Flight Restrictions: Noncompetes and Other Restrictions on Employee Movement

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BAKER DONELSON
BEARMAN, CALDWELL & BERKOWITZ, PC

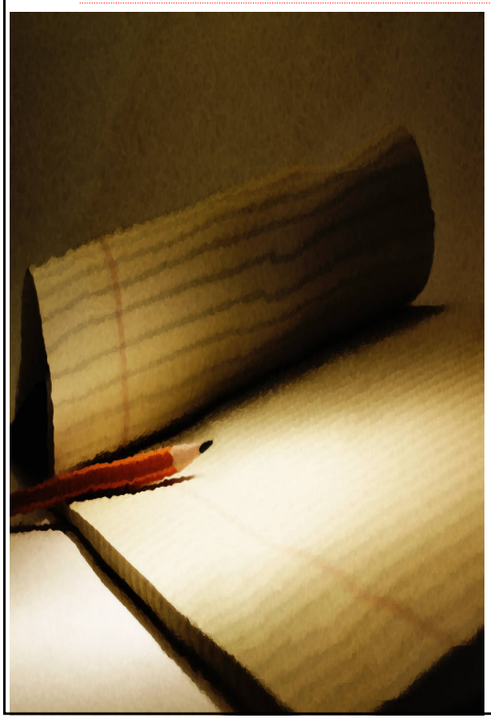
EXPAND YOUR EXPECTATIONS™

Are Noncompetes Enforceable?

- As Nancy Pelosi would say --
  - Seriously?

- Ask yourself the same question

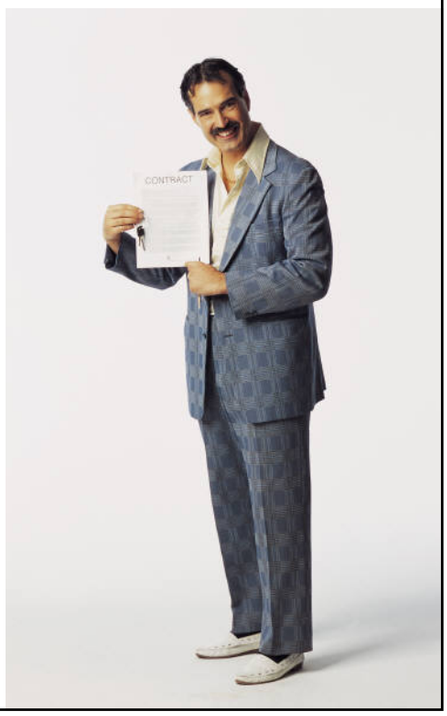
Recommendations



- Execute at inception of employment
- Reasonable time period
- Prohibit solicitation of customers instead of competition in a geographic area
- Prohibit solicitation of employees
- Include a severability clause

Elements of an Enforceable Noncompetition Agreement

- Consideration
- Protectable interest
- Reasonableness – duration
- Reasonableness – geographic scope
- Not against public interest



Protectable Interest Is The Key

- Confidential information or trade secrets
- Customers identify employer by the employee, i.e. face of the employer
- Specialized training

Confidential and Proprietary Information?

- Client lists or identities?
- Not necessarily!
- Can someone determine clients through other means or identify potential clients?

Truly Confidential And Proprietary

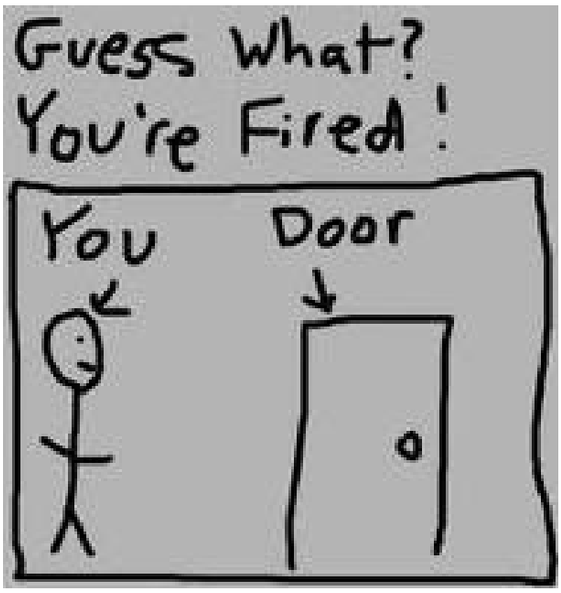
- Having and using information would give employee an **unfair** competitive advantage

Inenvitable Disclosure

- The employee will “inevitably disclose” confidential and proprietary information.

You’re Fired!

- Judges are very reluctant to effectively fire some one.



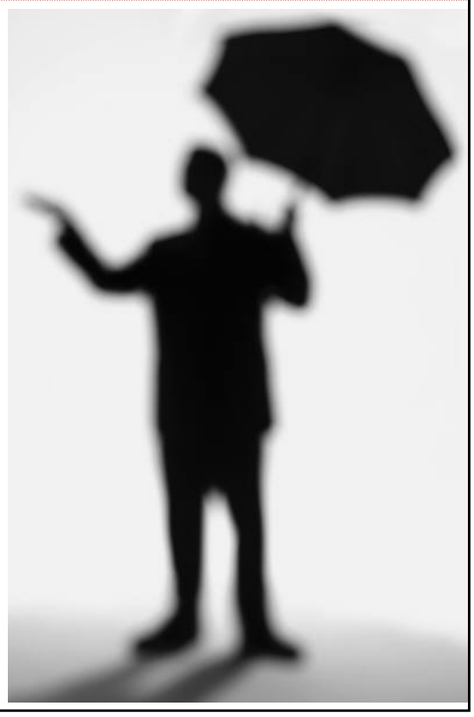
Blue Penciling

UDOM and Physician Noncompetes

Multi-state Agreements

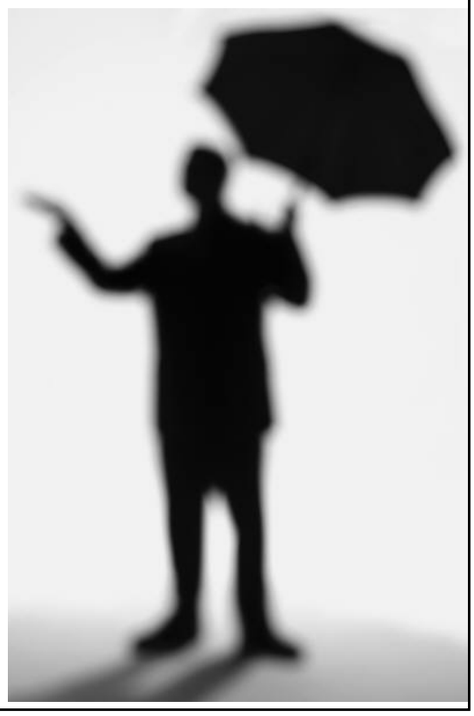
Other Ways To Protect Against Employee Competition

- Stay bonus
- Confidentiality agreement



Other Legal Protections

- Trade Secret Law
- Law on the Duty of Loyalty



Dealing With New Hires

- Avoid unlawful interference with contracts
- Avoid being implicated in misappropriation of trade secrets or confidential information

QUESTIONS?

FLIGHT RESTRICTIONS: NONCOMPETES AND OTHER RESTRICTIONS ON EMPLOYEE MOVEMENT

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INTRODUCTION

In today's competitive marketplace, employees are highly mobile. Employers devote considerable resources to training them, and in many cases, they are given access to specialized knowledge or confidential information. The possibility that such employees may leave to work for a competitor is a great concern. So what can employers do? Noncompetition clauses/agreements, typically called "noncompetes" may provide a solution.

What is a noncompete? Simply put, it is a clause or agreement that restricts the employee's ability to leave a company and compete with it, either individually or with another business. A noncompete is easy to define. However, difficulties arise when a company tries to draft an enforceable contract. Courts do not like to stop individuals from working, so they look for certain things before enforcing a noncompetition agreement.

LEGAL OVERVIEW

Restraints on trade, such as noncompetes, are disfavored. However, Tennessee courts will uphold noncompetes in certain situations. First, the agreement must be supported by consideration. Second, the employer must have an interest that can only be protected through enforcement of the noncompete. If the employer has a protectable interest, the danger of non-enforcement to the employer must outweigh the hardship to the employee (if the noncompete is

enforced). Finally, the agreement cannot harm the public interest. If these criteria are satisfied, a Tennessee court may uphold and enforce a noncompete. But these standards are more challenging than most employers think.

HISTORICAL BACKGROUND

In 1966, the Tennessee Supreme Court addressed these issues in *Allright Auto Parks, Inc. v. Berry*, 409 S.W.2d 361. Numerous decisions have since cited and upheld the *Allright Auto Parks* decision. *See Hasty v. Rent-A-Driver, Inc.*, 671 S.W.2d 471 (Tenn. 1984); *Central Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28 (Tenn. 1984); *Vantage Tech., LLC v. Cross*, 17 S.W.3d 637 (Tenn. Ct. App. 1999). Since *Allright Auto Parks*, courts have only minimally changed the law on noncompetes.

DISCUSSION

Noncompetes are enforceable if they are reasonable under the circumstances. *Allright Auto Parks*, 409 S.W.2d at 363. The method for determining the enforceability of these agreements is flexible, and "each case must stand or fall on its own facts." *Id.* The factors to be examined are the following: (1) the consideration supporting the noncompete, (2) the threatened danger to the employer if the agreement is not enforced, (3) the economic hardship that the noncompete would impose on the employee, and (4) whether enforcement of the contract would be against the public interest. *Id.*

I. Consideration

The first factor used to determine whether a noncompete is enforceable is whether it is supported by consideration. *Allright Auto Parks*, 409 S.W.2d at 363. What is "consideration?" In simple terms, its what is exchanged to make the contract two sided. In the case of a noncompete, what did the employee get? From a review of case law, it appears that the most common type of "consideration" relied upon by an employer trying to enforce a noncompete is

the employment itself. There may be times when an employer gives an employee money or something else of value; however, employment itself is the most common type of consideration. The analysis below concentrates on it.

Tennessee courts have long held that "employment, even for an indefinite period of time, subject to termination at the option of the employer is sufficient consideration" to support a noncompete. *Ramsey v. Mutual Supply Co.*, 427 S.W.2d 849, 852 (Tenn. Ct. App. 1968) (citing *Di-Deeland, Inc. v. Colvin*, 347 S.W.2d 483, 485-86 (Tenn. 1961)). Most Tennessee courts do not provide examples of consideration other than "continued employment" when examining employment contracts. However, they have held that a noncompete "signed prior to, contemporaneously with or shortly after employment begins is part of the original agreement, and . . . is supported by consideration." *Central Adjustment Bureau*, 678 S.W.2d 28, 33 (Tenn. 1984). Whether "continued employment" satisfies the consideration requirement depends on the facts of the case. *Id.* For example, the *Central Adjustment Bureau* court stated, "It is possible . . . that employment for only a short period of time would be insufficient consideration." *Id.* at 35 (citing *Frierson v. Sheppard Bldg. Supply Co.*, 154 So.2d 151, 154 (1963) (stating that "[i]f appellant had been discharged shortly after signing the agreement, this Court would probably hold the agreement was not supported by consideration")).

In *Central Adjustment Bureau*, the court examined an agreement between a debt collection corporation and its employees. The employees argued that because they were not presented with the noncompete until the first day of employment or shortly thereafter, it was "not the subject of free bargaining" and therefore was not supported by consideration. 678 S.W.2d at 30, 33. The court stated that the employees' argument, if successful, would not allow employers and employees who were already working to enter into agreements with one another. *Id.* The

court held that the employees' argument was invalid and that the noncompete at issue was supported by consideration. *Id.* As a result of the holding in *Central Adjustment Bureau*, it appears that Tennessee courts will find that employment is sufficient consideration for an agreement where the noncompete is part of the original employment contract. *Id.*

II. Danger to the Employer

The second factor considered in determining whether a noncompete is enforceable is the danger to the employer if the contract is not enforced. *Allright Auto Parks*, 409 S.W.2d at 363. The first question a court will likely ask is whether the employer has a "legitimate business interest" that can be protected by a noncompete. *Vantage Tech.*, 17 S.W.3d at 644; *see also Cam Int'l L.P. v. Turner*, 1992 WL 74567, at *3 (Tenn. Ct. App. April 15, 1992). If the employer has a protectable interest, the court will then examine whether the agreement is more restrictive (in time and territory limitations) than is necessary to protect that interest. *Cam Int'l*, 1992 WL 74567, at *3.

A. Employer's Protectable Interests

For an employer to be entitled to the protection of a noncompete (*i.e.*, have a protectable interest), it must show facts over and above ordinary competition. *Vantage Tech.*, 17 S.W.3d at 644 (quoting *Hasty*, 671 S.W.2d at 473). The facts must be "such that, without the [contract], the employee would gain an unfair advantage in future competition with the employer. *Id.* Courts have generally recognized the following three categories of protectable interests: (1) where the employer provided the employee with specialized training, (2) where the employer gave the employee access to trade secrets or other confidential business information, and (3) where the employer's business was of the type that customers tend to associate the business with its employees. *Id.; see also Cam Int'l*, 1992 WL 74567, at *3.

1. Specialized Training

An employer has a protectable interest where the employer provides the employee with specialized training. *Hasty*, 671 S.W.2d at 473; *see also Vantage Tech.*, 17 S.W.3d at 645. In *Hasty*, the court stated that general skill and knowledge acquired through training is not a protectable interest. *Hasty*, 671 S.W.2d at 473. Furthermore, this rule applies to both knowledge brought into the employment relationship and knowledge acquired during the employment relationship. *Vantage Tech.*, 17 S.W.3d at 645. However, training "in conjunction with other factors," such as the training being specialized, is a protectable interest. *Hasty*, 671 S.W.2d at 473.

In *Hasty*, the employer hired an employee who was already highly qualified. 671 S.W.2d at 474. Therefore, the employer did not expend resources in making the employee qualified. *Id.* Instead, the employee "merely received from [the employer] the opportunity to practice his trade." *Id.* On the other hand, in *Vantage Tech.*, the employee spent the first 241.5 hours on the job observing surgeries in preparation for the position. 17 S.W.3d at 646. Additionally, the employee attended monthly meetings after the initial training period. *Id.* Therefore, the *Vantage Tech.* court found that the employer had a protectable interest. *Id.* at 647.

In *Selox, Inc. v. Ford*, the court stressed the importance of distinguishing between general skills or knowledge of a trade and information that is "peculiar to [an] employer's business." 675 S.W.2d 474, 476 (Tenn. 1984). In *Selox*, the employee's duties involved selling industrial gases and welding supplies for Selox. *Id.* at 475. The employee was initially trained by being sent on a sales route with another salesperson and being required to attend weekly sales meetings. The court found that the employee had not received "additional or specialized training and that the particular work done by [the employee] could have been performed by any other

employee of average competence." *Id.* The employer failed to show that it was entitled to enforcement of the noncompete. *Id.*

Some courts focus on the amount of money expended by the employer to prepare the employee for the job when deciding whether the employer has a protectable interest. *See generally Koehler*, 380 F. Supp. at 1306; *William B. Tanner v. Taylor*, 530 S.W.2d 517, 522 (Tenn. Ct. App. 1974). In *William B. Tanner*, the Court noted, "[The employee] was hired and trained to become sales manager at considerable expense to his employer." 530 S.W.2d at 522. Additionally, in *Koehler*, the court pointed out that the company had invested approximately $30,000 in developing the ideas of the employee. 380 F. Supp. at 1306. The Court stated, "The danger to the employer has already been seen. [The company] has one valuable asset, the ideas of the [employee]. . . . The threatened danger to the employer . . . lay in experiencing competition from its own former idea man." *Id.* at 1306-07. In both cases, the Courts found that the employer had invested a sufficient amount of resources to establish a protectable interest. *Koehler*, 380 F. Supp. at 1307; *William B. Tanner*, 530 S.W.2d at 522-23.

2. Trade Secrets and Confidential Business Information

An employer may also have a protectable interest where an employer provides an employee with access to trade secrets or other confidential business information. *Vantage Tech.*, 17 S.W.3d at 645. The terms "trade secret" and "confidential information" are used synonymously in Tennessee. *Hickory Specialties, Inc. v. Forest Flavors Int'l, Inc.*, 26 F. Supp. 2d 1029 (M.D. Tenn. 1998) (citing *Heyer-Jordan & Assoc., Inc. v. Jordan*, 801 S.W.2d 814, 821 (Tenn. Ct. App. 1990)). In *Vantage Tech.*, the employer was a "mobile service provider" of medical equipment to hospitals. 17 S.W.3d at 641. The company also provided technicians who would assist the physicians during surgery. *Id.* The Court held that the

employer had a protectable interest because the employees were "made privy to surgeon preferences . . . and had a degree of knowledge of [the Company's] other customers and the prices [the Company] charged for its services. *Id.* at 646. Similarly, in *William B. Tanner Co.*, the Court determined that the employer had a protectable interest because the employee, a sales manager of a company that provided services to radio stations across North America, had access to every radio station with which the company conducted business. 530 S.W.2d at 522. Additionally, the employee knew of the company's prices and the nature of its contracts. *Id.* Therefore, the Court determined that the employee had received confidential information sufficient to create a protectable interest. *Id.* at 522-53.

In *Thompson, Breeding, Dunn, Creswell & Sparks v. Bowlin*, 765 S.W.2d 743 (Tenn. Ct. App. 1987), the court held that client lists containing the names of "present customers" are a protectable interest of the employer. *Id.* at 745. This holding seemed to suggest that "present customer" lists qualify as confidential business information. However, this holding has been slightly limited by decisions that have followed. For example, where the identity of potential customers can be determined by a mere examination of the Yellow Pages or a study of the industry, the customer names do not qualify as confidential business information. *Amarr Company, Inc. v. Depew*, 1996 WL 600330, at *4 (Tenn. Ct. App. Oct. 16, 1996). In *Amarr Company, Inc.*, the employer was a wholesale manufacturer and seller of garage doors. *Id.* at *1. The Court determined that the employer's customers could be determined from a general study of the industry and by looking at the Yellow Pages. *Id.* at *4. The Court also stated that price lists were available to any customer and therefore were not confidential information. *Id.*

The Court in *Selox, Inc.* came to a similar conclusion when it held that a seller of industrial gases and welding products did not have a protectable interest. 675 S.W.2d at 475.

The Court stated that the identity of people in the market for welding supplies can be determined by looking at the Yellow Pages. *Id.* However, in *Baker v. Hooper*, the court came to the opposite conclusion where the employer owned and operated a nail salon. *Baker v. Hooper*, 1998 WL 608285, at *5 (Tenn. Ct. App. Aug. 6, 1998). The court explained that customers in the nail industry seek out nail services and cannot be ascertained by looking in the phone book or studying the industry. *Id.*, at *5. Simply put, customer information that is "readily ascertainable from public sources is not entitled to protection." *Cam Int'l*, 1992 WL 74567, at *4.

3. Special Customer Relationships

An employer also may have a protectable interest where customers tend to associate the employer's business with the employees. *Hasty*, 671 S.W.2d at 473. Another way to view it is that, an employer has an interest in the relationships between its employees and customers. *Vantage Tech.*, 17 S.W.3d at 645. In *Hasty*, the court determined that while the employee "had personal contact with [the customer] . . . he had no influence on [the customer's] decision regarding its use of the services of [the employer]." 671 S.W.2d at 473. Therefore, the employer did not have a protectable interest. *Id.*

The court reached a similar result in *Kaset v. Combs*, 434 S.W.2d 838 (Tenn. Ct. App. 1968). The court stated that the personality of a catering truck driver had little effect on customers and that the "quality of the product . . . controls." *Id.* Therefore, the employer did not have a protectable interest. *Id.*

In *Vantage Tech.*, the Court determined that the employer had a protectable interest because of the company's special customer relationships. 17 S.W.3d at 646. The employer in *Vantage Tech.*, provided medical equipment services to hospitals and provided technicians to assist physicians during surgery. *Id.* at 641. The relationships that grew between the employees

and the physicians were initiated by the company and built the good will of the company. *Id.* at 646. The relationships involved direct mailings, face-to-face demonstrations wherein the employees sold the products, and the use of entertainment expense accounts on which the employees purchased meals and gifts for the physicians. *Id.* at 641. The Court determined that the employer had an interest in its customers sufficient to invoke the protection of a noncompete. *Id.* at 646. In a similar case, the Court examined an agreement between an insurance company and its former employee, an insurance salesman. *Powell v. McDonnell Ins. Co.*, 1997 WL 589232, at *5 (Tenn. Ct. App. Sept. 24, 1997). The record indicated that the company had encouraged its employees to build relationships with their customers. *Id.* Additionally, the company invested many resources in fostering these relationships. *Id.* As in *Vantage Tech.*, the Court determined that the company had established a protectable interest. *Id.* at *6.

In some instances, an employer might have a protectable interest where an employee is able to use contacts obtained while working for the employer to benefit one of the employer's competitors. *Dabora, Inc. v. Kline*, 884 S.W.2d 475, 478 (Tenn. Ct. App. 1994). In *Dabora*, the court examined a noncompete between a highly specialized equestrian periodical and one of its former employees. *Id.* at 478. The court stated, "By virtue of [the employee's] association with [the employer], [the employee] was able to quickly develop close personal relationships with many of the major players in the . . . industry." *Id.* The court further explained that the employee's use of these contacts for the benefit of the employer's competition would rise to the level of unfair competition. *Id.* The court made no mention of whether the "contacts" could be ascertained through public information but instead focused on the unfair advantage the employer

would have if the employee used the information to benefit one of the employer's competitors. *Id.*

B. Time and Territory Limits

The time and territorial limits of a noncompete can be no more restrictive than is necessary to protect the employer's interests. *Allright Auto Parks*, 409 S.W.2d at 363. An agreement is unreasonable and unenforceable where it embraces "territory in which the employee never performed services for his employer" unless the contract is intended to protect a trade secret. *Id.* In *Allright Auto Parks*, the employee's noncompete prohibited her from providing services in forty-six cities, but she had only worked in six. 409 S.W.2d at 364. The court stated that the agreement was too restrictive. *Id.* In another decision, the court upheld a noncompete where it prohibited the employee from working in any of his former territories which included several cities in Tennessee, Kentucky, Virginia, West Virginia, and North Carolina. *Standard Forms Co. v. Nave*, 422 F. Supp. 619, 623-24 (E.D. Tenn. 1976). In contrast, the court struck down a contract where it prohibited the employee from "being associated with any like business anywhere the [employer] ha[d] customers, undisputed to be in some thirty-six states" regardless of whether the employee had worked with the customers. *Delta Corp. of Amer. v. Sebrite Corp.*, 391 F. Supp. 638, 640 (E.D. Tenn. 1974).

In *Koehler v. Cummings*, the court cited the general rule from *Allright Auto Parks* that noncompetes cannot exclude employees from territory in which they had never worked. 380 F. Supp. 1294, 1308 (M.D. Tenn. 1971). However, the *Koehler* court reached a different result. *Id.* at 1309. In *Koehler*, the employer hired the employee to invent and exhibit specialized and novel safety equipment in a number of cities across the country. *Id.* at 1309. The court concluded that the thirty-state territory limitation was reasonable because the field was highly

specialized. *Id.* The Court reasoned that the restriction was necessary to protect the investment that the company had made in the product. *Id.* In a similar case, the court found a noncompete that covered the entire country was reasonable because the employer's industry (the equestrian newspaper industry) was limited to only six or seven publications. 884 S.W.2d at 478. Furthermore, the noncompete at issue only prohibited the employee from working for certain publications. *Id.* at 478. The Court noted that the agreement was only as restrictive as necessary to protect the employer's interest. *Id.*

In yet another Tennessee decision, the court held that a noncompete prohibiting an employee from working in a territory in which the employee had no contact at the time of the contract is reasonable if it "could be reasonably anticipated that such territory might be within [the employee's] coverage at some period during employment." *Ramsey*, 427 S.W.2d at 853. In *Ramsey*, the employee was one of two salespeople working for the company. *Id.* at 850. Both employees had a designated area in which they sold. *Id.* at 172-73. The Court determined that, at the time the contract was made, it could be reasonably anticipated that one salesperson would have to work in the other salesperson's territory. *Id.* Therefore, the territory limitation was reasonable although it reached outside the area in which the employee had worked and into another employee's territory. *Id.* at 173. In another decision, the Court seemed to look favorably upon a noncompete that did not have any territorial limitations. *See Thompson, Breeding*, 765 S.W.2d at 745-46. The court noted that the employee was only prohibited from soliciting the business of certain clients, which left him more "freedom to practice his profession in the same area as the [Company]." *Id.*

Few decisions have addressed the issue of time restrictions in detail. However, courts have held that time limits as high as five years after termination are reasonable. *Koehler*, 380 F.

Supp. at 1308. As with territorial limitations, the important issue is whether the restrictions are greater than necessary to protect the employer's interests. *Allright Auto Parks*, 409 S.W.2d at 286-87. In *Central Adjustment Bureau*, the court examined the nature of the employer's industry, debt collection, to determine whether a two-year limitation was unreasonably broad. 678 S.W.2d at 36. The court held that the limitation was too broad when it stated, "[W]hen clients of a collection agency change agencies in order to maintain a relationship with a former employee, they do so immediately." *Id.* On the other hand, in *Harvey v. Appalachian Claims Services, Inc.*, the Court held that a three-year time limitation was not too restrictive because the company was trying to establish itself. 1995 WL 140746, at *3 (Tenn. Ct. App. Mar. 31, 1995).

So what happens if the court finds that the time and territorial limits of a noncompete are unreasonable? The court can strike the entire agreement as unreasonable. *Central Adjustment Bureau*, 678 S.W.2d at 36. However, the more recent trend is for courts to judicially modify the noncompete by enforcing it "only to the extent . . . reasonably necessary to protect the employer's interest 'without imposing undue hardship on the employee.'" *Id.* (citation omitted). This rule of law was affirmed in *Cam Int'l*, 1992 WL 74567, at *3, when the court stated, "[c]ourts are no longer required to invalidate a noncompetition agreement if they find that it is too broad. If the employer has a protectable interest and has not been acting in bad faith . . . the courts should enforce [the agreement] after modifying it." *Id.* In *Vantage Tech.*, the court put this method to use when it restricted the geographical scope of a noncompete from the 50 miles surrounding the hospitals in which the employee had never performed services to the 50 miles from the hospital at which the employee had served patients. *Id.*

Generally noncompetes are strictly construed in favor of the employee. *Allright Auto Parks*, 409 S.W.2d at 365; *see also Hasty*, 671 S.W.2d at 472. Furthermore, the drafter of the

agreement (usually the employer) must take responsibility for ambiguous terms. *B & L Corp. v. Thomas & Thorngren, Inc.*, 917 S.W.2d 674 (Tenn. Ct. App. 1995). The *Vantage Tech.* court accounted for these propositions when it modified a noncompete to state that the 50-mile restriction represented the employee's driving distance. *Id.* at 648.

III. Hardship on the Employee

The third factor used to determine whether noncompetes are enforceable is the economic hardship on the employee if the contract is enforced. *Allright Auto Parks*, 409 S.W.2d at 363. Courts have held that where the hardship to the employee outweighs the benefits of the noncompete to the employer, the contract should not be enforced. *Selox*, 675 S.W.2d at 475. Tennessee courts have not stated specifically how hardship on the employee should be determined. Instead, they seem to decide this issue in conjunction with evaluating the danger to the employer. *See generally Id.; Dabora, Inc.*, 884 S.W.2d at 479. In addition, when determining reasonableness, courts look to the circumstances under which the employee leaves the workplace. *Central Adjustment Bureau*, 678 S.W.2d at 35. Where a termination is "arbitrary, capricious, or in bad faith[,]" a court is less likely to enforce the noncompete. *Id.*

In *Dabora, Inc.*, the court recognized that enforcement of the contract would cause hardship on the employee. The employee was earning far less money than she had earned at Dabora, Inc. and had few, if any, comparable job opportunities. 884 S.W.2d at 479. However, the court seemed to focus heavily on the employee's actions when it mentioned that she left her job voluntarily and knew her employer would enforce the agreement. *Id.* The court in *William B. Tanner Co.* reached a similar result when it stated, "To enforce the [noncompete] . . . will not work an undue hardship on [the employee]. It will require him to do only what he solemnly contracted to do." 530 S.W.2d at 523. Finally, in *Koehler*, the court stated that enforcement did not cause undue hardship on the employee where enforcement did not deprive the employee of

his only job opportunity. *Koehler*, 380 F. Supp. at 1307. In examining the few decisions that address the hardship factor, it appears unlikely that courts will find undue hardship on the employee where the employer establishes protectable interests.

IV. Harm to Public Interest

The final factor courts will examine to determine whether a noncompete is enforceable is whether enforcement will harm the public interest. *Allright Auto Parks*, 409 S.W.2d at 363. Courts usually cite to this factor prior to determining reasonableness; however, most courts do not address the public interest factor in detail. *See generally Amarr Co., Inc.*, 1996 WL 600330; *Selox, Inc.*, 675 S.W.2d 474. In *Vantage Tech.*, the court noted that enforcement of the noncompete had the potential to increase the cost of "what [were] already expensive health care services." 17 S.W.3d 637. However, the court enforced it, concluding that failure to do so could harm the public interest by reducing the incentive of employers to properly train and inform its employees. *Id.* Nevertheless, where the employer establishes protectable interests, the courts are likely to find that enforcement of the noncompete does not harm public interest.

CONCLUSION

Courts examine four factors to determine whether a noncompete is reasonable and therefore enforceable: (1) whether the contract is supported by adequate consideration, (2) potential danger to the employer if the agreement is not enforced, (3) hardship on the employee if the noncompete is enforced, and (4) whether enforcement of the contract opposes public policy. Where the employer establishes that she has a protectable interest and that the time and territory limitations are reasonably drawn to protect that interest, courts are likely to enforce the noncompete. Additionally, where an employer shows protectable interests, courts seem unlikely to find undue hardship on the employee or harm to the public interest. Therefore,

although most courts list all four factors for consideration, most cases hinge on the issue of potential harm to the employer.