Restrictive Covenants In Employment Agreements: Do They Really Work?

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I. Introduction.

To remain competitive, employers invest a lot of time, money and resources in their employees. For example, employers often educate their employees about their products and services and train their employees to develop special skills to help them sell to existing and new customers. Also, employers introduce their employees to customers and give them resources to build and maintain customer relationships and enhance good will. Additionally, employers provide their employees with trade secrets and other confidential and proprietary information about their products and services and/or their customers. Employers make these investments with the intent that their employees will use them to gain an advantage over others in the marketplace.

However, finding employees who are willing to devote their entire work life to one employer is a thing of the past. As a result, employers face an ever-increasing problem of having invested substantial amounts of time, money and resources with employees who then quit and, either on their own or with a competitor, start competing against them. Some employers have turned to post-employment restrictive covenants as a way to protect their investment. However, many employers are under the impression that restrictive covenants are not enforceable and not worth the paper that they are written on.

This article provides an overview of what restrictive covenants are and under what circumstances they are enforceable in employment agreements. Also, this article explains the remedies that post-employment restrictive covenants can provide in terms of restraining a former employee from competition and/or recovering monetary damages for breach or violation of the covenants. Finally, this article provides some practical advice on how to draft effective restrictive covenants in employment agreements.

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2 This handout contains general information concerning restrictive covenants and does not provide and should not be relied on as legal advice or opinion.
II. Restrictive Covenants.

A. General Concepts.

Restrictive covenants are contractual provisions which, in exchange for either employment or certain other consideration, restrict an employee's activities upon termination of his or her employment. Restrictive covenants include non-solicitation covenants, non-dealing covenants, non-competition covenants and garden leave provisions.

Being restraints of trade, restrictive covenants in employment agreements are not favored by the courts and are strictly construed. In determining the enforceability of any given covenant, courts generally balance the two competing interests involved: namely, (1) the terminated employees' legitimate interest in retaining the freedom to earn a livelihood in his or her chosen type of work; and (2) the employer's legitimate proprietary interest in protecting its property from being unlawfully used in competition against it.

It is universally recognized that restrictive covenants cannot be used merely to stop competition from a former employee. Rather, restrictive covenants will be enforced to stop a former employee from using or damaging something which legitimately belongs to his former employer.

Similarly, restrictive covenants cannot be used to prevent a former employee from using the skills, experience and aptitude that the employee gained from his or employment. However, restrictive covenants can be used to stop an employee from using a former employer's trade secrets and/or confidential or proprietary information or property.

If there is a legitimate interest to protect, restrictive covenants will be enforced to impose a restriction that is no wider than reasonably necessary to protect that interest. In other words, the covenant will be limited not only by reference to the restricted activities themselves but also by reference to the period and geographical extent of the covenant. As such, it is important that restrictive covenants are narrowly written. Failure to do so may result in the covenant being found to be overly broad and, therefore, declared to be unenforceable.

There is no guarantee that any restrictive covenant will be enforceable and there are no uniform guidelines as to what the courts will consider to be reasonable in terms of geographical scope or temporal limitations. Instead, courts will examine
each covenant on a case-by-case basis with reference to the business needs of the company or person seeking to impose the restriction versus the interests of the employee or agent seeking to earn a living.

B. Types of Enforceable Restrictive Covenants.

There are generally four types of enforceable restrictive covenants found in employment agreements: namely, non-solicitation covenants, non-dealing covenants, non-competition covenants, and garden leave provisions.

1. Non-Solicitation Covenants.

Generally, once an employment relationship is terminated, a former employee is free to solicit his or her former employer's customers or employees to join the former employee in competition against the former employer. Hence, to address this personal influence over customers or employees, non-solicitation covenants seek to prevent a former employee from soliciting his or her former employer's customers or employees.

Courts generally recognize that an employer has a legitimate interest in protecting its customer base from unlawful competition. However, to be enforceable, a customer non-solicitation covenant must be restricted to customers with whom the former employee had contact or responsibility for during a specified period before termination. A sensible way to establish the length of this period is to calculate the amount of time that it will take for the former employee’s successor to gain influence over such customers. A clause that seeks to prevent a former employee from soliciting any actual or prospective customers of the company with whom the former employee had no contact or responsibility is not likely to be enforced.

Similarly, it is well accepted that preventing a former employee from soliciting other employees protects an employer’s legitimate interest in the stability of its workforce. Yet, like a customer non-solicitation covenant, any clause that seeks to prohibit employee poaching must take into effect how long it will be before the former employee’s influence over existing employees will be eliminated or diminished and the actual employees over whom such influence exists. An overly broad employee non-solicitation covenant will be seen as an unlawful restraint on trade.
2. **Non-Dealing Covenants.**

Unlike customer non-solicitation covenants which seek to stop the active solicitation or enticement of customers, non-dealing covenants focus on whether a former employee can provide services to customers who are not solicited but nevertheless approach the former employee for competing goods or services. Non-dealing covenants have clear advantages as regards enforceability because it avoids the need to prove that the former employee made the solicitation or approach, which is usually hard to prove in practice. However, because non-dealing covenants provide broad protection to a former employer as well as impinge on the customer’s right to acquire goods or services from whomever he or she wants, courts are cautious about enforcing such covenants.

Generally speaking, the enforceability of non-dealing covenants depends on the interest being protected. Enforcement is more likely where the employer can establish a substantial personal connection between the former employee and the relevant customers and where the business environment is such that overt solicitation is not necessary for the former employer to be exposed to significant loss of business.

Non-dealing covenants are unlikely to be enforced if they prevent all contact with the relevant business contacts. Instead, the restriction must be focused on only that contact with those business contacts that negatively affects the employer’s legitimate business interests.

3. **Non-Competition Covenants.**

Non-competition covenants are the broadest form of protection that an employer can include in employment agreements. As such, they are harder to enforce than non-solicitation and non-dealing covenants.

Nevertheless, non-competition covenants are not *per se* unenforceable. On the contrary, non-competition covenants are enforceable if there exists a legitimate business interest that cannot be protected by other types of less burdensome restrictive covenants. For example, where it might be inevitable that the former employee will use his former employer’s trade secrets or confidential or proprietary information in any future employment, a restriction against carrying out that activity may be valid.
As with non-solicitation and non-dealing covenants, non-competition covenants will be enforced only if they are for a limited duration. When deciding the appropriate period, it is necessary to consider how long will it be before the employee’s competitive activities represent less than a material threat to the employer’s legitimate business interest. For example, how long will it be before the manufacturing process changes so much that the former employee's knowledge of it is out of date?

Equally important is the geographical extent of the non-competition covenant. Although worldwide covenants have been held to be enforceable, a large geographical area represents a greater restriction on trading and generally results in a finding that a non-competition covenant is unenforceable.


For years, employers in the United Kingdom have included in their employment agreements what are commonly referred to as “garden leave” clauses. Under these provisions, a certain amount of advance notice of employment termination must be given and, in exchange, the employer continues to pay the employee his full salary and benefits but does not require the employee to work during the period of the advance notice. More importantly, during the “garden leave,” the employee’s purported termination is not accepted, and the employee may not work for the employer's competitor. “Garden leave” can be used whether the employee’s termination is voluntary or involuntary. The term “garden leave” is based on the notion that the employer is paying the employee to stay at home and tend to his or her “garden.” See Cantor Fitzgerald, L.P. v. Chandler, C.A. Nos. 15689 & 15690, 1998 Del. Ch. LEXIS 134, at **5-6 (Del. Ch., decided July 20, 1998).

The aim of garden leave provisions is to preserve the status quo by keeping the terminating employee out of the market place long enough for any information they have to go out of date or to enable that employee's successor to establish themselves, particularly with customers, so as to protect goodwill. Moreover, some believe that offering garden leave helps deter a competitor from poaching employees in the first place.

To date, there have not been many reported decisions addressing the enforceability of garden leave provisions. In Bear, Stearns & Co v. Sharon, 550 F. Supp. 2d 174 (D. Mass. 2008), the court refused to impose a preliminary injunction against a former broker who resigned in breach of a garden leave
provision with a 90-day notice requirement in order to accept employment with a competitor. In denying the injunction, the court found that, as written, the garden leave provision was not a “simple restrictive covenant against competition” but instead a provision that would force the former broker into involuntary servitude:

Because the effect of specific performance in this case would be to require the defendant to continue an at-will employment relationship against his will, it is unenforceable in that manner...to give it full effect would be to force Sharon [the employee] to submit to Bear Stearn’s whim regarding his employment activity in the near future.

550 F.Supp. 2d at 178-179. However, the court’s analysis reflects that the interests of the broker’s clients and their need for advice during the economic crisis was of primary concern. Id. Indeed, the court concluded that monetary damages would be a better alternative if in fact the employee-broker had violated his garden leave clause, as this solution would ensure that the employee-broker’s clients would “not be disadvantaged.” Id. As such, it remains to be seen whether garden leave provisions will be enforced and under what circumstances.

C. Persons Not Subject to Restrictive Covenants.

Generally speaking, restrictive covenants are enforecable regardless of the nature of the underlying employment or work if the court is satisfied that all requirements for a valid restrictive covenant are met. However, there are categories of employment which, in certain circumstances, are not subject to enforceable restrictive covenants. The most discussed categories of exempt individuals are lawyers, doctors, and persons who are fired without cause.

1. Lawyers.

The Model Rules of Professional Conduct prohibit a lawyer from entering into or requesting another lawyer to execute a restrictive covenant except in limited circumstances. See Model Rule of Professional Conduct 5.6. As Rule 5.6 and its comment states:

RULE 5.6 – RESTRICTIONS ON RIGHT TO PRACTICE:

A lawyer shall not participate in offering or making:
Restrictive Covenants in Employment Agreements

(a) a partnership, shareholders, operating, employment or other similar type of agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement . . . .

COMMENT TO RULE 5.6

An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreement except for restrictions incident to provisions concerning retirement benefits for service with the firm.

As is apparent, Rule 5.6 continues the long-standing prohibition against restricting a lawyer’s right to practice. The comment reflects the purpose of the rule — to preclude limiting the freedom of clients to choose a lawyer.

For over thirty years, the American Bar Association (ABA) has issued opinions which have found restrictive covenants in the legal profession to violate the applicable ethical rules, including Rule 5.6. See, e.g., Formal Opinion 94-381 (May 9, 1994); Informal Opinion 1301 (Mar. 25, 1975); Informal Opinion 1171 (Feb. 4, 1971); Informal Opinion 1072 (Oct. 8, 1968); Formal Opinion 300 (Aug. 7, 1961). These ABA opinions make clear that the ethical prohibition on restrictions on the right to practice applies not only to employment agreements between lawyers, but also to employment agreements between in-house counsel and a non-law firm employer.

The most recent ABA opinion on restrictive covenants, Formal Opinion 94-381, considered whether an employment agreement which prohibited corporate counsel from representing anyone against the corporation in the future would be impermissible under Rule 5.6. The ABA concluded that it would, reasoning that to restrict a lawyer from ever representing one with interests adverse to the corporation would impermissibly restrain a lawyer from engaging in his profession. Moreover, it would restrict the public from access to lawyers who, by virtue of their background and experience, might be the best available lawyers to represent them. The ABA noted that any concern about the corporation's confidentiality interests would be sufficiently addressed by Rule 1.9 and,
therefore, any further restriction would unnecessarily compromise a strong policy in favor of providing the public with a free choice of counsel.

Despite the ABA opinions, non-law firm employers have successfully used employment restrictive covenants against lawyers whose employment involves more than the provision of legal services. See, e.g., BNY Mellon, N.A. v. Schauer, 27 Mass. L. Rep. 329, 2010 Mass. Super. LEXIS 209 (Mass. Super. Ct. 2010) (lawyer who served as a portfolio manager at BNY Mellon was enjoined for 12 months from soliciting prior customers and for 4 months from dealing with prior customers who had not yet approached him). Interestingly, in these cases, no one raised the applicability of Rule 5.6 or the ABA opinions.

Moreover, although restrictive covenants that impose a direct restriction on the practice of law are unenforceable, courts have found that “forfeiture for competition” or “financial-disincentive” provisions do not violate Rule 5.6 because they do not impose a blanket or geographical ban on the practice of law nor do they directly prohibit an attorney from representing former clients. See, e.g., Howard v. Babcock, 6 Cal. 4th 409, 863 P.2d 150, 157 (Cal. 1993); Anderson v. Aspelmeier, Fisch, Power, Warren & Engberg, 461 N.W.2d 598 (Iowa 1990); Pettingell v. Morrison, Mahoney & Miller, 426 Mass. 253, 687 N.E.2d 1237 (Mass. 1997); Jacob v. Norris, McLaughlin & Marcus, 128 N.J. 10, 607 A.2d 142 (N.J. 1992); Peroff v. Liddy, Sullivan, Galway, Begler & Peroff P.C., 852 F. Supp. 239 (S.D.N.Y. 1992); Cohen v. Lord, Day & Lord, 75 N.Y.2d 95, 550 N.E.2d 410, 551 N.Y.S.2d 157 (N.Y. 1989); Capozzi v. Latsha & Capozzi, P.C., 797 A.2d 314 (Pa. Super. 2002). However, to be enforceable, such provisions must meet the applicable standard for restrictive covenants.

2. Doctors.

Like lawyers, doctors are another group of individuals who, under certain circumstances, may not be subject to enforceable restrictive covenants. However, the rationale for such an exception is not based on ethical rules. Instead, courts have relied on a public interest analysis of restrictive covenants to determine whether a particular restrictive covenant is enforceable. In short, when patient demand in a geographical region in question exceeds the ability of appropriately trained physicians to provide expeditious treatment, then the public interest predominates over the right to enforce a non-competition covenant by injunction. See, e.g., Cogley Clinic v. Martini, 253 Iowa 541, 112 N.W.2d 678 (Iowa 1962); Foltz v. Struxness, 168 Kan. 714, 215 P.2d 133 (Kan. 1950); Middlesex Neurological Associates, Inc. v. Cohen, 3 Mass. App. Ct. 126, 324

3. **Individuals fired without cause.**

Another group of persons for whom some courts have held that restrictive covenants are unenforceable are those who have been involuntarily discharged without cause or for poor performance. See Kenneth J. Vanko, "You're Fired!! And Don't Forget Your Non-Compete!," 1 DePaul Bus. & Comm. L. J. 1 (2002).

However, even those jurisdictions which have endorsed this principle have not agreed on its application.

For example, New York has adopted a *per se* rule against enforcement for employees terminated without cause. See Post v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 48 N.Y.2d 84, 397 N.E.2d 358, 361, 421 N.Y.S.2d 847 (N.Y. 1979); SIFCO Indus., Inc. v. Advanced Plating Techs., Inc., 867 F. Supp. 155 (S.D.N.Y. 1994). Similarly, the Seventh Circuit, interpreting Illinois law, has concluded that noncompetition agreements should not be enforced where the employee was terminated without cause and in bad faith. See Rao v. Rao, 718 F.2d 219, 224 (7th Cir. 1983) (applying Illinois law).

Hence, before one seeks to enforce restrictive covenants against an employee who has been terminated for poor performance or without cause, an employer must determine whether a real risk of future competition or harm actually exists.

D. Requirements for Enforceability.

Generally speaking, in order to pursue a claim for breach or violation of a post-employment restrictive covenant, two requirements must be satisfied: namely. (1) the restrictive covenant must be ancillary to the taking of employment; and (2) the covenant must be supported by adequate consideration. Unfortunately, the interpretation of these two requirements varies by state. A good reference to review on the interpretation of these two requirements is “Covenants Not to Compete: A State-by-State Survey,” Seventh Edition, authored by Brian M. Malsberger and the ABA Section of Labor and Employment Law. The treatise is available on-line at: http://www.bna.com/covenants-not-compete-p12884904067/, as well as Amazon, Barnes and Noble, and other sites.

Additionally, a recurrent theme in judicial opinions examining restrictive covenants is to focus on certain reasonableness requirements. Courts uniformly hold that a restrictive covenant is enforceable only where the restrictions are reasonably necessary to protect the employer’s legitimate business interests and the restrictions are reasonably limited in duration and geographic extent. See, e.g., *BNY Mellon, N.A. v. Schauer*, 27 Mass. L. Rep. 329, 2010 Mass. Super. LEXIS 209, at *27 (Mass. Super. Ct. 2010).

As for an employer’s legitimate business interests, the courts have recognized that protecting trade secrets, confidential data and good will are interests for which restrictive covenants are reasonably necessary. Also, employers have a legitimate business interest in the stability of its workforce. However, employers do not have a legitimate business interest in appropriating the client goodwill that rightly belongs to the employee. See 6A Corbin, Contracts § 1391B (1982 Sup.) (“The objective of a reasonable noncompetition clause is to protect the employer’s good will, not to appropriate the good will of the employee.”)

A restrictive covenant will be enforceable only for such length of time as is reasonably necessary to protect the legitimate business interests of the employer. "In determining whether the restraint extends for a longer period of time than is necessary to protect the employer, the court must determine how much time is needed for the risk of injury to be reasonably moderated. When the restraint is for the purpose of protecting customer relationships, its duration is
reasonable only if it is no longer than necessary for the employer to put a new man on the job and for the new employee to have a reasonable opportunity to demonstrate his effectiveness to customers .” *Boldt Mach. & Tools, Inc. v. Wallace*, 469 Pa. 504, 513, 366 A.2d 902, 907 (1976).

Likewise, a restrictive covenant is reasonable in geographic scope only if it is tied to the geographic area or territory in which the employee actually performed services. See, e.g., *Albee Homes, Inc. v. Caddie Homes, Inc.*, 417 Pa. 177, 185-86, 207 A.2d 768, 773 (1965) (restrictive covenant would be enforced in sales territory where employee had developed customer contacts; the covenant would not be enforceable against the employee in every area where the company had opened an office). *But See Nat'l Bus. Servs, Inc. v. Wright*, F. Supp. 2d 701, 708 (E.D. Pa. 1998) (holding that although nationwide covenants are disfavored, they will be enforced if the employer's business is nationwide or not limited by state boundaries).

Further, while most courts focus on the reasonableness of the time period and geographic territory, restrictive covenants must also be reasonable in terms of the activities of the employee which the covenant attempts to prohibit. For example, if the restrictive covenant does not allow a former employee to ever be employed in the same business as the employer, such a covenant made be unenforceable as being unreasonable. See, e.g., *Siemens Med. Solutions Health Serv. Corp. v. Carmelengo*, 167 F. Supp. 2d 752 (E.D. Pa. 2001).

In determining the enforceability of restrictive covenants, courts will examine whether enforcement is consonant with the public interest. Public interest includes the interests of customers who seek to retain the former employee's services or at least have the option to do so, such as when there is a limited number of doctors in a geographical area whose services are in high demand. See, infra., p. 8.

Not all courts will re-write restrictive covenants to make them enforceable if they are too broad in terms of scope, time or geographical area. Instead, courts which do not recognize the “blue pencil” doctrine will simply declare the restrictive covenants void, invalid and/or unenforceable. However, courts generally seek to interpret restrictive covenants in a way that gives effect to the parties’ intentions. So if a covenant contains what, in the court's view, are two separate promises, only one of which is unenforceable, it will uphold the enforceable promise and strike out the other.
III. Available Relief.

A. Monetary Damages.

Because restrictive covenants are considered to be contracts, it is generally accepted that an employer is entitled to recover any damages that it has suffered as a result of an employee’s breach of restrictive covenants in his or her employment agreement. However, for a number of reasons, it is inherently difficult to quantify the damages recoverable from a breach of a restrictive covenant. Nevertheless, courts have recognized a number of different types of damages that may be recovered in order to compensate aggrieved employers. Such monetary damages include:

- **Lost profits.** See, e.g., Am. Air Filter Co. v. McNichol, 527 F.2d 1297, 1300 (3d Cir. 1975); Aiken Indus., Inc. v. Estate of Wilson, 477 Pa. 34, 383 A.2d 808, 813 n.7 (1978), cert. denied, 439 U.S. 877 (1978).

- **Training/replacement costs.** See, e.g., Aiken, 477 Pa. at 44-45, 383 A.2d at 813-14 (training costs incurred by employer to replace employees who defected were awarded by the court).

- **Competitor’s profits.** See, e.g., Int’l Industry, Inc. v. Warren Petroleum Corp., 248 F.2d 696, 699 (3d Cir. 1957). But see Am. Air Filter Co. v. McNichol, 527 F.2d 1297, 1300 (3d Cir. 1975) (rejecting this “equitable remedy” on the basis that it is an inappropriate measure of contract damages).


- **Attorney’s fees.** See, e.g., Mrozek v. Eiter, 2002 Pa. Super. 245 (2002), (while the parties contractually agreed to an award of attorney’s fees, the court denied the request for attorney’s fees based on the fact that, as reformed by the court, there was no breach of the restrictive covenant).

B. Injunctive Relief.

Because it is inherently difficult to quantify the damages recoverable from a breach of a restrictive covenant in an employment agreement, most employers seek injunctive relief when faced with a former employee who is in breach of his
or her restrictive covenants. In most cases, the form of that injunctive relief is in the nature of a temporary restraining order (TRO) or preliminary injunction sought shortly after discovery of the employee’s breach.

Whether in federal or state court, certain requirements must be satisfied before a court will grant a TRO or preliminary injunction to enforce a restrictive covenant in an employment agreement. Generally speaking, a TRO or preliminary injunction will be granted if the petitioning party has satisfied the following rigorous standard:

[F]irst, that it is necessary to prevent immediate and irreparable harm which could not be compensated by damages; second, that greater injury would result by refusing it than by granting it; and third, that it properly restores the parties to their status as it existed immediately prior to the alleged wrongful conduct . . . . Even more essential, however, is the determination that the activity sought to be restrained is actionable, and that the injunction issued is reasonably suited to abate such activity. And unless the plaintiff's right is clear and the wrong is manifest, a preliminary injunction will not generally be awarded . . . .


In determining whether a plaintiff has or will sustain irreparable injury sufficient to warrant the granting of a TRO or preliminary injunction, an employer must prove that the employee’s conduct poses a threat of unbridled continuation of harm and that the damages that employer is sustaining or will sustain are incalculable. Mere injuries later compensable in money is insufficient to constitute irreparable injury. Also, a delay in seeking injunctive relief shows a lack of irreparable harm to the employer.

In contrast, one seeking a permanent injunction does not need to prove irreparable harm. Instead, all one has to prove is that the activity sought to be restrained is actionable, and that the injunction issued is reasonably suited to abate such activity. Also, unlike a preliminary injunction, a permanent injunction can be issued without the posting of a surety bond. Also, a permanent injunction can be issued to address future harm, even though the employer recoveries monetary damages for any restrictive covenant breaches that occurred before the injunction is issued.
IV. Drafting Restrictive Covenants.

A. Know the facts and circumstances surrounding the employment.

To save costs, many employers have “form” employment agreements or “form” restrictive covenant language that they use for all of their employees regardless of the position in which the individual is employed or other circumstances surrounding their employment. Because the courts look at the circumstances of each case prior to determining whether particular restrictive covenants are enforceable, employers who use form agreements for all employees risk having a court declare the restrictive covenants as invalid or unenforceable, in whole or in part. Employers can avoid this risk if they know the facts and circumstances surrounding the employment of each employee or group of employees and draft their employment agreements and restrictive covenants accordingly.

B. No precise formula for drafting restrictive covenants.

Courts look to each restrictive covenant and the facts to determine whether the covenant will be enforceable.

It is often times helpful to see what already has been enforced by the court, but depending on your facts, the covenant may nevertheless be unenforceable. Each covenant really should be drafted to meet the specific needs of each employer and the position of the employee.

Covenants normally include:

- A recitation that the agreement is ancillary to the taking of employment and is a precondition to the commencement of the employment relationship.

- A recitation of when the restrictive covenants will be invoked, *i.e.*, upon the employee’s termination, whether voluntary or involuntary.

- A prohibition of what conduct or activities are prohibited upon the employee’s termination.

- A statement of the period of time and limited geographic scope of the restrictive covenants.
The employee’s acknowledgement and agreement that the restrictive covenants are reasonable and valid in duration and scope and in all other respects.

The employee’s acknowledgment and agreement that he or she will be able to earn a livelihood in the event that the employer seeks to enforce the restrictive covenants.

The employee’s agreement that the employer will suffer irreparable harm upon the breach of the restrictive covenants which cannot be adequately compensated by money damages alone.

The employer’s right to seek injunctive relief in addition to any other type of relief necessary, including monetary damages in the event of an employee’s breach of the restrictive covenants.

The employer’s right to recovery attorneys’ fees and costs as part of any action to enforce the restrictive covenants or recover damages for their breach.

A choice of law provision, *i.e.*, what state’s law will apply.

A choice of forum provision, *i.e.*, what court will have jurisdiction to hear the dispute.

An assignability provision stating that the agreement and its restrictive covenants may be assigned by the employer.

V. Conclusion

Although restrictive covenants constitute restraints of trade, they are not *per se* unenforceable or invalid. However, it is important for employers to review the circumstances of employment for every employee from whom they require a restrictive covenant and then carefully draft the covenant based upon the information derived. While pulling the “form” restrictive covenant off the shelf may be the simplest way to obtain a prospective employee’s signature on the covenant, the use of such forms may not lead to the result you ultimately desire.