermaster*, No. 08–CV–9078, 2008 WL 4974508, at *9 (S.D.N.Y. Nov. 21, 2008).

In a more recent case, a New York federal court denied IBM’s request for a preliminary injunction to enforce a 12-month non-compete agreement against a high level manager who went to work for a competitor. *International Business Machines Corp. v. Visentin*, No. 11 Civ. 399, 2011 WL 672025, at *1 (S.D.N.Y. Feb. 16, 2011). On the facts, the court found that the employee did not possess much confidential information, and that there was little risk of inevitable disclosure, so that the employer could not show irreparable harm. *Id.* at *7-20. The court rejected plaintiff’s argument that, by signing the agreement, the employee had agreed that his non-compliance with the agreement would lead to irreparable harm. *Id.* at *7, n.4. The court also pointed out that other employees who were privy to some of same information as defendant had not been required to sign restrictive covenants, undercutting plaintiff’s argument that court intervention was necessary to protect its information from disclosure. *Id.* at *5 and *10.
The court found that the non-competition agreement was not necessary to protect a legitimate interest of the employer, since the employee was not unique and did not possess trade secrets or confidential information. *Id.* at *21-22. The court noted that plaintiff’s own witness testified that the real purpose of the agreement was to serve as an employee “retention device” rather than to protect trade secrets. *Id.* at *22. Finally, the court found that enforcing the agreement would impose an undue hardship on the employee, because even though he would receive 12 months of salary from the plaintiff, the position with the competitor might not be available at the end of 12 months. *Id.* at *23.

When evaluating the enforceability of a restrictive covenant, New York courts may take into consideration whether or not the employer will make any payments to the employee for the period of “garden leave,” when the employee is no longer employed by the former employer but is restricted from working for a competitor. Courts are less likely to enforce restrictive covenants if the restriction would leave the employee without compensation from the former employer and without the right to earn compensation in his or her field. Employees also have a good faith argument that they are released from non-competition provisions when an employer breaches the parties’ employment or severance agreement by failing to pay severance payments due. See, e.g., *Cornell v. T.V. Dev. Corp.*, 17 N.Y.2d 69, 75, 268 N.Y.S.2d 29, 34 (1996); *DeCapua v. Dine-A-Mate, Inc.*, 292 A.D.2d 489, 744 N.Y.S. 2d 417 (2d Dep’t 2002).

The circumstances surrounding the employee’s termination also may affect the enforceability of restrictive covenants. Under the “employee choice doctrine,” restrictive covenants are held to be enforceable where employees who voluntarily terminate their
employment may choose to either comply and receive compensation (such as severance, deferred compensation or equity awards) or engage in the restricted activity and forego the compensation or award. See, e.g., Morris v. Schroder Capital Mgmt. Int'l, 7 N.Y.3d 616 (2006). When an employee is involuntarily terminated without cause, the employee choice doctrine does not apply and the Court must determine whether forfeiture is reasonable. Morris, 7 N.Y.3d at 701; Post v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 48 N.Y.2d 84, 421 N.Y.S.2d 847, 848 (1979) (forfeiture of pension benefits earned by employee who is involuntarily discharged is “unreasonable as a matter of law”); see also Lucente v. International Business Machines Corp., 310 F.3d 243, 254-55 (2d Cir. 2002). Some federal courts have held that when an employee is involuntarily terminated without cause, non-competition provisions are per se not enforceable under New York law. Arakelian v. Omnicare, Inc., 735 F. Supp. 2d 22, 41-42 (S.D.N.Y. 2010); SIFCO Indus., Inc. v. Advanced Plating Technologies, Inc., 867 F. Supp. 155, 158 (S.D.N.Y. 1994); but see Hyde v. KLS Professional Advisors Group, LLC, No. 12-1484-CV, 2012 WL 4840714, at *2 (2d Cir. Oct. 12, 2012) (dicta).

In a question certified to the New York Court of Appeals by the Second Circuit, the Court held that the constructive discharge test is the appropriate legal standard to apply when determining whether an employee voluntarily or involuntarily left his employment for purposes of the employee choice doctrine. Morris, 7 N.Y.3d at 618.
B. Non-Solicitation Provisions

Solicitation may consist of initiating contact with former clients and colleagues, taking affirmative steps to communicate directly with former clients and colleagues (such as through targeted mailings), and even touting one’s new business venture when contacted by a former client. *Miner*, 801 F. Supp. 2d at 191-92. Where a contract prohibits both “direct” and “indirect” solicitation, an employee may not act behind the scenes to assist his or her new employer to pursue his or her former clients, customers and/or colleagues. *Marsh USA Inc. v. Karasaki*, No. 08 Civ. 4195, 2008 WL 4778239, at *20 (S.D.N.Y. Oct. 31, 2008).

In *Miner*, defendant sold his insurance business and its goodwill to plaintiff. Within days, defendant joined another insurance company and sent an email to “everybody . . . in his contact list,” including plaintiff’s clients, stating that he had terminated his relationship with plaintiff and joined the new employer, which was “firmly committed to providing you with exceptional service.” *Id.* at 192. The court held that this e-mail constituted solicitation as a matter of law. *Id.* at 193. The court rejected defendant's argument that the e-mail was not “targeted” because it also included friends and family and that it was just “bragging.” *Id.* at 193, n. 19. Compare *Bessemer Trust Co. v. Branin*, 16 N.Y.3d 549, 559-560 (2011) (under an implied covenant not to solicit, one who has sold the goodwill of his business may not “contact his former clients directly,” but he may (i) answer factual questions “in response to inquiries made on a former client's own initiative,” (ii) assist his new employer in the “active development . . . [of] a plan” to respond to that client's inquiries, and (iii) attend a meeting with the former client in a “largely passive role”).
The Miner court suggested that “it may have been permissible for defendant to inform his former clients with whom he had a professional relationship that he was moving to a new company,” but found that defendant’s e-mail did more than that by touting the merits of his new employer. 801 F. Supp. 2d at 193, n. 20; see also FTI Consulting, Inc. v. Graves, No 05 Civ. 6719, 2007 WL 2192200, at *7 (S.D.N.Y. July 31, 2007) (defendant was permitted to simply inform clients of his departure from plaintiff employer); compare Ecolab, Inc. v. K.P. Laundry Machinery, Inc., 656 F. Supp. 894, 896-97 (S.D.N.Y. 1987) (“[a]lthough ostensibly sent as goodbye notes, it is clear that the letters [sent by defendants to their former customers] were actually intended as a first step in the solicitation” of those customers on behalf of the new employer).

The courts have limited the scope of the non-solicitation provisions to customer relationships created or maintained by the employer or at the employer’s expense. BDO Seidman v. Hirschberg, 93 N.Y.2d at 391-93; see also IDG USA, LLC v. Schupp, No. 10-CV-768, 2010 WL 3260046, at *1, *6, *7 (W.D.N.Y. Aug. 18, 2010), aff’d in part, rev’d in part, 416 F. App’x 86 (2d Cir. Mar. 25, 2011) (granting preliminary injunction where clients had been assigned to employee by the employer and the client relationships had been developed at the employer’s expense). In contrast, an employer does not have a legitimate interest in preventing a former employee from providing services to “personal clients . . . who came to the firm solely to avail themselves of his services an only as a result of his own independent recruitment efforts.” BDO Seidman, 93 N.Y.2d at 393; see also Frank Crystal & Co. v. Dilmann, 84 A.D.3d 704, 925 N.Y.S.2d 430 (1st Dep’t 2011); Weiser LLP v. Coopersmith, 74 A.D.3d 465, 902 N.Y.S.2d 74 (1st Dep’t 2010) (clients developed from independent sources including the

As with non-competition provisions, non-solicitation provisions may be held unenforceable if they are unreasonable in time and geographic scope. In Miner, the court found reasonable a non-solicitation clause that would prohibit defendant for 24 months from accepting business from former clients who voluntarily and without any solicitation choose to continue to do business with defendant. The court cited other cases holding that similar 24 month restrictions on solicitation of former clients in the insurance industry were reasonable. 801 F. Supp. 2d at 190-91. In a recent case involving employees of a fitness center, the court found that the covenants against competition and client solicitation were overbroad because they ran for 10 years and contained no geographic limitations. Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC, 813 F. Supp. 2d 489, 507-08 (S.D.N.Y. 2011).

In balancing the competing legitimate interests of the employer and employee, the courts have recognized (i) the general enforceability of non-solicitation covenants in employment agreements that “are necessary to prevent disclosure of trade secrets or confidential information or where an employee’s services are unique or extraordinary,” (ii) an employer’s interest in protecting clients procured through the use of a company’s name and resources, and (iii) the “duty to refrain from soliciting former customers, which arises upon the sale of the ‘good will’ of an established business.” Miner, 801 F. Supp. 2d at 190-91.
C. Confidentiality and Non-Disclosure Provisions

Confidentiality agreements and non-disclosure provisions often define what is deemed confidential by the employer, but these documents do not end the discussion. The courts retain the discretion to determine what is confidential and/or protected as a trade secret. See e.g., Miner, 801 F. Supp. 2d at 194-196 (denying defendant’s motion for summary judgment on the issue of whether the client coverage, contact, and policy information that he e-mailed from his work to his personal account constituted confidential information or was protected as a trade secret); Schanfield v. Sojitz Corp., 663 F. Supp. 2d 305, 345 (S.D.N.Y. 2009) (granting summary judgment on liability, finding that former employee breached non-disclosure provision in employment contract by e-mailing his employer’s documents containing “sensitive risk analysis” to third parties and retaining them after his termination).

Courts have held confidential information and trade secrets to include the employer’s business plan, operations manual, pricing policy, profit structure and, in some circumstances, customer lists. Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC, 813 F. Supp. 2d at 518-19; IDG USA, LLC, 2010 WL 3260046. Customer lists may not be considered confidential if they are available from public sources, or from sources other than the employer.

Restrictions on disclosure of confidential information and trade secrets are generally not limited in time or geographic scope, and may last forever. Ayco Co. v. Frisch, 795 F. Supp. 2d at 209.

In addition to the contractual claims, employers may also seek to assert common law claims, such as unfair competition, misappropriation of trade secrets, breach of
fiduciary duty and breach of loyalty, against employees for alleged improper use or
disclosure of the employer’s confidential information or trade secrets. See, e.g., IDG
USA, LLC, 2010 WL 3260046 at *15-16; Henbest & Morissey Inc v. W.H. Ins. Agency,
Inc., 259 A.D.2d 829, 686 N.Y.S.2d 207 (3d Dep’t 1999). Employers should be aware
that pursuing such claims may require them to disclose the allegedly misappropriated
trade secret during discovery. MSCI Inc. v. Jacob, 945 N.Y.S.2d 863, 865-66 (Sup. Ct.
2012) (requiring plaintiff to disclose source code allegedly misappropriated by
defendants).

III. Damages

As discussed above, employers may be entitled to injunctive relief for a former
2d at 209; International Business Machines Corp. v. Papermaster, 2008 WL 4974508,

Employers may also seek monetary damages. The “measure of damages for a
violation of a restrictive covenant is the loss sustained by reason of the breach,
including the ‘net profits of which the plaintiff was deprived’ by the defendant’s acts.”
Pure Power Boot Camp, 813 F. Supp. 2d at 519. But “[l]ost profits may be recovered
only if: (1) lost profits were ‘fairly within the contemplation of the parties to the contract
at the time it was made’; (2) lost profits were caused by the defendant’s breach; and (3)
damages are ‘capable of proof with reasonable certainty.’” Id. In Pure Power Boot
Camp, the court found that plaintiff could satisfy none of these requirements because:
(1) the employment agreements failed to mention lost profits; (2) plaintiff failed to prove
that but for defendant’s theft and use of its confidential information, it would have
earned these profits; and (3) plaintiff’s calculations were inherently speculative and its expert’s methodology was flawed. Id. at 520. Therefore, the court declined to award plaintiff any lost profits damages on its claim for breach of the non-disclosure agreement.

Employers may also seek to bring claims, such as tortious interference with contract or aiding and abetting breach of fiduciary duty, against the new employer. See Barbagallo v. Marcum LLP, 820 F. Supp. 2d 429, 444-45 (E.D.N.Y. 2011).

Conclusion

The drafting of restrictive covenants requires a careful review of the facts regarding the legitimate business needs of the employer, the role of the employee and the common practices in the applicable industry, as well as the law in the jurisdictions applicable to the employer and employee. Courts are more likely to enforce restrictive covenants that are tailored to balance both the legitimate business interests of the employer and the employee’s legitimate need to earn a livelihood in his or her chosen profession.

S.B.G.

March 20, 2013
Employers often enter into post-employment restrictive covenants (commonly referred to as non-compete agreements) with employees only to find that when the employees leave, the restrictive covenants are not enforceable or do not provide sufficient value to the company.

Here are seven steps to improve post-employment restrictions:

1. **Identify the Legitimate Interest to be Protected**

   An employer must have a legitimate interest that will be protected by restraining an employee’s ability to compete. Protecting trade secrets, confidential information, or unique relationships with clients are generally recognized in many states as legitimate interests that will support enforcement of a restrictive covenant. For example, when an employee has access to marketing or product development plans, the employer may have a legitimate protectable interest in preventing the employee from using knowledge of that confidential information for a competitor. Similarly, if an employee develops unique relationships with the employer’s clients, the employer may have a legitimate interest in protecting the goodwill inherent in those relationships.

   The employer should have a clear understanding of the legitimate interests a restrictive covenant is designed to protect before entering into the restrictive covenant. Once the protectable interests are identified and understood, the restrictive covenant should be crafted to protect those interests without overreaching.

2. **Ensure that the Restrictive Covenant is Reasonable**
Restrictive covenants will typically only be enforceable in most states if they are reasonable in scope, geographic range, and duration. Reasonableness depends on the nature of the employer’s legitimate interest and varies from industry to industry, from position to position, and often from state to state. Drafting a restrictive covenant that is more likely to be enforced requires understanding what the company realistically and reasonably needs to protect its legitimate interests if the employee leaves.

For example, if the employee is a salesperson whose territory is the Pacific Northwest and the employer’s legitimate protectable interest is the salesperson’s unique relationships with clients in that territory, a restrictive covenant preventing her from selling a competing product in the Pacific Northwest might be reasonable. On the other hand, an otherwise identical restrictive covenant preventing her from selling a competing product anywhere in the United States may be overbroad and unenforceable.

Similarly, a three-year restrictive covenant precluding an employee from working for a competitor might not be reasonable if it is based on the employee’s unique relationships with clients and the employer only needs one year to introduce and train a replacement. Finally, a restrictive covenant that precludes a vice president of marketing with responsibility for one particular product line from working in any capacity for any company that competes with the employer, even on an entirely different product line, might be overbroad.

3. Consider What State’s Law Should Apply

Determining what law applies to a restrictive covenant can make the difference between enforcement and irrelevance. For example, California has a statutory prohibition on the enforcement of most restrictive covenants, but New York will uphold restrictive covenants in appropriate circumstances. Employers who have all of their operations and employees in a single state typically apply the law of that state in their restrictive covenants. Employers with employees in several states, however, may be able to choose the law to apply. This requires analyzing the laws of the potentially applicable states and including an appropriate choice of law clause in the agreement.

In addition, restrictive covenants typically should contain choice of forum clauses requiring that disputes must be litigated in the state whose law was chosen. Courts in some states may ignore provisions choosing the law of a different state on the theory that their state’s public policy or interest in restrictive covenants overrides the parties’ choice of law. Many courts, however, will enforce choice of forum provisions and leave it to the forum state to determine which law to apply. Thus, if a restrictive covenant provides for Florida law, the agreement should also require that disputes be litigated in Florida.

To further increase the likelihood that choice of law and forum clauses are enforced with regard to employees who do not work in the chosen state, the employer can ensure that there are contacts between the employees and the chosen forum. These contacts could include having the employees (a) attend training programs in the forum state, (b) report to management in the forum state, (c) take on responsibility for clients or vendors in the forum state, or (d) supervise employees in the forum state.
Many employment agreements and restrictive covenants require arbitration of disputes. Even if the parties prefer arbitration, the agreement should permit the employer to seek injunctive relief from a court.

4. Confirm that the Restrictive Covenant is Supported by Consideration

Like most contracts, a restrictive covenant should be supported by valid consideration at the time of the agreement. Where a restrictive covenant is part of an employment agreement with a new employee, the offer of employment is often sufficient consideration. What constitutes valid consideration for a restrictive covenant with an existing employee can be a thornier issue.

In some states, continued employment of an at-will employee is valid consideration for a restrictive covenant. In other states, more tangible consideration—such as a raise or promotion—may be needed to support a restrictive covenant with an existing employee.

5. Decide Whether to Pay the Employee During the Restriction Period

The company should decide whether to pay the employee during the post-employment restriction period, and if so, how much. Paying the departing employee may enhance the likelihood of a court enforcing the restrictive covenant because, among other things, payments lessen the potential harm to the employee from enforcement of the covenant.

If payments will be made, the company should examine whether to pay only base salary or to also pay commissions or bonuses. The company should consider whether the agreement should permit payments to end if the employee violates the restrictions or should allow the company to terminate payments if the company does not wish to enforce the restrictive covenant.


Not all restrictions are created equal. Notice provisions, garden leave, and post-employment restrictive covenants serve different functions and can lead to different remedies if they are breached by a departing employee. For example, a provision requiring an employee to give 30 days’ notice theoretically provides the employer advance warning and an opportunity to prepare to replace the employee.

Many courts, however, will not specifically enforce notice provisions, so they might not give the employer the protection it seeks (although damages could still be available). Similarly, garden leave provisions require an employee to stay home from the office while remaining an employee in all other respects. This provides the employer with an opportunity to transition the departing employee’s responsibilities to a new employee before the departing employee begins working for a competitor. In practice, however, some courts enforce garden leave provisions only if they meet the criteria for enforcement of restrictive
Notice provisions, garden leave, and post-employment restrictions are all potentially useful tools, but it is important to understand their benefits and limitations and to consider which of these tools provides the best protection in each situation.

7. Prepare to Enforce Before Employees Leave

Employers often seek to enjoin departing employees from breaching (or continuing to breach) their restrictive covenants. Seeking injunctive relief requires moving deliberately and quickly once an employee leaves. It is helpful for the employer and its counsel to identify in advance the steps they will take when employees breach their restrictive covenants. Steps could include ensuring that the company maintains files for each employee with copies of contracts and other key information, having template litigation papers prepared, or ensuring that the company’s IT professionals are equipped and prepared to search for evidence of misappropriation of company information or improper communications with company employees or clients.

Enforcement of restrictive covenants depends on a number of factors, many of which are within the employer’s control. Careful thought and drafting before restrictive covenants are signed can increase the likelihood and consistency of favorable outcomes when employees leave.
§ 8.06 Enforcement of Restrictive Covenants in Employment Agreements, Restatement of the Law - Employment Law

Restatement of Employment Law § 8.06

Restatement of the Law - Employment Law

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Chapter 8. Employee Obligations and Restrictive Covenants

§ 8.06 Enforcement of Restrictive Covenants in Employment Agreements

Comment:

Reporters' Notes

Except as otherwise provided by other law or applicable professional rules, a covenant in an agreement between an employer and a former employee restricting the former employee's working activities is enforceable only if it is reasonably tailored in scope, geography, and time to further a protectable interest of the employer, as defined in § 8.07, unless:

(a) the employer discharges the employee on a basis that makes enforcement of the covenant inequitable;
(b) the employer acted in bad faith in requiring or invoking the covenant;
(c) the employer materially breached the underlying employment agreement; or
(d) in the geographic region covered by the restriction, a great public need for the special skills and services of the former employee outweighs any legitimate interest of the employer in enforcing the covenant.

Comment:

a. Scope and cross-references. Contractual restrictions on former employees’ working activities (“restrictive covenants”) involve several competing interests. On the one hand, these provisions enable employers to protect customer relationships, investments in an employee’s reputation, and other legitimate interests under § 8.07. On the other hand, restrictive covenants inhibit the freedom of employees to leave their employers and move to other employment where the employees may be more productive; and they frustrate the public interest in promoting competition. Courts balance these competing interests by enforcing restrictive covenants only if they are reasonably tailored to protect the legitimate employer interests identified in § 8.07. Some states prohibit by statute the enforcement of noncompetition clauses in employment contexts not related to the sale of a business, but these states generally will enforce restrictive covenants more limited than noncompetition clauses if they are reasonably tailored to protect a legitimate interest of the employer. The principles governing judicial modification of unreasonable restrictive covenants are the subject of § 8.08.

b. Types of restrictive covenants. The rule stated in this Section applies to many different types of postemployment restraints. So long as a restrictive covenant has the effect of substantially limiting employees from competing with their former employer, whether completely or in a specific manner, the agreement must meet the requirements of this Section to be enforceable. In addition to noncompetition covenants, this Section also covers covenants that, rather than forbidding competition entirely, provide that certain competitive activity by a former employee will, for example, require specified payments by the former employee to the former employer. This Section also applies to covenants that prohibit postemployment solicitation of customers or solicitation or hiring of coworkers with whom the employee came in contact while employed.

Different types of restrictive covenants may be necessary to protect different types of employer interests, and courts should examine the asserted business justification for each specific limitation. The same general inquiry, however, applies to all restrictive covenants—namely, a court should determine whether the employer has a protectable interest, and whether the
restrictive covenant is reasonably tailored to furthering that interest.

Illustrations:
1. Salesperson E interacts with the customers of employer X and has developed good relationships with them, sometimes using the expense budget provided by X for this purpose. E agrees that, for one year after leaving X’s employ, E will not solicit those customers of X with whom E dealt while working for X. E quits and immediately begins soliciting those customers for a competitor. X has a legitimate interest in enforcing the agreement for a reasonable period of time in order to protect its customer relationships.
2. Employee E agrees to pay employer X a sum of money if E competes with X after leaving X’s employ. E quits and begins competing with X. In the new position, E does not use X’s trade secrets or solicit X’s customers. X has no protectable interest under § 8.07 in preventing E from competing. Thus, even though X does not want a good employee like E competing against it, E’s agreement to pay X is unenforceable.

c. Reasonably tailored. A court will enforce a restrictive covenant only if it is reasonably tailored to the protection of a legitimate interest of the employer as set forth in § 8.07. To be reasonably tailored, the covenant should be no more restrictive in duration, scope of activities, or geography than necessary to protect the legitimate interest at stake. Whether limitations are reasonable will vary depending on the circumstances of the case, including industry practices and the nature of the interest justifying the restrictive covenant. When confronted with a blanket contractual restriction on all competition—even if the restriction otherwise is of reasonable duration and geographical scope—courts will inquire whether the employer’s legitimate interest could not be equally well served by a narrower restriction. For example, could the employer’s interest in protecting customer relationships be satisfied by a reasonable nonsolicitation clause instead of a noncompete clause? In some circumstances, however, such as when it is especially difficult for an employer to determine whether a former employee is soliciting its customers, a nonsolicitation clause may not adequately protect the employer’s legitimate interests. Regardless of the nature of an employer’s interest, the employer may not restrict employees from working in any market in which the employer does not do business.

The inquiry into the reasonableness of geographic, temporal, and scope-of-business limitations in restrictive covenants is context-sensitive and depends heavily on the nature of the legitimate interests at stake. Identical limitations will be reasonable to protect some interests but not others. A provision compensating the former employee during the term of the restrictive covenant (sometimes called “garden leave”) may be a factor in favor of finding the restriction reasonable.

Illustrations:
3. Same facts as in Illustration 1, except that E also agrees to refrain from all competition with X for the one-year period. E solicits no business from customers with whom E had contact while employed by X, but otherwise competes against X. Because a nonsolicitation covenant would have been sufficient to address X’s legitimate interests, the noncompensation covenant is unenforceable.
4. Employee E agrees not to compete with employer X, a website-developing business, for one year after the termination of E’s employment. Within a year of quitting, E goes to work for a competitor of X. Because of the nature of the website industry, X’s confidential strategic business plans, which E knows, are obsolete within six months. The covenant is not reasonably tailored to protect X’s strategic business plan and thus is not enforceable for a full year.
5. Salesperson E agrees not to solicit or do business with any customer of employer X after E’s employment is terminated until 30 days after X has stopped serving that customer. This agreement is not reasonably tailored to protect X’s customer relationships because it effectively prevents E from soliciting customers for an indefinite period. A reasonable covenant would prevent E from soliciting or doing business with X’s customers for only so long as needed to enable X to attempt to reestablish relationships with the customers with whom E dealt.
6. Salesperson E agrees that, after he leaves X’s employment, he will not compete with X in any state in which X services its customers. X services customers in 36 states, but E dealt with customers in only three states while working for X. The noncompetition agreement is not reasonably tailored to protect X from losing customer relationships that E developed with X’s assistance. A narrower agreement, such as one prohibiting E from soliciting the customers whom E had serviced while working for X, would be sufficient to protect X’s interest.
7. E, a vice president of computer-data-storage company X, agrees not to compete with X anywhere in the world for six months. Both X and its competitors serve customers worldwide, and E has had extensive access to X’s trade secrets, which apply worldwide. Because E’s trade secrets have worldwide utility, the worldwide restriction is
reasonably tailored to further a protectable interest of X.

d. Relation to § 8.03. The scope of agreements enforceable under this Section is significantly broader than the default rule stated in § 8.03, which prohibits the use or disclosure of trade secrets, even absent a formal agreement. The range of protectable interests that might support a reasonable restrictive covenant (as set forth in § 8.07) is not limited to the employer’s trade secrets, but also includes other confidential information not rising to the level of trade secret, information about the employer’s customer relationships, and employee-specific goodwill. Further, a restrictive covenant can do more than prohibit the use or disclosure of trade secrets and other confidential information. It can, in appropriate cases, proscribe all competition.

As noted in the Comments to § 8.01, the UTSA preempts common-law tort claims premised on the misappropriation of an employer’s trade secrets or other confidential information by employees in violation of their duty of loyalty. The UTSA does not affect contractual remedies, such as actions for breach of a nondisclosure agreement whether or not the confidential information is a trade secret under the act. In addition, nondisclosure agreements that cover confidential information not rising to the level of trade secret may provide the employer additional protection not available under the UTSA. An employer will not be able to enforce a restrictive covenant for information in which it has no protectable interest, such as information in the public domain or information that is part of the general experience, knowledge, training, and skills of the employee gained in the course of employment.

Illustrations:

8. Employee E works as a sales representative for X, a distributor of medical supplies. X plans to give E a long list of X’s customers for E to contact. Even if not protectable as a trade secret under § 8.03, for example, because much of the customer information could be obtained by others through proper means, X has a legitimate interest in protecting the list as confidential information and may prevent E from disclosing the list to competitors by means of an appropriate restrictive covenant.

9. X employs insurance agent E to manage a substantial number of accounts for X. X does not obtain a noncompetition agreement from E. E subsequently quits to work for a competitor of X, and then begins soliciting X’s customers. X has no claim against E under § 8.03. X also has no claim under § 8.06 because X did not obtain a restrictive covenant.

10. Same facts as in Illustration 9, except that, upon hire, E consented to a noncompetition agreement reasonably tailored to protect X’s customer relationships. The agreement is enforceable under § 8.06.

11. In the course of employment, stockbroker E learned the trade secrets of X, his employer. E quit working for X and began working for Y, a competitor of X, and X have no restrictive covenants. Under § 8.03, E may not use or disclose X’s trade secrets; under § 8.05, E may work for Y in competition with X.

E agreed to a restrictive covenant with X, promising not to compete against X for six months after leaving X’s employ. If the covenant is otherwise reasonable, not only may E not use or disclose X’s trade secrets, but E also may not work for Y for six months.

e. Restrictive covenants agreed to after the start of the employment relationship. The majority rule is that continuing employment of an at-will employee is sufficient consideration to support the enforcement of an otherwise valid restrictive covenant. However, a significant minority of jurisdictions require “new” or “additional” consideration. Under either approach, the parties may enter into enforceable restrictive covenants after the start of an employment relationship.

Illustration:

12. E, an at-will employee of X, begins working for X with no restrictive covenant. Two years later, X requires E to enter into a reasonable noncompetition agreement, after which X shares trade secrets or other competitively sensitive confidential information with E. The agreement is enforceable.

f. Terminated employees. Reasonable restrictive covenants are generally enforceable against employees who have been discharged for cause. An opposite rule would have the perverse consequence of providing an incentive for an employee who wants relief from the restrictions of a reasonable covenant to perform badly and thus trigger a for-cause termination.
In contrast, restrictive covenants are generally unenforceable against employees who are terminated without cause or who quit employment for cause attributable to the employer (defined in the same way as cause for the termination of fixed-term agreements in § 2.04(a)). An opposite rule would have the perverse consequence of enabling an employer to terminate rather than retain an employee who is performing satisfactorily and then restrict the discharged employee’s ability to secure new employment. By the same token, an employer should not be able to obtain enforcement of a restrictive covenant when the employer acts in bad faith, such as by securing the employee’s execution of the covenant after planning to discharge the employee.

Illustrations:

13. X employs E as a chiropractor. E, who has access to X’s patient files and other confidential business information, signs a reasonable restrictive covenant as part of an employment agreement with X. The employment agreement provides that E can be terminated without notice if the termination is for cause. E is persistently late to work, despite counseling, and his lateness has a substantial negative impact on patients and clinic operations. X fires E for cause based on E’s persistent lateness. X is not disqualified under this Section from enforcing the restrictive covenant against E, provided X can demonstrate a protectable interest under § 8.07.

14. X’s employee E, who has access to X’s trade secrets, signs a reasonable restrictive covenant as part of an employment agreement with X. The covenant states that E will forfeit special severance benefits if E competes with X within one year of leaving X’s employ. X fires E without cause, and E then begins working for a competitor. X may not enforce the covenant against E.

15. Same facts as Illustration 14, except that E quits because X, without cause, has constructively discharged (see § 5.01, Comment c) E by demoting E and depriving him of all customary staff assistance. Because E quit for cause attributable to the employer, X may not enforce the covenant against E.

g. Employer’s material breach of employment agreement. If the employer materially breaches the employment agreement, it cannot enforce an otherwise valid restrictive covenant contained in the agreement.

Illustration:

16. Employee E signs a restrictive covenant as part of a two-year employment agreement with employer X. The covenant states that E will not compete with X for one year after the termination of E’s employment. X materially breaches the employment agreement by failing to pay E for several weeks, and E therefore quits. Even if the non-competition covenant were otherwise reasonable, X may not enforce it against E because E’s quitting was in response to X’s material breach of the employment agreement.

h. Professionals. Laws and regulations governing various professions may limit the enforceability of some restrictive covenants. For example, a noncompetition agreement is generally not enforceable against an attorney because the rules governing the legal profession provide that the right of clients to have an attorney of their choice outweighs the protectable interests of employers under § 8.07. Enforceability of reasonable restrictive covenants against doctors, accountants, or other professionals may vary by jurisdiction because the rules regulating those professions and the availability of these professionals to serve public needs may vary. (See Comment i.)

i. Public interest. Courts may, in unusual circumstances, invalidate a restrictive covenant as against the public interest, even if the covenant satisfies all of the other requirements of this Section—for example, where the particular geographic market has only a very small number of persons or firms to provide an important good or service. Most often, this rationale is used to invalidate a restrictive covenant that would prevent a medical professional from practicing in a small town or rural area where there are few practitioners or too few with a specific specialty.

j. Employer’s demand for unenforceable restrictive covenants. As stated in § 5.02(d), an employer who fires an employee for refusing to sign what is in fact an unenforceable restrictive covenant may be liable to that employee in a tort suit based on wrongful discharge in violation of public policy.
Reporters’ Notes

Comment a. Some states have statutes prohibiting the enforcement of noncompetition clauses in employment contracts. See, e.g., Cal. Bus. & Prof. Code § 16600 (West 2008) (“Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.”). Other states have enacted laws prohibiting enforcement of noncompetition agreements in certain industries. See, e.g., N.Y. Lab. Law § 202-k (West 2009) (“2. A broadcasting industry employer shall not require as a condition of employment, whether in an employment contract or otherwise, that a broadcast employee or prospective broadcast employee refrain from obtaining employment: (a) in any specified geographic area; (b) for a specific period of time; or (c) with any particular employer or in any particular industry; after the conclusion of employment with such broadcasting industry employer. This section shall not apply to preventing the enforcement of such a covenant during the term of an employment contract.”).

Additionally, some states, such as Colorado, have exempted management personnel and the protection of trade secrets from their statutory ban, making the legal framework similar to states without a per se statutory prohibition. See Colo. Rev. Stat. § 8-2-113(2) (2003) (“Any covenant not to compete which restricts the right of any person to receive compensation for performance of skilled or unskilled labor for any employer shall be void, but this subsection (2) shall not apply to: (a) Any contract for the purchase and sale of a business or the assets of a business; (b) Any contract for the protection of trade secrets; (c) Any contractual provision providing for recovery of the expense of educating and training an employee who has served an employer for a period of less than two years; (d) Executive and management personnel and officers and employees who constitute professional staff to executive and management personnel.”).

Comment b. This Section applies to all types of restrictive covenants ancillary to an employment contract. Thus, a covenant that specifies forfeiture of some financial benefit as a consequence of competition is subject to the requirements listed in this Section. See Aniston Urologic Assocs., PC v. Kline, 689 So. 2d 54, 57-58 (Ala. 1997) (invalidating a covenant that devalued an employee’s stock if he competed after employment); Pierce v. Hand, Arendall, Bedsole, Greaves & Johnston, 678 So. 2d 765, 769-770 (Ala. 1996) (same); Cray v. Nationwide Mut. Ins. Co., 136 F. Supp. 2d 171, 179-180 (W.D.N.Y. 2001) (applying New York law; evaluating a contract that specified the forfeiture of deferred compensation in the event of competition); Pettingell v. Morrison, Mahoney & Miller, 687 N.E.2d 1237, 1239 (Mass. 1997) (noting that the “strong majority rule in this country is that a court will not give effect to an agreement that greatly penalizes a lawyer for competing with a former law firm, at least where the benefits that would be forfeited accrued before the lawyer left the firm”). A covenant that mandates the payment of a monetary penalty in the event of competition must meet the requirements of this Section as well. See Cherry, Bekaert & Holland v. Brown, 582 So. 2d 502, 505-506 (Ala. 1991) (invalidating a covenant that specified the payment of 150 percent of the employee’s past year’s billings in the event of competition); BDO Seidman v. Hirshberg, 712 N.E.2d 1220, 1222 (N.Y. 1999) (evaluating an agreement that required the departing employee “to pay for the loss and damages’ sustained by [the former employer] in losing any of its clients to [the employee] within 18 months after his departure, an amount equivalent to 1½ times the last annual billing for any such client who became [his] client”); Leon M. Reimer & Co. v. Cipolla, 929 F. Supp. 154, 159-160 (S.D.N.Y. 1996) (applying New York law; invalidating a covenant that specified the payment of 150 percent of the employee’s past year’s billings in the event of competition). See also Falmouth Ob-Gyn Assocs. v. Abisla, 629 N.E.2d 291, 292-294 (Mass. 1994) (invalidating a covenant that contemplated payment of $250,000 to employer in the event of competition); MetroWest Med. Group, Inc. v. Mount Auburn Hosp., No. 94-4767, 1994 WL 902895, at *4-5 (Mass. Super. Ct. Dec. 14, 1994) (invalidating a covenant that required a group of employees to assume $2,500,000 in debt if they competed); Philip H. Hunke, D.D.S., M.S.D., Inc. v. Wilcox, 815 S.W.2d 855, 856 (Tex. Ct. App. 1991) (invalidating a covenant that required an employee to pay his former employer $75,000 if he subsequently competed).

Section 8.06 also applies to more limited restrictive covenants such as those forbidding solicitation of specific customers or those forbidding disclosure of an employer’s confidential information (beyond the limits of § 8.03). See Picker Int’l, Inc. v. Parten, 935 F.2d 257, 261-264 (11th Cir. 1991) (applying Alabama law; upholding a nonsolicitation clause on the basis of customer relationships but invalidating a nondisclosure clause because the employee was not privy to any confidential information); McFarland v. Schneider, No. Civ.A. 96-7097, 1998 WL 136133, at *40-48 (Mass. Super. Ct. Feb. 17, 1998) (upholding nonsolicitation agreement and invalidating a covenant not to compete); Rehmann, Robson & Co. v. McMahan, 466 N.W.2d 325, 327-328 (Mich. Ct. App. 1991) (evaluating the reasonableness of nonsolicitation provision that prohibited former employee from contacting, soliciting, or offering to perform services for clients of the former employer for two years following termination).
Illustrations 1 and 3 both are drawn from McFarland v. Schneider, No. Civ. A. 96-7097, 1998 WL 136133, at *41-42 (Mass. Super. Ct. Feb. 17, 1998). In that case, the employee agreed to both a covenant not to compete and a covenant not to solicit clients with whom he had fostered a relationship at his employer’s expense. See id. The court upheld the nonsolicitation covenant but invalidated the noncompetition covenant, finding it overbroad and unreasonable insofar as the employer had a legitimate interest only in protecting its customer relationships. See id. See also Fortune Personnel Consultants, Inc. v. Hagopian, No. Civ. A. 97-24440-A, 1997 WL 796494, at *3 (Mass. Super. Ct. Dec. 30, 1997) (granting limited injunction and finding that “the portion of the covenant not to compete which prevents [the employee] from contacting any client or candidate whose account she handled, … is reasonable in scope and is reasonably drafted to protect the [former employer’s] goodwill”); DataType Int’l, Inc. v. Puzia, 797 F. Supp. 274, 285 (S.D.N.Y. 1992) (applying New York law; finding that former employer had a protectable interest in the personal relationships the employee had developed with particular customers on its behalf and prohibiting the employee from soliciting those specific individuals for a period of two years). Similarly, in Zep Mfg. Co. v. Harthcock, 824 S.W.2d 654, 660-663 (Tex. Ct. App. 1992), the court upheld a nondisclosure covenant but invalidated a noncompetition covenant because it contained no geographical limitations.

Illustration 2 is based loosely on Leon M. Reimer & Co., P.C. v. Cipolla, 929 F. Supp. 154, 158-160 (S.D.N.Y. 1996) (applying New York law). That case provides an example of a compensation-for-competition clause that was deemed to overprotect the former employer's interests and unreasonably restrict client choice in professional services. See also Falmouth Ob-Gyn Assoc. v. Abisla, 629 N.E.2d 291, 294 (Mass. 1994) (citing cases from Arkansas, Iowa, Maryland, and Georgia and concluding that compensation-for-competition agreements should be analyzed the same as noncompetition restrictive covenants).

Courts often claim to evaluate whether a restrictive covenant creates an undue burden on the employee who agreed to it. However, courts seldom, if ever, invalidate covenants solely on this ground. See, e.g., Marcam Corp. v. Orchard, 885 F. Supp. 294, 298 (D. Mass. 1995) (applying Massachusetts law; holding that a noncompetition covenant covering the entire United States did not work an undue burden on the employee because he could move to London or work in the United States for a noncompetitor). Generally, courts find that a restrictive covenant is an undue burden only when it fails to meet the requirements articulated in this Section. See, e.g., Chavers v. Copy Prods., Inc., 519 So. 2d 942, 945 (Ala. 1988) (holding that a covenant unnecessary to protect any legitimate interest also worked an “undue hardship”). At most, it seems that the undue-burden requirement is a tack-on rationale courts use only when a restrictive covenant is otherwise invalid.

Comment c. The inquiry into the reasonableness of geographic and temporal limitations on restrictive covenants is context-sensitive and depends heavily on the nature of the legitimate interest at stake. Identical temporal and geographic restraints will be reasonable to protect some interests but not others.

Illustration 4 is derived from EarthWeb, Inc. v. Schlack, 71 F. Supp. 2d 299, 313 (S.D.N.Y. 1999) (applying New York law), and shows how even relatively short restrictions might be invalidated depending on an employer’s industry and the nature of its legitimate interest. In that case, the employer’s “strategic content planning” was soon obsolete and thus did not justify restraining the employee for even a single year. Id.

Illustration 5 is based on Gen. Devices, Inc. v. Bacon, 888 S.W.2d 497, 504 (Tex. Ct. App. 1994), and is an example of a covenant that is temporally unreasonable. The covenant in that case was designed to last indefinitely; as long as the employer continued servicing its clients, the employee could not compete with it. See id. at 503-504. See also Cost Mgmt. Incentives, Inc. v. London-Osborne, No. CV020463081, 2002 WL 3188680, at *6 (Conn. Super. Ct. Dec. 5, 2002) (holding a two-year nonsolicitation agreement in the biotechnology employee placement industry to be of an unreasonable duration); Delli-Gatti v. Mansfield, 477 S.E.2d 134, 137 (Ga. Ct. App. 1996) (holding that a noncompetition agreement in a doctor’s employment contract limited to one county and a length of 12 months was reasonable).

Illustration 6 is drawn from Hartman v. W.H. Odell and Assocs., Inc., 450 S.E.2d 912, 918-920 (N.C. Ct. App. 1994). The covenant in Hartman was considered unnecessary to protect the employer’s legitimate interests in the customer relationships its employee had developed while employed. Hartman nicely illustrates how the only customer relationships that an employer may legitimately protect by contract are those specific to the employee it seeks to restrain. See id. at 917-918. When it attempts to protect its other customer relationships, the employer risks having its covenant invalidated. See also DataType Int'l, Inc. v. Puzia, 797 F. Supp. 274, 285-286 (S.D.N.Y. 1992) (applying New York law; upholding a nonsolicitation clause but declining to enforce a noncompetition covenant, protecting only an employer’s interest in those...
§ 8.06 Enforcement of Restrictive Covenants in Employment..., Restatement of...


Provision of a “garden leave” is not required, but helpful in obtaining enforcement of an otherwise reasonable restrictive covenant. See, e.g., Pontone v. York Grp., Inc., No. 08 Civ. 6314(WHP), 2008 WL 4539488, at *4 (S.D.N.Y. Oct. 8, 2008) (applying New York law; stating that “[a] factor weighing in favor of reasonableness is whether the individual received compensation during the time he was restrained from competing”). See also Bradford v. N.Y. Times Co., 501 F.2d 51, 58 (2d Cir. 1974) (noting that payments during the restricted period support the reasonableness of a noncompetition agreement).

Comment d. Even absent a contractual clause, an employee subject to the duty of loyalty cannot disclose or use trade secrets (§ 8.03) and cannot compete while an employee (§ 8.04). Section 8.06 recognizes that, with an appropriate contractual clause, the employer can protect interests other than trade secrets and can restrict competition by the employee after the employment relationship ends.

Illustration 8 is based on McKesson Med.-Surgical, Inc. v. Micro Bio-Medics, Inc., 266 F. Supp. 2d 590 (E.D. Mich. 2003) (applying Michigan law). The UTSA does not affect contractual remedies. See, e.g., Haw. Rev. Stat. Ann. § 482B-8(b)(1) (2013). Because courts hold that the UTSA does not preempt contract actions based on the misappropriation of trade secrets or other confidential information, an employer with a legitimate interest in protecting information—whether or not it qualified for trade-secret protection under the UTSA—may do so by means of an enforceable restrictive covenant. See Imaginative Research Assocs. v. Ramirez, 718 F. Supp. 2d 236, 249 n.8 (D. Conn. 2010) (applying Connecticut law; suggesting that, in order to protect information that is “confidential” or “proprietary” but not trade secret, the adequate remedy is enforcement of a nondisclosure agreement, which would not be preempted by the UTSA); Thomas & Betts Corp. v. Panduit Corp., 108 F. Supp. 2d 968, 972-973 (N.D. Ill. 2000) (applying Illinois law; noting that plaintiff’s breach-of-contract claim (based on a breach of an express confidentiality agreement) remained intact notwithstanding UTSA preemption and would “provide adequate protection with respect to this issue”); HDNet LLC v. North American Boxing Council, 972 N.E.2d 920, 925 (Ind. Ct. App. 2012) (noting that, although UTSA preemption of common-law tort claims seems harsh, “we emphasize that [the UTSA] does not preempt claims for misappropriation of information or ideas that are protected by contract”); McKesson Med.-Surgical, Inc. v. Micro Bio-Medics, Inc., 266 F. Supp. 2d 590, 596-597 (E.D. Mich. 2003) (applying Michigan law; concluding that customer lists that employer accused former employees of appropriating before they left to work for a competitor were not a trade secret, but that such information could be protected by the employer by means of an enforceable nondisclosure agreement); Modern Controls, Inc. v. Andreadakis, 578 F.2d 1264, 1268 (8th Cir. 1978) (applying Minnesota law; “[c]onfidential business information which does not rise to the level of a trade secret can be protected by a properly drawn covenant not to compete.” (citing Walker Emp’t Serv., Inc. v. Parkhurst, 219 N.W.2d 437 (Minn. 1974))); Mortgage Specialists, Inc. v. Davey, 904 A.2d 652, 664 (N.H. 2006) (noting that employers may protect their “commercially valuable information” by contract, “regardless of whether such information meets the statutory definition of ‘trade secret’”); MTG Guarnieri Mfg. v. Cloutier, 239 P.3d 202, 208 (Okla. Civ. App. 2010) (suggesting that, where an employer brings an action against a former employee for breaching an express covenant not to use or disclose confidential information in a manner detrimental to the employer’s interests, it is not relevant whether the information rises to the level of a trade secret, so long as the agreement was intended to protect such information and the information was regarded by both the employer and employee as confidential). See also Marinelli v. Medco Health Solutions, Inc., No. 3:13cv199 (MPS), 951 F. Supp. 2d 303 (D. Conn. June 13, 2013) (noting that injunctive relief was unnecessary to protect employer seeking to restrain former employee from working for a competitor, on the grounds that the employee had been exposed to confidential
and proprietary information that could benefit the competitor, because former employee “is already subject to an independent contractual obligation not to disclose confidential information”).

An employer may not protect by means of a restrictive covenant information in which it has no protectable interest, such as information in the public domain and information that would be considered part of the general experience, knowledge, training, and skills that an employee acquired in the course of employment. See Robert Unikel, Bridging the “Trade Secret” Gap: Protecting “Confidential Information” not Rising to the Level of Trade Secrets, 29 Loy. U. Chi. L.J. 841 (1998). Cf. Empire Farm Credit ACA v. Bailey, 239 A.D.2d 855, 856 (N.Y. App. Div. 3d Dept. 1997) (refusing to enforce a restrictive covenant against former employee of firm that provided financial services to area farmers, arguing that there was no evidence that plaintiff’s customers were not well known in the trade: “To the contrary, any farmer is a potential customer for the accounting/business services offered by plaintiff”).

Some jurisdictions do not permit an employer to protect by contract nonpublic information that is not also eligible for trade-secret protection. See, e.g., Metro Traffic Control, Inc. v. Shadow Traffic Network, 27 Cal. Rptr. 2d 573, 578 (Cal. Ct. App. 1994) (noting that California “Business and Professional Code section 16600 prohibits the enforcement of Metro’s noncompete clause except as is necessary to protect trade secrets”). See also Zemco Mfg. v. Navistar Int’l Transp. Corp., 759 N.E.2d 239, 251 (Ind. Ct. App. 2001) (holding that no damage to plaintiff resulted from transfer of information plaintiff sought to protect by nondisclosure agreement, because the court had reached the conclusion that plaintiff “had no protectable trade secrets”). But see Fla. Stat. Ann. § 542.335(1)(b)(2) (West 2002) (stating that an employer’s legitimate business interests that are protectable by means of a restrictive covenant include “valuable confidential business or professional information that otherwise does not qualify as trade secrets”).

Compare Illustration 9, taken from Arnold K. Davis & Co. v. Ludemann, 160 A.D.2d 614, 559 N.Y.S.2d 240, 241 (N.Y. App. Div. 1st Dept. 1990), with Illustration 10, derived from Stiepleman Coverage Corp. v. Raifman, 258 A.D.2d 515, 685 N.Y.S.2d 283, 284 (N.Y. App. Div. 2d Dept. 1999). The facts of these two cases are nearly identical, with the exception of the restrictive covenant signed in Stiepleman. See 685 N.Y.S.2d at 284. Taken together, they illustrate how employers can contractually protect customer relationships irrespective of whether information about those relationships is a trade secret under the UTSA or § 8.02. See also Booth v. WPMI Television Co., 533 So. 2d 209, 210-211 (Ala. 1988) (holding that customer relationships are legitimate interests of employers capable of supporting restrictive covenants); James S. Kemper & Co. Southeast, Inc. v. Cox & Associates, Inc., 434 So. 2d 1380, 1384 (Ala. 1983) (same); Bowne of Boston, Inc. v. Levine, No. Civ.A. 97 -5789A, 1997 WL 781444, at *4-5 (Mass. Super. Ct. Nov. 25, 1997) (upholding a restrictive covenant protecting customer relationships); Lowry Computer Prods., Inc. v. Head, 984 F. Supp. 1111, 1116-1117 (E.D. Mich. 1997) (applying Michigan law; same); BDO Seidman v. Hirsiberg, 712 N.E.2d 1220, 1225-1226 (N.Y. 1999) (upholding restrictive covenant but limiting scope to those clients with whom the former employee had developed relationships through his performance of services); Contempo Commc’ns, Inc. v. MJM Creative Servs., Inc., 182 A.D.2d 351, 582 N.Y.S.2d 667, 669 (N.Y. App. Div. 1st Dept. 1992) (holding that customer relationships are protectable interests sufficient to support a restrictive covenant but are not trade secrets entitled to common-law protection); Car Wash Sys., Inc. v. Brigance, 856 S.W.2d 853, 858 (Tex. Ct. App. 1993) (holding that customer relations will support a restrictive covenant). This difference in scope recognizes the unique role that employees play in fostering customer relationships and goodwill and allows the parties contractually to divide the value that the joint efforts of the employer and employee create. Because it is often difficult for an employer to monitor an employee’s efforts to develop goodwill, the parties might choose to allocate such goodwill to the employee in order to properly incentivize employee investment in the creation of goodwill and customer relationships. See Gillian L.L. Lester & Eric L. Talley, Trade Secrets and Mutual Investments (Georgetown Law and Economics Research, Paper No. 246406, 2000), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=246406 (last accessed Jan. 22, 2015) (arguing that an optimal trade-secret law “would (1) expressly consider the parties’ relative skills at making value-enhancing investments rather than the mere existence of a valuable informational asset; (2) tend to favor ‘weak’ entitlements (such as fractional property rights and/or liability rules) rather than undivided property rules; and (3) frequently have a dynamic structure that progressively favors employees during the lifetime of the disputed asset.”).

Illustrations 11(a) and 11(b) show the broader remedial scope available under this Section as compared with § 8.03. Illustration 11(a) is drawn from Garvin GuyButler Corp. v. Cowen & Co., 155 Misc.2d 39, 588 N.Y.S.2d 56, 59-60 (N.Y. Sup. Ct. 1992), and Illustration 11(b) is loosely based on Malby v. Harlow Meyer Savage, Inc., 166 Misc.2d 481, 633 N.Y.S.2d 926, 930 (N.Y. Sup. Ct. 1995). In Garvin, a stockbroker took his employer’s compilation of customer “off dates”—i.e., when customer repurchase or rollover was due—as well as a history of customer buying patterns and contact
§ 8.06 Enforcement of Restrictive Covenants in Employment..., Restatement of...

information. 588 N.Y.S.2d at 59-60. When he used the information to compete with his former employer, the court enjoined him from using the valuable information but, importantly, did not prevent him from competing. See id. In contrast, the court in Maltby enjoined the stockbroker, who was subject to a restrictive covenant, from working for a competitor of his former employer regardless of whether the stockbroker was making use of the employer’s valuable information or customer relationships. See 633 N.Y.S.2d at 930. See also Cent. Bancshares, Inc. v. Puckett, 584 So. 2d 829, 831 (Ala. 1991) (enjoining bank executives subject to a restrictive covenant from working in the banking industry in the state of Alabama for two years); U.S. Reinsurance Corp. v. Humphreys, 205 A.D.2d 187, 618 N.Y.S.2d 270, 272-273 (N.Y. App. Div. 1st Dept. 1994) (enjoining an employee from using or disclosing a valuable reinsurance scheme created by his employer but not from competing); DoubleClick Inc. v. Henderson, No. 11614/97, 1997 WL 731413, at *8 (N.Y. Sup. Ct. Nov. 7, 1997) (enjoining employees from making use of or disclosing valuable information but permitting employees to work for competitors).

Comment e. In most states, a promise of continued indefinite employment is sufficient consideration for a restrictive covenant that the employee signs after the inception of the employment arrangement. See Clark v. Liberty Nat’l Life Ins. Co., 592 So. 2d 564, 567 (Ala. 1992) (enforcing a noncompetition clause signed four years after initial employment and holding that the “sufficient and valid consideration” was the employee’s “continued employment … beyond [the signing date]”; Olin Water Servs. v. Midland Research Labs., Inc., 596 F. Supp. 412, 415 (E.D. Ark. 1984) (ruling that the agreements in question could be upheld under both Arkansas and Kansas law and that “the continued employment of [the at-will employees] was sufficient consideration to support the agreements not to compete signed by them” but not indicating whether the employees signed at the time of or after initial employment); Veliz v. Cintas Corp., No. C 03-1180 SBA, 2004 WL 2452851, at *11 (N.D. Cal. Apr. 5, 2004) (stating that “[w]here a party is offered employment or chooses to remain employed, there is legal consideration”); Research & Trading Corp. v. Powell, 468 A.2d 1301, 1303, 1305 (Del. Ch. 1983) (holding “there was sufficient consideration at the time of the signing of the covenant to support an enforceable restrictive covenant” when at-will employee signed the restrictive covenant at least one month after he accepted promotion and was told he would lose the position if he did not sign); Coastal Unilube v. Smith, 598 So. 2d 200, 201 (Fla. Dist. Ct. App. 1992) (upholding enforceability of noncompetition clause signed one week after initial employment by an employee who had moved his family to take the job when the noncompetition clause had not been discussed earlier; declaring that “where employment was a continuing contract terminable at the will of either [the] employer or employee, the Florida Courts have held continued employment constitutes adequate consideration to support a contract” (quoting Wright & Seaton, Inc. v. Prescott, 420 So. 2d 623, 628 (Fla. Dist. Ct. App. 1982))); Ins. Assocns. Corp. v. Hansen, 723 P.2d 190, 191 (Idaho Ct. App. 1986) (enforcing noncompetition covenant signed two years after employment began and eight months before the employee was fired, rejecting the employee’s argument that he “did not receive anything he did not already have before the agreement was entered into,” and holding that “there was consideration for the agreement” in that “if [the employee] had not signed the agreement, his employment would have been terminated” and “that, upon executing the agreement, [the employee] did keep his job ‘for an additional eight or nine months’’’); Ackerman v. Kimball Int’l, Inc., 652 N.E.2d 507, 509 (Ind. 1995) (enforcing restrictive covenant signed by at-will employee in 1974, nine years after initial hire and 19 years before termination, holding that “the 1974 employment agreement was not unenforceable due to lack of consideration, both because [the employee] received [the employer’s] promise to continue at-will employment and because [the employee] ratified the 1974 employment agreement by executing the termination agreement”); Moore Bus. Forms, Inc. v. Wilson, 953 F. Supp. 1056, 1064 (N.D. Iowa 1996) (applying Iowa law; enforcing noncompetition agreements repeatedly signed after initial employment; and holding that “[w]ith respect to the later-signed employment agreements, the [employees’] continued employment after entering into the agreements is sufficient consideration to support formation of the covenants not to compete”); Puritan-Bennett Corp. v. Richter, 657 P.2d 589, 592 (Kan. Ct. App. 1983) (upholding noncompetition clause signed on first day of work, which was a month after the initial confirmed employment offer and after the employee sold his house and moved from Wisconsin to Kansas, holding “that continued employment should not as a matter of law be disregarded as sufficient consideration to uphold a covenant not to compete” and noting that the employer “was given consistent promotions, increased responsibilities and greater importance in company operations after signing the covenant not to compete” and that “he had been advised that his continued employment was conditioned upon execution of the hiring agreement when he signed it”); Cellular One v. Boyd, 653 So. 2d 30, 34 (La. Ct. App. 1995) (rejecting employees’ argument that “the non-competition agreement is unenforceable because of a lack of mutuality or insufficient cause,” when the agreement was signed after the initial date of employment as a condition of continued employment); Robert Half Int’l, Inc. v. Van Steenis, 784 F. Supp. 1263, 1273 (E.D. Mich. 1991) (applying Michigan law; stating that “continued employment constitutes sufficient consideration for the [employee’s] execution of the restrictive covenants in the Employment Agreement—where, as here, the [employee’s] employment is otherwise ‘at will’”);
§ 8.06 Enforcement of Restrictive Covenants in Employment...

So. 2d 642, 646 (Miss. Ct. App. 2008) (holding that a noncompetition covenant was enforceable because it “specifically mention[ed]” the continued employment as consideration supporting the agreement); Computer Sales Int’l, Inc. v. Collins, 723 S.W.2d 450, 452 (Mo. Ct. App. 1986) (“A continuance by employee in the employment of employer where he is under no obligation to remain and that continuance by the employer of the employment where continuance is not required supplies adequate consideration for a secondary contract.”) (quoting Reed, Roberts Assoc., Inc. v. Bailsenson, 537 S.W.2d 238, 241 (Mo. Ct. App. 1976)); Camco, Inc. v. Baker, 936 P.2d 829, 832 (Neve. 1997) (“Today we adopt the majority rule which states that an at-will employee’s continued employment is sufficient consideration for enforcing a non-competition agreement.”); Smith, Batchelder & Rugg v. Foster, 406 A.2d 1310, 1312 (N.H. 1979) (stating that “[c]ontinued employment after signing an employment contract constitutes consideration for a covenant not to compete contained therein”); MAI Basic Four, Inc. v. Basis, Inc., 880 F.2d 286, 288 (10th Cir. 1989) (applying New Mexico law; reversing trial court’s decision that confidentiality and nondisclosure agreements were void for lack of consideration, finding that continued employment was sufficient consideration for the agreements in question); Campbell Soup Co. v. Desatnick, 58 F. Supp. 2d 477, 492 (D.N.J. 1999) (stating that “the continued employment of an at-will employee upon his execution of an agreement not to compete may constitute sufficient consideration to support the validity and enforceability of the restrictive covenant under New Jersey law”); Lake Land Employment Group, LLC v. Columber, 804 N.E.2d 27, 32 (Ohio 2004) (holding that “consideration exists to support a non-competition agreement when, in exchange for the assent of an at-will employee to a proffered non-competition agreement, the employer continues an at-will employment relationship that could legally be terminated without cause”); Nestle Food Co. v. Miller, 836 F. Supp. 69, 77 (D.R.I. 1993) (applying Rhode Island law; holding that continued employment and employment benefits are sufficient consideration for a restrictive covenant entered into while employed); Cent. Monitoring Serv., Inc. v. Zakinski, 553 N.W.2d 513, 517-518 (S.D. 1996) (holding that continued employment is adequate consideration for an at-will employee signing a noncompetition agreement six months after initial employment); Sys. Concepts v. Dixon, 669 P.2d 421, 429 (Utah 1983) (holding that an at-will employee’s continued employment is sufficient consideration to support a postemployment covenant not to compete); Summits 7, Inc. v. Kelly, 886 A.2d 365, 372-373 (Vt. 2005) (citing Restatement Third, Employment Law § 6.05, Comment d (Preliminary Draft No. 2, May 17, 2004) (“Continuing employment of an at-will employee is enough consideration to support an otherwise valid restrictive covenant. This means that parties may agree to enforceable restrictive covenants after the beginning of an employment relationship.”); holding that “[r]egardless of what point during the employment relationship the parties agree to a covenant not to compete, legitimate consideration for the covenant exists as long as the employer does not act in bad faith by terminating the employee shortly after the employee signs the covenant”); NBZ, Inc. v. Pilarski, 520 N.W.2d 93, 97 (Wis. Ct. App. 1994) (implying that continued employment may be sufficient consideration for a restrictive covenant, if it is made explicitly dependent on signing the covenant).

Illustration 12, based on Campbell Soup Co. v. Desatnick, 58 F. Supp. 2d 477, 490-492 (D.N.J. 1999) (applying New Jersey law), is an example of when an employer’s promise of continued employment is sufficient consideration for a restrictive covenant that the employee agreed to after the start of the employment relationship.

In a few states, courts recognize the promise of continued employment as sufficient consideration, but only if the employer actually retains the employee for a substantial period after covenant formation. See Curtis 1000, Inc. v. Suess, 24 F.3d 941, 945-947 (7th Cir. 1994) (applying Illinois law; enforcing a covenant not to compete entered into after the employee’s start date because it was supported by adequate consideration of continued employment and employee retained job for eight years after signing); Fifield v. Premier Dealer Services, Inc., 2013 IL App (1st) 120327, 373 Ill. Dec. 379, 993 N.E.2d 938, 942 (confirming that “continued employment for two years or more constitutes adequate consideration”; affirming grant of summary judgment for employee who quit after three months when employment was protected for only one year); Wausau Mosinee Paper Corp. v. Magda, 366 F. Supp. 2d 212, 220 (D. Me. 2005) (applying Maine law; holding “that the execution of a written non-compete agreement by an incumbent at-will employee constitutes a unilateral promise that will give rise to an enforceable contract where the employee continues to employ the at-will employee for a period in excess of one year from the date of execution of the non-compete agreement,” even when the employee moved from New Jersey to Maine and began work without knowing about the required noncompetition clause); Simko, Inc. v. Graymar Co., 464 A.2d 1104, 1107 (Md. Ct. Spec. App. 1983) (“[T]he continuation of employment for a substantial period beyond the threat of discharge is sufficient consideration for a restrictive covenant.”); Securities Acceptance Corp. v. Brown, 106 N.W.2d 456, 462-463 (Neb. 1960), aff’d on reh’g, 107 N.W.2d 540 (Neb. 1961) (holding that an employee is estopped from challenging the sufficiency of consideration supporting a postemployment noncompetition agreement when the employee stayed with the employer for seven years after signing the covenant); Int’l Paper Co. v. Suwyn, 951 F. Supp. 445, 448 (S.D.N.Y. 1997) (applying New York law; “Where any employment relationship continues for a substantial period after the covenant is given, the forbearance
necessary to constitute consideration is ‘real, not illusory and the consideration given for the promise is validated.’” (quoting Zellner v. Stephen D. Conrad, 589 N.Y.S.2d 903, 907 (N.Y. App. Div. 1992)); McCombs v. McClelland, 354 P.2d 311, 315 (Ore. 1960) (holding that “where one already employed is induced to enter into a subsequent agreement containing a restrictive covenant as to other employment, such agreement to be enforceable must be supported by a promise of continued employment, express or implied, or some other good consideration”); Cent. Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28, 35 (Tenn. 1984) (“Whether performance is sufficient to support a covenant not to compete depends upon the facts and circumstances of each case.”). See also Mattison v. Johnston, 730 P.2d 286, 290 (Ariz. Ct. App. 1986) (holding that continued employment was sufficient consideration for the employee’s promise not to compete where the employer voluntarily elected to terminate employment shortly after signing the noncompetition covenant). These courts, although often reaching the correct result, appear confused as to the appropriate rationale.

The length of time between the execution of the covenant and the end of the employment relationship may be relevant to whether the employer was acting in good faith in securing the covenant, see § 8.06, Comment f, but is inconsistent with the general contracts rule that courts do not measure the adequacy of consideration.

In a significant minority of states, the courts hold that in order to be valid and enforceable, a noncompetition covenant executed after the commencement of employment must be supported by new consideration. See Timentosial, Inc. v. Dagata, 277 A.2d 512, 515 (Conn. Super. Ct. 1971) (refusing to enforce a restrictive covenant because it lacked consideration when the employee signed it five days after beginning employment); Freeman v. Duluth Clinic, Ltd., 334 N.W.2d 626, 630 (Minn. 1983) (requiring that employees receive “real advantages” other than continued employment as consideration for a restrictive covenant); Access Organics, Inc. v. Hernandez, 175 P.3d 899, 904 (Mont. 2008) (holding that “in the context of non-compete agreements, we require clear evidence that the employee received good consideration in exchange for bargaining away some of his post-employment freedom to practice the profession or trade of his choice” while also “declin[ing] to broadly hold that continued employment may never serve as sufficient consideration”); Forrest Paschal Mach. Co. v. Miholesen, 220 S.E.2d 190, 196 (N.C. Ct. App. 1975) (holding that “when the relationship of [the] employer and employee is already established without a restrictive covenant, any agreement thereafter not to compete must be in the nature of a new contract based upon new consideration” (quoting Greene Co. v. Kelley, 134 S.E.2d 166, 167 (N.C. 1964))); Admiral Servs., Inc. v. Dreibit, No. CIV. A. 95 -1086, 1995 WL 134812, at *4 (E.D. Pa. Mar. 28, 1995) (applying Pennsylvania law; stating that “[a]n employee’s continued employment is not sufficient consideration for a covenant not to compete which the employee signed after the inception of his employment, where the employer makes no promise of continued employment for a definite term” (quoting Maintenance Specialties, Inc. v. Gottus, 314 A.2d 279, 282-283 (Pa. 1974))); Poole v. Incentives Unlimited, Inc., 548 S.E.2d 207, 209 (S.C. 2001) (holding that “when a covenant is entered into after the inception of employment, separate consideration, in addition to continued at-will employment, is necessary in order for the covenant to be enforceable”); Labriola v. Pollard Group, Inc., 100 P.3d 791, 796 (Wash. 2004) (stating that “independent consideration is required at the time promises are made for a noncompete agreement when employment has already commenced”); Env’tl. Prods. Co., Inc. v. Duncan, 285 S.E.2d 889, 890 (W. Va. 1981) (stating that “[i]f a covenant not to compete is contracted after employment has been commenced without restriction, there must be new consideration to support it’’); Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531, 541 (Wyo. 1993) (declaring that the “better view, even in the at-will relationship, is to require additional consideration to support a restrictive covenant entered into during the term of the employment” and that “[t]his view recognizes the increasing criticism of the at-will relationship, the usually unequal bargaining power of the parties, and the reality that the employee rarely ‘bargains for’ continued employment in exchange for a potentially onerous restraint on the ability to earn a living” but holding that a pay raise provided adequate additional consideration).

Massachusetts may be reconsidering its earlier view in Sherman v. Pfefferkorn, 135 N.E. 568, 569 (Mass. 1922), that a promise of indefinite employment is sufficient. See Zabota Cmty. Ctr., Inc. v. Frolova, No. 061909BLS1, 2006 WL 2089828, at *2-3 (Mass. Super. Ct. May 18, 2006) (refusing to issue injunction enforcing a noncompetition covenant signed by a recent Russian immigrant with limited command of English after working for the employer for about a year and told she would be fired the next day if she did not sign); IKON Office Solutions, Inc. v. Belanger, 59 F. Supp. 2d 125, 131 (1999) (applying Massachusetts law; while recognizing that older Massachusetts decisions hold that continuing employment is sufficient consideration, refusing to issue preliminary injunction in part because “later decisions demonstrate that, in order for a restrictive covenant to withstand scrutiny, some additional consideration ought pass to an employee upon the execution of a post-employment agreement. While those later cases do not specifically abrogate the prior holdings, they do reflect … that some additional consideration was in fact given the employees upon acceptance of the post-employment covenants.
Moreover, these decisions require some evidence that the terms of the underlying employment contract had been
negotiated.

Texas has taken a particularly complex legal path on the question of the enforceability of restrictive
covents signed after initial employment, but the trend is toward enforceability. A 1989 statute declared that “if
the covenant not to compete is executed on a date other than the date on which the underlying agreement is
executed, such covenant must be supported by independent valuable consideration.” 1989 Tex. Gen. Laws, ch.
1193, p. 4852. Responding to judicial decisions invalidating some restrictive covenants, the legislature in 1993
removed the “independent valuable consideration” requirement, 1993 Tex. Gen. Laws, so that the current
statute reads; “a covenant not to compete is enforceable if it is ancillary to or part of an otherwise
enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time,
geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint
than is necessary to protect the goodwill or other business interest of the promisee.” Tex. Bus. & Com. Code
Ann. § 15.50(a) (Vernon 2009). There has been considerable litigation over the words “otherwise enforceable
agreement at the time the agreement is made.” In Mann Frankfort Stein & Lipp Inc. v. Fielding, 289 S.W.3d 844
(Tex. 2009), an employee, upon being rehired, agreed to a confidentiality clause and also a client purchase
agreement whereby he would pay the employer a set price if he did business for the employer’s clients after quitting. See id. at 846. The Texas Supreme Court enforced the restrictive covenant, ruling that the nature of the job meant that the employer impliedly promised to provide the employee confidential information, and that this implied promise satisfied the statutory “otherwise enforceable agreement” requirement. Id. at 850. See also Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 209 S.W.3d 644, 657 (Tex. 2006) (enforcing noncompetition clause signed three months after at-will employee was promoted).

Comment f. The case law specifically addressing the enforceability of reasonable restrictive covenants against discharged employees is quite variable. Relatively few jurisdictions have squarely ruled that such covenants are enforceable regardless of the circumstances surrounding the termination of employment. See Twenty Four Collection v. Keller, 389 So. 2d 1062, 1062-1063 (Fla. Dist. Ct. App. 1980) (enforcing a noncompetition covenant triggered by a “termination, voluntarily or involuntarily”; declaring that “[t]he only authority the court possesses over the terms of a non-competitive agreement is to determine, as the statute provides, the reasonableness of its time and area limitations”); cf. Ins. Assocs. Corp. v. Hansen, 723 P.2d 190, 190-191 (Idaho Ct. App. 1986) (enforcing a restrictive covenant against an employee terminated without cause after analyzing how the circumstances of termination affect the enforceability of a restrictive covenant); Weber v. Tillman, 913 P.2d 84, 91-93 (Kan. 1996) (upholding restrictive covenant against physician without addressing the effect of physician being terminated without cause); Cellular One, Inc. v. Boyd, 653 So. 2d 30, 31-34 (La. Ct. App. 1995) (enforcing, based on its interpretation of a Louisiana statute, a restrictive covenant against two employees, one who was fired and the other who left voluntarily, with no differences in analysis); Hogan v. Bergen Brunswig Corp., 378 A.2d 1164, 1166-1167 (N.J. Super. Ct. App. Div. 1977) (not addressing whether dismissal was with or without cause in upholding restrictive covenant even though trial court noted the dismissal was without cause).

Courts generally consider the circumstances surrounding the employee’s termination to be an important, if not decisive, factor in determining whether the restrictive covenant should be enforced. See Gomez v. Chua Medical Corp., 510 N.E.2d 191, 194 (Ind. Ct. App. 1987) (“There appear to be four basic alternatives: (1) the employee voluntarily leaves the employment; (2) the employee is discharged for good cause; (3) the employee is discharged in bad faith; and (4) the employee is terminated, but neither good cause nor bad faith appear to exist.”). Most courts will not enforce an otherwise reasonable restrictive covenant against an employee who is discharged without cause, who quits for cause attributable to the employer (a form of “constructive discharge”), or who is let go because of a downturn in business. See Bailey v. King, 398 S.W.2d 906, 908 (Ark. 1966) (reasoning in dicta that “[o]f course, if an employer obtained an agreement of this nature from an employee, and then, without reasonable cause, fired him, the agreement would not be binding”); Bishop v. Lakeland Animal Hosp., PC, 644 N.E.2d 33, 36 (Ill. App. Ct. 1994) (“We agree with the [S]eventh [C]ircuit’s reasoning and find that the implied promise of good faith inherent in every contract precludes the enforcement of a non-competition clause when the employee is dismissed without cause.”); Ma & Pa. Inc. v. Kelly, 342 N.W.2d 500, 502 (Iowa 1984) (“[D]ischarge by the employer is a factor opposing the grant of an injunction, to be placed in the scales in reaching the decision as to whether the employee should be enjoined.”); Orion Broad., Inc. v. Forsythe, 477 F. Supp. 198, 201 (W.D. Ky. 1979) (applying Kentucky law; “[H]ad [the employee] voluntarily severed her relationship with plaintiff, the Court has no doubt that the non-competition covenant would have been enforceable against her. To hold that [the employee], at the whim of [her former employer], could be deprived of her livelihood in a highly competitive market, seems to the Court to be an example of industrialpeonage which has no place in today’s society.”); MacIntosh v. Brunswick Corp., 215 A.2d 222, 225-226 (Md.
§ 8.06 Enforcement of Restrictive Covenants in Employment...

1965) (holding that restrictive covenant imposed “undue hardship” on employee in part because employee was fired “through no fault of his own”); Post v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 397 N.E.2d 358, 360-361 (N.Y. 1979) (refusing to enforce a restrictive covenant because employee was terminated without cause and explaining that “[w]here the employer terminates the employment relationship without cause, ... his action necessarily destroys the mutuality of obligation on which the covenant rests”); In re UFG Int’l, Inc., 225 B.R. 51, 56 (Bankr. S.D.N.Y. 1998) (applying New York law; “Regardless of the scope of the restrictive covenant, an employer cannot hobble his employee by terminating him without cause and then enforcing a restriction that diminishes his ability to find comparable employment.”); Insulation Corp. of Am. v. Brobstn, 667 A.2d 729, 735 (Pa. Super. Ct. 1995) (“The employer who fires an employee for failing to perform in a manner that promotes the employer’s business interests deems the employee worthless. Once such a determination is made by the employer, the need to protect itself from the former employee is diminished by the fact that the employee’s worth to the corporation is presumably insignificant. Under such circumstances, we conclude that it is unreasonable as a matter of law to permit the employer to retain unfettered control over that which it has effectively discarded as worthless to its legitimate business interests.”); Cent. Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28, 35 (Tenn. 1984) (noting in dicta that “[a]nother factor affecting reasonableness is the circumstances under which an employee leaves” and “[a]lthough an at-will employee can be discharged for any reason without breach of the contract, a discharge which is arbitrary, capricious or in bad faith clearly has a bearing on whether a court of equity should enforce a non-competition covenant”); Sec. Servs., Inc. v. Priest, 507 S.W.2d 592, 595 (Tex. App. 1974) (refusing to enforce a restrictive covenant against an employee discharged without cause, finding “[t]he trial judge] could have inferred that [the employer] had employed [the employee] chiefly for the purpose of attracting the customers of [his former company] and that as soon as [the employer] had obtained maximum benefit from [the employee’s] contacts with those customers, it discharged him without reasonable cause”).

In addition, a number of courts have expressly distinguished the enforceability of restrictive covenants when the employee was fired for cause from the enforceability of restrictive covenants against an employee discharged without cause. See Bishop v. Lakeland Animal Hosp., P.C., 644 N.E.2d 33, 36 (Ill. App. Ct. 1994) (refusing to enforce a noncompetition agreement against an employee who was fired without cause because it would breach the implied covenant of good faith inherent in every contract even though the employment contract authorized termination by either party “with or without cause”); Prop. Tax Representatives, Inc. v. Chatam, 891 S.W.2d 153, 157-158 (Mo. Ct. App. 1995) (while noting that restrictive covenants are enforceable after termination with cause or voluntary departure, upholding lower court’s decision that restrictive covenant was unenforceable as a matter of equity when employee was terminated without cause); Cent. Monitoring Serv., Inc. v. Zakinski, 553 N.W.2d 513, 521 (S.D. 1996) (applying balancing test for deciding whether to enforce a restrictive covenant and considering additional factors for a restrictive covenant against an employee who was terminated without cause as compared to employees who left voluntarily or were terminated with cause); Clinch Valley Physicians, Inc. v. Garcia, 414 S.E.2d 599, 601 (Va. 1992) (construing noncompetition covenant narrowly so as to apply only to terminations for cause because the employment contract had lapsed).

Many courts have refused, or stated in dicta that they would refuse, to enforce a restrictive covenant against a discharged employee when the employer has acted in bad faith. See Robinson v. Computer Servicenters, Inc., 346 So. 2d 940, 943 ( Ala. 1977) (refusing to enforce a restrictive covenant against an employee when the employer had intended to discharge the employee at the time the covenant was executed); Am. Credit Bureau, Inc. v. Carter, 462 P.2d 838, 841 (Ariz. Ct. App. 1969) (upholding lower court’s decision that restrictive covenant could not be enforced because employer’s practice of only telling employee about restrictive covenant after inducing employee to quit previous job indicated employer had unclean hands); Kupscznk v. Blasters, Inc., 647 So. 2d 888, 891 (Fla. Dist. Ct. App. 1994) (noting in dicta that “in rare circumstances equitable considerations could possibly render a non-competition agreement void. For instance, had [the employer] hired [the employee] under the same terms and then terminated him without cause after a very short time, even though the termination would not be wrongful under the Florida at-will employment doctrine, [the employer’s] conduct might be deemed unconscionable and a court of equity would not permit its perpetuation by entry of an injunction.”); Rao v. Rao, 718 F.2d 219, 222-224 (7th Cir. 1983) (applying Illinois law; noting that when an employer terminates an employee to prevent him from exercising his rights under the agreed-upon stock-option plan, the court will refuse to enforce a noncompetition agreement because the employer wrongfully terminated the employee and acted in bad faith); Edin v. Jostens, Inc., 343 N.W.2d 691, 694 (Minn. Ct. App. 1984) (holding that to enforce the restrictive covenant would be inequitable when “management induced [the employee] into allowing his current contract to expire without signing the new contract, then terminated him for failing to timely sign the new contract”); Empiregas, Inc. of Kosciusko v. Bain, 599 So. 2d 971, 975-976 (Miss. 1992) (refusing to enforce restrictive covenant in part because, considering that evidence indicated that employee had acted in employer’s best interest, termination was in bad faith);
35 (Tenn. 1984) (upholding covenant against an employee who left voluntarily and there was no evidence that the employer "acted in bad faith or with unclean hands"); Allen v. Rose Park Pharmacy, 237 P.2d 823, 825-826 (Utah 1951) (enforcing restrictive covenant even though termination was without cause but suggesting an exception for covenants imposed in bad faith, "with intent on the part of the employer that the employment would be only long enough to bind the employee to the covenant, and with a view only of preventing him from working elsewhere"); Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531, 541 (Wyo. 1993) (noting, in dicta, that "if an employer hired an employee at will, obtained a covenant not to compete, and then terminated the employee, without cause, to arbitrarily restrict competition, ... such conduct would constitute bad faith. Simple justice requires that a termination by the employer of an at will employee be in good faith if a covenant not to compete is to be enforced."). See also Colonial Life & Accident Ins. Co. v. Sisco, No. CA 98-751, 1999 WL 328903, at *6-7 (Ark. Ct. App. May 19, 1999) (finding that restrictive covenant could not be enforced against employee who was dismissed without cause in breach of the employment agreement); Research & Trading Corp. v. Pfuhl, No. Civ. A. 12527, 1992 WL 345465, at *11-13 (Del. Ch. Nov. 18, 1992) (after noting that circumstances of termination are relevant to the enforcement of a restrictive covenant, enforcing a restrictive covenant because the deterioration of the employment relationship indicated an improper motive in termination); C.G. Caster Co. v. Regan, 410 N.E.2d 422, 426-427 (Ill. Ct. App. 1980) (holding that employee was excused from complying with restrictive covenant clause after employer’s failure to pay contractually required termination benefits); Francorp, Inc. v. Siebert, 126 F. Supp. 2d 543, 547 (N.D. Ill. 2000) (applying Illinois law; holding that employer “materially breached its employment relationship with [former employees] … by failing to pay them for a substantial period prior to their departure from the company”); Dunning v. Chem. Waste Mgmt., Inc., No. 91 C 2502, 1997 WL 222891, at *11 (N.D. Ill. Apr. 22, 1997) (applying Illinois and South Carolina law; holding that an employer cannot materially breach the employment agreement “and then expect to uphold the restrictive covenant as well”); Gomez v. Chua Med. Corp., 510 N.E.2d 191, 195 (Ind. Ct. App. 1987) (noting in dicta that a court will preclude enforcement if evidence indicates employer terminated employee in bad faith because employer is asking the court for equitable relief with unclean hands, but also holding that an employer need not establish a valid reason for discharge in order to enforce a restrictive covenant); Lantech.com, LLC v. Yarbrough, No. 3:06-CV-334-JDM, 2006 WL 3323222, at *3 (W.D. Ky. Nov. 14, 2006) (applying Kentucky law; refusing to enforce restrictive covenant when employer’s termination without cause “violate[d] its significant representations to [the employee] and its own corporate human resources policy”); Kroeger v. Stop & Shop Cos., 432 N.E.2d 566, 572-574 (Mass. Ct. App. 1982) (holding that executive’s restrictive covenant is valid even though the executive was not fired for misconduct, but refusing to enforce the covenant’s remedy of forfeiture of retirement benefits out of concern that doing so would be unfair to the employee).

New York adheres to an employee choice doctrine,” despite predictions of its demise, see Bradford v. New York Times Co., 501 F.2d 51 (2d Cir. 1974) (suggesting that New York no longer followed the employee-choice doctrine because few cases followed it). Under the employee-choice doctrine, the court will enforce a restrictive covenant without regard to its reasonableness if the employer can demonstrate it would have allowed the employee to continue working and receive the benefits of the employment contract but the employee nevertheless quit to work for a competitor. See Lucente v. IBM, 310 F.2d 243 (2d Cir. 2002) (noting that “New York courts will enforce a restrictive covenant without regard to its reasonableness if the employee has been afforded the choice between not competing (and thereby preserving his benefits) or competing (and thereby risking forfeiture)”). The Restatement does not adopt this exception to the requirement that courts will not enforce an unreasonable restrictive covenant.

Illustration 13 is based on Med. Wellness Assocs., P.C. v. Heithaus, No. 6500 of 2000, 2001 WL 1112991 (Pa. Com. Pl. Feb. 13, 2001). In that case, a chiropractor employed by a corporate practice signed an employment agreement that included nondisclosure and noncompetition clauses. The noncompetition clause prohibited the chiropractor from opening a practice within a 45-mile radius of his employer’s clinic, and from soliciting clients for a two-year period. Id. at *7-8. The chiropractor was fired for cause based on his persistent tardiness, which disrupted clinic operations, and his failure to maintain a clean work area. Id. at *28-30. Before leaving, the chiropractor made copies of sensitive business information, including patient lists and contact information and “highly confidential” patient-development and advertising plans for use in setting up a competing practice, which he did within the two-year period at an unacceptably close distance. Id. at *20. The chiropractor was enjoined from competing with his former employer according to the terms of the employment agreement, and was required to return all confidential information he had removed from the office. Id. at *32.

Illustrations 14 and 15 are based on Post v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 397 N.E.2d 358 (N.Y. 1979). In Merrill Lynch, employees were informed that they had forfeited their pension benefits by accepting employment with a competitor after Merrill Lynch terminated their employment. See id. at 360. In its analysis of the forfeiture provision at issue...
in the case, the New York Court of Appeals drew a distinction between voluntary and involuntary termination. The court found that in all prior cases, the termination had been voluntary and after the employee went to work for a competitor, “effect has been given to the forfeiture-for-competition provision …” Id. Guided by a “powerfully articulated congressional policy” in ERISA against forfeiture of employee benefits and a lack of “decisions which command a contrary result,” the court determined that an employer may not enforce a forfeiture provision against an employee who was terminated without cause. Id.

Comment g. Illustration 16 is based loosely on the facts of Francorp, Inc. v. Siebert, 126 F. Supp. 2d 543, 547 (N.D. Ill. 2000) (applying Illinois law), which held that an employer cannot enforce a noncompetition agreement after materially breaching an employment agreement by failing to pay an employee. Most courts agree with this approach, as it stems from the longstanding contract principle that material breach by one party generally excuses the nonbreaching party from having to perform their contractual obligations. See Laconia Clinic v. Cullen, 408 A.2d 412, 414 (N.H. 1979) (holding that a clinic’s mismanagement of its financial affairs constituted a material breach of an employment agreement, thus releasing a physician from his noncompetition agreement); cf. Wichita Clinic v. Louis, 185 P.3d 946, 962-963 (Kan. Ct. App. 2008) (holding that an employer’s breach of employment agreement did not relieve an employee of specific performance under a covenant not to compete if the employee was estopped from raising issue of employer’s breach because the employee accepted prior breaches by the employer).

Comment h. Absolute restrictions on competition are generally unenforceable against attorneys. See ABA Model Rules of Professional Responsibility 5.6 (“A lawyer shall not participate in offering or making: (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement”); Dwyer v. Jung, 336 A.2d 498, 500 (N.J. Super. Ct. Ch. Div. 1975), aff’d, 348 A.2d 208 (N.J. Super. Ct. App. Div. 1975); Denburg v. Parker Chapin Flattau & Klimpl, 624 N.E.2d 995, 998 (N.Y. 1993). A few states will enforce forfeiture-for-competition and compensation-for-competition clauses among law-firm partners. See, e.g., Howard v. Babcock, 863 P.2d 150, 156-157 (Cal. 1993) (holding that an agreement imposing a reasonable economic consequence does not constitute a restriction on an attorney’s ability to practice law). Most states will not enforce even such “indirect” restraints on competition. See Cmty. Hosp. Group, Inc. v. More, 869 A.2d 884, 893-896 (N.J. 2005) (contrasting judicial treatment of restrictive covenants against physicians and attorneys and noting that a per se rule prohibits such restrictions against attorneys while restrictions against physicians are subject to a reasonableness test); Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142, 151 (N.J. 1992) (noting that “[t]he more lenient test used to determine the enforceability of a restrictive covenant in a commercial setting … is not appropriate in the legal context”) (internal citations omitted); Whiteside v. Griffin & Griffin, P.C., 902 S.W.2d 739, 743 (Tex. Ct. App. 1995) (declaring that “cases from other jurisdictions almost universally hold that financial disincentives … are void and unenforceable restrictions on the practice of law”). In a few states, some law-firm employees owe a fiduciary duty of loyalty to their firm that imposes certain obligations with respect to competition. See Graubard Mollen Dannett & Horowitz v. Moskovitz, 653 N.E.2d 1179, 1183-1184 (N.Y. 1995) (noting that “secretly attempting to lure firm clients (even those the partner has brought into the firm and personally represented) to the new association, lying to clients about their rights with respect to the choice of counsel, lying to partners about plans to leave, and abandoning the firm on short notice (taking clients and files) would not be consistent with a [law firm] partner’s fiduciary duties”); Johnson v. Brewer & Pritchard, PC, 73 S.W.3d 193, 202 (Tex. 2002) (holding that “an associate owes a fiduciary duty not to accept a fee or other compensation for referring a matter to a lawyer or law firm other than the associate’s employer without the employer’s consent”); Prince, Yeates & Geldzahler v. Young, 94 P.3d 179, 185 (Utah 2004) (“Because of the privilege granted to engage in the practice of law, we impose upon members of our bar a fiduciary duty that encompasses the obligation to not compete with their employer, which [the court] define[s] as any law firm or legal services provider who may employ them in a legal capacity, without the employer’s prior knowledge and agreement.”).

In most states, restrictive covenants are enforceable against professionals other than lawyers to the same extent as any other employee. See, e.g., Mohanty v. St. John Heart Clinic, 866 N.E.2d 85, 95-96 (Ill. 2006) (restrictive covenant in physician employment contracts held not void against public policy). A few states will not enforce restrictive covenants against other classes of professionals. See Anniston Urologic Assoc., P.C. v. Kline, 689 So. 2d 54, 56 (Ala. 1997) (refusing to enforce a covenant imposing a $75,000 penalty on a doctor competing for one year within 25 miles of his former firm); Field v. Lamar, 822 So. 2d 893, 900 (Miss. 2002) (separate three-Judge opinion; declaring that “[n]on-competition agreements between medical doctors are unenforceable, as they are in conflict with the public policy of patient choice”); Murfreesboro Medical Clinic v. Udom, 166 S.W.3d 674 (Tenn. 2005) (holding that “except for restrictions specifically provided for by
statute, covenants not to compete are unenforceable against physicians”). In New York, doctors and accountants are considered to have “unique” or “extraordinary” skills justifying a reasonable noncompetition covenant, but this is a matter of proof dependent on the particular market for the professional services. See BDO Seidman v. Hirshberg, 712 N.E.2d 1220, 1224 (N.Y. 1999) (recognizing that courts give “wider latitude to covenants between members of a learned profession because their services are unique or extraordinary,” but refusing to uphold a covenant where the relevant market consisted of “the entirety of a major metropolitan area” and the employee’s “status in the firm was not based upon the uniqueness or extraordinary nature of the accounting services he generally performed on behalf of the firm, but … on his ability to attract a corporate clientele”).

Comment i. Most decisions addressing a residual “public interest” factor deal with a shortage of healthcare professionals in a particular geographical area. See, e.g., Odess v. Taylor, 211 So. 2d 805, 810-812 (Ala. 1968) (pointing out a shortage of doctors in Alabama and adopting a blanket prohibition of restrictive covenants among medical professionals as a matter of statutory interpretation); Cmty. Hosp. Grp., Inc. v. More, 869 A.2d 884, 900 (N.J. 2005) (ruling that a restrictive covenant among physicians was reasonable except in its geographical limitations, and “blue penciling” the agreement accordingly on grounds of public policy so as not to adversely affect access to specialists). Some courts will subject restrictive covenants affecting public access to healthcare professionals to a higher degree of scrutiny based on public policy. See, e.g., AGA, LLC v. Rubin, 533 S.E.2d 804, 806 (Ga. Ct. App. 2000) (holding that the geographical scope of a restrictive covenant must be predictable beforehand to be reasonable). See also Sammarco v. Anthem Ins. Cos., Inc., 723 N.E.2d 128, 132 (Ohio Ct. App. 1998), overruled on other grounds, 839 N.E.2d 49, 54 (Ohio Ct. App. 2005) (“[R]estrictive covenants that purport to limit a physician’s ability to practice medicine in a geographic area are scrutinized more carefully than similar covenants restricting other types of employment.”).