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BALANCING BUSINESS PROTECTION WITH FREEDOM TO WORK: A REVIEW OF NONCOMPETE AGREEMENTS IN MINNESOTA

Gerald T. Laurie
David A. Harbeck

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I. INTRODUCTION

Noncompete agreements, also known as "restrictive covenants" or "covenants not to compete," are contracts in which one party agrees to avoid undertaking certain employment or employment-related activities that would be competitive to the other party. Although the enforceability of noncompete agreements depends on the facts of each case, Minnesota courts generally uphold noncompete agreements if the restrictions against competition are "reasonable."2

In recent years, the use of noncompete agreements has dramatically increased in the employment setting.3 As long-term employment relationships have dwindled and loyalty between employers and employees has declined, many employers have found noncompete agreements desirable to prevent unfair competition by former employees.4 The increased use of noncompete agreements, coupled with the willingness of employees to risk breaching such agreements in order to work in their chosen fields, has resulted in increased litigation concerning such agreements.

Employers may seek to use noncompete agreements and similar devices for a variety of purposes, such as:

- noncompetition provisions – prohibiting em-

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2. See, e.g., Bennett v. Storz Broad. Co., 270 Minn. 525, 533, 134 N.W.2d 892, 898 (1965) (holding that covenants are valid when the restraint is: 1) for a just and honest purpose; 2) for the protection of a legitimate interest of the party in whose favor it is imposed; 3) reasonable; and 4) not injurious to the public).
3. See Phillip J. Closius & Henry M. Schaffer, Involuntary Nonservitude: The Current Judicial Enforcement of Employee Covenants Not to Compete – A Proposal for Reform, 57 S. CAL. L. REV. 531, 532 (1984). Although this Article cites cases that address the enforceability of noncompete agreements in connection with the sales of businesses, it focuses only on noncompete agreements in the employment context. Courts recognize a distinction between restrictive covenants relating to commercial transactions involving business or property transfers and those relating to employment contracts entered into by wage earners, and courts use different standards of reasonableness with respect to each type. See Bennett, 270 Minn. at 534, 134 N.W.2d at 899.
5. See Note, supra note 4, at 519 n.1.
employees from entering into direct or indirect competition with the employer;  

- nonsolicitation provisions – prohibiting former employees from soliciting the employer's prospects and customers;  

- confidential information provisions – prohibiting former employees from using or disclosing the employer's confidential or proprietary information;  

- anti-raiding provisions – prohibiting former employees from hiring away the employer's other employees; or  

- shop rights provisions – giving the employer ownership rights to any inventions created during the employment relationship.

Despite these advantages, noncompete agreements are not appropriate for every employer. The need for such agreements depends on the nature of the employer's business, the employer's personnel, and the potential consequences of competition. Prior to using noncompete agreements, an employer should determine what interests need protection, which employees should be required to sign noncompete agreements, and whether the employer would be willing to seek enforcement of such an

6. See, e.g., Jim W. Miller Constr., Inc. v. Schaefer, 298 N.W.2d 455, 457 (Minn. 1980) (invalidating a noncompete agreement that prohibited the employee from directly or indirectly competing with the construction firm for two years after the termination within a 100-mile radius in a same or similar construction business and from working as a real estate broker within a 20-mile radius).  

7. See, e.g., Webb Publ'g Co. v. Fosshage, 426 N.W.2d 445, 447 (Minn. Ct. App. 1988) (holding that the employer's intent was legitimate, but remanding to determine the reasonableness of the restriction where a noncompete agreement prohibited a former employee, for 18 months, from soliciting or having an interest in a business that solicited any customer who had done business with the employer during the year prior to the termination of employment).  

8. See, e.g., Satellite Indus., Inc. v. Keeling, 396 N.W.2d 635, 637-38 (Minn. Ct. App. 1986) (noting that the employment agreement barred the employee from disclosing any of the employer's inventions, improvements, or discoveries).  

9. See, e.g., Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142, 145 (N.J. 1982) (holding that part of a law firm's departure agreement violated public policy where termination compensation was withheld from former members who solicited the law firm's employees).  


11. See generally Blake, supra note 4, at 627 (discussing reasons employers may utilize noncompete agreements).
agreement in the event of a breach.

For employees, signing a noncompete agreement is often a prerequisite to obtaining a job. Accordingly, employees generally have little bargaining power with regard to noncompete agreements. If at all possible, an employee should avoid signing a noncompete agreement, because signing the noncompete agreement may restrict the employee's future ability to earn a livelihood. If signing a noncompete agreement is a prerequisite to employment, the employee should be fully aware of the terms and effect of the agreement. In addition, an employee may be able to negotiate at least some of the terms of the agreement. Finally, and most importantly, the employee should be aware of the consequences that may result from breaching a noncompete agreement.

This Article discusses the factors Minnesota courts use in determining the enforceability of a noncompete agreement – i.e., ascertaining whether the agreement is supported by consideration, if the agreement is reasonable, and what courts may do if a provision is found to be unreasonable. In addition, this Article discusses other litigation issues of which employers should be aware prior to drafting a noncompete agreement and once an agreement is breached.

II. DETERMINING THE ENFORCEABILITY OF A NONCOMPETE AGREEMENT

Generally, the enforceability of noncompete agreements is a matter of state law; however, the Federal Arbitration Act may allow the parties to a noncompete agreement to avoid the application of state law by providing for arbitration of any alleged breaches and by specifying the substantive rules that shall apply to the arbitration. Parties to noncompete agreements also should be aware of the potential impact of antitrust laws on noncompete agreements.

12. Cf. Note, supra note 4, at 519 (proposing that federal antitrust law be applied to noncompete agreements, instead of state contract law, because antitrust law allows a more complete assessment).

13. See 9 U.S.C. §§ 1-307 (1994). Although arbitration may appear to favor them, employers must recognize that enforcing arbitration decisions regarding noncompete clauses can be difficult.

The various states, either by statute or by development of the common law, have adopted different approaches to the enforceability of noncompete agreements. Some states prohibit noncompete agreements as a matter of public policy, while others apply varying standards of enforceability. In Minnesota, no statute addresses the validity of noncompete agreements. Instead, Minnesota’s courts determine the validity of noncompete agreements on a case-by-case basis, applying common-law principles.

A. The Consideration Requirement

As with any contract, a noncompete agreement must be supported by consideration. Defined broadly, consideration is a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared illegal.”); Minn. Stat. § 325D.51 (1996) (“A contract, combination, or conspiracy between two or more persons in unreasonable restraint of trade or commerce is unlawful.”). The mere fact that parties agree to eliminate competition between themselves may not be enough to bring the agreement within the condemnation of antitrust laws. See Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360 (1933). For example, the enforceability of a noncompete agreement is determined under the “rule of reason” analysis of antitrust law, which essentially upholds a restraint of trade that is not unreasonable. See National Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 689 (1978). Thus, if a noncompete agreement satisfies the common-law reasonableness standard, it will likely be upheld under the antitrust laws. See, e.g., Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 265 (7th Cir. 1981) (holding that unless the challenged activity conforms to one of the few categories of restraints adjudged to be per se illegal, its legality under the Sherman Act is properly tested under the rule of reason analysis).


16. See Miller Mechanical, Inc. v. Ruth, 300 So. 2d 11, 12 (Fla. 1974) (granting an injunction prohibiting the employee from competing with the employer for the period of time found to be reasonable); Slade Gorton & Co. v. O’Neil, 242 N.E.2d 551, 554-55 (Mass. 1968) (upholding a restrictive covenant for the period of time during which the employee’s employment by a competitor would have substantial effects on the interests of the former employer); Davies & Davies Agency, Inc. v. Davies, 298 N.W.2d 127, 130-31 (Minn. 1980).


19. See Davies, 298 N.W.2d at 130. The consideration requirement also applies to employment contracts that contain provisions prohibiting the misappropriation of confidential information. See Jostens, Inc. v. National Computer Sys.,
benefit accrued by one party or a detriment suffered by another party.\textsuperscript{20} Whether an agreement is supported by consideration depends on the facts of each case,\textsuperscript{21} and "if consideration is found at all . . ., inquiry into its adequacy is forbidden."

Consideration exists only if the noncompete agreement is bargained for and provides the employee with "real advantages.\textsuperscript{23} "Real advantages" may include:

- promotions;\textsuperscript{24}
- substantial training;\textsuperscript{25}
- benefits that are not offered to employees who do not sign a noncompete agreement;\textsuperscript{26} or
- a new promise by the employer to pay the employee a continuing salary if suitable, non-competitive employment cannot be found after termination of the relationship.\textsuperscript{27}

Moreover, to constitute consideration supporting the noncompete agreement, the employer's undertaking must be attributable to the employee's signing of the agreement.\textsuperscript{28}

\begin{flushright}
Inc., 318 N.W.2d 691, 703-04 (Minn. 1982).
\end{flushright}

\textsuperscript{20.} See, e.g., C & D Invs. v. Beaudoin, 364 N.W.2d 850, 853 (Minn. Ct. App. 1985) (citing Estrada v. Hanson, 215 Minn. 353, 355, 10 N.W.2d 223, 225 (1943)).

\textsuperscript{21.} See Davies, 298 N.W.2d at 130.

\textsuperscript{22.} Satellite Indus., Inc. v. Keeling, 396 N.W.2d 635, 639 (Minn. Ct. App. 1986) (citing Pine River State Bank v. Mettille, 333 N.W.2d 622, 629 (Minn. 1983)).

\textsuperscript{23.} See id.

\textsuperscript{24.} See Davies, 298 N.W.2d at 131; Satellite Indus., 396 N.W.2d at 639.

\textsuperscript{25.} See Satellite Indus., 396 N.W.2d at 639; cf. National Recruiters, Inc. v. Cashman, 323 N.W.2d 736, 741 (Minn. 1982) (finding no consideration existed where the employees received training, because the training was part of an oral employment agreement and did not provide the employees with a "real advantage").

\textsuperscript{26.} Compare Davies, 298 N.W.2d at 131 (finding the employee derived a benefit after signing the noncompete agreement, since he could not have advanced to a sales position with the agency had he not signed the agreement), with Freeman v. Duluth Clinic, Ltd., 334 N.W.2d 626, 630 (Minn. 1983) (holding that consideration was insufficient where an employee-shareholder indirectly benefited by a benefit that accrued to all shareholders of the corporation, regardless of whether they had signed the agreement), and Jostens, Inc. v. National Computer Sys., Inc., 318 N.W.2d 691, 703-04 (Minn. 1982) (signing the noncompete agreements did not provide employees with future benefits, raises, or promotions).

\textsuperscript{27.} See Modern Controls, Inc. v. Andreadakis, 578 F.2d 1264, 1267-68 (8th Cir. 1978) (holding a restrictive covenant was supported by independent consideration, because the employer was obligated to pay the employee his base salary for two years if he could not find suitable work in another field).

\textsuperscript{28.} See Sanborn Mfg. Co. v. Currie, 500 N.W.2d 161, 164 (Minn. Ct. App. 1993) (stating that a noncompete agreement that is not ancillary to the employ-
In Minnesota, when an employee signs a noncompete agreement prior to starting employment, the new job itself usually constitutes sufficient consideration to support the agreement.\textsuperscript{29} Consideration may not exist, however, if an employer presents a noncompete agreement after the employee has commenced employment.\textsuperscript{30} Likewise, mere continued employment alone does not provide the consideration necessary to support a noncompete agreement.\textsuperscript{31} Courts have recognized that an employer attempting to impose a noncompete agreement after the employee has accepted a job "takes undue advantage of the inequality of the parties."\textsuperscript{32} For this reason, consideration does not exist where an employer presents an employee with a noncompete agreement after the employee has accepted an offer of employment, and the employee does not receive a substantial benefit from continued employment.\textsuperscript{33}

For instance, in \textit{National Recruiters, Inc. v. Cashman}, the Minnesota Supreme Court found no consideration where the employer presented a noncompete agreement to certain employees during the first several days of work, but not until after the completion of negotiations regarding compensation, duties, and benefits.\textsuperscript{34} Similarly, in \textit{Sanborn Manufacturing Co. v. Currie}, the court of appeals held that a noncompete agreement executed the day before commencement of employment, but several weeks after the employee had accepted the employment offer, "must fail for lack of consideration."\textsuperscript{35} In \textit{Currie}, the court expressly rejected the employer's argument that consideration exists so long as the par-
ties executed the noncompete agreement before the employee began work.\textsuperscript{36} Thus, lack of consideration may be an employee's primary defense to an action for breach of a noncompete agreement – particularly when an employer seeks to enforce a noncompete agreement that was signed after the parties had agreed upon the other terms and conditions of the employment relationship.\textsuperscript{37}

To avoid consideration problems, an employer requiring noncompete agreements for prospective employees should notify applicants that signing such an agreement is a prerequisite to employment and should obtain a signed agreement when the applicant accepts an offer of employment.\textsuperscript{38} An employer implementing noncompete agreements for existing employees, however, must provide consideration that is a "real advantage" to the employees.\textsuperscript{39}

B. The Reasonableness Requirement

In \textit{Bennett v. Storz Broadcasting Co.}, the Minnesota Supreme Court noted the inherently competing principles in noncompete agreements. On the one hand, employers have the right to be secure in their contracts and to pursue their business or employment free from the interference of others – except where others act in pursuance of a superior or equal right.\textsuperscript{40} On the other hand, the court recognized that noncompete agreements consti-

\textsuperscript{36} Id. But see Millard v. Electronic Cable Specialists, 790 F. Supp. 857, 862 (D. Minn. 1992) (finding consideration where the employee received valuable training, gained economic and professional benefits, and upon signing the noncompete agreement, reviewed it paragraph by paragraph, writing "OK" next to each paragraph – even though the agreement was not signed until after the employee began work).

\textsuperscript{37} See, e.g., \textit{Freeman}, 334 N.W.2d at 630 (holding that a noncompete agreement signed by a physician subsequent to his original contract was not bargained for and, therefore, was unenforceable for lack of consideration).

\textsuperscript{38} See \textit{Davies & Davies Agency, Inc. v. Davies}, 298 N.W.2d 127, 132-33 (Minn. 1980) (holding a restrictive covenant unenforceable for failure of consideration when, prior to employment, the employee was informed he would be required to sign a noncompete agreement, but he neither signed it nor was shown a copy of it until eleven days after employment began).

\textsuperscript{39} See \textit{Cashman}, 323 N.W.2d at 741 (rejecting a noncompete agreement on the ground that "[t]here was no advantage which inured to [the employee's] benefit"); \textit{supra} notes 24-27 and accompanying text.

\textsuperscript{40} Bennett v. Storz Broad. Co., 270 Minn. 525, 532, 134 N.W.2d 892, 897 (1965) (citing Roraback v. Motion Picture Mach. Operators’ Union, 140 Minn. 481, 486-87, 168 N.W. 766, 768 (1918)).
To balance these competing interests, the court adopted a reasonableness standard:

The test applied is whether or not the restraint is necessary for the protection of the business or good will of the employer, and if so, whether the stipulation has imposed upon the employee any greater restraint than is reasonably necessary to protect the employer's business, regard being had to the nature and character of the employment, the time for which the restriction is imposed, and the territorial extent of the locality to which the prohibition extends.42

This "reasonableness" test is still applied today.43

To date, Minnesota cases have not expressly determined which party bears the burden of proving the reasonableness or unreasonableness of a noncompete agreement.44 It would appear, however, that the party seeking to enforce the agreement must prove its reasonableness, because under general contract law principles, the party seeking to enforce an agreement must prove the existence of a valid agreement.45 Since the employer usually is the party seeking to enforce a noncompete agreement, the employer will nearly always bear the burden of proving that a valid, and thus reasonable, agreement exists. Establishing such proof requires the evaluation of each of the factors set forth in Bennett: (1) the nature and character of the employment relationship; (2)

41. Id. at 533, 134 N.W.2d at 898 (citing Arthur Murray Dance Studios v. Wit-ter, 105 N.E.2d 685, 693 (Ohio Ct. C.P. 1952)).
42. Id. at 534, 134 N.W.2d at 899.
43. See, e.g., Dynamic Air, Inc. v. Bloch, 502 N.W.2d 796, 799 (Minn. Ct. App. 1993) (citing Bennett, recognizing that a restrictive covenant will be upheld if the restriction is necessary for the protection of the employer's business or good will and if its scope is reasonable). Some recent decisions have expressed a willingness to uphold noncompete agreements "routinely," so long as they are reasonable. See, e.g., Millard v. Electronic Cable Specialists, 790 F. Supp. 857, 860 (D. Minn. 1992) (holding that a noncompete agreement was "reasonable" because it furthered the legitimate interests of both the employee and the employer, was supported by ample consideration, and was limited in time and geographic region).
44. See Dynamic Air, 502 N.W.2d at 799; cf. Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 265 (7th Cir. 1981) (explaining that in federal suits brought under the Sherman Act, the plaintiff shoulders the burden of proving the restraint is unreasonable unless the challenged activity violates the Act per se).
45. See, e.g., Gryc v. Lewis, 410 N.W.2d 888, 891 (Minn. Ct. App. 1987) (holding that the plaintiff has the burden of proving all essential contractual elements).
the time for which the restriction is imposed; and (3) the geographical area to which the prohibition extends. In analyzing these factors, great weight is given to the intent of the parties, and noncompete agreements should not be extended beyond the parties' true intent.

1. Nature and Character of the Employment Relationship

In order to enforce a noncompete agreement, an employer must have legitimate business interests to protect. The nature and character of the employment relationship determines whether the employer is acting pursuant to a legitimate business interest. In analyzing the employment relationship, the court may utilize a wide variety of factors, including:

- the employee's experience and the expertise contributed by the employer;
- the amount of contact between the employee and the customers;
- the existence of direct competition between the employee and the former employer;
- whether the agreement is broader than necessary

46. Bennett, 270 Minn. at 534, 134 N.W.2d at 899 (1965). In undertaking an analysis of what is "reasonable," courts also will consider equitable concerns. See Hruska v. Chandler Assoc's., Inc., 372 N.W.2d 709, 715 (Minn. 1985).

47. See Snyder's Drug Stores, Inc. v. Sheehy Properties, Inc., 266 N.W.2d 882, 885 (Minn. 1978) ("In sum, while covenants against competition should be construed so as to give effect to the intention of the parties, such covenants should not be extended beyond their true intent.").

48. See Bennett, 270 Minn. at 533, 134 N.W.2d at 898.

49. See Klick v. Crosstown State Bank, Inc., 372 N.W.2d 85, 89 (Minn. Ct. App. 1985) (refusing to enforce a noncompete agreement against an employee of eight months who had little expertise, while distinguishing another case where the employee had been employed for ten years and had gained substantial experience).

50. Compare Klick, 372 N.W.2d at 88 (refusing to enforce a noncompete agreement because the former employee "did not develop any special relationships with bank customers"), with Webb Publ'g Co. v. Fosshage, 426 N.W.2d 445, 450 (Minn. Ct. App. 1988) (enforcing a noncompete agreement where the former employee's relationship with customers was sufficiently close as to give the employer a legitimate interest in prohibiting the solicitation of those customers).

51. See Davies, 298 N.W.2d at 131-32 (recognizing an insurance agency's need to bar former employees from actively soliciting business from its customers). In Davies, the noncompete agreement prohibited the insurance agency's former employee from engaging in the insurance business for five years within a 50-mile radius of Minneapolis, Saint Paul, or Duluth, Minnesota. Id. The court found this agreement to be too broad and subject to judicial modification. Id.
to protect the employer's business interests, goodwill, and trade secrets;\textsuperscript{52} 

- whether the information or knowledge sought to be protected was already known to the employee or was readily ascertainable by other proper means;\textsuperscript{53} 

- whether the contract attempts to restrict competition beyond those functions actually performed by the employee;\textsuperscript{54} and 

- whether the employer has enforced noncompete agreements against other employees, since a failure to do so may evidence the lack of a legitimate business interest in enforcing the covenant.\textsuperscript{55}

In contrast, courts disfavor noncompete agreements used by an employer simply to discourage employees from seeking new employment or merely to protect the employer from fair competition.\textsuperscript{56} These agreements "constitute a form of industrial peonage without redeeming virtue in the American enterprise system."\textsuperscript{57} Moreover, an employer must avoid imposing a noncompete agreement so that the employee cannot obtain any

\textsuperscript{52} See Saliterman v. Finney, 361 N.W.2d 175, 177 (Minn. Ct. App. 1985) ("[A] noncompete covenant in an employment contract will be enforced when necessary to protect the goodwill of the employer's business.").

\textsuperscript{53} See Jim W. Miller Constr., Inc. v. Schaefer, 298 N.W.2d 455, 459 (Minn. 1980) (finding that the former employee could not reasonably be restrained from acting as a real estate broker, because the information the employer sought to protect was available to the public); Eutectic Welding Alloys Corp. v. West, 281 Minn. 13, 18-19, 160 N.W.2d 566, 570 (1968) (denying an employer's request for injunctive relief; reasoning that information seen by employees is not a "trade secret" merely because it is labeled "confidential").

\textsuperscript{54} See West, 281 Minn. at 19, 160 N.W.2d at 570. In West, the court refused to enforce a restriction against a former employee where the employer unreasonably extracted a commitment far broader than the employee's actual functions and status could reasonably require. Id. Although classified as a technical representative, the employee was actually an ordinary salesman. Id.

\textsuperscript{55} Cf West, 281 Minn. at 20, 160 N.W.2d at 571. Attempting to enforce a noncompete agreement against one employee, but not others may indicate that the employer's purpose was to punish the employee, and thus, was improper. See id. But see Minnesota Mining & Mfg. Co. v. Kirkevold, 87 F.R.D. 324, 336 (D. Minn. 1980) (holding that evidence that an employer did not enforce noncompete agreements against other employees was not "overly probative" of the employer's intent to relinquish its contractual rights and, thus, did not provide the employee with a waiver defense).

\textsuperscript{56} See, e.g., West, 281 Minn. at 20, 160 N.W.2d at 571.

\textsuperscript{57} Id.
suitable employment.\textsuperscript{58}

Despite the strict judicial approach to noncompete agreements, some well-crafted agreements survive scrutiny. In some employment fields, such as the legal field, noncompete agreements may be unenforceable as a matter of public policy.\textsuperscript{59}

2. Temporal Scope

The reasonableness of a noncompete agreement also depends on the agreement's duration.\textsuperscript{60} In determining whether a temporal restriction is reasonable, courts have adopted two alternative standards. A temporal restriction may be reasonable if it is for (1) "the length of time necessary to obliterate the identification between the employer and the employee in the minds of the employer's customers," or (2) "the length of time necessary for the employee's replacement to obtain licenses and learn the fundamentals of the business."\textsuperscript{61}

While a vast number of Minnesota cases have addressed what constitutes a reasonable temporal restriction,\textsuperscript{62} the factual nature of this inquiry has not yielded a bright-line rule for determining reasonableness. For instance, some cases have upheld three-year temporal restrictions, while others have rejected them.\textsuperscript{63}

\textsuperscript{58} See Menter Co. v. Brock, 147 Minn. 407, 411, 180 N.W. 553, 555 (1920) (refusing to enforce a noncompete agreement that was designed to "needlessly fetter the employee, and prevent him from seeking to better his condition").

\textsuperscript{59} See Minn. Rules of Professional Conduct Rule 5.6 (1985) (prohibiting an agreement that restricts a lawyer's right to practice after termination of the employment relationship); Kenneth S. Engel, Note, Should Minnesota Abandon the Per Se Rule Against Law Firm Noncompetition Agreements?, 23 WM. MITCHELL L. REV. 133 (1997).

\textsuperscript{60} See Bennett v. Storz Broad. Co., 270 Minn. 525, 534, 134 N.W.2d 892, 899 (1965).

\textsuperscript{61} Dean Van Horn Consulting Assocs. v. Wold (Dean Van Horn II), 395 N.W.2d 405, 408-09 (Minn. Ct. App. 1986); accord Davies & Davies Agency, Inc. v. Davies, 298 N.W.2d 127, 131-32 (Minn. 1980).

\textsuperscript{62} See, e.g., Davies, 298 N.W.2d at 131-32 (approving one year); Webb Publ'g Co. v. Foshage, 426 N.W.2d 445, 450 (Minn. Ct. App. 1988) (approving eighteen months); cf. Bennett, 270 Minn. at 535, 134 N.W.2d at 898-99 (holding that the reasonableness of an eighteen-month restriction presented a fact question precluding summary judgment).

\textsuperscript{63} Compare B & Y Metal Painting Inc. v. Ball, 279 N.W.2d 813, 815 (Minn. 1979) (finding a three-year restriction reasonable where the covenant not to compete arose out of both a sale of business and an employment contract with the purchaser, the seller's attorney drafted both the covenant not to compete and the employment contract, and the seller signed the covenant as part of the sale), with Dean Van Horn II, 395 N.W.2d at 409 (finding a three-year restriction unreasonable...
This division of authority places employers in a difficult position. On the one hand, an employer cannot impose an unreasonable temporal restriction, because a court simply may refuse to enforce the agreement in its entirety. On the other hand, an employer’s business interests may not be protected adequately by a shorter temporal restriction. An employer’s practical solution to this dilemma may be to impose a maximum restriction of two years, with an automatic extension of the agreement for a period of time equal to any breach of the agreement.

3. Geographic Scope

From an employee’s perspective, the geographic scope of an agreement may be the most important factor in finding an agreement unreasonable. The validity of a geographic limitation generally depends on the nature of the employer’s business, the area in which the employee actually worked, and whether the restrictions would cause the employee undue hardship. Courts may also consider whether the restrictions are broader than necessary to protect the employer’s good will and whether the restriction has a deleterious effect on the public interest. As with many aspects of noncompete agreements, what may be reasonable in one case may be unreasonable in another. Although much uncertainty results from the factual nature of each decision, an employer’s best course is to limit noncompete agreements to those geographic areas in which the employee actually worked for the employer.

In two circumstances, the absence of a geographic limitation may not be fatal to a noncompete agreement. First, a geographic limitation may not be necessary if the employer has a nationwide

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because the employer alerted clients to the termination of its relationship with the former employee), and Klick v. Crosstown State Bank, Inc., 372 N.W.2d 85, 88 (Minn. Ct. App. 1985) (holding a three-year restriction unreasonable where the former employee never developed any special relationships with customers).

64. See, e.g., Klick, 372 N.W.2d at 88-89.
67. See Klick, 372 N.W.2d at 88.
68. Compare Alside, 300 Minn. at 296, 220 N.W.2d at 280 (upholding a covenant within the six-county area in which the employee actively worked), with Eutectic Welding Alloys Corp. v. West, 281 Minn. 13, 19, 160 N.W.2d 566, 571 (1968) (rejecting a 50-mile radius restriction where the salesperson’s ordinary territory did not include the entire area).
or worldwide clientele and business. 69 If the employer's business
does not span the nation, however, a court may refuse to enforce
the agreement or, at least, the nationwide geographic limitation. 70

Second, a customer-based restriction may be valid in lieu of a
geographic restriction. 71 A noncompete agreement that contains
no geographic limitation may be deemed reasonable, if it bars the
solicitation of those customers with whom the former employee
actually worked or those customers with whom the former em-
ployee had contact during employment. 72 A customer-based re-
striction, however, may be rejected if it bars the employee from
working with all existing or potential customers of the former
employer. 73 For instance, in Webb Publishing Co. v. Fosshage, the
court indicated that a noncompete agreement prohibiting solici-
tation of all customers of the former employer suggests over-
breadth, and it might be more appropriate to narrow the scope of
the restriction to those customers with whom the employee had
dealt personally. 74

C. Modifying the Agreement to Make it Reasonable

Rather than rendering an entire agreement invalid, the Min-
nesota Supreme Court has held that a court may modify unrea-
sonable provisions of a noncompete agreement so as to make it

("[W]e hold that a restrictive covenant on employment lacking a territorial limi-
tation is not per se unenforceable.").

70. See Ring Computer Sys., Inc. v. Paradata Computer Networks, Inc., No. C4-
90-889, 1990 WL 132615, at *1 (Minn. Ct. App. Sept. 18, 1990) (refusing to en-
force a noncompete agreement that lacked a geographical limitation, because
Minnesota courts require a reasonable noncompete covenant to have both time
and geographical restrictions).

71. See Davies & Davies Agency, Inc. v. Davies, 298 N.W.2d 127, 132 (Minn.
1980); Webb Publ'g Co. v. Fosshage, 426 N.W.2d 445, 450 (Minn. Ct. App. 1988).

72. See, e.g., Overholt Crop Ins. Serv. Co. v. Bredeson, 437 N.W.2d 698, 703
(Minn. Ct. App. 1989) (finding a restrictive covenant reasonable where it prohib-
ited the employee from soliciting any business for two years from customers he
personally served while with the company).

73. See Fosshage, 426 N.W.2d at 450.

74. Id. While remanding the issue for consideration of the appropriate scope
of the restraint, the court noted that the restriction might be overbroad in light of
its purpose. Id. Although the employer's clients were assigned to individual ac-
count executives, the noncompete agreement restricted Fosshage from soliciting
business from any of Webb's customers. Id. at 447, 450. Because the record did
not indicate that Fosshage had access to information on other Webb customers
that would aid him in soliciting their business, the court suggested that a restric-
tion as to all customers could be deemed unreasonable. Id. at 447.
Although this judicial power is often referred to as the "blue pencil" doctrine, Minnesota courts utilize a more expansive approach. Whereas the "blue pencil" doctrine traditionally allows a court only to strike language from an agreement, Minnesota has modified the doctrine by allowing courts to strike, change, or insert language as necessary to make the agreement reasonable.

Where a court blue-pencils a noncompete agreement, the court must provide an explanation of why the revision is warranted. Courts are not required to modify an overly broad noncompete agreement, however, and may refuse to enforce the agreement entirely. Thus, an employer should not draft the broadest possible noncompete agreement with the hope or expectation that a court simply will modify and enforce it to the extent that it is reasonable.

Under this modified version of the blue pencil doctrine, a court actually may extend the restrictions contained in a noncompete agreement or prevent an employee from competing even when the agreement has lapsed. For instance, to provide meaningful relief from violations of trade secrets laws, the supreme court in *Cherne Industrial, Inc. v. Grounds & Associates, Inc.*, prohibited the employee from contacting certain key customers even though the contractual noncompetition period had elapsed.

75. See Davies, 298 N.W.2d at 131-32 (adopting the "blue pencil" doctrine in the employment context); cf. Bess v. Bothman, 257 N.W.2d 791, 794-95 (Minn. 1977) (adopting the "blue pencil" doctrine in the context of a sale of a business). In *Bess*, the court affirmed the district court's modification to a restrictive covenant that lacked necessary territorial or temporal limitations by restricting the agreement to the area in and around the town of the seller's former business. *Bess*, 257 N.W.2d at 794-95. The court chose a five-year restrictive period, because it represented a reasonable balance between the protection of the plaintiff's good will and avoidance of undue hardship to the defendant. *Id.* at 795.

76. See *Bess*, 257 N.W.2d at 794 (noting that in a majority of jurisdictions, the "blue pencil" doctrine requires that the reasonable and unreasonable restraints be severable – i.e., unreasonable restraints will be stricken from the agreement, not modified).

77. See Davies, 298 N.W.2d at 131 n.1; cf. *Bess*, 257 N.W.2d at 794-95.


80. See *Cherne Indus., Inc. v. Grounds & Assoc.*, Inc., 278 N.W.2d 81, 93 (Minn. 1979).

81. *Id.* at 94.
III. LITIGATION ISSUES

As with determining the reasonableness of noncompete agreements, litigation involving noncompete agreements is fraught with uncertainty. Prior to engaging in litigation involving a noncompete agreement, both the employer and employee must carefully consider many factors. First and foremost, both parties must balance the likely benefits of litigation against the risks and significant expenses that accumulate from the probable motions for injunctive relief, fast-track depositions, and other discovery. The parties also must consider the following litigation pitfalls.

A. Choice of Law and Forum Considerations

Because different states treat noncompete agreements in vastly different manners, the determination of which state’s law should apply is crucial. To protect the enforceability of a noncompete agreement, an employer should carefully consider the laws of any states that have a reasonable relation to the contracting parties and should include an appropriate choice of law provision in the agreement.

If such a choice of law provision is included in the agreement, Minnesota courts likely will honor a reasonable provision. Other states, however, have ignored choice of law provisions and have refused to enforce noncompete agreements where the agreements were deemed contrary to the public policy of the forum state. Those decisions may thwart any attempt to enforce a

82. When a choice of law conflict arises, a court must decide what state law it will apply among potentially applicable legal rules. James A. White, Comment, Stacking the Deck: Wisconsin’s Application of Leflar’s Choice-Influencing Considerations to Torts Choice-of-Law Cases, 1985 Wis. L. Rev. 401, 401. Choice of law conflicts occur when more than one jurisdiction has significant contacts with the parties and/or the incident involved in the case. See id.

83. See Milliken & Co. v. Eagle Packaging Co., 295 N.W.2d 377, 380 n.1 (Minn. 1980). Likewise, Minnesota courts will honor the parties’ forum selection provision, unless the provision is unreasonable. See Hauenstein & Bermeister, Inc. v. Met-Fab Indus., Inc., 320 N.W.2d 886, 889-91 (Minn. 1982).

84. See, e.g., Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 97 Cal. Rptr. 811, 814 (Cal. Ct. App. 1971) (finding parties’ choice of law agreement for application of New York law invalid where it would offend public policy under California’s Business and Professions Code § 16600, which declares “every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void”); Davis v. EbSCO Indus., Inc., 150 So. 2d 460, 464 (Fla. Dist. Ct. App. 1963) (finding a covenant not to compete in magazine subscription and recreational businesses, although valid under New York law, con-
noncompete agreement in those states. Thus, a forum selection clause is also very important.

In the absence of a choice of law provision, Minnesota courts follow the "better law" approach. Under the "better law" rule, when Minnesota has significant contacts with either party, the incident occurs in another state, and there is a conflict of law, Minnesota will apply the "better law" to further governmental interests.

Other states follow different choice of law rules. For example, the "lex loci" doctrine, the traditional tort conflict-of-law rule, dictates that the law of the state where the incident occurs governs. The "most significant contacts" test looks to the law of the jurisdiction that has the most significant contacts with the parties and the conflict. If the agreement does not contain a choice of law provision, the forum state frequently applies its own law. Thus, the failure to include a choice of law provision or a forum selection clause in a noncompete agreement may give rise to "forum-shopping" by the employer or the employee.

B. Other Claims for Employers

In addition to alleging a violation of a noncompete agreement, an employer should consider whether to assert one or more additional claims. These claims may provide employers with protection even in the absence of an enforceable noncompete agreement.

85. See Milkovich v. Saari, 295 Minn. 155, 164, 203 N.W.2d 408, 413 (1973). The policy behind the "better law" approach is that "[u]nless other considerations demand it, we should not go out of our way to enforce [the] law of another state as against the better law of our own state." See id. (quoting Clark v. Clark, 222 A.2d 205, 210 (N.H. 1966)). Further, "[t]he fact that... Minnesota has the better law reinforces our decision. The legislature of this state has shown its antipathy toward the guest statute by refusing to enact one." Id. (quoting Bolgrean v. Stich, 293 Minn. 8, 10, 196 N.W.2d 442, 444 (1972)).

86. See id. at 164, 203 N.W.2d at 418-19; Comment, Conflict of Laws: Minnesota Rejects the "Significant Contacts" Doctrine in Favor of the "Better Law" Test, 58 Minn. L. Rev. 199, 206 (1974).

87. See Comment, supra note 86, at 199.

88. See id. at 200.
1. The Law of Trade Secrets

An employer should first consider whether the employee has violated applicable trade secrets laws. If the employee has used or disclosed information that is within the statutory definition of a trade secret, the employer should allege a violation of the UTSA.

2. Tortious Interference with Contractual Relations

Employers also should consider whether the employee or any third parties may be liable for tortious interference with contractual relations. Although persons who were not parties to a contract generally cannot be sued for breach of the contract, a third party who encourages an employee to breach a noncompete agreement may be held liable under tort-based theories. The most common theory is a tortious interference claim against the employee's subsequent employer. Employers seeking to avoid

89. Employers can use noncompete agreements to protect information that would not be otherwise protected by the law of trade secrets. See Saliterman v. Finney, 361 N.W.2d 175, 177-78 (Minn. Ct. App. 1985). However, courts will not enforce noncompete agreements that attempt to protect information that is generally known or easily obtained. See, e.g., Jim W. Miller Constr., Inc. v. Schaefer, 298 N.W.2d 455, 459 (Minn. 1980).

90. See generally MINN. STAT. §§ 325C.01-.08 (1996). The UTSA defines "trade secret" as information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Id. § 325C.01, subd. 5.

91. See Surgidev Corp. v. Eye Tech., Inc., 828 F.2d 452, 455 (8th Cir. 1987) (stating that under the UTSA only reasonable efforts are required to protect the confidentiality of putative trade secrets, and the employee cannot defend an alleged violation by claiming the employer failed to undertake "all conceivable efforts" to protect it).


93. See, e.g., id. (holding the subsequent employer liable for punitive damages after encouraging employees of the former employer to breach noncompete agreements by coming to work for him in a competing business and by bringing
potential liability for tortious interference should ask new employees whether the new employment relationship will violate any existing noncompete agreements to which they are parties.

3. Nondisclosure and Confidentiality Claims

Even in the absence of a noncompete agreement, an employee may have a common-law duty of confidentiality with respect to any information the employer deems confidential and which the employer identifies to the employee as being confidential in nature. Rather than relying on this common-law duty, however, many employers require employees to enter into an agreement regarding confidential information.

Although confidential information provisions minimally restrain trade, Minnesota courts generally evaluate noncompete provisions and confidentiality provisions pursuant to the same reasonableness standard. Unlike trade secrets laws, which include a nebulous statutory definition of protected information, a confidential information provision can be very broad in its application, because the employer has more control over defining what is a "secret."

C. Additional Defenses for Employees

In mapping a litigation strategy, both the employer and the employee must consider the employee's affirmative defenses or counterclaims that could defeat the employer's claim, further complicate the litigation, or even result in an award for the employee.

In recent years, courts have become more receptive to the wrongful termination defense in actions for breach of a noncompete agreement. Termination of an employee may preclude en-
enforcement of a noncompete agreement, at least where the employer has taken "undue advantage" of its right to terminate the employee.\(^9\) For instance, where an employee is wrongfully terminated or constructively discharged, an employer may be precluded from enforcing a noncompete agreement.\(^9\) This wrongful termination defense could arise out of a myriad of claims, such as discrimination, sexual harassment, whistle-blowing, tortious conduct, or a breach of other contractual provisions.

An employee faced with pending noncompete litigation also should consider whether the employer's actions constitute tortious interference with contractual relations. For instance, if the employer's attempt to enforce the noncompete agreement is without legal support, the employer may be liable for tortious interference with the relationship between the employee and the subsequent employer.\(^10\)

D. Relief Available Upon Breach

1. Injunctive Relief

Frequently, an employer will seek injunctive relief immediately upon the commencement of noncompete litigation.\(^10\) In considering the propriety of injunctive relief, the court must consider:

1. the relationship between the parties before the dispute;
2. the harm the plaintiff will suffer if relief is denied


\(^{99}\) See, e.g., Edin, 343 N.W.2d at 694 (refusing to enforce a covenant where a discharged sales representative was wrongfully terminated by a manufacturing company).

\(^{100}\) See Bennett v. Storz Broad. Co., 270 Minn. 525, 527, 134 N.W.2d 892, 895 (1965) (analyzing an action by a radio announcer against the former employer for tortious interference after the latter threatened a potential employer with legal action if it hired the announcer).

\(^{101}\) See, e.g., Edin, 343 N.W.2d at 693.
compared with the harm inflicted on the defendant if the injunction is issued;

(3) the likelihood that one party or the other will prevail on the merits;

(4) the public interest involved, if any; and

(5) the administrative burden involved in enforcing the relief requested.\(^{102}\)

The second factor – i.e., balancing the hardships – is the most important.\(^ {103}\)

In addition, the party seeking injunctive relief must establish that its other legal remedies, such as monetary damages, are not adequate and that the injunction is necessary to prevent irreparable injury.\(^ {104}\) Although irreparable injury may be inferred from the breach of an otherwise valid noncompete agreement, this inference may be rebutted by evidence that the employee "has no hold on the good will of the business or its clientele."\(^ {105}\) Irreparable injury likely will not exist unless the employee's breach of the noncompete agreement is continuous.\(^ {106}\)

Because there is ample precedent, courts may be more willing to impose injunctive relief in noncompete cases than in other cases.\(^ {107}\) This is particularly true in cases where the defendant employee also is using confidential information or trade secrets.\(^ {108}\) Seeking injunctive relief, however, is not without risk. For in-


\(^{103}\) See Edin, 343 N.W.2d at 694.

\(^{104}\) See Cherne Indus., Inc. v. Grounds & Assoc., Inc., 278 N.W.2d 81, 92 (Minn. 1979).

\(^{105}\) Webb Pub'l'g Co. v. Fosshage, 426 N.W.2d 445, 448 (Minn. Ct. App. 1988); see also Eutectic Welding Alloys Corp. v. West, 281 Minn. 13, 16 n.4, 160 N.W.2d 566, 569 n.4 (1968).


\(^{108}\) Compare Cherne, 278 N.W.2d at 93 (extending protection of certain key accounts two years beyond the original period of the restriction where the defendant used confidential information and trade secrets), with Minnesota Best Maid Cookie Co. v. Flour Pot Cookie Co., 412 N.W.2d 380, 385-86 (Minn. Ct. App. 1987) (refusing to grant injunctive relief where the alleged violation did not involve the use or disclosure of confidential information).
stance, in *Hubbard Broadcasting, Inc. v. Loescher*, the employer obtained a temporary restraining order after posting an injunction bond. After the employee prevailed at trial, the supreme court allowed the employee to recover damages against the bond.

2. Monetary Damages

The award of injunctive relief does not preclude an award of damages. However, "[d]amages do not flow from the breach of a covenant not to compete as a matter of course. They must be proved." An employer may prove its damages by at least two methods. First, the employer may show lost profits were directly caused by a breach of the noncompete agreement and that the amount of the loss can be calculated with reasonable certainty. Second, where an employee wrongfully profits from the breach of an agreement, the measure of damages may be the employee's actual gain. The value of the employee's gain may be determined by the employee's actual profits or by the value of the advantage gained by the employee in violating the agreement.

Because an employer's actual damages are often difficult to prove, employers should consider including a liquidated damages provision in their noncompete agreements. A liquidated dam-

109. 291 N.W.2d 216, 218 (Minn. 1980).
110. Id. The court also held that the employee had no duty to mitigate his damages by obtaining local employment where doing so would violate the injunction. Id. at 221. Likewise, the employee was not required to seek or accept employment outside his line of business or at a great distance. Id. Moreover, the court held it would be degrading and offensive, as a matter of law, to require an employee to accept reinstatement with the former employer. Id. at 222.
111. See *Cherne*, 278 N.W.2d at 94.
112. *B & Y Metal Painting, Inc. v. Ball*, 279 N.W.2d 813, 816 (Minn. 1979).
113. See id.
114. See *Cherne*, 278 N.W.2d at 94-95 (allowing the measure of damages to be 10% of the employee's revenue, which constituted the profits wrongfully gained from his misappropriation of confidential information from his former employer); *Peterson v. Johnson Nut Co.*, 209 Minn. 470, 475, 297 N.W. 178, 181 (1941) (awarding the employer damages at least equal to the profits the ex-employee made from invading territory protected by a noncompete agreement).
115. See *Cherne*, 278 N.W.2d at 94-95; *Peterson*, 209 Minn. at 475, 297 N.W. at 181.
116. No reported Minnesota cases have determined whether a liquidated damages clause in a noncompete agreement precludes the availability of injunctive relief. The general rule, however, is that a liquidated damages provision will not preclude equitable relief, absent express language in the contract stating that the liquidated damages were to be the sole remedy in the event of a breach. See,
ages clause generally will be upheld and can be used when damages include items that are difficult to value, such as good will or lost profits. Indeed, if the actual damages are speculative and difficult to prove, courts may be willing to uphold a liquidated damages award that is "much larger than the apparent actual injury and loss." The reasonableness of a liquidated damages provision depends on the facts of each case.

Although punitive damages usually are not recoverable in a breach of contract action, they may be recovered where the breach resulted from an independent or willful tort and the defendant acted with malice. In *Cherne Industries, Inc. v. Grounds & Associates, Inc.*, the court upheld an award of $10,000 in punitive damages pursuant to a tortious interference claim. The court found the defendant acted with malice, because the defendant knew that the noncompete agreements existed, encouraged two of the plaintiff's employees to breach the agreements by coming to work for the defendant, and then used trade secrets the employees took from their former employer.

Finally, attorney fees may not be recovered in an action to enforce a noncompete agreement absent specific contractual or statutory authority. If a noncompete agreement provides for the recovery of attorney fees, however, a court may be willing to

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*e.g.*, Brian McDonagh S.C. v. Moss, 565 N.E.2d 159, 160-61 (Ill. App. Ct. 1990); *see also* 1 CHARLES L. KNAPP, COMMERCIAL DAMAGES: A GUIDE TO REMEDIES IN BUSINESS LITIGATION, § 9A.02[2] (1995) ("A valid liquidated damages clause generally does not foreclose a plaintiff from suing for specific performance, assuming the prerequisites for equitable relief are present.").


119. *Id.*

120. *Compare* Roth v. Gamble-Skogmo, Inc., 532 F. Supp. 1029, 1032 (D. Minn. 1982) (upholding a contract under which the employer could terminate deferred compensation of $90,000 per year if the employee engaged in direct competition with employer), *with* Bellboy Seafood Corp. v. Nathanson, 410 N.W.2d 349, 352-53 (Minn. Ct. App. 1987) (finding unenforceable a penalty clause that required an employee to pay back his share of profits for the last fiscal year if he went into competition with the employer).

121. *See* Cherne Indus., Inc. v. Grounds & Assocs., Inc., 278 N.W.2d 81, 95 (Minn. 1979) (defining malice as "the intentional doing of a harmful act without legal justification").

122. *Id.* at 95-96.

123. *Id.* at 96.

124. *See* id.
award fees to the prevailing party. In the absence of a contractual provision, attorney fees can be recovered where the unsuccessful party disputes in bad faith the existence or meaning of the agreement. Minnesota's trade secrets laws also provide for the recovery of attorney fees under certain circumstances.

IV. DRAFTING A NONCOMPETE AGREEMENT

Careful drafting of a noncompete agreement is essential. A well-drafted noncompete agreement may dissuade employees from breaching the agreement, and it may simplify subsequent litigation by eliminating or weakening potential defenses to enforcement of the agreement.

Employers should draft noncompete agreements to avoid any possible ambiguities. Roberts v. Baumgartner provides an example of an ambiguity that defeated enforcement of a noncompete agreement. In Roberts, the court distinguished between "termination" and "expiration" of the agreement. Although the court acknowledged the similar dictionary meanings of the terms, the court held that a noncompete agreement applicable only upon "termination" was not enforceable following "expiration" of the agreement.

In determining the validity of a noncompete agreement, courts may consider which party drafted the agreement and may

125. See, e.g., Ecolab, Inc. v. Ford, No. C4-94-2179, 1995 WL 238837, at *1 (Minn. Ct. App. Apr. 25, 1995) (awarding the employer attorney fees pursuant to a clause in the noncompete agreement providing for the award of such fees to the employer if it prevailed in an enforcement proceeding).

126. See Cherne, 278 N.W.2d at 96-97; see also MINN. STAT. § 549.21 (1996) (allowing reimbursement for certain costs in civil actions).

127. See MINN. STAT. § 325C.04 (1996) (providing that reasonable attorney fees may be awarded to the prevailing party if (i) a misappropriation claim is made in bad faith, (ii) a motion to terminate an injunction is made or resisted in bad faith, or (iii) willful and malicious misappropriation occurred).

128. 391 N.W.2d 545, 547-48 (Minn. Ct. App. 1986). In Roberts, the covenant prohibited the subcontractor from providing physical or occupational therapy services to the principal contractor's employer upon "any such termination" of the subcontracts. Id.

129. See id. at 547-48.

130. Id. The court found that the subcontracts did not use the term "expiration" to distinguish natural termination from termination by action of the parties; nor did the subcontracts use the word "termination" to refer to expiration of the subcontracts. Id. at 548. The word "termination" was used only in relation to the conclusion of the agreement by the action of the parties. See id.
construe the agreement against the drafting party.\textsuperscript{131} To avoid such an interpretation, an employer should consider including a provision expressly stating that the agreement shall not be construed against the drafter.

To deter subsequent breaches of the agreement, the drafter should include a provision requiring the employee to notify the employer of any successive employment within the duration of the noncompete agreement. Absent such notice, an employer may not know whether a breach has occurred.

To enhance the likelihood of enforcement, the agreement should contain a recital that the employee has received consideration to support the agreement.\textsuperscript{132} The agreement also should include an acknowledgment by the employee that the restrictions contained in the agreement are reasonable and necessary to protect the employer's interests. Further, the drafter must carefully define the scope of the agreement's restrictions, including a description of the conduct prohibited, a reasonable temporal restriction, and a reasonable geographic restriction.\textsuperscript{133}

The employer should consider whether to include a prohibition against solicitation of the company's employees and a provision requiring the prompt return of company property upon termination of the employment relationship. In addition, a continuing salary provision may convince a court that the agreement is reasonable.\textsuperscript{134}

The agreement also should be drafted so as to eliminate potential litigation problems.\textsuperscript{135} First, the agreement should include a severability clause, which may persuade a court not to reject the agreement in its entirety if isolated clauses are deemed unreasonable.\textsuperscript{136} Second, the agreement should contain a choice of law

\textsuperscript{131} See, e.g., B & Y Metal Painting Inc. v. Ball, 279 N.W.2d 813, 815 (Minn. 1979) (opening of the seller's new competing business directly violated the contract, where the seller's attorney drafted the three-year covenant not to compete, the covenant was reasonable, and the seller signed the covenant as part of the sale of the business).

\textsuperscript{132} See Fitzgerald v. English, 73 Minn. 266, 269, 76 N.W. 27, 29 (1898) (explaining that a contractual recital of the adequacy of consideration constitutes rebuttable evidence of consideration).

\textsuperscript{133} See Emerson, supra note 1, at 1053-63; supra Part II.B.

\textsuperscript{134} See supra text accompanying note 27 (describing a continuing salary provision).

\textsuperscript{135} See generally supra Part III (discussing litigation issues arising from noncompete agreements).

\textsuperscript{136} See supra note 77 and accompanying text.
provision and a forum selection clause.\textsuperscript{137} Third, the agreement should state that it binds and benefits successors and assigns, remains enforceable after termination of the employment relationship, and remains enforceable regardless of whether the termination of employment is voluntary or involuntary. Fourth, the agreement should provide that the employer's failure to enforce the agreement immediately or its failure to enforce similar agreements against other employees does not constitute a waiver or estoppel of the employer's rights.\textsuperscript{138}

A well-drafted agreement will enable an employer to recover its damages to the fullest extent of the law. The agreement can include either a liquidated damages provision or a provision stating that the employer may recover damages in an amount equal to the greater of the employer's economic losses or the employee's economic gains. The agreement should also entitle the employer to recover all attorney fees, costs, and expenses in a successful action to enforce the agreement. A provision acknowledging that the employer will suffer irreparable harm from competition, or upon use or disclosure of confidential information or trade secrets, may make it easier for the employer to obtain injunctive relief. Finally, the agreement should include a provision automatically extending the agreement for a period of time equal to any breach.

V. CONCLUSION

A noncompete agreement must be supported by consideration and be reasonably necessary to protect the employer's legitimate business interests, while not unduly restricting an employee's right to earn a living. Given the increased use of these agreements, litigation related to them has increased. Such litigation often is fraught with difficulties and frequently is expensive. Careful drafting of noncompete agreements can reduce the likelihood of litigation difficulties but cannot eliminate all potential problems. Thus, employers and employees should enter into noncompete agreements and pursue their enforcement only after careful consideration of the facts and legal issues.

\textsuperscript{137} See supra Part III.A.
\textsuperscript{138} See supra note 55 and accompanying text.