
DRAFTING AND ENFORCING NON-COMPETE CLAUSES IN IOWA: A THIRTY-YEAR REVIEW

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ABSTRACT

The use of restrictive covenants in employment agreements has been the subject of litigation for many years. Though much of Iowa law on restrictive covenants has remained unchanged in recent decades, there have also been significant changes. While employers have gained new valuable tools for enforcement, Iowa courts have also created new potential pitfalls for unwary employers not properly advised by counsel. First published in the Drake Law Review by Frank Harty in 1985, this Article seeks to provide an update on significant developments in Iowa law on restrictive covenants in employment agreements over the past thirty years.

In an increasingly technological world, employers face new challenges in protecting sensitive information. These challenges have led to legal disputes in Iowa where courts have wrestled with employee liability for unauthorized access of their employers' computer-stored data. In addition, Iowa courts have created new ways for employers to protect against prospective misappropriation of trade secrets. When an employer seeks to obtain injunctive relief against a former employee for misappropriation of trade secrets, the employer has traditionally been required to show actual misappropriation by the employee. But in 2006, Judge Bennett of the Northern District of Iowa adopted the "inevitable disclosure doctrine"—a means for preventing misappropriation where a former employee's new employment will inevitably lead that employee to rely on the employee's former employer's trade secrets.

In addition to its concentration on Iowa law, this Article also seeks to provide insight into federal and other states' approaches to the law on restrictive covenants. The Article discusses various laws of states surrounding Iowa. And because many employers today use employee benefit and equity devices to impose restrictive covenants on their employees, this Article offers an exploration of the manner in which ERISA may affect restrictive covenant litigation in Iowa.

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I. INTRODUCTION

The use of restrictive covenants in employment agreements has been the subject of litigation for many years. Though much of Iowa law on restrictive covenants has remained unchanged in recent decades, there also has been significant changes. While employers have gained new valuable tools for enforcement, Iowa courts have also created new potential pitfalls for unwary employers not properly advised by counsel. This Article seeks to explore Iowa law on restrictive covenants, particularly noteworthy developments of the last 30 years.¹

1. This Article is an update of an earlier work appearing in a 1985 edition of the *Drake Law Review*. See Frank B. Harty, *Competition Between Employer and Employee*:

In an increasingly technological world, employers face new challenges in protecting sensitive information.² These challenges have led to legal disputes in Iowa, where courts have wrestled with employee liability for unauthorized access of their employers' computer-stored data.³ In addition, Iowa courts have created new ways for employers to protect against prospective misappropriation of trade secrets.⁴ An employer who seeks to obtain injunctive relief against a former employee for misappropriation of trade secrets has traditionally been required to show actual misappropriation by the employee.⁵ But in 2006, Judge Bennett of the Northern District of Iowa adopted the "inevitable disclosure doctrine"—a means for preventing misappropriation where a former employee's new employment will inevitably lead him to rely on his former employer's trade secrets.⁶

When counseling an employer or employee, the practicing attorney should have a firm grasp on the principles of this area of the law as well as some insight into the practical aspects of litigating claims arising from competition between employer and employee. The drafter of an employment agreement should be aware of the methods courts will employ in scrutinizing a restrictive covenant. A variation in the wording of an anti-competition covenant can be determinative when the enforceability of the provision is later called into question. This Article discusses the law of restrictive covenants as used in employment contracts and tactics for litigating conflicts arising from restrictive covenants. Finally, the Authors offer suggestions for drafting anti-competitive provisions in employment agreements, as well as their take on the future of restrictive covenants under state and federal law.

Drafting and Enforcing Restrictive Covenants in Employment Agreements, 35 DRAKE L. REV. 261 (1985).

2. See, e.g., Phillip Gordon, *Managing the Evolving Challenges of Workplace Privacy and Information Security*, ASTAPORE, Mar. 2013, at *1, 2013 WL 1752698; FRANK HARTY, COMPUTER FRAUD AND ABUSE ACT: A NEW TOOL FOR EMPLOYERS 1, http://www.nyemaster.com/media/cms/FBHarty_Computer_Fraud__Abuse_Act__64072421E2C40.pdf (last visited Feb. 23, 2016).

3. See *infra* Part II.D.

4. See *infra* Part II.D.

5. See *E.W. Bliss Co. v. Struthers-Dun, Inc.*, 408 F.2d 1108, 1112 (8th Cir. 1969); *Hulsenbusch v. Davidson Rubber Co.*, 344 F.2d 730, 734–35 (8th Cir. 1965); *Universal Loan Corp. v. Jacobson*, 237 N.W. 436, 438 (Iowa 1931); see also *infra* Part II.C.

6. *Interbake Foods, L.L.C. v. Tomasiello*, 461 F. Supp. 2d 943, 973 (N.D. Iowa 2006); see *infra* Part II.D.

II. THE EMPLOYMENT RELATIONSHIP

A. *The Employee's Right to Compete*

The law of restrictive covenants is integrally related to the common law defining the rights and duties of employers and employees. Often, a dispute over a restrictive covenant will also encompass claims that an employee breached common law fiduciary duties owed to the employer.⁷ Thus, a general discussion of these duties is beneficial.

In Iowa, in the absence of an enforceable restrictive covenant, trade secret misappropriation, or breach of confidence, an employee at will is entitled to resign and engage in direct competition with his or her former employer.⁸ This is consistent with the general rule of most jurisdictions.⁹ The reasoning behind this general rule was well-stated by the Iowa Supreme Court in *Baker v. Starkey*:

[A]n employer has no right to unnecessarily interfere with the employee following any trade or calling for which he is fitted and from which he may earn his livelihood and he cannot be precluded from exercising the skill and general knowledge he has acquired or increased through experience or even instructions while in the employment.¹⁰

Similarly, in *E.W. Bliss v. Struthers-Dunn, Inc.*, the Eighth Circuit Court of Appeals, applying Iowa law, stated at-will employees are "entitled to resign from [the employer's] employ for a good reason, a bad reason, or no reason at all, and are entitled to pursue their chosen field of endeavor in direct competition with [the employer] so long as there is no breach of a confidential relationship with [the employer]."¹¹

With some exceptions, Iowa courts have not been benevolent to former employers seeking to restrain ex-employees from using information acquired while employed or from setting up competing businesses using skills acquired while working for the former employer.¹² An employer

7. See *infra* Part II.B.

8. See *E.W. Bliss Co.*, 408 F.2d at 1113; *Universal Loan Corp.*, 237 N.W. at 437-38.

9. See, e.g., *Avocado Sales Co. v. Wyse*, 10 P.2d 485, 487 (Cal. Ct. App. 1932); *Renpak, Inc. v. Oppenheimer*, 104 So. 2d 642, 644 (Fla. Dist. Ct. App. 1958).

10. *Baker v. Starkey*, 144 N.W.2d 889, 897 (Iowa 1966).

11. *E.W. Bliss Co.*, 408 F.2d at 1113 (citing *Baker*, 144 N.W.2d at 897; *Mutual Loan Co. v. Pierce*, 65 N.W.2d 405, 408 (Iowa 1954); *Universal Loan Corp.*, 237 N.W. at 436).

12. See, e.g., *E.W. Bliss Co.*, 408 F.2d at 1113; see also *Baker*, 144 N.W.2d at 897; *Mut. Loan Co.*, 65 N.W.2d at 408; *Universal Loan*, 237 N.W. at 438.

cannot claim that the general skills of an employee are the property of the employer merely because a salary was paid.¹³ An employee's right to move on to other employment is a valuable personal right that Iowa courts recognize and weigh against the asserted rights of the employer: "The employee may achieve superiority in his particular department by every lawful means at hand, and then, upon the rightful termination of his contract for service, use that superiority for the benefit of rivals in trade of his former employer."¹⁴ Thus, a former employee, in competing with a former employer, may freely use general knowledge, skills, and experience gained in the employment relationship.¹⁵

However, there are limitations on an employee's right to compete with a former employer. Employees are subject to pre-resignation fiduciary and common law duties.¹⁶ Additionally, ex-employees are restricted in their activities under certain circumstances.¹⁷ Employees are subject to these duties in addition to any contractually imposed obligations. Thus, an

13. See *Universal Loan*, 237 N.W. at 438.

14. *Id.* (internal citations omitted). The Iowa Supreme Court in *Universal Loan Company v. Jacobson* continued:

"A man's aptitudes, his skill, his dexterity, his manual or mental ability . . . ought not to be relinquished by the servant; they are not his master's property; they are his own property; they are himself. There is no public interest which compels the rendering of those things dormant or sterile or unavailing; on the contrary, the right to use and expand his powers is advantageous to every citizen, and may be highly so for the country at large."

Id. (quoting *Herbert Morris, Ltd. v. Sazelby* (1916) 1 AC (HL) 688, at 714).

15. See *New England Overall Co. v. Woltmann*, 176 N.E.2d 193, 198 (Mass. 1961) (wearing apparel sales); *Gulf Oil Corp. v. Rapp*, 226 N.Y.S.2d 562, 564 (Sup. Ct. 1962) (oil and gas sales); *Albert B. Cord Co. v. S. & P. Mgmt. Serv., Inc.*, 207 N.E.2d 247, 248 (Ohio Ct. App. 1965) (management consulting services). Accordingly, an Illinois court once stated:

Our free economy is based upon competition. One who works for another cannot be compelled to erase from his mind all of the general skills, knowledge, acquaintances and the over-all experience which he acquired during the course of his employment. The success of a person who is engaged in sales depends largely upon his personal friendships and the confidences inherent herein. Absent special circumstances, such persons cannot be prevented from seeking out customers of his former employer when he has entered into a competing business or gone to work for a competitor.

Revcor, Inc. v. Fame, Inc., 228 N.E.2d 742, 746 (Ill. App. Ct. 1967).

16. See *infra* Part II.B.

17. See *infra* Part II.B.

action for breach of a covenant not to compete may also involve claims couched in tort terms arising from a breach of these common law and fiduciary duties.¹⁸

B. *Fiduciary and Common Law Duties of Employees*

Anyone acting as an agent, employee, director, or in any other fiduciary capacity is legally bound not to act contrary to the interests of the business.¹⁹ Employees, as agents of their employers, are bound to exercise good faith and loyalty.²⁰ This fiduciary obligation prohibits employees from competing with their employers while still employed.²¹ Even in the absence of a restrictive covenant, employees may be enjoined from competing with their employers if the employees violated pre-resignation fiduciary and common law duties.²²

Iowa courts have indicated a certain tolerance for an employee, while still employed, making limited preparations for a competing business while on “company time.”²³ But an employee “may *not* (1) appropriate the company’s trade secrets; (2) solicit his employer’s customers while still working for his employer; (3) solicit the departure of other employees while still working for his employer; or (4) carry away confidential information, such as customer lists.”²⁴ In addition, an employee who openly competes with his or her employer during the course of employment commits an actionable breach of fiduciary duty.²⁵

Numerous courts have held that employees breach their fiduciary duty of loyalty owed their employers when they act for their own account in competition with their employer while still employed.²⁶ Sales

18. See *infra* Part II.B.

19. See *Las Luminarias of the N.M. Council of the Blind v. Isengard*, 587 P.2d 444, 449 (N.M. Ct. App. 1978) (explaining employees owe “an undivided and unselfish loyalty to the corporation”).

20. *Fowler v. Berry Seed Co.*, 84 N.W.2d 412, 416 (Iowa 1957).

21. *Vigoro Indus., Inc. v. Crisp*, 82 F.3d 785, 788 (8th Cir. 1996).

22. *Ins. Field Servs., Inc. v. White & White Inspection & Audit Serv., Inc.*, 384 So. 2d 303, 307–08 (Fla. Dist. Ct. App. 1980).

23. See *Cent. States Indus. Supply, Inc. v. McCullough*, 279 F. Supp. 2d 1005, 1043 (N.D. Iowa 2003).

24. *Id.* (emphasis added) (citations omitted).

25. See *infra* Part IV.C for a discussion of competition by an employee and its effect on the likelihood of injunctive relief in an action to enforce a restrictive covenant.

26. See, e.g., *Am. Express Fin. Advisors, Inc. v. Topel*, 38 F. Supp. 2d 1233, 1247 (D. Colo. 1999); *Nat’l Chemsearch Corp. of N.Y. v. Hanker*, 309 F. Supp. 1278, 1281 (D.D.C.

representatives, for example, who sell in competition with their employer during the course of such employment commit an actionable breach of fiduciary duty.²⁷ This duty of loyalty not only forbids actual sales for competitors while employed, it also forbids the beginning of negotiations to be later consummated by competitors.²⁸ For example, in *Group Association Plans, Inc. v. Colquhoun*, a sales representative for the plaintiff insurance brokerage firm resigned without notice and immediately began employment with a competitor.²⁹ Prior to his resignation, the employee began negotiations for the sale of group insurance plans to at least three potential customers.³⁰ Subsequent to his resignation, the employee consummated these negotiations on behalf of his new employer.³¹ The court issued an injunction against this conduct and directed an accounting of proceeds, stating:

An employee who is in the process of securing business for his employer and works on the matter as part of his employment on his employer's time for which his employer pays him, may not, upon terminating his employment, continue negotiations in behalf of himself or in behalf of a new employer. In a sense he is delivering the proceeds or the fruits of his work for one employer to his new employer if he continues solicitations for the latter. This is such an activity that is clearly a breach of an agent's duty at common law irrespective of contract.³²

Thus, employees cannot rid themselves of their fiduciary obligations to their employers merely by submitting a resignation.³³ The Second Restatement of Agency imposes upon ex-employees the duty not to use trade secrets and confidential information intimated during the agency relationship.³⁴ The law of Iowa is in accord with the view set forth in the

1970); *Midland-Ross Corp. v. Yokana*, 185 F. Supp. 594, 605 (D.N.J. 1960), *aff'd*, 293 F.2d 411 (3d Cir. 1961); *PFS Distrib. Co. v. Raduechel*, 492 F. Supp. 2d 1061, 1074–75 (S.D. Iowa 2007), *aff'd*, 574 F.3d 580 (8th Cir. 2009).

27. *See Grp. Ass'n Plans, Inc. v. Colquhoun*, 292 F. Supp. 564, 565–66, 568 (D.D.C. 1968), *vacated on other grounds*, 466 F.2d 469 (D.C. Cir. 1972).

28. *See id.* at 568.

29. *Id.* at 565–66.

30. *Id.* at 566.

31. *Id.* at 567.

32. *Id.*

33. *See id.*

34. The Restatement of Agency provides:

Unless otherwise agreed, after the termination of the agency, the agent:

Second Restatement of Agency.³⁵ Even in the absence of an employment contract containing a covenant not to compete, it is well established that the law implies an obligation on the employee not to use “for his own advantage, and to the detriment of his former employer, [confidential] information or trade secrets acquired by or imparted to him in the course of his employment.”³⁶

In addition to the post-resignation duties discussed thus far, employees may be prevented from undertaking other acts that injure former employers. For example, courts have held that ex-employees cannot misrepresent to customers the circumstances under which they left a former employer in order “to play on the sympathies of customers and [thus] influence them” to switch their business.³⁷ Similarly, ex-employees cannot attempt to deceive customers as to the source of the goods or services supplied after the employees enter new employment in competition with former employers.³⁸

C. Traditional Causes of Action Against Ex-Employee

In the absence of an employment contract containing an enforceable

(a) has no duty not to compete with the principal;

(b) has a duty to the principal not to use or to disclose to third persons, on his own account or on account of others, in competition with the principal or to his injury, trade secrets, written lists of names, or other similar confidential matters given to him only for the principal's use or acquired by the agent in violation of duty. The agent is entitled to use general information concerning the method of business of the principal and the names of the customers retained in his memory, if not acquired in violation of his duty as agent;

(c) has a duty to account for profits made by the sale or use of trade secrets and other confidential information, whether or not in competition with the principal;

(d) has a duty to the principal not to take advantage of a still subsisting confidential relation created during the prior agency relation.

RESTATEMENT (SECOND) OF AGENCY § 396 (AM. LAW INST. 1958).

35. See *Lemmon v. Hendrickson*, 559 N.W.2d 278, 280–81 (Iowa 1997) (citing RESTATEMENT (SECOND) OF AGENCY § 396).

36. *Hulsenbusch v. Davidson Rubber Co.*, 344 F.2d 730, 735 (8th Cir. 1965), *cert. denied*, 382 U.S. 977 (1966) (quoting 35 AM. JUR. *Master and Servant* § 99 (1941)); *Basic Chems., Inc. v. Benson*, 251 N.W.2d 220, 230 (Iowa 1977) (quoting *Sperry Rand Corp. v. Rothlein*, 241 F. Supp. 549, 564–65 (D. Conn. 1964)).

37. *Carl A. Colteryahn Dairy, Inc. v. Schneider Dairy*, 203 A.2d 469, 473 (Pa. 1964).

38. *Basic Chems.*, 251 N.W.2d at 232.

restrictive covenant, an employer seeking injunctive or monetary relief from a former employee would have to show: the employee misappropriated a trade secret or confidential information;³⁹ the employee engaged in some manner of unfair competition;⁴⁰ or the employee acted in bad faith in breach of a confidential relationship.⁴¹ As discussed below, many of these causes of action and claims will accompany a claim for breach of a restrictive covenant. Thus, this area of the law is discussed in conjunction with actions to enforce restrictive covenants.

D. *Developing Causes of Action Against Ex-Employee*

Where employers cannot show a former employee has actually misappropriated trade secrets, employers may nonetheless be able to obtain injunctive relief if their employee's new employment will inevitably result in the employee's reliance on the former employer's trade secrets.⁴² The aptly-titled "inevitable disclosure" doctrine provides modern-day employers in Iowa another valuable tool for combating threats posed by former employees.⁴³

In 2006, United States District Judge Mark Bennett of the Northern District of Iowa adopted the inevitable disclosure doctrine in *Interbake Foods, L.L.C. v. Tomasiello*.⁴⁴ There, a manufacturer of ice cream sandwich wafers sought injunctive relief against a former manager and his new employer, an ice cream cone maker that sought to penetrate the wafer market.⁴⁵ The wafer manufacturer could adduce no evidence at the preliminary injunction hearing that the former manager had disclosed any confidential information to his new employer.⁴⁶ Therefore, the wafer manufacturer sought to avail itself of the inevitable disclosure doctrine.⁴⁷

At the time of Judge Bennett's decision in *Interbake Foods*, the Iowa Supreme Court had not addressed the doctrine of inevitable disclosure, and

39. See *Hulsenbusch*, 344 F.2d at 734–35.

40. See *Universal Loan Corp. v. Jacobson*, 237 N.W. 436, 438 (Iowa 1931).

41. See *E.W. Bliss Co. v. Struthers-Dunn, Inc.*, 408 F.2d 1108, 1113 (8th Cir. 1969).

42. See Tracy Batemen Farrell, Annotation, *Applicability of Inevitable Disclosure Doctrine Barring Employment of Competitor's Former Employee*, 36 A.L.R. 6th 537, § 2 (2015).

43. See *id.*

44. *Interbake Foods, L.L.C. v. Tomasiello*, 461 F. Supp. 2d 943, 973 (N.D. Iowa 2006).

45. *Id.* at 949–51.

46. *Id.* at 954.

47. *Id.* at 969–70.

there was some disagreement among other jurisdictions as to whether the inevitable disclosure doctrine should even be applied.⁴⁸ Where courts do apply the inevitable disclosure doctrine, courts generally consider:

[T]he present state and nature of the industries at issue to determine whether the alleged harm would be irreparable and that injunctive relief is granted in cases where

the employee's knowledge would allow a competitor to improve its business with little or no effort, or where the present and former employers were "endeavoring to develop the identical product" and the breaching employee had "learned exactly how [his former employer] was making the [product]," including all details concerning the production process, which refinements in the process were producing improvements and failures, and how near to success development efforts were.⁴⁹

The inevitable disclosure doctrine bears close resemblance to the doctrine of threatened disclosure, though there are differences: "The inevitable disclosure doctrine appears to be aimed at preventing disclosures despite the employee's best intentions, and the threatened disclosure doctrine appears to be aimed at preventing disclosures based on the employee's intentions."⁵⁰ Thus, the inevitable disclosure doctrine is simply a way to establish a threatened disclosure where the party seeking the doctrine's protection lacks additional evidence of the existence of a substantial threat of impending injury.⁵¹

Another tool for employers which has been gaining importance in recent decades is the Computer Fraud and Abuse Act. The CFAA imposes civil and criminal liability on anyone who:

48. *Id.* at 970, 972–73 (*comparing* PepsiCo, Inc. v. Redmond, 54 F.3d 1262 (7th Cir. 1995), *and* Merck & Co. v. Lyon, 941 F. Supp. 1443 (M.D.N.C. 1996) (applying the inevitable disclosure doctrine), *with* Del Monte Fresh Produce Co. v. Dole Food Co., 148 F. Supp. 2d 1326 (S.D. Fla. 2001) (rejecting the inevitable disclosure doctrine)).

49. *Id.* at 972 (quoting Int'l Paper Co. v. Suwyn, 966 F. Supp. 246, 258–59 (S.D.N.Y. 1997) (alterations in original) (citations omitted)).

50. Barilla Am., Inc. v. Wright, No. 4-02-CV-90267, 2002 WL 31165069, at *9 (S.D. Iowa July 5, 2002).

51. *Interbake Foods*, 461 F. Supp. 2d at 973. On the facts of *Interbake Foods*, the court concluded application of the doctrine was not warranted because the manufacturing processes and equipment of the plaintiff and defendant were distinguishable. *Id.* Consequently, much of the allegedly confidential information possessed by the former manager was of limited value to the defendant employer. *Id.* at 974.

[I]ntentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer;

[or] . . .

[K]nowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than \$5,000 in any 1-year period⁵²

In 2009, the U.S. District Court for the Southern District of Iowa awarded a \$1.5 million judgment to a former employer who brought action against its former employee for, *inter alia*, violations of the CFAA.⁵³ The plaintiff, NCMIC Finance Corp., provided lease equipment financing, mostly for low-cost healthcare items.⁵⁴ The defendant, William Artino, founded Professional Capital Group, an equipment leasing business that offered “loans over the Internet to service healthcare vendors.”⁵⁵ NCMIC eventually acquired PCG and hired Artino as vice president and general manager of the equipment-financing division.⁵⁶

As part of the terms of NCMIC’s acquisition of PCG and its hiring of Artino, NCMIC provided Artino a personal goodwill purchase agreement.⁵⁷ The goodwill agreement offered Artino commission-based “incentives to generate a high volume of leases without regard to the riskiness of the lease.”⁵⁸ Artino also executed an employment agreement with a restrictive covenant not to compete or solicit NCMIC’s customers for “eighteen months following the termination of [his] employment, and [which] prohibit[ed] Artino from disclosing any confidential information to NCMIC competitors.”⁵⁹

In terms of revenue, NCMIC’s largest vendor was ProSolutions, Inc. (PSI), an entity that marketed chiropractic equipment.⁶⁰ PSI sold

52. 18 U.S.C. § 1030(a)(2)(C), (a)(4) (2012).

53. NCMIC Fin. Corp. v. Artino, 638 F. Supp. 2d 1042, 1088–89 (S.D. Iowa 2009).

54. *Id.* at 1049.

55. *Id.*

56. *Id.*

57. *Id.* at 1049–50.

58. *Id.* at 1050.

59. *Id.*

60. *Id.* at 1051–52.

chiropractic equipment at national trade shows and would then forward credit applications to equipment-leasing companies (such as NCMIC) for lease financing.⁶¹ At a 2006 trade show that Artino attended as an officer of NCMIC, Artino introduced PSI to LEAF, an NCMIC competitor.⁶² Artino began working with PSI to place leases with LEAF, and Artino received compensation from LEAF for his referrals.⁶³ Artino used NCMIC company resources, including its computer system, to assist LEAF in the booking of PSI leases.⁶⁴

To assess Artino's liability under the CFAA, the court had to decide whether Artino accessed NCMIC computers "without authorization."⁶⁵ This issue necessarily required the court to side with one of two competing approaches to the construction of "without authorization."⁶⁶ Under the broad view, an employee is "without authorization" when the employee "accesses an employer's computer in order to obtain business information for his own personal benefit and to the detriment of his employer, thereby breaches his duty of loyalty to his employer."⁶⁷ Under the narrow view, an employee is liable "only when the employee's *initial* access to the computer is not permitted and" the employee then misappropriates the employer's information.⁶⁸ When *NCMIC Finance Corp. v. Artino* was decided, the Eighth Circuit had not taken a stance on either view.⁶⁹

In *Artino*, Judge Gritzner adopted the broad view of "without authorization."⁷⁰ To arrive at this result, the court relied heavily on the CFAA's legislative history.⁷¹ The CFAA, as originally enacted, was a criminal statute.⁷² Congress amended the CFAA in 1994 to include a private cause of action.⁷³ "The 1994 amendment was intended 'to expand the statute's scope to include civil claims challenging the unauthorized removal

61. *Id.* at 1051.

62. *Id.* at 1054.

63. *Id.*

64. *Id.*

65. *Id.* at 1055–56 (citing 18 U.S.C. § 1030(a)(2)(C) (2012)).

66. *Id.* at 1056.

67. *Id.* (compiling courts that follow the broad view).

68. *Id.* (emphasis added) (compiling courts that apply the narrow view).

69. *Id.*

70. *Id.* at 1059.

71. *See id.* at 1058–59.

72. *Id.* at 1058.

73. *Id.*

of information or programs from a company's computer database.”⁷⁴ Just two years later, Congress again amended the CFAA to broaden the scope of the statute's coverage.⁷⁵ Specifically, Congress added to the range of computers that would fall within the statute's reach “by substituting the phrase ‘federal interest computer’ with ‘protected computer.’”⁷⁶ The senate report on the 1996 amendments states:

Those who improperly use computers to obtain other types of information—such as financial records, nonclassified Government information, and information of nominal value from private individuals or companies—face only misdemeanor penalties, *unless the information is used for commercial advantage, private financial gain or to commit any criminal or tortious act.*⁷⁷

In light of the CFAA's broad scope, “[e]mployers . . . are increasingly taking advantage of the CFAA's civil remedies to sue former employees and their new companies who seek a competitive edge through wrongful use of information from the former employer's computer system.”⁷⁸ The combination of these factors led the court to conclude the broad view of “without authorization” is the correct view.⁷⁹ Under the broad view, the court imposed liability against Artino under the CFAA.⁸⁰

III. THE LAW OF RESTRICTIVE COVENANTS IN EMPLOYMENT AGREEMENTS

Though restrictive covenants ancillary to contracts of employment were once considered void as repugnant to public policy, they have now long been enforced by U.S. courts.⁸¹ Judicial aversion for non-competition provisions is, however, still evidenced by procedural⁸² and substantive⁸³ rules operating against the party seeking enforcement of restrictive covenants. In

74. *Id.* (quoting *Pac. Aerospace & Elecs., Inc. v. Taylor*, 295 F. Supp. 2d 1188, 1196 (E.D. Wash. 2003)).

75. *Id.*

76. *Id.*

77. S. REP. NO. 104-357, at 8 (1996).

78. *Pac. Aerospace*, 295 F. Supp. 2d at 1196.

79. *Artino*, 638 F. Supp. 2d at 1059, 1065–66.

80. *Id.* at 1066.

81. *See Cropper v. Davis*, 243 F. 310, 314 (8th Cir. 1917).

82. *See Iowa Glass Depot, Inc. v. Jindrich*, 338 N.W.2d 376, 381 (Iowa 1983).

83. *See Diversified Fastening Sys., Inc. v. Rogge*, 786 F. Supp. 1486, 1493 (N.D. Iowa 1991) (stating that the party seeking enforcement of a restrictive covenant bears the burden of proving the covenant is reasonable in scope).

Iowa, as in numerous other jurisdictions, a party seeking to enforce a restrictive covenant must prove that the covenant is “reasonably necessary for the protection of the employer’s business.”⁸⁴

Iowa courts have dealt with restrictive covenants on numerous occasions, and the law of Iowa has developed in the same manner as that of the majority of jurisdictions.⁸⁵ Although at early common law restrictive covenants were deemed void as restraints of trade, Iowa courts have never held them void per se. Nevertheless, non-compete agreements are disfavored under Iowa law.⁸⁶

A. *The Enforceability of Restrictive Covenants in Iowa*

It is important to note that although the general principles of the law of restrictive covenants are readily distilled, cases are determined on an ad hoc basis, and while trends and propensities can be discussed, it is very difficult to predict the outcome of a given situation.⁸⁷ Iowa adheres to the “rule of reason” doctrine for enforcing restrictive covenants.⁸⁸ In Iowa, the general rule is that a restrictive covenant that is supported by consideration will be enforced if the “covenant is reasonably necessary for the protection of the employer’s business”⁸⁹ and “not unreasonably restrictive of the employee’s rights nor prejudicial to the interest of the public.”⁹⁰

Because of their separate importance, each element of the covenant’s enforceability will be discussed below.

B. *Consideration Requirements*

Generally, a covenant not to compete is unenforceable unless

84. See *Dan’s Overhead Doors & More, Inc. v. Wennermark*, No. 06-1049, 2007 WL 1486133, at *2 (Iowa Ct. App. May 23, 2007) (internal citations omitted).

85. See *Ehlers v. Iowa Warehouse Co.*, 188 N.W.2d 368, 370 (Iowa 1971) *reh’g denied and opinion modified*, 190 N.W.2d 413 (Iowa 1971).

86. See *Bd. of Regents v. Warren*, No. 08-0017, 2008 WL 5003750, at *3 (Iowa Ct. App. Nov. 26, 2008).

87. See *Hanley v. Misischi*, 302 A.2d 79, 82 (R.I. 1973).

88. *Glenn v. Diabetes Treatment Ctrs. of Am., Inc.*, 116 F. Supp. 2d 1098, 1105 (S.D. Iowa 2000).

89. *Warren*, 2008 WL 5003750, at *4 (quoting *Dental East, P.C. v. Westercamp*, 423 N.W.2d 553, 555 (Iowa Ct. App. 1988)); *Dan’s Overhead*, 2007 WL 1486133, at *2.

90. *Iowa Glass Depot, Inc. v. Jindrich*, 338 N.W.2d 376, 381 (Iowa 1983) (citing *Ehlers*, 188 N.W.2d at 369); see *Warren*, 2008 WL 5003750, at *5; *Lemmon v. Hendrickson*, 559 N.W.2d 278, 282 (Iowa 1997).

supported by consideration.⁹¹ To be enforceable under Iowa law, a restrictive covenant must be ancillary or incidental to a lawful contract.⁹² This requirement is often couched in terms of consideration.⁹³ Additionally, it is generally held that consideration alone is insufficient to make a restrictive covenant enforceable.⁹⁴ “Naked” restrictive covenants, those not ancillary to a valid employment agreement, are unenforceable because they are subject to the full force of common law and federal prohibitions on contracts in restraint of trade.⁹⁵ Restrictive covenants will be scrutinized under the “rule of reason” standard only when they are incidental to the employment contract.⁹⁶

Courts differ as to what constitutes sufficient consideration for a covenant not to compete. Generally, courts in most jurisdictions will hold that a restrictive covenant is supported by adequate consideration when the employee executes the covenant not to compete at the inception of employment.⁹⁷ Iowa courts have upheld covenants not to compete where the only supporting consideration is the employee’s continued employment:

We held in [prior decisions] that continued employment for an indefinite period of time is sufficient consideration to support a covenant not to compete. Although other jurisdictions are evenly split on the question of whether continued employment by itself is adequate consideration, we find no compelling reason to overrule our prior decisions. This is especially true since we determine the covenant is invalid for reasons indicated hereafter.⁹⁸

Where, however, an employee executes a non-competition covenant sometime after beginning employment, there is a split of authority on whether the covenant is ancillary to the employee’s employment

91. *Pro Edge, L.P. v. Gue*, 374 F. Supp. 2d 711, 741 (N.D. Iowa 2005), *modified*, 411 F. Supp. 2d 1080 (N.D. Iowa 2006).

92. *Chapin v. Brown*, 48 N.W. 1074, 1075 (Iowa 1891).

93. *See, e.g., Mona Elec. Grp., Inc. v. Truland Serv. Corp.*, 193 F. Supp. 2d 874, 875–76 (E.D. Va. 2002), *aff’d*, 56 F. App’x 108 (4th Cir. 2003).

94. *Pro Edge*, 374 F. Supp. 2d at 741.

95. *See Water Servs., Inc. v. Tesco Chems., Inc.*, 410 F.2d 163, 167 n.4 (5th Cir. 1969); *Morgan’s Home Equip. Corp. v. Martucci*, 136 A.2d 838, 845 (Pa. 1957).

96. *See, e.g., Iowa Glass Depot, Inc. v. Jindrich*, 338 N.W.2d 376, 381 (Iowa 1983); *Kadis v. Britt*, 29 S.E.2d 543, 545 (N.C. 1944).

97. *See, e.g., Modern Controls, Inc. v. Andreadakis*, 578 F.2d 1264, 1267–68 n.5 (8th Cir. 1978).

98. *Iowa Glass*, 338 N.W.2d at 381 (citations omitted).

agreement.⁹⁹ Some courts have held that a covenant executed by an employee after the employee has already worked for a period of time is not ancillary to the taking of employment and hence invalid as a naked restraint of trade.¹⁰⁰ In contrast, other courts have held directly to the contrary, that sufficient consideration exists for a restrictive covenant executed after the inception of employment.¹⁰¹

Some courts hold that it is sufficient that an employer refrain from terminating an at-will employee.¹⁰² This liberal view should be distinguished from those decisions in which a court either finds adequate consideration from factors other than continued employment,¹⁰³ or holds that the execution of a restrictive covenant relates back to the inception of employment and is therefore ancillary to the original contract of employment.¹⁰⁴

Numerous decisions hold that agreements not to compete executed after the inception of employment are ancillary to the original employment contract. For example, where a restrictive covenant was discussed between the parties at the beginning of employment but executed some time later, courts have found the covenant to be supported by adequate consideration.¹⁰⁵ Similarly, other courts will overlook the fact that a written agreement containing a restrictive covenant is not formally executed until sometime after the employee starts work where there are other indicia that the covenant was ancillary to the taking of employment.¹⁰⁶ For instance, where the execution of a written agreement was delayed to enable the

99. *Mona Elec. Grp., Inc. v. Truland Serv. Corp.*, 193 F. Supp. 2d 874, 875–76 (E.D. Va. 2002), *aff'd*, 56 F. App'x 108 (4th Cir. 2003) (noting split of authority and citing cases).

100. *See, e.g.,* *Kadis v. Britt*, 29 S.E.2d 543, 548–49 (N.C. 1944); *McCombs v. McClelland*, 354 P.2d 311, 315 (Or. 1960).

101. *See, e.g.,* *Phx. Renovation Corp. v. Rodriguez*, 461 F. Supp. 2d 411, 425 (E.D. Va. 2006), *aff'd*, 258 F. App'x 526 (4th Cir. 2007) (citing *Paramount Termite Control Co. v. Rector*, 380 S.E.2d 922 (Va. 1989)); *Credit Bureau Mgmt. Co. v. Huie*, 254 F. Supp. 547, 554–55 (E.D. Ark. 1966).

102. *See, e.g.,* *Daughtry v. Capital Gas Co.*, 229 So. 2d 480, 483 (Ala. 1969).

103. *See, e.g.,* *Mouldings, Inc. v. Potter*, 315 F. Supp. 704, 713–15 (M.D. Ga. 1970); *Thomas v. Coastal Indus. Servs., Inc.*, 108 S.E.2d 328, 330 (Ga. 1959); *Credit Rating Serv. v. Charlesworth*, 8 A.2d 847, 849 (N.J. Ch. 1939).

104. *Marine Contractors Co. v. Hurley*, 310 N.E.2d 915, 920–21 (Mass. 1974); *Novelty Bias Binding Co. v. Shevrin*, 175 N.E.2d 374, 376 (Mass. 1961).

105. *See, e.g.,* *Ehlers v. Iowa Warehouse Co.*, 188 N.W.2d 368, 372, 374 (Iowa 1971); *see also* *Farm Bureau Serv. Co. v. Kohls*, 203 N.W.2d 209, 212 (Iowa 1972).

106. *See* *Seaboard Indus., Inc. v. Blair*, 178 S.E.2d 781, 787 (N.C. Ct. App. 1971).

employee to participate in a more favorable stock option plan, the court in *Seaboard Industries, Inc. v. Blair* held the covenant to be part of the original contract of employment.¹⁰⁷ The rationale for this rule was well-stated by the Pennsylvania Supreme Court: “As long as the restrictive covenants are an auxiliary part of the taking of regular employment, and not an after-thought to impose additional restrictions on the unsuspecting employee, a contract of employment containing such covenants is supported by valid consideration, and is therefore enforceable.”¹⁰⁸

Courts in some jurisdictions will require a showing of additional consideration where a restrictive covenant is executed after the inception of employment.¹⁰⁹ In jurisdictions that hold that mere continued employment is insufficient consideration, courts will look to numerous items as possible consideration. For example, restrictive covenants have been found to be supported by consideration where the employee receives a promotion¹¹⁰ or increased compensation.¹¹¹ Other substantial changes in employment will support a restrictive covenant. For instance, where the employee’s employment status changes substantially due to a change in position from office worker to outside salesman, thereby gaining a commission on sales, a restrictive covenant will likely be held to be supported by consideration.¹¹²

In Iowa, the settled rule is that continued employment for an indefinite period is sufficient consideration to support a covenant not to compete executed subsequent to employment.¹¹³ In *Ehlers v. Iowa Warehouse Co.*, the Iowa Supreme Court enjoined an ex-employee from competing with his former employer for two years following the termination of employment.¹¹⁴ The employment contract at issue “was not signed until sometime after [the employee] began work.”¹¹⁵ However, the covenant not to compete “had

107. *Id.*

108. *Beneficial Fin. Co. v. Becker*, 222 A.2d 873, 876 (Pa. 1966) (citations omitted).

109. *See, e.g., Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127, 132–33 (Minn. 1980) (finding non-compete agreement unenforceable for want of consideration where employee knew he would be asked to sign non-compete agreement but was not actually asked to do so until two weeks after his employment began).

110. *See, e.g., Jacobson & Co. v. Int’l Env’t Corp.*, 235 A.2d 612, 617 (Pa. 1967).

111. *See, e.g., Labriola v. Pollard Grp., Inc.*, 100 P.3d 791, 794 (Wash. 2004).

112. *See M.S. Jacobs & Assocs., Inc. v. Duffley*, 303 A.2d 921, 923 (Pa. 1973).

113. *Titan Int’l, Inc. v. Bridgestone Firestone N. Am. Tire, LLC*, 752 F. Supp. 2d 1032, 1050 (S.D. Iowa 2010); *Cent. States Indus. Supply, Inc. v. McCullough*, 279 F. Supp. 2d 1005, 1031 (N.D. Iowa 2003); *Iowa Glass Depot, Inc., v. Jindrich*, 338 N.W.2d 376, 381 (Iowa 1983); *Farm Bureau Serv. Co. v. Kohls*, 203 N.W.2d 209, 212 (Iowa 1972).

114. *Ehlers v. Iowa Warehouse Co.*, 188 N.W.2d 368, 374 (Iowa 1971).

115. *Id.* at 372.

been discussed at the time [the employee] accepted the position.”¹¹⁶ The court, *sub silentio*, found the covenant to be supported by sufficient consideration and enforced it under the rule of reason doctrine.¹¹⁷

The Iowa rule was more explicitly stated in *Farm Bureau Service Co. v. Kohls*, where the court held that a restrictive covenant is supported by consideration if signed after the creation of the employment relationship.¹¹⁸ The court quoted American Jurisprudence Second Edition:

“An employee’s anticompetitive covenant executed after the commencement of employment has been held unenforceable by some courts as without consideration. Other courts, however, have held that there is sufficient consideration in the continuance of employment—at least where the employee would have been discharged had he not agreed to the covenant.”¹¹⁹

The court then adopted the rule that continued employment of an employee-at-will would support a restrictive covenant.¹²⁰ This rule was reaffirmed in *Iowa Glass Depot, Inc. v. Jindrich*,¹²¹ and has been more recently reaffirmed in several cases including *Titan International, Inc. v. Bridgestone Firestone North American Tire, LLC*¹²² and *Phone Connection, Inc. v. Harbst*.¹²³

Presumably, a different holding would result where an employee had a contract with a specific term and executed a covenant not to compete after the commencement of that term. The Iowa Supreme Court has not dealt with this specific issue. The Iowa Court of Appeals did, however, deal with a very similar question in *Insurance Agents, Inc. v. Abel*.¹²⁴ In that case, the defendant-employee, Abel, sold his business to the plaintiff in 1977 with the sale-of-business agreement providing that Abel would sell his business “in

116. *Id.*

117. *Id.* at 373–74. The court noted that the voluntariness of the execution of the agreement was called into question by the employee, but made no mention of the adequacy of consideration supporting the agreement. *Id.*

118. *Farm Bureau Serv. Co.*, 203 N.W.2d at 212.

119. *Id.* (quoting 54 AM. JUR. 2D *Monopolies* § 550 (1971)).

120. *Id.*

121. *See* *Iowa Glass Depot, Inc. v. Jindrich*, 338 N.W.2d 376, 384 (Iowa 1983).

122. *See* *Titan Int’l, Inc. v. Bridgestone Firestone N. Am. Tire, LLC*, 752 F. Supp. 2d 1032, 1050 (S.D. Iowa 2010).

123. *See* *Phone Connection, Inc. v. Harbst*, 494 N.W.2d 445, 449 (Iowa Ct. App. 1992).

124. *See* *Ins. Agents, Inc. v. Abel*, 338 N.W.2d 531, 535 (Iowa Ct. App. 1983).

exchange for shares of the plaintiff's stock."¹²⁵ The sale agreement further provided that Abel would not compete with the plaintiff for three years, and that the plaintiff would employ Abel for three years.¹²⁶ Shortly after his employment began, Abel signed a second agreement in 1978; whereby, he was asked by the plaintiff's president to enter into a "Corporate Stock Purchase Plan with Agreement Not to Compete" in connection with receiving share of stock of the plaintiff.¹²⁷ The stock was transferred to Abel under the first agreement.¹²⁸ The second agreement was not incorporated into the sale-of-business agreement executed in 1977.¹²⁹ Abel was terminated after the employment term of the sale-of-business agreement expired.¹³⁰ He then proceeded to compete with Insurance Agents, Inc.¹³¹

The Iowa Court of Appeals held that the non-competition agreement contained in the 1978 contract failed for lack of consideration.¹³² The court correctly reasoned that, although the covenant was signed while the defendant employed the plaintiff, it was a naked agreement in that no additional consideration passed between the parties.¹³³ The defendant, as a term employee, did not execute the second covenant in exchange for continued employment.¹³⁴ Thus, a restrictive covenant executed by a term employee after the commencement of employment would, by analogy, be unenforceable for lack of consideration.¹³⁵

C. Enforceability of Restrictive Covenants Under Judicial Standards of Reasonableness

As previously stated, the general rule in Iowa is that a non-competition provision embodied in an employment contract will be enforced if the covenant "is reasonably necessary for the protection of the employer's business and is not unreasonably restrictive of the employee's rights nor prejudicial to the public interest."¹³⁶ The Iowa rule is analogous

125. *Id.* at 532.

126. *Id.*

127. *Id.*

128. *Id.* at 533.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 534-35.

133. *Id.* at 535.

134. *Id.*

135. *See id.*

136. *Ma & Pa, Inc. v. Kelly*, 342 N.W.2d 500, 502 (Iowa 1984); *Iowa Glass Depot*,

to that set forth in section 188 of the Second Restatement of Contracts.¹³⁷ That provision reads:

- (1) A promise to refrain from competition that imposes a restraint that is ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade if
 - (a) the restraint is greater than is needed to protect the promisee's legitimate interest, or
 - (b) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public.
- (2) Promises imposing restraints that are ancillary to a valid transaction or relationship include the following:
 - (a) a promise by the seller of a business not to compete with the buyer in such a way as to injure the value of the business sold;
 - (b) a promise by an employee or other agent not to compete with his employer or other principal;
 - (c) a promise by a partner not to compete with the partnership.¹³⁸

In *Iowa Glass*, the court amplified this standard, stating:

Although we must afford fair protection to the business interests of the employer, the restriction on the employee must be no greater than necessary to protect the employer. Moreover, the covenant must not be oppressive or create hardships on the employee out of proportion to the benefits the employer may be expected to gain. The burden of proving reasonableness is upon the employer who seeks to enforce such a covenant.¹³⁹

A majority of states follow basically the same common law "rule of reason" doctrine as is used in Iowa.¹⁴⁰ Courts in various jurisdictions which

Inc. v. Jindrich, 338 N.W.2d 376, 381 (Iowa 1983).

137. Compare RESTATEMENT (SECOND) OF CONTRACTS § 188 (AM. LAW INST. 1981), with *Kelly*, 342 N.W.2d at 502, and *Iowa Glass*, 338 N.W.2d at 381.

138. RESTATEMENT (SECOND) OF CONTRACTS § 188 (AM. LAW INST. 1981).

139. *Iowa Glass*, 338 N.W.2d at 381 (citing *Mut. Loan Co. v. Pierce*, 65 N.W.2d 405, 407-08 (Iowa 1954); *Brecher v. Brown*, 17 N.W.2d 377, 379 (Iowa 1945)).

140. See, e.g., *Mixing Equip. Co. v. Phila. Gear, Inc.*, 436 F.2d 1308, 1312 (3d Cir. 1971) (applying New York law); *Water Servs., Inc. v. Tesco Chems., Inc.*, 410 F.2d 163, 167-68 (5th Cir. 1969) (applying Georgia law); *Budget Rent-A-Car Corp. v. Fein*, 342 F.2d 509, 514 (5th Cir. 1965) (applying Georgia and North Carolina law); *Hydraulic Press Mfg. Co. v. Lake Erie Eng'g Corp.*, 132 F.2d 403, 404 (2d Cir. 1942); *E.L. Conwell & Co. v. Gutberlet*, 298 F. Supp. 623, 628-29 (D. Md. 1969), *aff'd*, 429 F.2d 527 (4th Cir. 1970);

apply the rule of reason doctrine differ somewhat in the manner in which they apply the rule.¹⁴¹

Iowa courts engage in a four-part analysis in assessing the reasonableness of non-competitive covenants contained in employment agreements.¹⁴² Generally, the courts will: (1) examine the time and (2) area

Am. Credit Bureau, Inc. v. Carter, 462 P.2d 838, 840 (Ariz. Ct. App. 1969); *McLeod v. Meyer*, 372 S.W.2d 220, 222 (Ark. 1963); *House of Vision, Inc. v. Hiyane*, 225 N.E.2d 21, 24 (Ill. 1967); *Barrington Trucking Co. v. Casey*, 253 N.E.2d 36, 38 (Ill. App. Ct. 1969); *Silver v. Goldberger*, 188 A.2d 155, 158 (Md. 1963); *Richmond Bros., Inc. v. Westinghouse Broad. Co.*, 256 N.E.2d 304, 307 (Mass. 1970); *Novelty Bias Binding Co. v. Shevrin*, 175 N.E.2d 374, 375–76 (Mass. 1961); *Solari Indus., Inc. v. Malady*, 264 A.2d 53, 56 (N.J. 1970); *Purchasing Assocs., Inc. v. Weitz*, 196 N.E.2d 245, 247–48 (N.Y. 1963); *Harwell Enter., Inc. v. Heim*, 173 S.E.2d 316, 318–19 (N.C. 1970); *Kelite Prod., Inc. v. Brandt*, 294 P.2d 320, 327 (Or. 1956); *Morgan’s Home Equip. Corp. v. Martucci*, 136 A.2d 838, 844 (Pa. 1957); *Standard Register Co. v. Kerrigan*, 119 S.E.2d 533, 536 (S.C. 1961); *Ramey v. Combined Am. Ins. Co.*, 359 S.W.2d 523, 525–26 (Tex. Civ. App. 1962).

141. The Alabama Code has been interpreted as prohibiting restrictive covenants in contracts with independent contractors. *See C&C Prod., Inc., v. Fid. & Deposit Co.*, 512 F.2d 1375, 1377 n.2 (5th Cir. 1975). As to agents or employees, reasonable restrictive covenants are permitted. *See Odess v. Taylor*, 211 So. 2d 805, 810–11 (Ala. 1968); *see also* COLO. REV. STAT. ANN. § 8-2-113 (West 2016) (prohibiting restrictive covenants in employment contracts, except for “[e]xecutive and management personnel and officers and employees who constitute professional staff to executive and management personnel”); FLA. STAT. ANN. § 542.33(2)(a) (West 2016) (allows restrictive covenants in which employee agrees to refrain from engaging in similar business and from soliciting old customers within a reasonable limited time and area); HAW. REV. STAT. ANN. § 480-4 (West 2016) (allowing, inter alia, reasonable restrictive covenants prohibiting the use of trade secrets, or transferor of business, or withdrawing partner to agree not to compete within reasonable area for reasonable time); LA. STAT. ANN. § 23:921(C) (West 2016) (allowing non-compete restrictions for period of up to two years); MONT. CODE ANN. § 28-2-703 (West 2016) (restrictive covenants in employment agreements generally void); NEV. REV. STAT. ANN. § 598A.030(c) (West 2016) (“Penaliz[ing] all persons engaged in . . . anticompetitive practices . . .”); N.D. CENT. CODE ANN. § 9-08-06 (West 2016) (stating restrictive covenants in employment agreements are generally void); OKLA. STAT. ANN. tit. 15, § 217 (West 2016) (stating restrictive covenants in employment agreements are generally void); OR. REV. STAT. ANN. § 653.295 (1)(a)(A)–(B) (West 2016) (prohibiting restrictive covenants in employment agreements which are not entered into upon initial employment of employee or upon bona fide advancement of employee); S.D. CODIFIED LAWS § 53-9-11 (West 2016) (stating restrictive covenants in employment agreements are prohibited except the employee may agree not to compete for two years after employment and to not solicit existing customers within specified area for up to two years); WIS. STAT. ANN. § 103.465 (West 2016) (allowing reasonable restrictive covenants in employment agreements but prohibiting partial enforcement of overly broad restrictive covenants).

142. *See Iowa Glass*, 338 N.W.2d at 381–82. Courts may also frame this analysis with three factors: (1) whether “the restriction [is] reasonably necessary for the protection of

restrictions contained in the covenant; (3) determine whether the restrictive covenant was reasonably necessary to protect the plaintiff-employer's business; and (4) weigh the countervailing interests of the employer, employee, and public, and assess whether the detriment suffered by the employee is outweighed by the potential benefits the employer would derive from the enforcement of the covenant.¹⁴³ In *Lamp v. American Prosthetics, Inc.*, the Iowa Supreme Court phrased this analysis in the form of a three-pronged test: "(1) Is the restriction reasonably necessary for the protection of the employer's business; (2) is it unreasonably restrictive of the employee's rights; and (3) is it prejudicial to the public interest?"¹⁴⁴

Obviously, what is reasonable in any given instance will depend upon the facts.¹⁴⁵ However, the practitioner need not approach this subject blindfolded. Iowa courts have continually supplied parameters by which to gauge the reasonableness of a restrictive covenant.¹⁴⁶ The decisions are best analyzed by looking to the elements of a restrictive covenant.

1. Protectable Employer Interests

Most restrictive covenants should embody the necessary elements of employer need, area, and time restraints.¹⁴⁷ Necessity, duration of the covenant, territory encompassed, and reasonableness as to the employee and the general public are obviously dependent upon each other.¹⁴⁸ Employers who use restrictive covenants not to compete are either attempting to retain customers in a specified area or trying to protect their market and investment by keeping confidential information, such as trade or business secrets, away from competitors.¹⁴⁹ The necessity of protecting these assets is also the justification for the duration of the covenant and the

the employer's business;" (2) whether the restriction is "unreasonably restrictive of the employee's rights;" and (3) whether the restriction is "prejudicial to the public interest." Reg Seneca, LLC v. Harden, 938 F. Supp. 2d 852, 859 (S.D. Iowa 2013) (citing *Lamp v. Am. Prosthetics, Inc.*, 379 N.W.2d 909, 910 (Iowa 1986)).

143. See *Iowa Glass*, 338 N.W.2d at 381–82.

144. *Lamp*, 379 N.W.2d at 910 (citations omitted).

145. See *Iowa Glass*, 338 N.W.2d at 381, 383 ("In testing the validity of a restrictive covenant, we must look to the facts and circumstances of the particular case that shed light on the reasonableness of the restraint as applied to the individual interests of both parties.").

146. See *id.* at 381.

147. See *id.*

148. See *id.* at 381, 383.

149. See *Water Servs., Inc. v. Tesco Chems., Inc.*, 410 F.2d 163, 168 (5th Cir. 1969).

area encompassed by it.¹⁵⁰ As the court stated in *Mutual Loan Co. v. Pierce*, the employer's burden is "to show the reasonable necessity for the enforcement of the covenant at all in order to protect its business."¹⁵¹

An employer must be able to show one of the following: (1) close proximity between the employee and customers facilitating a potential piracy of business by the employee;¹⁵² (2) the employee received special training or knowledge giving the employee an unfair competitive advantage over the employer;¹⁵³ or (3) the employee misappropriated trade secrets or confidential information.¹⁵⁴

One way to show the "business necessity" required to justify a restrictive covenant is to prove the employee has a unique opportunity to pirate the business goodwill and customers of the employer.¹⁵⁵ This aspect of the business necessity requirement usually involves sales employees.¹⁵⁶ Employers often attempt to meet this burden by showing that an employee had close proximity to customers.¹⁵⁷ Proximity to customers is examined in light of the nature of the employer's business and other factors, including the employee's "accessibility to information peculiar to the employer's business."¹⁵⁸ Where, however, the employer fails to show substantial customer contact, the court will refuse to enforce a restrictive covenant on the basis that the restriction was unreasonable.¹⁵⁹

150. See *Iowa Glass*, 338 N.W.2d at 381.

151. *Mut. Loan Co. v. Pierce*, 65 N.W.2d 405, 408 (Iowa 1954); see also *Ehlers v. Iowa Warehouse Co.*, 188 N.W.2d 368, 373 (Iowa 1971). The Iowa Supreme Court in *Mutual Loan Co.* further stated that there must be

some showing that defendant, when he left plaintiff's employment, pirated or had the chance to pirate part of plaintiff's business; took or had the opportunity of taking some part of the good will of plaintiff's business; or it can reasonably be expected some of the patrons or customers he served while in plaintiff's employment will follow him to the new employment.

Mut. Loan Co., 65 N.W.2d at 408.

152. See *Bd. of Regents v. Warren*, No. 08-0017, 2008 WL 5003750, at *4 (Iowa Ct. App. Nov. 26, 2008).

153. See *Reg Seneca, LLC v. Harden*, 938 F. Supp. 2d 852, 859 (S.D. Iowa 2013).

154. See *Stuart C. Irby Co. v. Tipton*, 796 F.3d 918, 924 (8th Cir. 2015).

155. See *Moore Bus. Forms, Inc. v. Wilson*, 953 F. Supp. 1056, 1064 (N.D. Iowa 1996) *aff'd*, 105 F.3d 663 (8th Cir. 1996).

156. See, e.g., *id.* at 1059, 1064.

157. See, e.g., *id.* at 1064.

158. *Iowa Glass Depot, Inc. v. Jindrich*, 338 N.W.2d 376, 382 (Iowa 1983); see also *Diversified Fastening Sys., Inc. v. Rogge*, 786 F. Supp. 1486, 1493 (N.D. Iowa 1991).

159. See *Mut. Loan Co. v. Pierce*, 65 N.W.2d 405, 408-09 (Iowa 1954).

The Iowa Supreme Court terms a special type of restrictive covenant case involving an employee's proximity to customers the "route case."¹⁶⁰ These cases typically involve an employee who is given an area or route in which he regularly services his employer's customers.¹⁶¹ In *Mutual Loan Co. v. Pierce*, the Iowa Supreme Court stated that in route cases "the employee has had a close contact with his employer's customers and it is only fair, on termination of his employment, there be an interval when the new employee will be able to get acquainted with the customers."¹⁶² The business necessity element is well-illustrated by the route cases because in the eyes of the customer, the employee personifies his employer and is, for all intents and purposes, the company.¹⁶³

As noted above, however, even very close proximity to customers may be outweighed by factors militating against enforcement of a restrictive covenant.¹⁶⁴ For instance, in *Ma & Pa, Inc. v. Kelly*, the court refused to enforce a restrictive covenant where the employee sold bulk petroleum products in a designated area and had extensive personal contact with customers.¹⁶⁵ In refusing to uphold the covenants, the court emphasized the hardship that its enforcement would work on the employee.¹⁶⁶ The numerous factors that affect a court's decision in restrictive covenant cases will be discussed in detail in Part IV below.

An employer can also show that a restrictive covenant is necessary because the employee received "special training or peculiar knowledge that would allow him to unjustly enrich himself at the expense of his former employer."¹⁶⁷ Thus, Iowa courts have held that employers have met the burden of showing business necessity by establishing that they had invested substantial time and money in training the employee.¹⁶⁸ However, the mere

160. See *Iowa Glass*, 338 N.W.2d at 383.

161. See, e.g., *id.*; *Farm Bureau Serv. Co. v. Kohls*, 203 N.W.2d 209, 210 (Iowa 1972); *Orkin Exterminating Co. v. Burnett*, 146 N.W.2d 320, 323–24 (Iowa 1966).

162. *Mutual Loan*, 65 N.W.2d at 409.

163. See *id.*; see also *Iowa Glass*, 338 N.W.2d at 383.

164. See *Ma & Pa, Inc. v. Kelly*, 342 N.W.2d 500, 502–03 (Iowa 1984); *Iowa Glass*, 338 N.W.2d at 381.

165. *Ma & Pa*, 342 N.W.2d at 501, 503.

166. *Id.* at 502–03.

167. *Iowa Glass*, 338 N.W.2d at 382 (citations omitted).

168. See, e.g., *Orkin Exterminating Co. v. Burnett*, 146 N.W.2d 320, 323 (Iowa 1966) (employee given eight weeks of training in exterminating insects and methods of operation); *Cogley Clinic v. Martini*, 112 N.W.2d 678, 679–80 (Iowa 1962) (clinic supported doctor for seven years and doctor's "entire acquaintance with patients, referral doctors, hospital personnel, and local procedures . . . was through his association

training of an employee should not be a sufficient reason to justify a restrictive covenant based upon business necessity.¹⁶⁹ The experience and knowledge gained by the employee during a period of employment do not become the property of the employer.¹⁷⁰

An employer can also meet the business necessity requirement by showing an employee had access to trade secrets and confidential information.¹⁷¹ The essence of this justification is that if the information reposed in confidence was used in competition with the employer it would result in irreparable harm.¹⁷²

Before enforcing an employee non-competition covenant designed to protect trade secrets, courts will first determine whether in fact the employer has given this employee access to valid trade secrets.¹⁷³ The burden is on the employer to justify the employee's non-competition restraint by demonstrating the potential danger of irreparable harm to the employer's business potentially resulting from the employee's divulgence of trade secrets.¹⁷⁴ If there are no trade secrets, or they were not disclosed to the employee, many jurisdictions will refuse to enforce a covenant.¹⁷⁵ Mere training of an employee in the employer's methods may not prove the existence of any trade secrets.¹⁷⁶ The fact that an employee gained general

with the clinic"); *Federated Mut. Implement & Hardware Ins. Co. v. Erickson*, 110 N.W.2d 264, 268 (Iowa 1961) (insurance company agent had intimate knowledge of customer list, policyholders' insurance needs and, undoubtedly, policy expiration dates); *Sioux City Night Patrol v. Mathwig*, 277 N.W. 457, 458, 460 (Iowa 1938) (employee's position made him privy to confidential information about his employer's business and the property of its customers); *Dain Bosworth Inc. v. Brandhorst*, 356 N.W.2d 590, 593 (Iowa Ct. App. 1984) (employee received \$20,000 worth of training to be broker).

169. See *Dan's Overhead Doors & More, Inc. v. Wennermark*, No. 06-1049, 2007 WL 1486133, at *2, *4 (Iowa Ct. App. May 23, 2007) (denying application for injunctive relief notwithstanding employer's contention it invested substantial time in training employee).

170. See *Universal Loan Corp. v. Jacobson*, 237 N.W. 436, 438 (Iowa 1931).

171. See *Ehlers v. Iowa Warehouse Co.*, 188 N.W.2d 368, 373 (Iowa 1971); *Dan's Overhead*, 2007 WL 1486133, at *4 (denying the employer's request of injunctive relief because, in part, the employee did not have access to and did not take any trade secrets).

172. See *Dan's Overhead*, 2007 WL 1486133, at *4.

173. See, e.g., *Mixing Equip. Co. v. Phila. Gear, Inc.*, 436 F.2d 1308, 1311 (3d Cir. 1971).

174. See *Iowa Glass Depot, Inc. v. Jindrich*, 338 N.W.2d 376, 381 (Iowa 1938).

175. See, e.g., *Orkin Exterminating Co. v. Wesver*, 521 S.W.2d 69, 70-71 (Ark. 1975); *Gaynor & Co. v. Stevens*, 402 N.Y.S.2d 398, 398 (1978).

176. See *Club Aluminum Co. v. Young*, 160 N.E. 804, 806 (Mass. 1928); *Menter Co. v. Brock*, 180 N.W. 553, 554-55 (Minn. 1920); *Gates-McDonald Co. v. McQuilkin*, 34

knowledge at the employer's expense is not enough.¹⁷⁷

Determining whether an employee has had access to trade secrets may be extremely difficult. The Iowa Supreme Court, in *Basic Chemicals, Inc. v. Benson*, adopted the First Restatement of Torts definition of a trade secret.¹⁷⁸ In essence, a trade secret is: (1) information or a device; (2) used in a trade or business; (3) lending an economic advantage over competitors; and (4) not generally known in the industry.¹⁷⁹

The inability to show that an employee had access to information that

N.E.2d 443, 444 (Ohio Ct. App. 1941).

177. See *Reg Seneca, LLC v. Harden*, 938 F. Supp. 2d 852, 861 (S.D. Iowa 2013) (stating that normally "general knowledge and skills [employees have] accumulated in the course of employment" are not enough to enforce a restrictive covenant, though ultimately finding that the employee had enough specialized training that it was reasonable to enjoin the employee taking those specialized skills to another employer); *NCMIC Fin. Corp. v. Artino*, 638 F. Supp. 2d 1042, 1068 (S.D. Iowa 2009); *Iowa Glass*, 338 N.W.2d at 382–83 ("Although an employer has an interest in protecting his business from an employee's use of personal influence or peculiar knowledge gained in employment, the employer has no right to unnecessarily interfere with the employee following any trade or calling which he is fitted and from which he may earn his livelihood. An employee cannot be precluded from exercising the skill and general knowledge he has acquired or increased through experience or even instruction while in the employment.").

178. *Basic Chems., Inc. v. Benson*, 251 N.W.2d 220, 226 (Iowa 1977). The comments in the Restatement of Torts provide:

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the date fixed for the announcement of a new policy or for bringing out a new model or the like. A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (AM. LAW INST. 1939) (internal references omitted).

179. See RESTATEMENT (FIRST) OF TORTS § 757 cmt. b.

risers to the level of a trade secret should not prohibit the enforcement of a restrictive covenant.¹⁸⁰ An employer need only show that the employee had access to confidential information.¹⁸¹ A covenant not to compete is, in fact, a “pragmatic solution to the problem of protecting confidential information.”¹⁸² As the Eighth Circuit Court of Appeals stated in *Modern Controls, Inc. v. Andreadakis*, “To require an employer to prove the existence of trade secrets prior to the enforcement of a covenant not to compete may defeat the only purpose for which the covenant exists.”¹⁸³ Thus, an employer may be able to meet the business necessity requirement by showing that an employee had access to secret processes or methods, confidential customer lists, supply sources, “income and expense data, and the like.”¹⁸⁴ This should be true regardless of whether the information rises to the level of trade secret so long as the information is of a confidential nature.¹⁸⁵

2. Time and Area Restraints

Courts will examine both the time and area restraints contained in a restrictive covenant in evaluating its reasonableness in connection with the rights of the employer and the interests of the public.¹⁸⁶ It is impossible to predict the results of judicial scrutiny of any given covenant because the cases are addressed on an ad hoc basis.¹⁸⁷

Geographic limitations in restrictive covenants have been expressed as restraints on competition within a particular municipality, state, region, or radius surrounding the employer’s business.¹⁸⁸ The reasonableness of any

180. See *Water Servs., Inc. v. Tesco Chems., Inc.*, 410 F.2d 163, 168 (5th Cir. 1969) (starting its analysis of whether the covenant not to compete was reasonable by determining whether the employer was trying to protect *confidential* information, which the court said “may or may not rise to the level of trade secret”).

181. See *id.*

182. *Id.* at 171; see *Cont’l Grp., Inc. v. Kinsley*, 422 F. Supp. 838, 845 (D.C. Conn. 1976) (citations omitted).

183. *Modern Controls, Inc. v. Andreadakis*, 578 F.2d 1264, 1268 (8th Cir. 1978).

184. See Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 667, 670, 673 (1960) (internal citations omitted).

185. See *Andreadakis*, 578 F.2d at 1268. It would be necessary, however, to show that the information was imparted to the employee in the context of a confidential nature. *Id.*

186. See *Pro Edge, L.P. v. Gue*, 374 F. Supp. 2d 711, 739 (N.D. Iowa 2005), *modified*, 411 F. Supp. 2d 1080 (N.D. Iowa 2006).

187. See *Dain Bosworth, Inc. v. Brandhorst*, 356 N.W.2d 590, 593 (Iowa Ct. App. 1984).

188. Milton Handler & Daniel E. Lazaroff, *Restraint of Trade & the Restatement*

given covenant will necessarily depend upon the nature of the employer's business and the type of business interest that the employer is seeking to protect.¹⁸⁹ For example, where it is claimed that the employee could take advantage of proximity to customers, courts will require that the geographic limitation embodied in the covenant bear some relationship to the area in which the employee had client contact.¹⁹⁰ Similarly, if the employer is attempting to safeguard trade secrets and confidential information, a reasonable geographic limitation would be one in which the employer would be harmed by disclosure by the employee.¹⁹¹ In some instances, this could be nationwide.¹⁹²

Iowa courts have upheld geographic limitations in restrictive covenants encompassing cities,¹⁹³ counties,¹⁹⁴ and any geographic area described in terms of a radius from the employer's officers.¹⁹⁵ The Iowa Supreme Court has indicated that a restriction might reasonably cover the entire nation if it embodies the employer's trade area.¹⁹⁶

In 1998, a federal court in Michigan considered the validity under Iowa law of a restrictive covenant that effectively prevented a defendant "from working in any capacity for any computer-related company anywhere in the world."¹⁹⁷ Not surprisingly, the court found this provision unenforceable.¹⁹⁸ Because enforcement of the covenant would have left the employee with "nowhere in the world" to move to, the court denied the employer's motion for preliminary injunction.¹⁹⁹

(*Second*) of *Contracts*, 57 N.Y.U. L. REV. 669, 764 (1982).

189. *Curtis 1000, Inc. v. Youngblade*, 878 F. Supp. 1224, 1261 (N.D. Iowa 1995); *Iowa Glass Depot, Inc. v. Jindrich*, 338 N.W.2d 376, 382 (Iowa 1938).

190. *See Standard Register Co. v. Kerrigan*, 119 S.E.2d 533, 539-40 (S.C. 1961).

191. *See Orkin Exterminating Co. v. Mills*, 127 S.E.2d 796, 797-78 (Ga. 1962).

192. *See Vais Arms, Inc. v. Vais*, 383 F.3d 287, 296 (5th Cir. 2004).

193. *Larsen v. Burroughs*, 277 N.W. 463, 465 (Iowa 1938).

194. *Phone Connection, Inc. v. Harbst*, 494 N.W.2d 445, 447, 450 (Iowa Ct. App. 1992) (affirming a modification of the restrictive covenant's geographical limitations to particular counties).

195. *Orkin Exterminating Co. v. Burnett*, 146 N.W.2d 320, 327 (Iowa 1966).

196. *See Tasco, Inc. v. Winkel*, 281 N.W.2d 280, 282 (Iowa 1979) (stating that this is an issue that reasonable minds can differ to and that the employer should have the chance to litigate the merits of the issue).

197. *Gateway 2000, Inc. v. Kelley*, 9 F. Supp. 2d 790, 797 (E.D. Mich. 1998).

198. *Id.*

199. *Id.*

Restrictive covenants must also contain a time limitation.²⁰⁰ This temporal limitation must also be reasonable.²⁰¹ Theoretically, the time limitation contained in a restrictive covenant should bear some relationship to the harm the covenant is designed to prevent.²⁰² Some courts express this requirement in the terms of how much time is needed by an employer to mitigate reasonably the potential injury caused by an employee's departure.²⁰³

Thus, if a restraint is aimed at "protecting customer relationships, the [time restriction] is reasonable only if it is no longer than necessary for the employer to put a new employee on the job and for this employee to demonstrate his effectiveness to the customers."²⁰⁴ If a relationship is complex or customer contacts numerous, a longer period may be warranted.²⁰⁵ Similarly, if a covenant is justified by an employee's access to confidential information, the duration of the time restraint should bear a relationship to the useful life of the confidential information.²⁰⁶

It has been said by some Iowa lawyers that two years is the "rule of thumb" for the duration of time limitations contained in restrictive covenants.²⁰⁷ Due to many factors which determine when a restrictive covenant is reasonable, reliance on such a general rule is dangerous. Iowa courts have enforced restrictive covenants with temporal limitations ranging from 90 days²⁰⁸ to 10 years.²⁰⁹ Iowa courts have, on numerous occasions, upheld covenants not to compete with time limitations of three years or less.²¹⁰

200. See *Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 761 (Iowa 1999).

201. See *id.*

202. See *Blake*, *supra* note 184, at 677 ("In determining whether a restraint extends for a longer period of time than necessary to protect the employer, the court must determine how much time is needed for the risk of injury to be reasonably moderated." (citations omitted)).

203. See *id.*

204. *Id.* (citations omitted).

205. *Id.*

206. *Id.* at 678.

207. See, e.g., Thomas W. Foley, *Freedom of Contract vs. the Right to Work: An Analysis and Some Thoughts on Iowa's Covenant Not to Compete Law*, 61 *DRAKE L. REV.* 205, 217 (2012).

208. *Dain Bosworth Inc. v. Brandhorst*, 356 N.W.2d 590, 593 (Iowa Ct. App. 1984).

209. See *Swigert v. Tilden*, 97 N.W. 82, 83, 86 (Iowa 1903), *cited with approval in Sutton v. Iowa Trenchless, L.C.*, 808 N.W.2d 744, 751 (Iowa Ct. App. 2011).

210. See e.g., *Pro Edge, L.P. v. Gue*, 374 F. Supp. 2d 711, 740 (N.D. Iowa 2005) (one year, 250 miles), *modified*, 411 F. Supp. 2d 1080 (N.D. Iowa 2006); *Ehlers v. Iowa*

3. *Judicial Enforcement of Restrictive Covenants: Weighing the Interests of Employer and Employee*

Once the court has determined that the time and area restraints contained in a covenant are reasonable, it will examine the relative interests of the employer, the employee, and the public.²¹¹ It will weigh in the employee's favor if the employer is attempting to prevent the employee from engaging in the only business the employee knows.²¹² Courts will also consider the former employee's mobility and financial situation together with the terms of the employment relationship when determining whether the covenant not to compete is reasonable.²¹³ Additionally, courts have stated that termination of the employee by the employer is a factor militating against the grant of an injunction.²¹⁴ The employee's conduct as it affects the likelihood of injunctive relief will be discussed in Part IV below.

Iowa courts have broad powers to order partial enforcement of restrictive covenants.²¹⁵ There are several schools of thought with regard to the method of enforcement of restrictive covenants. One school is the "blue pencil" rule of partial enforcement, now abandoned in most states, which

Warehouse Co., 188 N.W.2d 368, 373 (Iowa 1971) (two years); Orkin Exterminating Co. v. Burnett, 146 N.W.2d 320, 327 (Iowa 1966) (three years, 10 miles).

211. See, e.g., *Pro Edge*, 374 F. Supp. 2d at 741 (N.D. Iowa 2005) (examining public interest).

212. See *Ma & Pa, Inc. v. Kelly*, 342 N.W.2d 500, 502–03 (Iowa 1984) (stating that because "selling [was] his only skill," enforcing the covenant "would work severe hardship" on the employee).

213. See *Uncle B's Bakery, Inc. v. O'Rourke*, 938 F. Supp. 1450, 1461–63 (N.D. Iowa 1996) (balancing employee's hardship against employer's need for enforcement).

214. See, e.g., *Hopper v. All Pet Animal Clinic, Inc.*, 861 P.2d 531, 541 (Wyo. 1993) ("For example, 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, we believe 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 *Curtis 1000, Inc. v. Youngblade*, 878 F. Supp. 1224, 1264 (N.D. Iowa 1995).

215. See, e.g., *Phone Connection, Inc. v. Harbst*, 494 N.W.2d 445, 449 (Iowa Ct. App. 1992) (affirming district court's modification of restrictive covenant to include only counties in which plaintiff had established business and reducing time restraint from five years to two years); see also, e.g., *Moore Bus. Forms, Inc. v. Wilson*, 953 F. Supp. 1056, 1064 (N.D. Iowa) (discussing Iowa's preference of "partial enforcement to the extent reasonably necessary to protect the employer's legitimate interests" when the "restrictive covenants purport to impose overly stringent restraints"), *aff'd*, 105 F.3d 663 (8th Cir. 1996).

holds that a restrictive covenant will only be enforced if it is easily divisible.²¹⁶ Thus, if the restrictive covenant is phrased in terms such that the offending restraint could be eliminated by crossing out a few words, while the remaining terms constitute an entire contract, the restrictive covenant will be partially enforced.²¹⁷

An example would be an employer seeking to enforce an otherwise valid restrictive covenant encompassing the states of Iowa and Missouri. If the employee's sales territory includes only Iowa, the blue pencil doctrine would allow the court to enforce the covenant to prevent competition in Iowa but not in Missouri. However, the blue pencil doctrine applies only if the covenant contains distinct and severable geographic areas.²¹⁸ If the restriction is a 50-mile radius around Des Moines, Iowa, the doctrine would not apply.²¹⁹

Iowa courts have never utilized the blue pencil rule.²²⁰ Although Iowa at one time adhered to the harsh "all or nothing" rule,²²¹ the courts now take the most liberal approach in modifying overly broad temporal or geographic limitations.²²² The Iowa Supreme Court, in *Ehlers v. Iowa Warehouse Co.*, engaged in an in-depth discussion of the advisability of partial enforcement of restrictive covenants.²²³ Noting the "all or nothing" rule of enforcement led to "results of questionable equity," the court adopted the reasoning of the New Jersey Supreme Court in *Solari Industries, Inc. v. Malady*,²²⁴ the seminal case applying the reasonableness test.²²⁵

In *Solari Industries, Inc.*, the New Jersey Supreme Court abandoned the void per se and blue pencil tests in favor of the reasonableness test permitting partial enforcement of non-competition agreements.²²⁶ The court construed the covenant in light of the reasonableness test and held that

216. See *Raimonde v. Van Vlerah*, 325 N.E.2d 544, 546–47 (Ohio 1975) (discussing the blue pencil doctrine and the reasons for its wide rejection by many states).

217. See *id.*

218. See *Shultz v. Ingram*, 248 S.E.2d 345, 350–51 (N.C. Ct. App. 1978).

219. See *Timenterial, Inc. v. Dagata*, 277 A.2d 512, 514–15 (Conn. Super. Ct. 1971).

220. See *Curtis 1000, Inc. v. Youngblade*, 878 F. Supp. 1224, 1262 (N.D. Iowa 1995) (noting the Iowa Supreme Court's rejection in *Ehlers* of the blue pencil rule).

221. *Brecher v. Brown*, 17 N.W.2d 377, 380 (Iowa 1945), *overruled in part by Ehlers v. Iowa Warehouse Co.*, 188 N.W.2d 368 (Iowa 1971).

222. See *Curtis 1000*, 878 F. Supp. at 1262.

223. *Ehlers*, 188 N.W.2d at 370–72.

224. See generally *Solari Indus., Inc. v. Malady*, 264 A.2d 53 (N.J. 1970).

225. *Ehlers*, 188 N.W.2d at 371–72 (citations omitted).

226. *Solari Indus.*, 264 A.2d at 61.

“plaintiffs are entitled . . . to that limited measure of relief within the terms of the non-competitive agreement which is reasonably necessary to protect their legitimate interests, will cause no undue hardship on the [employee], and will not impair the public interest.”²²⁷ Consequently, the court remanded the case, reasoning that the extent of relief allowable depended on the determination of a reasonable territorial limit by the trial court below.²²⁸

Iowa courts do not hesitate to modify both the temporal and geographic elements of restrictive covenants.²²⁹ This reasonableness approach is laudable in that it may provide for more uniformity of outcome and is not dependent upon mechanical rules concerning the divisibility of a contract.²³⁰ The reasonableness test is not, however, without its shortcomings. The primary criticism leveled against it is that partial enforcement allegedly destroys an employer’s incentive to draft narrow covenants.²³¹

The *Ehlers* decision provides an excellent example of partial enforcement of restrictive covenants.²³² The Iowa Supreme Court examined the facts and determined that, with modification, the covenant at issue was reasonable and would be enforced.²³³ An exception to the court’s decision would be a geographic limitation embodied in the covenant which is too broad.²³⁴ In *Ehlers*, instead of prohibiting the employee from competing in an area consisting of a 150-mile radius around Waterloo, Iowa, as provided for in the covenant—because though the employer’s business extended over that area, there were many places within that radius that employer had no customers and therefore it “would be an undue hardship on [the employee] to prohibit him from doing business in an area not served by [the employer]”—the court enjoined the employee from soliciting customers that were solicited by the ex-employee while actually working for the

227. *Id.*

228. *Id.*

229. *See, e.g., Ehlers*, 188 N.W.2d at 374; *Phone Connection, Inc. v. Harbst*, 494 N.W.2d 445, 449 (Iowa Ct. App. 1992).

230. *See Ehlers*, 188 N.W.2d at 374; *Wood v. May*, 438 P.2d 587, 590–91 (Wash. 1968).

231. *See Rector-Phillips-Morse, Inc. v. Vroman*, 489 S.W.2d 1, 5 (Ark. 1973). Courts respond to this criticism by asserting that “in no event are restraints enforceable where their purposes [contravene] public policy.” *Solari Indus.*, 264 A.2d at 57 (citing *Fullerton Lumber Co. v. Torborg*, 70 N.W.2d 585, 592 (Wis. 1955)).

232. *See Ehlers*, 188 N.W.2d at 373–74.

233. *Id.* at 374.

234. *See id.* at 373.

employer.²³⁵

D. Developments in Neighboring States

The law of restrictive covenants among the states has long resembled a patchwork quilt. Thus, it is not surprising that Iowa's neighboring states treat non-competes quite differently.²³⁶ These distinctions are important because many states are fiercely protective of their right to control restraints on trade within their borders.²³⁷ In fact, most courts hold that the state's interest in applying its law of restrictive covenants within its borders will take priority over choice of law provisions in employment contracts.²³⁸

For example, in Nebraska a restrictive covenant is enforceable only if it is limited to actual contact and customers.²³⁹ In addition, where an employment agreement dictates that Iowa law will govern the terms of an agreement with an employee domiciled in Nebraska, the Nebraska courts will disregard the election of the parties and apply Nebraska law.²⁴⁰ Illinois,²⁴¹ Wisconsin,²⁴² Minnesota,²⁴³ and Missouri²⁴⁴ do likewise.

Illinois has a three-pronged test for determining the validity of restrictive covenants.²⁴⁵ "Assuming [the covenant] is ancillary to a valid

235. *Id.* Ehlers consisted of an action by the former employee to have the noncompetition covenants declared void and unenforceable. *Id.* at 369. At trial, the plaintiff introduced a list of all persons he contacted while working for the defendant, which was used by the court in modifying the restrictive covenant. *Id.* at 373–74.

236. *See, e.g.,* *Gaver v. Schneider's O.K. Tire Co.*, 856 N.W.2d 121, 128 (Neb. 2014).

237. *See, e.g.,* *Brown & Brown, Inc. v. Mudron*, 887 N.E.2d 437, 440 (Ill. App. Ct. 2008) (finding the forum state had a "materially greater interest in the issue" than the state in the choice of law provision of the employment contract and because "as a matter of fundamental public policy, Illinois provides its workers greater protection from the negative effects of restrictive covenants" than the choice of law state); *Beilfuss v. Huff Corp.*, 685 N.W.2d 373, 377 (Wis. Ct. App. 2004) (striking a choice of law provision to selectively enforce a covenant not to compete).

238. *See, e.g.,* *Mudron*, 887 N.E.2d at 440; *Beilfuss*, 685 N.W.2d at 377.

239. *Gaver*, 856 N.W.2d at 128.

240. *See* *Rain & Hail Ins. Serv., Inc. v. Casper*, 902 F.2d 699, 700–01 (8th Cir. 1990); *see also* *Mertz v. Pharmacists Mut. Ins. Co.*, 625 N.W.2d 197, 203–04 (Neb. 2001).

241. *Mudron*, 887 N.E.2d at 440.

242. *See* *Henderson v. U.S. Bank, N.A.*, 615 F. Supp. 2d 804, 808–10 (E.D. Wis. 2009); *Beilfuss*, 685 N.W.2d at 376–77.

243. *See* *Menzies Aviation, USA, Inc. v. Wilcox*, 978 F. Supp. 2d 983, 996–97 (D. Minn. 2013).

244. *See* *Nat'l Starch & Chem. Corp. v. Newman*, 577 S.W.2d 99, 104 (Mo. Ct. App. 1978).

245. *Reliable Fire Equip. Co. v. Arredondo*, 965 N.E.2d 393, 396 (Ill. 2011).

employment relationship,” Illinois courts will uphold a restrictive covenant if it: “(1) is no greater than is required for the protection of a legitimate business interest of the employer-promisee; (2) does not impose undue hardship on the employee-promisor, and (3) is not injurious to the public.”²⁴⁶ Under the first prong, Illinois generally recognizes two legitimate interests: (1) “‘near-permanent’ relationships with customers,” and (2) “trade secrets or confidential information a former employee has acquired through his or her employment and subsequently tried to use for his or her own benefit.”²⁴⁷ Illinois also requires restrictive covenants to be reasonable in their restrictions of type of activity, geographical area, and time.²⁴⁸

Wisconsin courts have promulgated a five-factor test for analyzing the enforceability of a restrictive covenant.²⁴⁹ A covenant must:

- (1) be necessary for the protection of the employer, that is, the employer must have a protectable interest justifying the restriction imposed on the activity of the employee; (2) provide a reasonable time limit; (3) provide a reasonable territorial limit; (4) not be harsh or oppressive as to the employee; and (5) not be contrary to public policy.²⁵⁰

Wisconsin has also addressed restrictive covenants by statute.²⁵¹ Notably, this statute explicitly forbids judicial modification of restraints that are partially reasonable and partially unreasonable.²⁵² Wisconsin thus incentivizes the careful tailoring of restrictive covenants to ensure

246. *Id.* (citing *BDO Seidman v. Hirshberg*, 712 N.E.2d 1220, 1223 (N.Y. 1999); RESTATEMENT (SECOND) OF CONTRACTS § 187 cmt. b, § 188(1) & cmts. a, b, c (AM. LAW INST. 1981)).

247. *Unisource Worldwide, Inc. v. Carrara*, 244 F. Supp. 2d 977, 985 (C.D. Ill. 2003) (citations omitted).

248. *See Arredondo*, 965 N.E.2d at 396–97.

249. *Star Direct, Inc. v. Dal Pra*, 767 N.W.2d 898, 905 (Wis. 2009).

250. *Id.* (citing *Lakeside Oil Co. v. Slutsky*, 98 N.W.2d 415, 415 (Wis. 1959)).

251. Section 103.465 of the Wisconsin Annotated Statutes provides:

A covenant by an assistant, servant or agent not to compete with his or her employer or principal during the term of the employment or agency, or after the termination of that employment or agency, within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Any covenant, described in this subsection, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.

WIS. STAT. ANN. § 103.465 (West 2016).

252. *See id.*

reasonableness in purpose and scope.²⁵³

Unlike Wisconsin, Minnesota courts can and do excise unreasonable portions from non-compete agreements and enforce them to the extent they are reasonable.²⁵⁴ In Minnesota, a restrictive covenant will be enforceable when the restriction is necessary for the protection of the employer's business or good will, and the time and space restraints are no greater than necessary to protect the employer's interests.²⁵⁵ Further, "continued employment alone is insufficient consideration to support" and warrant enforcement of a restrictive covenant in Minnesota.²⁵⁶ And where employers seek to get around this rule through a forum selection clause, Minnesota courts may not be willing to enforce the forum selection clause where the employment at issue does not take place in the selected forum.²⁵⁷

Of the various states discussed in this section, Missouri is the most employer-friendly when it comes to enforcement of restrictive covenants. In Missouri, restrictive covenants are enforceable to the extent necessary to protect well-defined interests, such as trade secrets or customer contacts, if limited to reasonable geographic and temporal restraints.²⁵⁸ With respect to non-solicitation clauses, even where an employer is not seeking to protect its trade secrets, customer relationships, or goodwill, restrictive covenants are enforceable in Missouri for up to one year after the conclusion of employment.²⁵⁹ Continued employment is adequate consideration to support restrictive covenants in Missouri.²⁶⁰

E. Restrictive Covenants in Benefit and Equity Plans

Many employers use employee benefit and equity devices to impose

253. See *id.*; Bradden C. Backer, *Star Direct Takes Restrictive Covenant Law in A New Direction*, 82 WIS. LAW. 10, 12 (Nov. 2009).

254. See, e.g., *Guercio v. Prod. Automation Corp.*, 664 N.W.2d 379, 385 (Minn. Ct. App. 2003).

255. *Bennett v. Storz Broad. Co.*, 134 N.W.2d 892, 899 (Minn. 1965).

256. *Menzies Aviation, USA, Inc. v. Wilcox*, 978 F. Supp. 2d 983, 998 (D. Minn. 2013); *Sanborn Mfg. v. Currie*, 500 N.W.2d 161, 164 (Minn. Ct. App. 1993).

257. See *Wilcox*, 978 F. Supp. 2d at 996–97.

258. *Whelan Sec. Co. v. Kennebrew*, 379 S.W.3d 835, 841–42 (Mo. 2012) (en banc). Missouri has codified its law on restrictive covenants in MO. ANN. STAT. § 431.202 (West 2016).

259. MO. ANN. STAT. § 431.202(1)(4).

260. *Comput. Sales Int'l, Inc. v. Collins*, 723 S.W.2d 450, 452 (Mo. Ct. App. 1986) (holding that continued employment of two and a half years was adequate consideration when the employment is at will).

restrictive covenants on current and former employees. Depending on the nature of the mechanism used, this approach may or may not implicate Iowa law on non-competes. Many benefit plans are governed by the Employee Retirement Income Security Act of 1974 (ERISA).²⁶¹

ERISA allows employers to include restrictive covenants in benefit plans.²⁶² Courts also interpret ERISA to have a broad preemption effect.²⁶³ In analyzing a potential ERISA question, the first question is whether ERISA applies to the retirement or pension program at issue. Indeed, ERISA applies only to programs or arrangements that constitute an “employee benefit plan.”²⁶⁴ “The term ‘employee benefit plan’ or ‘plan’ means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.”²⁶⁵ This deceptively simple definition is at the root of many complex legal disputes²⁶⁶ and will not be explored in detail here.²⁶⁷ But if a program falls within the definition of “employee benefit plan,” the program may fall within ERISA’s broad preemptive reach.

ERISA’s preemptive effect²⁶⁸ has two primary components: §§ 502(a)

261. See 29 U.S.C. §§ 1001–1461 (2012); *Health Benefits, Retirement Standards, and Workers’ Compensation: Employee Benefit Plans*, U.S. DEPT. OF LAB., <http://webapps.dol.gov/elaws/elg/erisa.htm> (last visited Mar. 2, 2016).

262. See *Lojek v. Thomas*, 716 F.2d 675, 679 (9th Cir. 1983); *Bigda v. Fischbach Corp.*, 898 F. Supp. 1004, 1014–16 (S.D.N.Y. 1995), *aff’d*, 101 F.3d 108 (2d Cir. 1996).

263. *John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank*, 510 U.S. 86, 99 (1993).

264. 29 U.S.C. § 1101; *id.* § 1003; *Crews v. Gen. Am. Life Ins. Co.*, 274 F.3d 502, 505 (8th Cir. 2001) (noting a central issue in cases involving claims of breach of contract, misrepresentation, and claim for relief under ERISA was whether insurance company’s alleged promise to provide employee benefits was premised on or constituted an “employee benefit plan”).

265. 29 U.S.C. § 1002(3).

266. See, e.g., *Massachusetts v. Morash*, 490 U.S. 107, 113 (1989) (“The precise coverage of ERISA is not clearly set forth in the Act.”); *Van Natta v. Sara Lee Corp.*, 439 F. Supp. 2d 911, 920–23 (N.D. Iowa 2006); see also LEE T. POLK, 1 ERISA PRACTICE & LITIGATION § 2:2 (2015) (“Section 3(3) [of ERISA] provides only a brief glimpse of the notion of ERISA plans. That is, while the ERISA status of a program or arrangement is often determined with ease, there are many instances where that determination is subject to a variety of surrounding facts and circumstances.”).

267. For an in-depth discussion on complete preemption under ERISA, see David L. Goodwin, *The Puzzle of Panel Processing: ERISA, Complete Preemption, and the Federal Jurisdiction Gap*, 64 DRAKE L. REV. (forthcoming 2016).

268. Though no one authority can possibly offer an exhaustive explanation of the issues presented by ERISA’s preemptive effect, many of these issues are cogently

and 514(a).²⁶⁹ Section 514(a) “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.”²⁷⁰ Section 502(a) provides a comprehensive set of remedies designed to enforce ERISA’s provisions.²⁷¹ Where a state cause of action falls within the scope of § 502(a)’s remedial scheme, the state cause of action is preempted because it offends ERISA’s exclusive remedial scheme even where the cause of action on its own would not be preempted by § 514(a).²⁷² As the Supreme Court has stated:

[T]he detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.²⁷³

As stated above, § 514 preempts state laws that “relate to” an employee benefit plan.²⁷⁴ A law relates to an employee benefit plan if it has “a connection with or reference to such a plan.”²⁷⁵ In other words, state laws that explicitly reference ERISA relate to employee benefit plans and are thus preempted.²⁷⁶ In addition, ERISA’s preemption provisions may be implicated even where the state law does not expressly reference ERISA—that is, where the effect is only indirect.²⁷⁷

Judge Bennett discussed²⁷⁸ ERISA’s preemption of Iowa law in *Van Natta v. Sara Lee Corp.*²⁷⁹ There, a Sara Lee employee elected his employer’s

explained in Judge Bennett’s 2006 decision in *Van Natta v. Sara Lee Corp.* See 439 F. Supp. 2d at 924–38.

269. See *id.* at 924–25 (citing *Metro Life Ins. Co. v. Taylor*, 481 U.S. 58, 66 (1987)).

270. 29 U.S.C. § 1144(a).

271. *Id.* § 1132(a); *Van Natta*, 439 F. Supp. 2d at 925.

272. *Van Natta*, 439 F. Supp. 2d at 925.

273. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987).

274. 29 U.S.C. § 1144(a).

275. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96–97 (1983).

276. See *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829 (1988).

277. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990).

278. In *Van Natta*, Judge Bennett colorfully, and perhaps appropriately, likened the process of analyzing an ERISA case to wading through the “Serbonian bog.” *Van Natta v. Sara Lee Corp.*, 439 F. Supp. 2d 911, 917, 917 n.1 (N.D. Iowa 2006).

279. See *id.* at 924–35.

group health coverage for both himself and his common law spouse.²⁸⁰ When the spouse submitted a claim for medical expenses, Sara Lee declined to accept her claim because (as a common law spouse) she did not meet the plan's definition of "spouse" or "dependent."²⁸¹ The employee and his spouse brought state law claims for bad faith breach of contract and under Iowa's insurance trade regulation statutory scheme.²⁸²

After concluding the plan at issue was governed by ERISA,²⁸³ the *Van Natta* court determined the plaintiffs' state law claims were preempted.²⁸⁴ Because the plaintiffs' claims arose solely out of Sara Lee's allegedly improper administration of plan benefits—namely, an improper denial of benefits—their claims were subject to ERISA preemption under § 514(a).²⁸⁵ In addition, the *Van Nattas*' claims were also subject to complete preemption under § 502, as the *Van Nattas* sought relief that was of the sort contemplated by ERISA.²⁸⁶ Indeed, the *Van Nattas* sought benefits under the plan that were denied, and they sought judicial relief for that denial.²⁸⁷ Such a cause of action is a request for exactly the type of relief afforded by ERISA's civil enforcement scheme; thus, the *Van Nattas*' state law claims were preempted in their entirety.²⁸⁸

IV. LITIGATING RESTRICTIVE COVENANTS

A. Representing the Employer

Employers, in cases of breach of a restrictive covenant, frequently seek injunctive relief as the remedy.²⁸⁹ Enjoining the ex-employee from competing with the ex-employer is usually the only effective remedy available to the employer.²⁹⁰ This is a function of the nature of the wrong and

280. *Id.* at 918.

281. *Id.*

282. *Id.* at 917; *see* IOWA CODE § 507B (2015).

283. *Van Natta*, 439 F. Supp. 2d at 923.

284. *Id.* at 927–28.

285. *Id.*

286. *Id.* at 934–35.

287. *Id.*

288. *Id.* at 935.

289. *See, e.g.,* Reg Seneca, LLC v. Harden, 938 F. Supp. 2d 852, 854 (S.D. Iowa 2013); Pathology Consultants v. Gratton, 343 N.W.2d 428, 431 (Iowa 1984); Ma & Pa, Inc. v. Kelly, 342 N.W.2d 500, 501 (Iowa 1984); Ins. Agents, Inc. v. Abel, 338 N.W.2d 531, 533 (Iowa 1983); Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376, 379 (Iowa 1983).

290. *See* Proudfoot Consulting Co. v. Gordon, 576 F.3d 1223, 1243 (11th Cir. 2009).

the difficulty in calculating and proving monetary damages resulting from the violation of a restrictive covenant.²⁹¹ Other forms of relief are available; in the appropriate situation, an employer may be awarded an accounting for profits and damages.²⁹²

The rules applying to a request for injunctive relief in the context of a restrictive covenant conform to the general principles governing injunctive relief.²⁹³ Generally, the plaintiff must show an invasion or imminent invasion of its contractual rights which would result in a substantial injury if an injunction is not granted.²⁹⁴ A temporary injunction may be issued if the employer proves with reasonable certainty that it will prevail in a disposition of the underlying case and irreparable harm will result in the absence of injunctive relief.²⁹⁵

A federal court in Iowa will grant preliminary injunctive relief if there are sufficiently serious questions going to the merits of a case, so as to make them fair ground for litigation, and a balancing of the hardships tips the scale decidedly toward the employer.²⁹⁶ Ultimately, the court will consider “the threat of irreparable harm to the [employer],” the balance of harm to the employer and employee, and the relative interests of the parties and public.²⁹⁷

Iowa Rule of Civil Procedure 1.1502 governs the issuance of injunctive relief in Iowa courts.²⁹⁸ Rule 1.1502(1) provides that a temporary injunction is proper “[w]hen the petition, supported by affidavit, shows the plaintiff is entitled to relief which includes restraining the commission or continuance of some act which would greatly or irreparably injure the plaintiff.”²⁹⁹ In Iowa, the burden is on the plaintiff-employer to prove an invasion of the

291. See *Lakeside Oil Co. v. Slutsky*, 98 N.W.2d 415, 422 (Wis. 1959).

292. See, e.g., *Presto-X-Co. v. Ewing*, 442 N.W.2d 85, 90 (Iowa 1989). Other remedies, such as replevin, are less commonly sought. See, e.g., *Hedberg v. State Farm Mut. Auto. Ins. Co.*, 350 F.2d 924, 929 (8th Cir. 1965).

293. See 43A C.J.S. *Injunctions* §§ 157, 159, Westlaw (database updated 2015); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 44 (AM. LAW INST. 1995).

294. See *Redeker v. Litt*, No. 04-0637, 2005 WL 1224697, at *6 (Iowa Ct. App. May 25, 2005).

295. See *Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 893 (8th Cir. 2013).

296. See *Fennell v. Butler*, 570 F.2d 263, 264 (8th Cir. 1978).

297. See *H & R Block Tax Servs. LLC v. Acevedo-Lopez*, 742 F.3d 1074, 1077 (8th Cir. 2014) (citing the four “Dataphase” factors set forth in *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981)).

298. IOWA R. CIV. P. 1.1502.

299. *Id.* at 1.1502(1).

right, “or [that] such injury is reasonably to be apprehended.”³⁰⁰

Although a concrete showing of harm from competition by the employee is not a prerequisite to obtain enforcement of a non-competition agreement,³⁰¹ courts will require a greater showing of harm from the employer in most circumstances.³⁰² An employer should be prepared to identify concrete evidence of such harm to prevail in otherwise marginal cases.³⁰³

Counsel can evaluate numerous factors in assessing the likelihood of an award of injunctive relief.³⁰⁴ The court will, of course, take into account those factors weighed in determining the reasonableness of the restrictive covenant.³⁰⁵ There are, however, other considerations that will influence a court’s decision concerning injunctive relief.³⁰⁶ The factors frequently stressed by courts denying injunctive relief include: (1) a lack of evidence of malice or bad faith on the part of the former employee;³⁰⁷ (2) evidence of employer intent to stifle competition;³⁰⁸ and (3) nonexistence of extensive customer contact or access to highly confidential information.³⁰⁹ Other factors that weigh in the determination to grant injunctive relief include bad faith on the part of the employee manifested in preparations to compete while still employed, notification of customers of the intent to set up a competing enterprise, solicitation of co-employees, and misleading the former employer as to the employee’s intent to embark upon a competing enterprise.³¹⁰

300. *Nelson v. Leaders*, 140 N.W.2d 921, 924 (Iowa 1966) (citing *Cogley Clinic v. Martini*, 112 N.W.2d 678, 682 (Iowa 1962)).

301. *See, e.g., Cogley Clinic*, 112 N.W.2d at 682 (“It is not necessary for plaintiff to prove specific items or amount of damage. Such a requirement would render restrictive covenants in the professional field almost useless.”).

302. *See Iowa Glass Depot v. Jindrich*, 338 N.W.2d 376, 384 (Iowa 1983).

303. *See id.*

304. *See Ma & Pa, Inc. v. Kelly*, 342 N.W.2d 500, 502–03 (Iowa 1984) (looking here at the financial hardship an injunction would create for the employee and his family).

305. *See id.*

306. *See id.*

307. *See, e.g., Universal Loan Corp. v. Jacobson*, 237 N.W. 436, 437–38 (Iowa 1931).

308. *See, e.g., Ehlers v. Iowa Warehouse Co.*, 188 N.W.2d 368, 377 (Iowa 1971). It will help the employee if it appears from the facts that an employer is using a restrictive covenant as a sword rather than a shield. *See E.W. Bliss Co. v. Struthers-Dunn, Inc.*, 408 F.2d 1108, 1112–13 (8th Cir. 1969).

309. *See Iowa Glass Depot v. Jindrich*, 338 N.W.2d 376, 382 (Iowa 1983).

310. *See Cent. States Indus. Supply, Inc. v. McCullough*, 279 F. Supp. 2d 1005, 1043 (N.D. Iowa 2003).

B. Suggested Strategy for the Former Employer

An employer should waste little time when faced with the departure of a key employee. Assuming that an enforceable restrictive covenant is in place, the employer's first task is to determine whether a former employee is actively engaged in competition in violation of a restrictive covenant. A former employee might attempt to disguise the offending acts of competition by various methods. Effective drafting, however, can ensure that a former employee competing in any form will be in breach of a non-competition clause.³¹¹ Proof of the offending competition will usually exist in the form of circumstantial evidence, including customer solicitations, finance agreements, purchases of supplies, and the like.³¹² Occasionally, the employer will be provided direct evidence tantamount to a "smoking gun." An example is a copy of a letter from the former employee to customers advertising the former employee's competing enterprise.³¹³ This would indicate a clear violation of the covenant not to compete.³¹⁴

Counsel for the employer should act immediately upon receiving reasonably reliable evidence of the breach of a restrictive covenant. The former employer should attempt to place the former employee and new employer on the run. A "blitz" of legal action by the former employer may have the effect of placing the former employee and new employer at an unrectifiable disadvantage. This may be best accomplished by filing a complaint, a motion for temporary restraining order, and a preliminary injunction together with a motion for accelerated discovery. Many employees do not believe that an employer will actually sue to enforce a covenant and will be surprised by a swift flurry of action. Employers should take care to draft the complaint with a specific request for modification and partial enforcement of the restrictive covenant as an alternative remedy.³¹⁵

311. See *infra* Part V.

312. See, e.g., *NCMIC Fin. Corp. v. Artino*, 638 F. Supp. 2d 1042, 1052–54 (S.D. Iowa 2009).

313. See *Basic Chems., Inc. v. Benson*, 251 N.W.2d 220, 223–25 (Iowa 1977).

314. See *id.* at 232. Though there was a lack of covenant not to compete in the case at bar, the court did find that the defendant sending catalogs to his former employer's customers that was similar to his former employer's catalogue was unfair competition that was "calculated to convince customers defendants were offering identical products to those offered by [the former employer] and at the same prices." See *id.* The Authors have, on multiple occasions, been presented with cases in which employees, out of ignorance of the existence or effect of a restrictive covenant, have communicated in writing their intent to leave their employer and either establish or join a competing concern.

315. See *Lamp v. Am. Prosthetics, Inc.*, 379 N.W.2d 909, 911 (Iowa 1986).

If the dispute involves information of questionable confidentiality, the plaintiff-employer should file a request for a protective order.³¹⁶ The application should request a protective order aimed at guaranteeing the continued confidentiality of trade secrets and other confidential information. In cases involving the alleged misappropriation of customer lists and other information, which are arguably trade secrets or of a confidential nature, a protective order may have a bootstrap effect and create an inference or presumption that the information is confidential.³¹⁷ The protective order request also functions as a barometer by which the employer can determine whether the confidential nature of the information is at issue.

Naturally, the employer should immediately initiate all necessary discovery including requests for production of documents, interrogatories, and depositions. The employee should be deposed as soon as possible after commencement of the action. While litigants typically cannot obtain discovery until after the parties' discovery conference,³¹⁸ a party may, with leave of court, obtain a deposition sooner.³¹⁹ Otherwise, the employer may serve notice of the deposition immediately after commencement of the action but must set the date for the deposition more than 30 days after the service of the summons.³²⁰ The former employer should obtain all of the defendant's business records in an attempt to substantiate the ex-employee's contract with the plaintiff's customers. While employers used to look to telephone records for evidence of solicitation of customers or contacts with suppliers, the advent of social media has provided discovery new tools for employers and new pitfalls for employees.³²¹ Discovery should be aimed at establishing the breach of the restrictive covenant, the violation of employee

316. See IOWA R. CIV. P. 1.504.

317. Information such as customer lists and buying habits may or may not be accorded trade secret protection. See *Interbake Foods, L.L.C. v. Tomasiello*, 461 F. Supp. 2d 943, 964–65 (N.D. Iowa 2006) (discussing what qualifies as a trade secret under Iowa law); *Am. Specialty Co. v. Collis Co.*, 235 F. 929, 934 (S.D. Iowa 1916). The protective order request may predispose the court to find the information to be trade secrets.

318. FED. R. CIV. P. 26(d); IOWA R. CIV. P. 1.505(1), 1.507. Iowa amended its procedural rules in 2015 to track more closely with the federal approach. See IOWA R. CIV. P. 1.505(1). These amendments include, inter alia, the inclusion of a mandatory conference to trigger the discovery period. See *id.* at 1.505(1), 1.507.

319. FED. R. CIV. P. 30; IOWA R. CIV. P. 1.505(1).

320. See FED. R. CIV. P. 30.

321. See, e.g., Margaret DiBianca, *Discovery and Preservation of Social Media Evidence*, ABA (Jan. 2014), http://www.americanbar.org/publications/blt/2014/01/02_dibianca.html.

fiduciary obligations, and other wrongful acts of the employee.

An action to enforce a restrictive covenant may consist of much more than an action to enjoin the former employee from breaching the restrictive covenant. The former employer will probably want to join any new employer of the ex-employee as a party defendant.³²² Several theories exist upon which a former employer might base an action against the former employee's new employer. The possible causes of action include intentional interference with existing contractual relations, intentional interference with prospective business relations, trade secret theft, and civil conspiracy.³²³ It stands to reason that, to a greater extent, each of these causes of action would turn upon whether the non-competition agreement is enforceable.³²⁴

If improper methods are not utilized, a party can interfere with prospective or at-will business relations in furtherance of its own economic interest.³²⁵ A new employer would, therefore, be privileged to hire an employee away from the employee's present employer if it did not, by doing so, violate a covenant not to compete, or act to purloin trade secrets or confidential information. Section 768 of the Second Restatement of Torts provides:

- (1) One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if
 - (a) the relation concerns a matter involved in the competition between the actor and the other and
 - (b) the actor does not employ wrongful means and
 - (c) his action does not create or continue an unlawful restraint of trade and
 - (d) his purpose is at least in part to advance his interest in

322. The plaintiff may, for tactical reasons, choose to exclude the new employer in the hope that the employee, faced with a costly defense, will capitulate. Often, however, the new employer will finance the former employee's defense regardless of whether it has been joined as a party to the litigation.

323. See, e.g., *Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 758 (Iowa 1999).

324. See *id.* at 763.

325. See *Farmers Coop. Elevator, Inc. v. State Bank*, 236 N.W.2d 674, 681–82 (Iowa 1975); see also *Candalaus Chi., Inc. v. Evans Mill Supply Co.*, 366 N.E.2d 319, 326–27 (Ill. App. Ct. 1977); *M & M Rental Tools, Inc. v. Milchem, Inc.*, 612 P.2d 241, 244–45 (N.M. Ct. App. 1980).

competing with the other.

(2) The fact that one is a competitor of another for the business of a third person does not prevent his causing a breach of an existing contract with the other from being an improper interference if the contract is not terminable at will.³²⁶

Honest competition is, therefore, a valid defense to any cause of action filed by a former employer. A cause of action for intentional interference with existing contractual relations may be based upon a defendant's causing a third party to breach a contract or preventing the plaintiff from performing, or increasing plaintiff's expense or burden in performing its contract.³²⁷

Most authorities hold that breach of a contract by a party to the contract does not constitute tortious interference with the business of another.³²⁸ A party to a contract cannot be "guilty of 'inducing' . . . itself to breach . . . its own contract."³²⁹ The former employee would, therefore, not be liable for tortious interference with the employment relationship. However, acts that can constitute a breach of contract can also independently constitute the tort of intentional interference with another's existing or prospective business relationships.³³⁰ Thus, the former employee may sue the former employer who, in turn, may sue the former employee's current employer for inducing a breach of the restrictive covenant.

The elements of the tort of intentional interference with prospective business relationships are: (1) the existence of a prospective business relationship between the plaintiff and a third party; (2) knowledge of the relationship on part of the interfering party; (3) intentional interference by the defendant with the prospective relationship; (4) that interference caused the third party to refrain from entering or to discontinue the relationship; and (5) damage.³³¹ In cases involving interference with an *existing*

326. RESTATEMENT (SECOND) OF TORTS § 768 (AM. LAW INST. 1979).

327. See *id.* at §§ 766, 766A; see also *Westway Trading Corp. v. River Terminal Corp.*, 314 N.W.2d 398, 402–03 (Iowa 1982).

328. See RESTATEMENT (SECOND) OF TORTS § 766; see also *George A. Davis, Inc. v. Camp Trails Co.*, 447 F. Supp. 1304, 1309 (E.D. Pa. 1978); *Allison v. Am. Airlines, Inc.*, 112 F. Supp. 37, 39 (N.D. Okla. 1953); *Dryden v. Tri-Valley Growers*, 65 Cal. App. 3d 990, 998–99 (1977); *Cuker Indus., Inc. v. William L. Crow Constr. Co.*, 178 N.Y.S.2d 777, 779 (1958).

329. See *Allison*, 112 F. Supp. at 39.

330. See *Pogge v. Fullerton Lumber Co.*, 277 N.W.2d 916, 920 (Iowa 1979).

331. *Burke v. Hawkeye Nat. Life Ins. Co.*, 474 N.W.2d 110, 114 (Iowa 1991); *Seneca Waste Sols., Inc. v. D & K Managing Consultants, LLC*, No. 13-1777, 2015 WL 567272, at *9 (Iowa Ct. App. Feb. 11, 2015).

contractual relationship, the employer must show it had a valid and existing contract.³³² Thus, the former employer would have to prove that the non-competition provision of the employment contract was enforceable in order to recover from the new employer because liability will not arise for inducing breach of a void contract.³³³ However, the fact that liability under the contract may be avoided by a party to the contract does not permit a third party to interfere with performance of the contract before it is avoided.³³⁴ Thus, it appears that a court could refuse to enforce a restrictive covenant but still find a third party liable for inducing a breach of the employment agreement by the former employee.³³⁵

The ex-employer must show the new employer had knowledge of the employment contract containing the restrictive covenant.³³⁶ The new employer must have intended to interfere with an existing contract and have acted at least in part with the purpose of that interference.³³⁷

In addition, the ex-employer might also allege that the new employer—by enticing the employee into leaving employment and causing the employee to breach the non-competition agreement—interfered with prospective sales that the employee may have procured for the ex-employer. Generally, two types of actions may lead to liability for interference with a prospective business relation: (1) causing a third person not to enter into or continue a prospective relation; or (2) preventing the plaintiff from acquiring or continuing the prospective relation.³³⁸ The “fundamental premise” of the tort of interference with a prospective business relation is “that a person has a right to pursue his valid contractual and business expectancies unmolested

332. See *Burke*, 474 N.W.2d at 114.

333. See *Peterson v. First Nat'l Bank of Iowa*, 392 N.W.2d 158, 165 (Iowa Ct. App. 1986); see also *Colo. Accounting Machs., Inc. v. Mergenthaler*, 609 P.2d 1125, 1127 (Colo. App. 1980) (stating that where a “restrictive covenant is void . . . there can be no liability for inducing its breach”). Liability can, however, arise for inducing a breach of a contract which is voidable. See RESTATEMENT (SECOND) OF TORTS § 766 cmt. (f) (AM. LAW INST. 1979); *Colorado Accounting*, 609 P.2d 1126–27; *Carman v. Heber*, 601 P.2d 646, 648 (Colo. App. 1979).

334. See *Royal Realty Co. v. Levin*, 69 N.W.2d 667, 671 (Minn. 1955).

335. But see *Hi-Line Elec. Co. v. Dowco Elec. Prods.*, 765 F.2d 1359, 1362 (5th Cir. 1985).

336. See *Gruen Indus., Inc. v. Biller*, 608 F.2d 274, 282 (7th Cir. 1979); *Criterion 508 Sols., Inc. v. Lockheed Martin Servs., Inc.*, 806 F. Supp. 2d 1078, 1101 (S.D. Iowa 2009).

337. See *Criterion*, 806 F. Supp. at 1102 (granting summary judgment for new employer on intentional interference with contract claim where there was no evidence new employer had knowledge of, or intended to interfere with, restrictive covenant).

338. See *Farmers Coop. Elevator, Inc.*, 236 N.W.2d at 679.

by the wrongful and officious intermeddling of a third party.”³³⁹ The tort is aimed at protecting the “expectancies of ‘future contractual relations, such as the . . . opportunity of obtaining customers.’”³⁴⁰ Examples of interferences that can give rise to this tort include: interference with the prospect of obtaining employment or employees, the opportunity of selling or buying real or personal property or services, and other relations leading to potentially profitable contracts.

The elements of the tort of interference with a prospective business relation are: (1) an existing business expectancy; (2) knowledge of the expectancy on the part of the defendant; (3) intentional interference with the expectancy; (4) causation; and (5) damage.³⁴¹ Although the elements of this tort appear similar to the elements for tortious interference with existing contracts, there are significant differences.³⁴² The plaintiff must show a reasonably likely business relationship or contract from which pecuniary benefit could be derived.³⁴³ The plaintiff must also show the interference was both intentional and improper, that is, the defendant “acted with the sole or predominate purpose to injure or financially destroy the plaintiff.”³⁴⁴ The Second Restatement of Torts suggests a less stringent requirement of intent, which focuses on the actor’s motive, the interest sought to be advanced by the actor, and whether the actor’s means or conduct of interference was itself wrongful, criminal, or fraudulent.³⁴⁵

Iowa courts require a specific purpose to injure or destroy on the part

339. *Calbom v. Knudtzon*, 396 P.2d 148, 162 (Wash. 1964).

340. *Page Cnty. Appliance Ctr., Inc. v. Honeywell, Inc.*, 347 N.W.2d 171, 177 (Iowa 1984) (quoting W. PROSSER, *LAW OF TORTS* 950 (4th ed. 1971)) (alteration in original); *see Hawkeye Land Co. v. ITC Midwest LLC*, No. C 15-3119-MWB, 2015 WL 4741141, at *5 (N.D. Iowa Aug. 11, 2015) (quoting *North v. State*, 400 N.W.2d 566, 569 (Iowa 1987)).

341. *Am. Express Fin. Advisors Inc. v. Fury*, No. C95-1032, 1997 WL 33558610, at *15 (N.D. Iowa July 1, 1997).

342. *Compare id.*, with *Burke v. Hawkeye Nat. Life Ins. Co.*, 474 N.W.2d 110, 114 (Iowa 1991).

343. *Criterion 508 Sols., Inc. v. Lockheed Martin Servs., Inc.*, 806 F. Supp. 2d 1078, 1100 (S.D. Iowa 2009) (citing Iowa Model Civil Jury Instruction 1200.7, which defines a prospective contractual relationship as a “reasonably likely contract of financial benefit to the plaintiff” and a prospective business relationship as “a reasonably likely business relationship of financial benefit to the plaintiff”); *Econ. Roofing & Insulating Co. v. Zumaris*, 538 N.W.2d 641, 651 (Iowa 1995); *see also* RESTATEMENT (SECOND) OF TORTS § 766B cmt. c (AM. LAW INST. 1979).

344. *Compiano v. Hawkeye Bank & Trust*, 588 N.W.2d 462, 464 (Iowa 1999) (citations omitted).

345. RESTATEMENT (SECOND) OF TORTS §§ 766B cmt. d, 767.

of defendants.³⁴⁶ Thus, the tort of intentional interference with prospective contracts will be difficult to prove and will be available to former employers only in exceptional circumstances.³⁴⁷

Civil conspiracy on the part of the former employee and new employer is an additional cause of action that may be joined with a complaint for a breach of a non-competition.³⁴⁸ This claim would be premised upon the mutual action taken by the former employee and the new employer with the intent to harm the former employer.³⁴⁹ A conspiracy claim would probably be a companion cause of action for other tort claims accompanying the action to enforce the restrictive covenant.³⁵⁰

C. Advising and Representing the Employee

The conduct of the employee before and after termination of the employment relationship will substantially affect the court's inclination to enjoin subsequent competition. Evidence of an employee planning a new business while still employed may tip the scales in favor of an injunction or liability.³⁵¹ If the employee is insightful enough to consult counsel before acting, the attorney should surmise that a few precautionary steps may be determinative of any subsequent litigation involving the restrictive covenant.

346. *Tredrea v. Anesthesia & Analgesia, P.C.*, 584 N.W.2d 276, 283 (Iowa 1998).

347. *See, e.g., Criterion*, 806 F. Supp. 2d at 1101 (finding that, although the new employer may have had knowledge that plaintiff was the employee's former employer, there was insufficient evidence that new employer had knowledge of contract or intended to interfere with restrictive covenant).

348. *See Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 755, 769 (Iowa 1999).

349. *See Criterion*, 806 F. Supp. 2d at 1103–04 (citing *Basic Chems., Inc. v. Benson*, 251 N.W.2d 220, 233 (Iowa 1977)). “To establish a civil conspiracy under Iowa law, two or more persons must act together ‘to accomplish an unlawful purpose, or to accomplish by unlawful means some purpose not in itself unlawful.’” *Id.* at 1103 (quoting *Wright v. Brooke Grp., Ltd.*, 652 N.W.2d 159, 171 (Iowa 2002)).

350. *See id.* at 1104.

351. *See, e.g., NCMIC Fin. Corp. v. Artino*, 638 F. Supp. 2d 1042, 1083 (S.D. Iowa 2009); *Basic Chems.*, 251 N.W.2d at 230; *see also Inland Rubber Corp. v. Triple A Tire Serv., Inc.*, 210 F. Supp. 880, 884 (S.D.N.Y. 1962) (prior to termination, employee negotiated with competing company and removed records from office); *Am. Loan Corp. v. Cal. Commercial Corp.*, 211 Cal. App. 2d 515, 519–21, 524–25 (Cal. Dist. Ct. App. 1963) (corporate officer began to solicit customers on confidential list even before end of his employment; solicitation enjoined and damages awarded); *State Export Co. v. Mol Shipping & Trading*, 155 N.Y.S.2d 188, 189 (N.Y. Sup. Ct. 1956) (stating that employees are not free to exploit his or her employer's trade through acts of preparation and disloyalty prior to resignation).

The importance of the manner in which an employee departs is illustrated by two Iowa Supreme Court decisions.³⁵² Although neither *Universal Loan Co. v. Jacobsen*³⁵³ nor *Basic Chemicals, Inc. v. Benson*³⁵⁴ involve restrictive covenants, when viewed together the decisions provide useful insight into how a court will react to certain employee conduct.

Both cases involved a key employee leaving his former employer to work for a competitor.³⁵⁵ In both situations, the former employee used his substantial knowledge of his former employer's customers to the advantage of his new employer.³⁵⁶ And in both cases, the former employee advertised his job change with a letter of announcement.³⁵⁷ In *Basic*, the court held the employee's actions constituted unfair competition and trade secret misappropriation.³⁵⁸ But the *Universal Loan* court held the former employee was free of any wrongdoing.³⁵⁹

The important difference in the two cases seems to be the manner in which the former employee went about competing with his former employer. In *Basic*, the former employee was obvious in his attempts to duplicate sales techniques and advertising used by his former employer.³⁶⁰ In contrast, although the former employee in *Universal Loan* used his rapport with customers to the advantage of his new employer, the employee did not engage in an all-out attempt to purloin the customers of his former employer.³⁶¹ The letters sent by each employee announcing the change in their employment exemplifies the difference in conduct.³⁶² In *Universal Loan*, a circular advertising the business of the new employer and announcing the affiliation of the new employee with the new employer was

352. See *Basic Chems.*, 251 N.W.2d at 223–25, 232; *Universal Loan Co. v. Jacobsen*, 237 N.W. 436, 436–38 (Iowa 1931).

353. *Universal Loan*, 237 N.W. at 437.

354. *Basic Chems.*, 251 N.W.2d at 227.

355. See *Id.* at 223; *Universal Loan*, 237 N.W. at 437.

356. See *Basic Chems.*, 251 N.W.2d at 223–24; *Universal Loan*, 237 N.W. at 437.

357. See *Basic Chems.*, 251 N.W.2d at 223–24; *Universal Loan*, 237 N.W. at 437.

358. See *Basic Chems.*, 251 N.W.2d at 232.

359. See *Universal Loan*, 237 N.W. at 438.

360. See *Basic Chems.*, 251 N.W.2d at 224, 232 (concluding that the employee sending prospective customers, including customers of his former employer, catalogues that were similar to his former employer's was "calculated to convince customers [that the new employer was] offering identical products to those offered by [the former employer] at the same prices" and that this was done "to cause confusion and misunderstanding as to the products in question").

361. See *Universal Loan*, 237 N.W. at 437–38.

362. *Basic Chems.*, 251 N.W.2d at 224; *Universal Loan*, 237 N.W. at 437–38.

mailed to numerous individuals, most of whom were *not* customers of the plaintiff-former employer.³⁶³ In *Basic*, the letters were sent primarily to customers of the former employer.³⁶⁴ Additionally, the *Basic* letters stated that the products of the new employer were identical to those of the former employer and that customers of the former employer could make purchase orders using the catalogue of the former employer.³⁶⁵ The *Basic* court also found, *inter alia*, that the defendants distributed a catalogue strikingly similar to the plaintiff's, which contained product numbers nearly identical to those of the former employer.³⁶⁶

With a good understanding of the principles of restrictive covenant law, an attorney for the employee should be able to provide the employee with guidance aimed at avoiding or minimizing the impact of litigation. The employee should be advised to avoid taking any steps toward the establishment of a competing business while still working for the established employer because this would constitute a breach of every employee's fiduciary duty to give his or her employer his or her undivided loyalty.³⁶⁷

The employee should not confiscate and make use of any written or computerized list of customers. This may constitute the misappropriation of a trade secret.³⁶⁸ The taking of any records concerning the purchasing habits of clients and any other documentation of customer habits and needs may also constitute a misappropriation of trade secrets.³⁶⁹

The employee must avoid the "enticement and bailout" situation.³⁷⁰ Where an officer of the company uses knowledge of key employee compensation and productivity to entice such employees away from an established company to form a competing venture, a court might hold that there is a conspiracy with the intent to restrain trade for purposes of Section 1 of the Sherman Act.³⁷¹ Such a scenario may also give rise to common law

363. See *Universal Loan*, 237 N.W. at 438.

364. *Basic Chems.*, 251 N.W.2d at 223.

365. *Id.* at 224, 232.

366. *Id.* at 232.

367. See *Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 599 (Iowa 1999).

368. See IOWA CODE § 550.2(3) (2015); *NCMIC Fin. Corp. v. Artino*, 638 F. Supp. 2d 1042, 1079–80. (S.D. Iowa 2009).

369. See *Movie Gallery US, LLC v. Greenshields*, 648 F. Supp. 2d 1252, 1263–64 (M.D. Ala. 2009); *Artino*, 638 F. Supp. 2d at 1078–79.

370. See, e.g., *Nalley's Inc. v. Corona Processed Foods, Inc.*, 240 Cal. App. 2d 948, 950–52 (Cal. Dist. Ct. App. 1966).

371. See, e.g., *Metal Lubricants Co. v. Engineered Lubricants Co.*, 411 F.2d 426, 431–32 (8th Cir. 1969) (finding no violation of the Sherman Act and that "[t]he mere fact that

tort liability.³⁷²

The employee should strive to avoid the appearance of impropriety. The decisions involving restrictive covenants indicate that a court is more willing to award a former employer injunctive and compensatory relief where the departing employee has not acted in an above-board and straightforward manner.³⁷³ A departing employee should, if possible, avoid using identical or similar advertising brochures, order forms, trademarks, names, or other items used by the former employer.³⁷⁴ By the same token, it appears that acting in a professional fashion may cause a court to view an employee's actions in a favorable light.³⁷⁵ Courts are more inclined to grant injunctive relief and damages to the former employer where it appears that the former employee has acted with the intent to injure or destroy the former employer's business.³⁷⁶

Any marketing plan involving direct customer contact should not be aimed exclusively or primarily at preferred customers of the employee's former employer.³⁷⁷ A marketing strategy that calls for aggressive business solicitation and campaigning should include non-customers of the former employer and should be well-documented.³⁷⁸

[employees] decided to leave their employ and enter into competition with their employer is by itself not sufficient evidence to establish unfair and inequitable dealings so as to sustain a claim of unfair competition under the Sherman Act").

372. See *id.* at 429 (finding no common law tort liability when the information given to the defendants was in no way given to them in confidence or obtained through "improper means").

373. Compare *id.* at 431 (where the departing employee was forthright with his employer and acted above-board and was not found liable), with *Am. Loan Corp. v. Cal. Commercial Corp.*, 211 Cal. App. 2d 515, 523-25 (Cal. Dist. Ct. App. 1963) (where employee was enjoined from soliciting customers on a list that the employee surreptitiously copied before he departed).

374. See *Basic Chems., Inc. v. Benson*, 251 N.W.2d 220, 232 (Iowa 1977).

375. *Metal Lubricants*, 411 F.2d at 431-32.

376. See *Gloria Ice Cream & Milk Co. v. Cowan*, 41 P.2d 340, 342 (Cal. 1935); see also *Reid v. Mass Co.*, 318 P.2d 54, 59-60 (Cal. Dist. Ct. App. 1957) ("[E]very individual possesses a form of property, the right to pursue any calling business or profession he may choose. A former employee has the right to engage in a competitive business for himself and to enter into competition with his former employer, even for the business of those who had formerly been the customers of his former employer, *provided such competition is fairly and legally conducted.*").

377. See *Basic Chemicals*, 251 N.W.2d at 223-24, 232.

378. See *Universal Loan Corp. v. Jacobson*, 237 N.W. 436, 437-38 (Iowa 1931); see also *Reid*, 318 P.2d at 59-60 (employee is not expected to surrender his acquaintance and knowledge of a former employer's customers and such knowledge may be used in a fair

D. Interesting Iowa Trends

For the employer who seeks to enforce a restrictive covenant against a former employee, a potential pitfall worth noting comes in the form of laches or estoppel arguments by the ex-employee. Where an employer hesitates to enforce its rights and sanctions against the former employee's new employment relationship, the employer jeopardizes its chances at successful enforcement of the restrictive covenant. The argument runs like this: if the employer fails to raise an objection quickly and assertively to the ex-employee's new employment (and, in the case of estoppel, if the employer actually voices its support for the new employment and the employee relies on that support to the employee's detriment), the employer should not be permitted to subsequently change course and seek relief under a restrictive covenant.³⁷⁹ Iowa courts have in recent years proven to be receptive to these arguments.

The doctrine of laches applies to the attempted enforcement of a non-compete agreement.³⁸⁰ To invoke the doctrine of laches, the defendant must establish two elements: (1) "lack of diligence by the plaintiff and (2) injurious reliance by the defendant."³⁸¹ To establish estoppel, a party must show that it was induced to believe certain facts were true and reasonably relied on that belief to its detriment.³⁸² Both laches and estoppel are premised on the equitable principle that "one who has made a certain representation should not thereafter be permitted to change his position to the prejudice of one who has relied on it."³⁸³

An Iowa court applied this form of laches and estoppel reasoning to deny an employer's motion for temporary injunction in *Iowa Wireless Services, L.P. v. Boesen*.³⁸⁴ In that case, the defendant-employee sought to leave her employer to work for a competitor, and her supervisor advised her to "go for it."³⁸⁵ Because the employee acted "appropriately in discussing her prospective job offer with her supervisor," and reasonably relied on her supervisor's response, the court denied the employer's motion for a

and legal manner).

379. See *Moore Bus. Forms, Inc. v. Wilson*, 953 F. Supp. 1056, 1066 (N.D. Iowa 1996).

380. See *id.*

381. *Id.* (citations omitted).

382. *Sanborn v. Md. Cas. Co.*, 125 N.W.2d 758, 763 (Iowa 1964).

383. *Id.* at 762 (citations omitted).

384. *Iowa Wireless Servs., L.P. v. Boesen*, No. CL 87806, at *3-4 (Iowa Ct. App. Jan. 11, 2002).

385. *Id.* at *2.

temporary injunction.³⁸⁶

V. DRAFTING SUGGESTIONS

The drafter of an employment agreement containing a restrictive covenant should take into account the facts and holdings of the numerous Iowa decisions concerning the enforceability of such provisions. The attorney should ascertain and document, as extensively as possible, the business necessity providing the impetus of the covenant.³⁸⁷ If it appears that there is very little business necessity, an employer should be advised that the covenant may be of marginal benefit. Restrictive covenants will be accorded greater weight and effect if used sparingly.³⁸⁸ A standard employment contract containing a restrictive covenant that is used with numerous and varied employees may be viewed more as an *in terrorem* device than one aimed at protecting an employer's business interests.³⁸⁹ The drafter should premise a restrictive covenant with recitals of the reasons for it.³⁹⁰ The recitals should be specific and explicit.³⁹¹

The drafter must remember that reasonableness should be stressed.³⁹²

386. *Id.* at *3–4. Other jurisdictions have employed similar reasoning. *See* EEOC v. Vucitech, 842 F.2d 936, 942 (7th Cir. 1988) (“If the defendant in a suit for trademark infringement had been led to believe that the plaintiff would not sue, and in reliance expended large sums of money on exploiting the allegedly infringing trademark, he can plead laches if the plaintiff later sues, even if the delay has not impaired his ability to defend in the slightest.” (citations omitted)); *see also* Becker Holding Corp. v. Becker, No 92-14057, 1994 WL 1867249, at *13 (S.D. Fla. Mar. 7, 1994) (noting that the company waived argument or was estopped from asserting that former employee violated non-compete agreement where company failed to object to acquisition of allegedly competing business despite being asked whether they considered the acquisition a violation of stock purchase documents), *aff’d in relevant part*, 78 F.3d 514 (11th Cir. 1996); *Suburban Neurosurgical Specialists, P.C. v. Jimenez*, 608 S.E.2d 256, 257–59 (Ga. 2004) (noting employer was barred by laches and equitable estoppel from seeking extension of interlocutory injunction against former employee where employer delayed seeking relief until one month prior to interlocutory injunction expired and employee would have been prejudiced by employer’s delay).

387. *See* *Iowa Glass Depot, Inc. v. Jindrich*, 388 N.W.2d 376, 381 (Iowa 1983); *Ehlers v. Iowa Warehouse Co.*, 188 N.W.2d 368, 370 (Iowa 1971).

388. A tailored agreement will probably be given greater import. *See* *Curtis 1000, Inc. v. Youngblade*, 878 F. Supp. 1224, 1261 (N.D. Iowa 1995).

389. *See, e.g., Ferrofluidics Corp. v. Advanced Vacuum Components, Inc.*, 968 F.2d 1463, 1471 (1st Cir. 1992).

390. *See* DONALD J. ASPELUND & JOAN E. BECKNER, *EMPLOYEE NONCOMPETITION LAW* § 10:20 (West 2015).

391. *See id.*

392. *See* *Iowa Glass*, 388 N.W.2d at 381; *Ehlers*, 188 N.W.2d at 370.

Although Iowa is liberal in allowing the modification of overly broad provisions,³⁹³ especially onerous terms may cause the agreement to be construed as aimed at stifling competition as opposed to protecting an interest of the employer.³⁹⁴ In this regard, it may be useful to insert a clause expressly providing for partial enforcement of the restrictive covenant.³⁹⁵ The compositional, geographic, and temporal limitations should be narrowly tailored to serve the legitimate function of protecting the employer's interests.³⁹⁶ For instance, a clause prohibiting competition with specifically enumerated customers for a period of time adequate to allow the reestablishment of the employer's relationship would probably be enforced.

Counsel should also be mindful that when terms of a contract are ambiguous, courts will construe language against the drafter. In *Farm Bureau Mutual Insurance Co. v. Osby*, the Iowa Court of Appeals construed a non-solicitation provision that prohibited the employee from "solicit[ing]," but did not define what "soliciting" meant.³⁹⁷ In analyzing this provision, the court emphasized, "Where a term used in a written contract is susceptible to two reasonable interpretations, we resolve ambiguity against the drafter."³⁹⁸ In *Osby*, the provision was drafted solely by the employer.³⁹⁹ Consequently, the court held the term "solicit" must be interpreted to prohibit only "active conduct on the part of the solicitor directed at a specific target audience."⁴⁰⁰ Therefore, the employee's advertisements to the general public, and even the employee's sale of products to customers of the employer who initiated

393. See *supra* Part III.C.3.

394. The Illinois Supreme Court has stated:

To stake out unrealistic boundaries in time and space . . . is to impose upon an employee the risk of proceeding at his peril, or the burden of expensive litigation to ascertain the scope of his obligation. While we do not hold that a court of equity may never modify the restraints embodied in a contract of this type and enforce them as modified, the fairness of the restraint initially imposed is a relevant consideration for a court of equity.

House of Vision, Inc. v. Hiyane, 225 N.E.2d 21, 25 (Ill. 1967).

395. See *supra* Part III.C.3.

396. See *Curtis 1000, Inc. v. Youngblade*, 878 F. Supp. 1224, 1261 (N.D. Iowa 1995) (discussing the requirement that time and area restraints be reasonable).

397. See *Farm Bureau Mut. Ins. Co. v. Osby*, No. 05-0073, 2005 WL 2990129, at *3 (Iowa Ct. App. Nov. 9, 2005).

398. *Id.* (citing *Village Supply Co. v. Iowa Fund, Inc.*, 312 N.W.2d 551, 555 (Iowa 1981)).

399. *Osby*, 2005 WL 2990129, at *1.

400. *Id.* at *3.

contact with the employee, were not prohibited.⁴⁰¹

If a restrictive covenant is drafted with the intent that it have effect beyond Iowa, the drafter should be aware of conflicts of law issues.⁴⁰² The law of the forum state is especially important.⁴⁰³ As a general rule, even if the restraint is valid under the law of the contracting state, the restraint will be held unenforceable if contrary to the public policy of the forum state.⁴⁰⁴

Thus, a stipulation that the employment agreement will be governed by Iowa law would be ineffective where the restrictive covenant would be unenforceable in the forum state.⁴⁰⁵ However, absent a public policy of the forum state invalidating the provision, the enforcement of the restrictive covenant should be governed by the law of Iowa if the covenant was made and performed there.⁴⁰⁶

VI. CONCLUSION: LOOKING FORWARD

Based upon the relatively static history of the law of restrictive covenants in Iowa, it would be reasonably safe to predict the law will remain unchanged in the future. However, the Authors do not believe Iowa non-compete law will march along unchanged.

401. *Id.* at *3–4.

402. *See supra* Part III.D.

403. *See supra* Part III.D.

404. *See* E. H. Schopler, Annotation, *Conflict of Laws as to Validity, Enforceability, and Effect of Ancillary Restrictive Covenant not to Compete, in Contract of Employment or for Sale of Business*, 70 A.L.R. 2d 1292 §5 (1960); *see also* Curtis 1000, Inc. v. Youngblade, 878 F. Supp. 1224, 1251–57 (N.D. Iowa 1995) (engaging in conflict of laws analysis to determine whether Iowa or Delaware law applies in determining enforceability of restrictive covenant).

405. *See supra* Part III.D; Solari Indus., Inc. v. Malady, 264 A.2d 53, 61 (N.J. 1970) (adopted in Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368, 371–72 (Iowa 1971)). *Accord* Hollingsworth Solderless Terminal Co. v. Turley, 622 F.2d 1324, 1338 (9th Cir. 1980); Forney Indus. Inc. v. Andre, 246 F. Supp. 333, 334–35 (D.N.D. 1965). *But compare* Temporarily-Yours Temporary Help Servs., Inc. v. Manpower, Inc., 377 So. 2d 825, 827 (Fla. Dist. Ct. App. 1979), *with* Minn. Mining & Mfg. Co. v. Kirkevold, 87 F.R.D. 324, 330–32, 339 (D. Minn. 1980) (Where non-competition covenant entered into in Minnesota specified that Minnesota law should govern, and employee left to work for competing firm in California that would not uphold a non-competition covenant, Minnesota law would apply where employee was sued in Minnesota and thus covenant precluded employee from working for competing firm in California).

406. *See, e.g.,* Curtis 1000, Inc. v. Youngblade, 878 F. Supp. 1224, 1253–54 (N.D. Iowa 1995) (finding Iowa law and public policy determined enforceability of non-compete agreement notwithstanding contract's inclusion of Delaware choice-of-law where salesman's business office, residence, and principal place of performance were in Iowa).

One can predict changes in the law of restrictive covenants that parallel general trends in the development of other aspects of the workplace. For better or worse, the modern workplace is increasingly controlled not by concepts of private bargain, but rather by governmental oversight and regulation. Rather than wait for societal and economic forces to effect changes in the workplace, Iowa's legislature enacted comprehensive statutory and regulatory schemes dictating what conduct and interests would be acceptable or unacceptable in the workplace.⁴⁰⁷

The age-old tension between employer and employee in the restrictive covenant arena will soon draw the attention of Iowa's lawmakers. Anecdotes about families, unroofed or reduced to poverty by onerous non-competes will compete with stories of fortunes stolen by ungrateful and unscrupulous employees. Armed with the ever-present belief that it knows best, the Iowa legislature will devise some system for regulating restraints on workers.

An equally likely change will come in the form of pervasive oversight by the federal government. Whether in the form of legislative or executive branch actions, Washington will put its stamp on the law of restrictive covenants. This trend has already started.

The National Labor Relations Board recently extended its reach to the entire private sector, ruling that employers cannot dictate that employees keep salary information confidential or refrain from complaining about the workplace in social media.⁴⁰⁸ Workplace conditions of federal contractors are tightly controlled by increasingly expansive executive orders.⁴⁰⁹

It is likely that the law of restrictive covenants will, likewise, capture the attention of the federal government. With a comprehensive national healthcare regime in place, it would be quite easy for the executive branch to deem restrictive covenants in the medical profession as inconsistent with the goals and needs of the national health insurance reform program. With the brush of a pen, the President could outlaw restrictive covenants of any sort in the vast health sector tied to federal regulation or subsidy. This would merely be an extension of the argument often made in non-compete cases

407. See, e.g., *Welcome to the Iowa Division of Labor*, IOWA DIV. OF LAB., <http://www.iowadivisionoflabor.gov/> (last visited Mar. 3, 2016).

408. See, e.g., Memorandum from Anne Purcell, Assoc. Counsel, to All Regional Directors, Officers-in-Charge and Residential Officers, Office of the Gen. Counsel 4 (May 30, 2012), <https://www.nlr.gov/news-outreach/fact-sheets/nlr-and-social-media>; *Social Media*, NLRB, <https://www.nlr.gov/rights-we-protect/whats-law/employees/i-am-not-represented-union/social-media> (last visited Mar. 3, 2016).

409. See, e.g., Exec. Order No. 13,665, 79 Fed. Reg. 22591 (Apr. 8, 2014).

that public policy dictates maximum availability and mobility of trained health care professionals.

Whether by the hand of state or federal politicians, it is safe to predict that statutory and regulatory oversight will supplant the current law of restrictive covenants. If history is a guide, this will not signal the end of the need for lawyers well-versed in this area of the law.⁴¹⁰ The tensions that generate today's litigation will revise the law. It will simply mean that lawyers will have to retool. The battlefield might change—the battle will not.

410. *See supra* Part IV.