

## ESSAY

# TRENDING AND THE RESTATEMENT OF EMPLOYMENT LAW'S PROVISIONS ON EMPLOYEE MOBILITY

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### INTRODUCTION

Employment law is a dynamic field. I have been teaching the course for nearly twenty years and I have rarely taught the same course twice, in large part because the law has changed so much over those two decades. Just to offer a few examples: there are a handful of new statutes, including the Affordable Care Act (ACA), the Amendments to the Americans with Disabilities Act, the Genetic Nondiscrimination Act, a new pension law, Sarbanes-Oxley as amended by Dodd-Frank, not to mention the high profile but limited impact Lilly Ledbetter Fair Pay Act.<sup>1</sup> In addition to the new statutes, there have been significant changes in case law, including the surge in interest in social media in the context of the National Labor Relations Act,<sup>2</sup> a similar increase in interest in the Fair Labor Standards Act with a particular

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<sup>1</sup> See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 9 and 15 U.S.C.); ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 29 and 42 U.S.C.); Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (codified as amended in scattered sections of 29 and 42 U.S.C.); Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (codified as amended in scattered sections of 26 and 29 U.S.C.); Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15, 18, 28, and 29 U.S.C.); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 9 and 15 U.S.C.); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified at 42 U.S.C. §§ 2000(a), 2000e-5 (2010)).

<sup>2</sup> See, e.g., *Three D, LLC*, 361 N.L.R.B. 31 (2014) (finding that an employee's dismissal due to out-of-work activities on Facebook violated the National Labor Relations Act); *Dish Network Corp.*, 359 N.L.R.B. 108, at 8 (2013) (finding employer's social media policy violated the Act as too restrictive). For discussions of the National Labor Relations Board's (NLRB) increased interest in social media, see Steven Greenhouse, *Even if it Enrages Your Boss, Social Net Speech is Protected*, N.Y. TIMES, Jan. 21, 2013, at A1; Lawrence E. Dubé, *NLRB's Solomon Tackles Social Media Cases, Gives Wal-Mart Policy Revision Green Light*, BLOOMBERG BNA (June 4, 2012), <http://www.bna.com/nlrbs-solomon-tackles-n12884909814/>.

focus on collective actions,<sup>3</sup> and just about everywhere one looks, there is something new and something new on the horizon, as well.

This is also true of the area that is loosely denominated as involving employee mobility or intellectual property, namely the doctrinal trio of restrictive covenants (noncompetes), trade secrets, and the duty of loyalty. Over the last two decades, employers have drastically increased the use of restrictive covenants, attaching them to all manner of jobs where they had previously not been seen, including to the sandwich makers at Jimmy John's.<sup>4</sup> And as I will discuss more below, courts are adapting to the excessive use and reach of restrictive covenants by returning to the earlier days of a meaningful "hard look" review and there is a growing proclivity for courts to strike down restrictive covenants when employers overreach or when enforcement of the covenant would prove unduly burdensome to the former employee.<sup>5</sup> There has also been a surge in litigation regarding trade secrets, including several high-profile criminal prosecutions and extensive litigation regarding how to define the concept of a trade secret.<sup>6</sup> Indeed, at least at the moment, trade-secret litigation has clearly captured the interest of the employment bar like never before

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<sup>3</sup> The increase in litigation involving Fair Labor Standards Act (FLSA) cases has been well documented. A report by the law firm Seyfarth Shaw noted that FLSA lawsuits had increased from 1,257 in 1990 to 4,389 in 2006 to 7,764 in 2013. See *FLSA Cases in Federal Court 1990, 1993-1999, 2000-2013*, SEYFARTH SHAW LLP (2013), <http://www.wagehourlitigation.com/files/2013/07/FLSA-Cases-Filed-2013.pdf>. Relying on slightly different data, the United States Government Accountability Office found a similar increase in cases filed. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-69, FAIR LABOR STANDARDS ACT: THE DEPARTMENT OF LABOR SHOULD ADOPT A MORE SYSTEMATIC APPROACH TO DEVELOPING ITS GUIDANCE (2013), available at <http://www.gao.gov/assets/660/659772.pdf>.

<sup>4</sup> The *Huffington Post* was the first to report the story regarding the Jimmy John's noncompete agreements, which have recently been challenged in a class action lawsuit. See Dave Jamieson, *Jimmy John's Makes Low-Wage Workers Sign 'Oppressive' Noncompete Agreements*, HUFFINGTON POST (Oct. 13, 2014, 4:03 PM), [http://www.huffingtonpost.com/2014/10/13/jimmy-johns-non-compete\\_n\\_5978180.html](http://www.huffingtonpost.com/2014/10/13/jimmy-johns-non-compete_n_5978180.html). The increased use of noncompete agreements has been widely noted. Professor Charles Sullivan has observed that, "In the past, only the most valuable employees, often those under individual employment contracts, were subject to noncompetition clauses. Today, however, many at-will employees are also subject to such restrictions." Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127, 1149 (2009). A recent story in the *New York Times* likewise reported that noncompetes have been imposed on a wide variety of jobs, including summer camp counselors, hair stylists, lawn maintenance workers and yoga instructors. See Steven Greenhouse, *Noncompete Clauses Increasingly Pop Up in Array of Jobs*, N.Y. TIMES, June 8, 2014, at B1.

<sup>5</sup> See *infra* Part II.

<sup>6</sup> See *United States v. Zhang*, 590 F. App'x 663 (9th Cir. 2014) (upholding conviction for trade-secrets theft); Alex Lawson, *Ex-Microsoft Worker Arrested for Trade Secret Theft, Leaks*, LAW360 (Mar. 20, 2014, 1:45 PM), <http://www.law360.com/articles/520287/ex-microsoft-worker-arrested-for-trade-secret-theft-leaks> (criminal prosecution). For a discussion of the increase in litigation over trade secrets see David S. Almeling et al., *A Statistical Analysis of Trade Secret Litigation in Federal Courts*, 45 GONZ. L. REV. 291, 293 (2010) ("Trade secret litigation in federal courts is growing exponentially.").

and between the two doctrines there has been a flurry of unprecedented activity in this area.

None of the above discussion will strike anyone who is familiar with the area as news, other than perhaps the fact that many courts are returning to a strict review of noncompete agreements. But in the context of this symposium, the question I want to address is whether the recently completed Restatement of Employment Law can adequately capture and account for such a dynamic area of law. In Chapter 8 of the Restatement, which includes the trio of doctrines mentioned above (duty of loyalty, restrictive covenants, and trade secrets), there is nothing especially controversial about the substance of the provisions. The Restatement generally expresses the majority approach in a generic way, though it often does so in a way that is likely too vague to offer much guidance, which is an occupational hazard attached to the Restatement projects. There remains, however, the puzzling issue of the duty-of-loyalty claim, an issue I have written on previously.<sup>7</sup> Unlike its doctrinal counterparts, the duty of loyalty is not a dynamic cause of action and does not generate much litigation. It has, in fact, been confined to the limited situation where an employee leaves his employment to start a competing business; it has not been used to remedy a circumstance when an employee seeks to move to a competitor.<sup>8</sup> The final version of the Restatement continues to give primacy to the duty-of-loyalty claim by making it the lead-off hitter of the Chapter,<sup>9</sup> and it potentially broadens its impact by stating that an employee's duty outlasts the employment relationship and by attempting to recast the statutory trade-secrets claims under the guise of the common-law duty-of-loyalty tort.<sup>10</sup> I will have more to say about this later in this Essay but the Restatement's fascination with the duty of loyalty is clearly inconsistent with the limited role the tort claim currently plays in the common law.

The larger concern that I have is the role the Restatement is likely to play in this area. If it is true, as I will demonstrate momentarily, that the law is moving in a direction that restricts the power of employers to restrain employees from moving to other employers, can the Restatement accommodate that trend? (One might even ask whether a Restatement is capable of accounting for emerging trends in the law, Restatement section 90 notwithstanding, but that is a de-

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<sup>7</sup> See Michael Selmi, *The Restatement's Supersized Duty of Loyalty Provision*, 16 *EMPL. RTS. & EMPLOY. POL'Y J.* 395 (2012). I should note that the essay referenced above was written in conjunction with a symposium sponsored by the American Bar Foundation and the Labor Law Group; the latter is a group to which I belong. This current Essay has no affiliation with the Labor Law Group.

<sup>8</sup> See *id.* at 403.

<sup>9</sup> RESTATEMENT OF EMP'T LAW § 8.01 (2015).

<sup>10</sup> See *id.* § 8.01(b)(i).

bate I will leave to others.) Similarly, can the Restatement provide any guidance on the crucial but fact-specific question of how trade secrets are defined? Will it influence judicial developments relating to non-negotiated restrictive covenants that seek to bar employees from any contact with customers, even customers that the individual employee may never have had interacted with in the prior relationship?

My tentative answer to these questions is that the new Restatement is likely to miss the trend on restrictive covenants entirely (I will even suggest that it has already done so) and is likely to offer little help in defining the difficult concept of trade secrets, in part because the Restatement has to be a bit coy regarding how trade secrets are dealt with since they lost their common-law pedigree many years ago.<sup>11</sup> It is perhaps worth noting that part of my skepticism regarding the role the Restatement might play in this area has to do with the sheer complexity of creating Restatements in a modern world with readily available electronic services and the extraordinary abundance of case law, which invariably leads to a broader diversity in the law than can readily be captured in a handful of broad provisions or a survey of selected cases. The early Restatements functioned largely, or at least significantly, as treatises by collecting disparate case law that may not have been readily available to most attorneys and sought to interpret that case law while often making choices among conflicting cases as a way of advancing the law. There is still room for such a project but in an area like employment law that is dynamic and filled with substantially varying jurisdictional approaches, it strikes me as likely to be of less interest to those working in the field to have a compilation of cases, frozen in time as it were, as a summary of the law. This issue is compounded by the sheer proliferation of case law with respect to noncompete agreements and trade secret litigation.

This Essay will proceed in two parts. Part I briefly discusses the duty-of-loyalty provisions but I will intentionally truncate my analysis to avoid repetition of my prior essay.<sup>12</sup> It is my sense that the Restatement's effort to recast the duty of loyalty as a broad catchall tort is not likely to catch on, and I suspect the provisions will be widely disregarded. Part II will concentrate on the provisions relating to restrictive covenants, and I will begin my analysis by charting what I believe is a trend toward closer scrutiny and more frequent invalidation

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<sup>11</sup> The Uniform Trade Secrets Act was promulgated in 1979 and subsequently amended in 1985, and it has been adopted in some variation by forty-eight states (Massachusetts and New York are the holdouts). See MARION G. CRAIN, PAULINE T. KIM & MICHAEL SELMI, *WORK LAW: CASES AND MATERIALS*, ch. 6B (2015). Although the statute largely incorporates the common law of trade secrets, the law is now statutory in nature, which poses a problem for the common-law Restatement.

<sup>12</sup> Selmi, *The Restatement's Supersized Duty of Loyalty Provision*, *supra* note 7.

of noncompete agreements. I will then see how the Restatement aligns with this emerging trend to assess its likely future impact.

## I

### THE STRUCTURE AND SUBSTANCE OF RESTATEMENT CHAPTER 8

In a previous essay, I wrote critically of what I then thought was the final draft of the duty-of-loyalty provisions of Chapter 8.<sup>13</sup> As it turned out, the section was not yet final and was modified to remove some of its more egregious provisions, such as creating a duty of loyalty for employees not to disclose confidential information even after the employment relationship had ended. The revised and now final provision is more consistent with existing case law, though there is little question that the Restatement affords the duty-of-loyalty cause of action far more prominence than one would find in the common law, and I must confess I remain puzzled regarding why the reporters chose to make this move. It makes little sense, for example, to protect trade secrets through the duty-of-loyalty tort, although that is precisely what section 8.03 does:

An employee or former employee breaches the duty of loyalty owed to the employer under § 8.01(b)(i) if, without the employer's consent, the employee discloses to a third party or uses for the employee's own benefit or a third party's benefit the employer's trade secrets, as that term is defined in § 8.02.<sup>14</sup>

There is, after all, a separate cause of action for misappropriation of trade secrets,<sup>15</sup> and there is no logical reason to create an additional cause of action grounded in the duty of loyalty. On the contrary, shifting from the statutory trade-secrets claim to the common-law tort designed to remedy a breach of the duty of loyalty potentially expands the available remedies. I am not aware of any case, or more importantly, any body of case law that seeks to protect trade secrets through the duty-of-loyalty cause of action.

It is quite likely that assigning the work traditionally apportioned to a trade-secrets claim to the duty-of-loyalty tort has to do with a quirk in the formalities of a Restatement—trade-secrets claims are now statutory,<sup>16</sup> as the Restatement acknowledges,<sup>17</sup> and traditionally Restatements focus on the common law. Trade secrets, however, are an

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<sup>13</sup> See *id.* at 398–99, 404–06.

<sup>14</sup> RESTATEMENT OF EMP'T LAW § 8.03(a) (2015).

<sup>15</sup> See *id.* § 8.01 cmt. c, Reporters' Notes ("This Chapter . . . acknowledges that most employer claims for breach of the employee duty of loyalty that are based solely on the misappropriation of the employer's trade secrets are brought as actions under the relevant jurisdiction's Trade Secrets Act, if there is one.").

<sup>16</sup> See *supra* note 11.

<sup>17</sup> RESTATEMENT OF EMP'T LAW § 8.01 cmt. c (2015).

integral part of the doctrine relating to employee mobility, so it seems likely that the duty-of-loyalty tort was used primarily as a vehicle to highlight the relevance of trade secrets, which also play an important role in restrictive covenants. Even so, this seems like an unusual move, and if that is the rationale, it is likely to be one of no harm, no foul, as it seems highly unlikely that any court is likely to move in this direction, particularly since the Restatement fully incorporates the statutory definition of trade secrets. Section 8.02 defines trade secrets as follows:

- An employer's information is a trade secret under this Chapter if
- (a) it derives independent economic value from being kept secret,
  - (b) the employer has taken reasonable measures to keep it secret, and
  - (c) the information is not
    - (i) generally known to the public or in the employer's industry;
    - (ii) readily obtainable by others through proper means; or
    - (iii) acquired by employees through their general experience, knowledge, training, or skills during the ordinary course of their employment.<sup>18</sup>

This definition is borrowed virtually wholesale from the Uniform Trade Secrets Act.<sup>19</sup> I would add that the definition and the accompanying notes do little to illuminate the most important question regarding trade secrets, namely when information rises to the level of a trade secret, which is often an intensely factual inquiry but one that has taken on greater importance with the explosion of trade-secret litigation instituted by employers over the last decade. For all of these reasons, the prospect of sweeping trade-secret litigation into the little-used duty-of-loyalty tort seems minimal at best.

Moreover, the absence of any substantial discussion of the permissible scope of trade secrets will likely limit the value of the Restatement. Within the last five years, trade-secret litigation has become the focus on issues relating to intellectual property and employee mobility. Employers are filing trade-secret claims in a wide swath of areas, claiming trade-secret protection for just about anything that has a monetary value, including recently, a series of lawsuits filed by Little Caesars claiming trade-secret protection into the process of making

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<sup>18</sup> *Id.* § 8.02.

<sup>19</sup> UNIF. TRADE SECRETS ACT § 1(4) (amended 1985), 14 U.L.A. 538 (2005)

("Trade secret" means 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.).

pizza quickly (though at least according to the press reports, not for a secret sauce or even a good pizza).<sup>20</sup> It is possible a court will find that process to be a trade secret; however, the point I want to make here is that the central focus on issues relating to intellectual property and employee mobility is largely absent from the Restatement, despite the effort to sneak it in through the duty-of-loyalty tort. It seems inconceivable to me that courts will now begin to treat trade-secret violations under the duty-of-loyalty tort, and I think it is equally unlikely that an employer would even plead such a claim. If my supposition is correct, two of the three provisions relating to employee mobility are likely to have little impact on the future development of the law.

## II

### RESTRICTIVE COVENANTS

It appears that the duty-of-loyalty provisions are likely to be of minimal influence, which leaves in Chapter 8 only restrictive covenants for their potential influence. Here I would suggest that the provisions, as stated, are largely consistent with an important strand of the law but are ultimately too limited to offer much guidance or influence future developments. Unlike their approach to many provisions of employment law, jurisdictions vary considerably in their approach to noncompete agreements, and it is difficult for the basic provisions of a Restatement to capture that diversity in approach.<sup>21</sup> Many jurisdictions still view restrictive covenants through the hostile lens of restraints on trade,<sup>22</sup> while others simply glance to see whether the agreement appears reasonable or was actually negotiated.<sup>23</sup> But as employers have increasingly relied on non-negotiated agreements, an increasing number of courts are moving toward a more rigorous level of review,<sup>24</sup> a move that is missing from the Restatement provisions. Indeed, on its face, the Restatement appears to be agnostic toward the proper level of scrutiny courts should afford noncompete agreements, though a careful reading of the supporting cases indicates that the

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<sup>20</sup> See Allissa Wickham, *Little Caesars Claims Ex-Manager Stole Trade Secrets*, LAW360 (May 8, 2014, 5:39 PM), <http://www.law360.com/articles/535707/little-caesars-claims-ex-manager-stole-trade-secrets>. It appears that the claims are part of several filed by Little Caesars against former franchise owners.

<sup>21</sup> Not only are jurisdictions diverse in their approach to reviewing the agreements but they also use a number of different names, which can make electronic searches come up incomplete. My sense is that within the business community, the agreements are typically referred to as noncompetes, and courts will often use that term, but courts also refer to them as restrictive covenants or covenants not to compete, and language relating to restraints on trade also enter many of the cases.

<sup>22</sup> See, e.g., FLA. STAT. § 542.335 (2014); *Murfreesboro Med. Clinic, P.A. v. Udom*, 166 S.W.3d 674, 678 (Tenn. 2005).

<sup>23</sup> See, e.g., *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 775–77 (Tex. 2011).

<sup>24</sup> See *infra* note 38.

Restatement is most closely aligned with the jurisdictions that typically uphold such agreements.<sup>25</sup> The Restatement also does not distinguish between those agreements that are actually negotiated and those that are imposed on employees, often unwary employees or employees who have no power to resist the covenants. It is my sense that this latter issue—the distinction between negotiated and imposed agreements—is emerging as a crucial component in courts' analyses, one on which the Restatement is silent and where the Reporters may have missed an opportunity to help shape the law in a direction that at least some courts are inclined to move.

Restrictive covenants, or noncompetes, are not new, though their increased use has raised a number of new questions. Historically, restrictive covenants have been viewed with suspicion as “restraints on trade,” and some of the early cases were essentially limited versions of antitrust claims since companies were seeking to restrain their employees from moving to competitors without any evident justification for the restraint other than to prevent competition.<sup>26</sup> As courts and commentators noted, the way to keep a good employee was to pay him or her more, or create conditions that would make them want to stay, rather than preventing them from moving to a competitor. Until recently, the law in this area was relatively limited and not particularly complicated. While many courts remained hostile to noncompete agreements, that hostility began to weaken as the employment-at-will rule blossomed in the 1980s. Judge Posner captured these changes in his inimical style. After noting that Illinois, the jurisdiction from which the dispute he was adjudicating arose, was hostile to noncompete agreements he went on:

There is no longer any good reason for such hostility, though it is nothing either new or limited to Illinois. The English common law called such covenants “restraints of trade” and refused to enforce them unless they were adjudged “reasonable” in time and geographical scope. The original rationale had nothing to do with restraint of trade in its modern, antitrust sense. It was paternalism in a culture of poverty, restricted employment, and an exiguous social safety net. The fear behind it was that workers would be tricked into agreeing to covenants that would, if enforced, propel them into destitution. . . .

Later, however, the focus of concern shifted to whether a covenant not to compete might have anticompetitive consequences, since the covenant would eliminate the covenantor as a potential competitor of the covenantee within the area covered by, and during the term of, the covenant. . . .

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<sup>25</sup> See *infra* text accompanying notes 61–72.

<sup>26</sup> A widely cited case for this proposition is *Rem Metals Corp. v. Logan*, 565 P.2d 1080 (Or. 1977).

At the same time that the concerns behind judicial hostility to covenants not to compete have waned, recognition of their social value has grown. The clearest case for such a covenant is where the employee's work gives him access to the employer's trade secrets. The employer could include in the employment contract a clause forbidding the employee to take any of the employer's trade secrets with him when he left the employment. . . . Such clauses are difficult to enforce, however, as it is often difficult to determine whether the former employee is using his former employer's trade secrets or using either ideas of his own invention or ideas that are in the public domain. A covenant not to compete is much easier to enforce, and to the extent enforced prevents the employee, during the time and within the geographical scope of the covenant, from using his former employer's trade secrets.

A related function of such a covenant is to protect the employer's investment in the employee's "human capital," or earning capacity. The employer may give the employee training that the employee could use to compete against the employer. If covenants not to compete are forbidden, the employer will pay a lower wage, in effect charging the employee for the training. There is no reason why the law should prefer this method of protecting the employer's investment to a covenant not to compete.

I can see no reason in today's America for judicial hostility to covenants not to compete. It is possible to imagine situations in which the device might be abused, but the doctrines of fraud, duress, and unconscionability are available to deal with such situations. A covenant's reasonableness in terms of duration and geographical scope is merely a consideration bearing on such defenses . . . .<sup>27</sup>

Judge Posner's views, however, never fully caught on, though they represented a position that was consistent with broader developments within employment law, which began to develop and mature in the 1980s and 1990s.

Restrictive covenants are, after all, simply a form of contract, and if viewed strictly as a contract it is easy to see how they should be readily enforced. For a number of years, employers have had relatively free reign imposing contracts on their employees, or in the handbook context unimposing them, through the ethereal notion that continued performance by an at-will employee provides consideration sufficient to establish a binding contract.<sup>28</sup> Employers have

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<sup>27</sup> *Outsource Int'l, Inc. v. Barton*, 192 F.3d 662, 669–70 (7th Cir. 1999) (Posner, J., dissenting) (citations omitted).

<sup>28</sup> Courts vary somewhat on whether separate consideration is required to modify a contract, though most courts follow the basic principle that continued performance can constitute consideration for employer-imposed policies. *See, e.g., Asmus v. Pac. Bell*, 999 P.2d 71, 81 (Cal. 2000) (requiring notice but no separate consideration for employer's withdrawal of unilaterally imposed policy); *DeMasse v. ITT Corp.*, 984 P.2d 1138, 1144 (Ariz. 1999) (requiring separate consideration for modifying an agreement). *But see*

successfully changed policies, altered handbooks, and imposed arbitration agreements almost at will<sup>29</sup> and one might be easily lulled into believing that it is a short step to apply the same logic to noncompete agreements. But it never quite worked out that way, and it is also perhaps worth mentioning that despite the Supreme Court's robust enthusiasm for arbitration agreements, lower courts have invalidated hundreds, or perhaps thousands, of arbitration agreements, and continue to do so.<sup>30</sup>

To be sure, a few, but very few, jurisdictions see restrictive covenants as just another form of contract. For example, the Supreme Court of Texas has recently stated:

The Texas Constitution protects the freedom to contract. Entering a noncompete is a matter of consent; it is a voluntary act for both parties. . . .

. . . Unreasonable limitations on employees' abilities to change employers or solicit clients or former co-employees, i.e., compete against their former employers, could hinder legitimate competition between businesses and the mobility of skilled employees. On the other hand, valid noncompetes constitute reasonable restraints on commerce agreed to by the parties and may increase efficiency in industry by encouraging employers to entrust confidential information and important client relationships to key employees. Legitimate covenants not to compete also incentivize employers to develop goodwill by making them less reluctant to invest significant resources in developing goodwill that an employee could otherwise immediately take and use against them in business.<sup>31</sup>

The view expressed by the Supreme Court of Texas identifies noncompete agreements as simply another contract, although even that court reviews the agreements to determine whether they are

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Torosyan v. Boehringer Ingelheim Pharm. Inc., 662 A.2d 89, 99 (Conn. 1995) (holding that continued performance by at-will employee is insufficient consideration for a handbook modification).

<sup>29</sup> See *Pac. Bell*, 999 P.2d at 81; see, e.g., *Ferrera v. A.C. Nielsen*, 799 P.2d 458, 461 (Colo. App. 1990) (finding a company that released a revised handbook did not limit its right to discharge employees); *Lang v. Burlington N. R.R.*, 835 F. Supp. 1104, 1106 (D. Minn. 1993) (holding an employee's continued employment is an acceptance of an arbitration policy). Again, there are exceptions to this basic principle. See, e.g., *Whitworth v. McBride & Son Homes, Inc.*, 344 S.W.3d 730, 741 (Mo. Ct. App. W.D. 2011) (holding that continued performance is not valid consideration to support arbitration agreement).

<sup>30</sup> See, e.g., *Sharpe v. AmeriPlan Corp.*, 769 F.3d 909, 918 (5th Cir. 2014) (invalidating an arbitration provision where its adherence would "render[ ] the dispute resolution provisions meaningless"); *Brown v. MHN Gov't Servs. Inc.*, 306 P.3d 948, 957–58 (Wash. 2013) (finding shifting-of-attorney's-fee provision and other provisions in arbitration agreement unconscionable).

<sup>31</sup> See *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 768–69 (Tex. 2011) (citations omitted). It is worth noting that the Supreme Court of Texas's enthusiastic endorsement of noncompetes drew a strong dissenting opinion from three justices. See *id.* at 788 (Green, J., dissenting).

“reasonable,” something that is not done in the context of handbooks or other employment policies.<sup>32</sup> The Restatement’s primary provision on noncompetes focuses on the reasonableness inquiry<sup>33</sup> but what the Restatement overlooks is that what is reasonable may depend on the position one starts from, and the position of the Supreme Court of Texas—or Judge Posner—is not where most jurisdictions start from; indeed, many jurisdictions start far away from the notion that restrictive covenants are just another contract.

There are, in fact, four different positions from which jurisdictions begin their inquiries. As is well known, California prohibits restrictive covenants in the employment context<sup>34</sup> but what is less well known is that Colorado (generally)<sup>35</sup> and North Dakota do as well.<sup>36</sup> The next group of jurisdictions is likely the largest—these jurisdictions are affirmatively hostile to restrictive covenants, and although they may frame their hostility in different ways, all of them sound a theme similar to the following: “[A]greements that restrict an employee from competing with his or her employer upon termination of employment are judicially disfavored because ‘powerful considerations of public policy . . . militate against sanctioning the loss of a [person’s] livelihood.’”<sup>37</sup> This sentiment, which reflects a hostility to noncompetes, runs across many jurisdictions, including jurisdictions that might otherwise be thought to be friendly to employer interests. Indeed, judicial hostility to restrictive covenants is the current law in Montana, Tennessee, and Virginia, none of which would be considered excessively friendly to employees, as well as New York, Georgia, Indiana and Illinois.<sup>38</sup> Together these jurisdictions—and there are

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<sup>32</sup> See *id.* at 778 (noting that the trial court determines whether “any particular provision is unreasonable or overbroad”).

<sup>33</sup> See *infra* note 63.

<sup>34</sup> See CAL. BUS. & PROF. CODE § 16600 (West 2015).

<sup>35</sup> Although Colorado generally prohibits noncompetes, they are allowed under certain circumstances, which would suggest that Colorado perhaps belongs in the jurisdictions that are hostile to the agreements. See COLO. REV. STAT. § 8-2-113(2)(b) (2013) (permitting restrictive covenants only to protect trade secrets).

<sup>36</sup> See *Earthworks, Inc. v. Sehn*, 553 N.W.2d 490, 493 (N.D. 1996) (noting that North Dakota statutory law “invalidates provisions in employment contracts prohibiting an employee from working for a competitor after completion of his employment”).

<sup>37</sup> *Brown & Brown, Inc. v. Johnson*, 980 N.Y.S.2d 631, 637 (App. Div. 2014) (quoting *Reed, Roberts Assocs. v. Strauman*, 335 N.E.2d 590, 593 (N.Y. 1976)).

<sup>38</sup> For a sampling of similar statements, see *Orca Commc’ns Unlimited, LLC v. Noder*, 314 P.3d 89, 94 (Ariz. Ct. App. 2013) (“‘Restrictive covenants which tend to prevent an employee from pursuing a similar vocation after termination of employment are disfavored’ and are strictly construed against the employer.” (quoting *Amex Distrib. Co. v. Mascari*, 724 P.2d 596, 600 (Ariz. Ct. App. 1986)); *Coates v. Heat Wagons, Inc.*, 942 N.E.2d 905, 913 (Ind. Ct. App. 2011) (“Indiana courts strongly disfavor as restraints of trade covenants not to compete in employment contracts.”); *Access Organics, Inc. v. Hernandez*, 175 P.3d 899, 902 (Mont. 2008) (“Since Montana’s public policy strongly disfavors agreements in restraint of trade, . . . we construe non-compete agreements strictly.”); *Murfreesboro*

likely others—cover many of the major cities in the United States, and a substantial portion, if not majority, of the areas that are currently experiencing job growth. The fourth kind of jurisdiction comprises those that are essentially neutral on the validity of noncompetes, in particular, the jurisdictions that seek to balance the interests of the competing parties.<sup>39</sup>

The diversity of approaches courts have adopted is not new, and I am not aware of any jurisdiction that has changed its approach, moving, for example, from a liberal to a strict review in recent years. It is also not the case that strict reviews invariably lead to invalidating noncompete agreements, although in some jurisdictions (e.g., Georgia and Alabama) it has traditionally been very difficult to enforce restrictive covenants.<sup>40</sup> What is new is that many courts are again taking their strict review seriously, scrutinizing agreements closely and frequently striking down such agreements, particularly when they are the product of employer overreach.<sup>41</sup>

My conviction that a trend is emerging in which restrictive covenants are closely scrutinized and more frequently invalidated now than they were a decade ago arises primarily out of my research for this Essay and the third edition of a casebook of which I am a co-author.<sup>42</sup> I cannot say that I have performed an exhaustive review—and one problem with trying to make judgments about the case law is that most covenants are never challenged (an issue I will return to shortly) and many covenants that are disputed never result in a published opinion. Nevertheless, it seems fair to assume that informal and thus unreported resolutions of disputes are likely to arise in the

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Med. Clinic, P.A. v. Udom, 166 S.W.3d 674, 678 (Tenn. 2005) (noting that noncompetes “are viewed as a restraint of trade, and . . . are construed strictly in favor of the employee”).

<sup>39</sup> Missouri seems to fit this category: “In balancing the [ ] competing interests, Missouri courts generally enforce a non-compete agreement if it is demonstrably reasonable.” *Whelan Sec. Co. v. Kennebrew*, 379 S.W.3d 835, 841 (Mo. 2012). Just to offer a reminder that this middle ground can result in the invalidation of an agreement, in *Whelan* the court found the nonsolicitation agreement overbroad. *Id.* at 844.

<sup>40</sup> See, e.g., *Sheffield v. Stoudenmire*, 553 So. 2d 125, 126 (Ala. 1989) (noting that Alabama courts review covenants with disfavor “because they tend not only to deprive the public of efficient service, but tend to impoverish the individual” (quoting *Robinson v. Computer Servicers, Inc.*, 346 So. 2d 940, 943 (Ala. 1977))). Georgia has long been one of the most hostile jurisdictions for the enforceability of covenants not to compete, in large part because courts would not exercise their “blue pencil” to rewrite the agreements so that they were enforceable. In 2010, the law was changed to allow for blue-pencil rewriting of agreements. The changes are discussed in Joseph P. Shelton, *A New Day Dawns for Georgia Non-Compete Law*, NON-COMPETE AND TRADE SECRETS (Nov. 3, 2010, 8:20 AM), <http://www.noncompetenews.com/post/2010/11/03/A-New-Day-Dawns-For-Georgia-Non-Compete-Law.aspx>.

<sup>41</sup> See, e.g., *Saban v. Caremark Rx, LLC*, 780 F. Supp. 2d 700, 712–14 (N.D. Ill. 2011) (holding Caremark overreached in creating a noncompete where it did not tailor the provisions to meet the employee’s skills).

<sup>42</sup> See CRAIN ET AL., *supra* note 11, at ch. 6.

“shadow of the law” as it were, and leading published Appellate and Supreme Court cases are likely to create that shadow. And based on a sample that includes all published Appellate and Supreme Court cases decided in the last five years, I believe courts are scrutinizing noncompetes more carefully and invalidating them more frequently than they were just a few years earlier.

One perhaps surprising area of change has to do with the preliminary question regarding whether the restrictive covenant was supported by consideration. Given that the covenant is a contract, it requires valid consideration. Until recently, most courts were willing to engage in the very permissive notion—originating in the handbook cases—that an at-will employee’s continued performance constitutes consideration for any contract, including a restrictive covenant.<sup>43</sup> But that notion seems to be in flux. Recently, the Illinois Appellate Court held that two years of continuous employment was necessary “to constitute adequate consideration in support of a restrictive covenant” even when the employee had resigned.<sup>44</sup> The Montana Supreme Court also concluded that a restrictive covenant that was not entered into at the time of hire required independent consideration and continued employment was insufficient to support a restrictive covenant, even in a circumstance where the employee had received a promotion shortly before the covenant was imposed.<sup>45</sup> Courts have also recently found noncompetes overbroad, particularly with respect to nonsolicitation provisions (which had traditionally been scrutinized lightly because they were a lesser form of restraint), and they have likewise invalidated overbroad confidentiality provisions.<sup>46</sup>

Two additional recent cases further illustrate what I consider an emerging trend toward more careful scrutiny of noncompete agreements. The first case involved employees who worked selling fire-alarm systems in Chicago, a business that was competitive and that primarily involved service and customer relationships since the

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<sup>43</sup> See *supra* note 28 and accompanying text.

<sup>44</sup> See *Fifield v. Premier Dealer Servs.*, 993 N.E.2d 938, 943 (Ill. App. Ct. 2013); see also *Prairie Rheumatology Assocs. v. Francis*, 24 N.E. 3d 58, 62 (Ill. App. Ct. 2014) (reaffirming two-year rule).

<sup>45</sup> See *Access Organics, Inc. v. Hernandez*, 175 P.3d 899, 903 (Mont. 2008).

<sup>46</sup> See *generally* *nClosures Inc. v. Block & Co.*, 770 F.3d 598 (7th Cir. 2014) (finding confidentiality agreement not enforceable because of the plaintiff’s failure to take adequate steps to protect secrecy); *Tradesman Int’l, Inc. v. Black*, 724 F.3d 1004, 1014 (7th Cir. 2013) (in declining to grant injunctive relief the court noted it was “unable to locate an Ohio case that upholds a [covenant not to compete] protecting proprietary information that constitutes something less than either trade secrets or goodwill”); *Orca Commc’ns Unlimited, LLC v. Noder*, 314 P.3d 89 (Ariz. Ct. App. 2013) (striking down as overbroad confidentiality provisions); *Whelan Sec. Co. v. Kennebrew*, 379 S.W.3d 835 (Mo. 2012) (holding nonsolicitation agreements invalid because overbroad).

competing businesses all sold the same products.<sup>47</sup> Noteworthy all on its own is that the opinion goes on for more than thirty pages, closely parsing many Illinois precedents, and consistently returning to the theme that as restraints on trade, restrictive covenants are disfavored.<sup>48</sup> Ultimately, the appellate court narrowed the legitimate protectable interests sufficient to support a restrictive covenant to protecting “near permanent” relationships and trade secrets or other confidential information.<sup>49</sup> Applying that standard, the court found the restrictive covenants at issue—which prohibited both competition and solicitation—unenforceable.<sup>50</sup> Central to the court’s decision was the fact that the agreements had not been negotiated: “Neither [of the defendants] was in a practical position to refuse to sign the agreements or to negotiate better terms. In an economic climate where workers are desperate to keep their jobs, employers’ requests easily become demands.”<sup>51</sup> The Illinois Supreme Court, in another lengthy opinion, reversed the Appellate Court’s narrowing of the “legitimate business test,” opting instead for a “totality of the circumstances” position advocated by a concurring justice on the Appellate Court.<sup>52</sup> Although the Illinois Supreme Court remanded the case to the trial court, in doing so it noted that the concurring justice found the covenants invalid under the totality-of-the-circumstances test.<sup>53</sup> The close reading of cases and the extensive opinions the dispute generated suggest that the law is deeply contested, and I would add that even when courts are upholding agreements they are doing so through lengthy nuanced decisions that typically spark spirited dissents.<sup>54</sup> Reading through the Restatement, one is likely to miss both the nuance and just how contested the law remains.

The next case is even more interesting. It comes from Virginia, hardly a jurisdiction that anyone would consider unfriendly to the interests of employers, and yet one that retains a traditional hostility to noncompete agreements. The dispute centered on a two-year

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<sup>47</sup> Late in the opinion the court notes that, “[T]he evidence showed that plaintiff’s business was sales driven. . . . It was also shown that plaintiff provided not a unique product, but one that was sold by other suppliers as well.” *Reliable Fire Equip. Co. v. Arredondo*, 940 N.E.2d 153, 183 (Ill. App. Ct. 2010).

<sup>48</sup> See, e.g., *id.* at 165 (“One of the oldest and best established of the policies developed by courts is that against restraint of trade.” (quoting E. ALLAN FARNSWORTH ON CONTRACTS § 5.3, at 19 (3d ed. 2004)); *id.* at 172 (noting that the “legitimate-business-interest” test used in Illinois “grew out of the policy, rooted in centuries of common law and no less necessary today, of protecting a person’s ability to pursue his or her chosen occupation”).

<sup>49</sup> *Id.* at 181.

<sup>50</sup> *Id.* at 185.

<sup>51</sup> *Id.* at 173–74.

<sup>52</sup> *Reliable Fire Equip. Co.*, 940 N.E.2d at 402–03.

<sup>53</sup> *Id.* at 403.

<sup>54</sup> See, e.g., *Star Direct, Inc. v. Dal Pra*, 767 N.W.2d 898, 917 (Wis. 2009) (Bradley, J., dissenting in part and concurring in part); *id.* at 922 (Abrahamson, C.J., dissenting).

restrictive covenant that had been imposed on an employee of a pest control company.<sup>55</sup> Although the opinion does not discuss the duties of the employee, it acknowledges that twenty-two years earlier the very same court had upheld the very same language in a restrictive covenant. Not surprisingly, the company argued that principles of stare decisis counseled in favor of again upholding the provision.<sup>56</sup> The Supreme Court of Virginia balked and in language that provides a clear indication that something is afoot stated:

We acknowledge that the language of the provision we upheld in *Paramount Termite* is identical to the Provision [at issue here]. However, we have incrementally clarified the law since that case was decided in 1989. In the intervening twenty-two years, we have gradually refined its application [in a series of cases] . . . [and] to the extent that *Paramount Termite* conflicts with any portion of our holding today . . . [it] is overruled.”<sup>57</sup>

One could certainly question whether this handful of cases represents a trend rather than a set of isolated decisions but my own view is that they clearly reflect a trend, and one that is appearing in other areas as well. When one looks at the privacy cases, particularly the recent spate of Supreme Court cases involving the Fourth Amendment, the notion from a decade ago that employees had little to no privacy in the workplace—or outside of it—is starting to crack.<sup>58</sup> The social-media cases are also providing a check on the employer’s reach outside of the workplace,<sup>59</sup> and a recent and interesting case from the Oregon Supreme Court firmly rejects the notion that it is unreasonable for employees to rely on a promise of at-will employment.<sup>60</sup> Again, a handful of cases may not represent a major shift in what has been a strong pro-employer tenor in the common law, but if nothing else it demonstrates a vibrant diversity within the case law as well as clear indicators of a dynamic field. The question this paper set out to address is whether the Restatement can capture either development.

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<sup>55</sup> See *Home Paramount Pest Control Cos. v. Shaffer*, 718 S.E.2d 762, 763–64 (Va. 2011) (setting out Virginia’s test for restrictive covenants).

<sup>56</sup> *Id.* at 766.

<sup>57</sup> *Id.*

<sup>58</sup> This is obviously not the place to mount a lengthy defense of this position but I would point to the stream of cases acknowledging privacy rights starting with *City of Ontario v. Quon*, moving to the recent GPS case and most recently landing on cell phone privacy. See 560 U.S. 746, 760 (2010); *Riley v. California*, 134 S. Ct. 2473, 2493–94 (2014); *United States v. Jones*, 132 S. Ct. 945, 950–51 (2012). These cases all involve Fourth Amendment claims but I believe one can find similar trends in the private workplace. See, e.g., *Stengart v. Loving Care*, 990 A.2d 650, 653–54 (N.J. 2010).

<sup>59</sup> See *Karl Knauz Motors, Inc.*, 358 N.L.R.B. 164 (2012).

<sup>60</sup> See *Cocchiara v. Lithia Motors, Inc.*, 297 P.3d 1277 (Or. 2013).

The Restatement's provisions on restrictive covenants are surprisingly brief, distilled into only three sections, or two fewer than comprise the duty of loyalty claim.<sup>61</sup> The primary provision is:

§ 8.06. Enforcement of Restrictive Covenants in Employment Agreements

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

- (a) the employer discharges the employee on a basis that makes enforcement of the covenant inequitable;
- (b) the employer acted in bad faith in requiring or invoking the covenant;
- (c) the employer materially breached the underlying employment agreement; or
- (d) in the geographic region covered by the restriction a great public need for the special skills and services of the former employee outweighs any legitimate interest of the employer in enforcing the covenant.<sup>62</sup>

The subsequent section sets forth interests that the employer can seek to protect through restrictive covenants:

§ 8.07. Protectable Interests for Restrictive Covenants

- (a) A restrictive covenant is enforceable only if the employer can demonstrate that the covenant furthers a legitimate interest.
- (b) An employer has a legitimate interest in protecting, by means of a reasonably tailored restrictive covenant with its employee, the employer's
  - (i) trade secrets, as defined in § 8.02, and other protectable confidential<sup>[63]</sup> information that does not meet the statutory definition of trade secret,
  - (ii) customer relationships,

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<sup>61</sup> See RESTATEMENT OF EMP'T LAW §§ 8.06–8.08 (2015).

<sup>62</sup> *Id.* § 8.06.

<sup>63</sup> Nonsolicitation agreements are often analyzed as part of a restrictive covenant but there are also situations where a nonsolicitation agreement is treated independently. Recently, there has been an upsurge in litigation over nonsolicitation clauses, including questions relating to how employees can respond to customer inquiries or whether posting a job move or notice on Facebook or LinkedIn constitutes solicitation. See, e.g., *Corp. Techs. v. Harnett*, 731 F.3d 6, 10–13 (1st Cir. 2013) (exploring proper judicial test when the customer initiates contact); *Pre-Paid Legal Servs., Inc. v. Cahill*, 924 F. Supp. 2d 1281 (E.D. Okl. 2013) (while granting employer relief on some aspects of nonsolicitation agreement, court held that Facebook posting did not constitute a breach of the agreement); *Whelan Sec. Co. v. Kennebrew*, 379 S.W.2d 835 (Mo. 2012) (finding nonsolicitation agreement overbroad and restricting them to actual prior customers); *Enhanced Network Solutions Grp. v. Hypersonic Techs. Corp.*, 951 N.Ed.2d 265 (Ind. App. 2011) (posting employment opportunity on LinkedIn did not constitute breach of nonsolicitation agreement).

- (iii) investment in the employee's reputation in the market, or
- (iv) purchase of a business owned by the employee.<sup>64</sup>

These two provisions constitute the entirety of the substance of restrictive covenants, with the third section (8.08) involving the so-called blue-pencil rule allowing for modification unless there is clear evidence of bad faith in the original execution of the agreement.<sup>65</sup>

I want to reiterate that in its substance there is nothing particularly alarming about these provisions, and indeed, one might applaud, from an employee's perspective, the effort to limit an employer's protectable interests to the three identified interests,<sup>66</sup> as well as the presumed penalty for purposefully drafting an overbroad agreement. At the same time, even as illustrated through the comments, the section provides little guidance for the important issues of when customer relations or an employee's reputation in the market will justify a restrictive covenant, as these issues are largely left unexplored.<sup>67</sup> For example, the very brief discussion of customer relationships says only that an employer should be able to protect its investments in customer relationships but it makes no distinction in current, future or past customers, nor new or intermittent ones.<sup>68</sup> It might be possible to read the language as suggesting that only current customers should be protected but this is a subject the Restatement could have addressed directly, and one that has taken on growing importance in the case law regarding nonsolicitation agreements.

Despite the potential breadth of customer relationships and employer investment in an employee's reputation in the market, what is missing from the provisions seems likely to prove more important than what is present. The provisions make no mention of the sheer diversity of the case law; in particular the traditional hostility to restrictive covenants that so many courts still bring to their analysis is nowhere to be found in Chapter 8. If anything, the absence of any such discussion might suggest that the Restatement treats restrictive covenants as presumptively valid along the lines of the approach adopted by the Supreme Court of Texas.<sup>69</sup> If that is the vision that infuses the Restatement provisions, then it is a decidedly minority view.<sup>70</sup> The possibility that the Restatement intends to establish a presumptive

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<sup>64</sup> *Id.* § 8.07.

<sup>65</sup> *Id.* § 8.08.

<sup>66</sup> The fourth interest, having to do with the sale of a business, is not properly considered a restrictive covenant for an employee. Even California permits such covenants in the context of a sale of a business where there is obvious voluntariness and consideration. *See* CAL. BUS. & PROF. CODE § 16601 (West 2007).

<sup>67</sup> *See* RESTATEMENT OF EMP'T LAW § 8.06 cmt. c (2015).

<sup>68</sup> *See id.*

<sup>69</sup> *See supra* note 31 and accompanying text.

<sup>70</sup> *See id.*

validity to noncompete agreements might also be seen in the absence of any discussion regarding consideration in the substance of the provision, in particular the need for valid consideration to support a restrictive covenant. The comments and supporting case law for the section, on the other hand, indicate that continued performance of an at-will employee will typically constitute valid consideration.<sup>71</sup> While the comments recognize the diversity of approaches courts apply, the overwhelming number of cases that are cited uphold covenants based on continued performance.<sup>72</sup> Given recent developments in the case law, it is not at all clear that continued performance will always provide adequate consideration to support an agreement, and if the Restatement wanted to advocate for a best practices rule, it could have offered guidance in the substantive provision rather than leaving it to the lengthy recitation of cases. This is also an area that the Restatement could have sought to move the law forward by suggesting that restrictive covenants require actual consideration.

Offering such guidance would have been particularly important with non-negotiated agreements another issue on which the Restatement remains silent and therefore foregoes an opportunity to provide both guidance and influence on the law. As noted at the outset of this Essay, up until the last decade or so, restrictive covenants were reserved primarily for high-level employees and were often negotiated, or seen as part of a comprehensive compensation package.<sup>73</sup> Under those circumstances, the agreements can generally be seen as

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<sup>71</sup> The Reporters' Notes include a lengthy recitation of cases that covers the spectrum on continued performance as consideration. See *RESTATEMENT OF EMP'T LAW* § 8.06 cmt. e (2015). I will note that a California case dealing with arbitration agreements slipped into the mix and may garner some attention since California does not permit restrictive covenants. See *Veliz v. Cintas Corp.*, No. C 03-1180 SBA, 2004 WL 2452851, at \*11 (N.D. Cal. Apr. 5, 2004) (upholding arbitration agreement against various challenges).

<sup>72</sup> Although the Reporters' Notes mention that a number of jurisdictions require a period of substantial employment as consideration, the Notes go on to criticize such a principle:

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

*RESTATEMENT OF EMP'T LAW*, § 8.06 cmt. e (2015). This criticism seems misplaced and may reveal a penchant for rejecting the doctrine many courts follow. The reference to "general contracts rule[s]" suggests that the Reporters are treating restrictive covenants as just another contract, which ignores the fact that all jurisdictions have developed case law that is specific to restrictive covenants under the broad rule of reason. For example, under basic contract principles, a court would not consider either the length of time or the geographical scope and likely would also ignore the purpose behind the agreement. Moreover, moving toward good faith and away from the concept of a lengthy employment period to justify the agreement would place the agreements in a nebulous doctrinal land since there is no obvious principle of good faith that would invalidate the agreement.

<sup>73</sup> See *supra* note 4 and accompanying text.

voluntary with less need for judicial supervision, and much of the law that the Restatement cites in its notes involves the older case law involving negotiated agreements.<sup>74</sup> Today it seems at least as likely that noncompetes will be imposed on at-will employees, who as the Illinois court noted, have little bargaining power and a minimal ability to reject them.<sup>75</sup> It is hard to see how such agreements should be analyzed under the same principles as those that apply to negotiated agreements yet the Restatement makes no distinction between the two, and misses a critical opportunity to address some of the more glaring abusive practices by employers, whether that involves imposing restrictive covenants on low-paid sandwich makers, dance teachers, karate instructors, pest-control salesmen or other low-wage workers whose livelihood would be seriously affected by the presence of a restrictive covenant.<sup>76</sup>

Indeed, the proliferation of noncompetes for all manner of jobs is never mentioned in the Restatement, other than indirectly in the context of limiting the availability of a modification in a case where the employer has no good-faith belief that the agreement is legally valid.<sup>77</sup> This limitation, while surely well intentioned, is not likely to be much of a limitation. It may have an impact in a case like that involving Jimmy John's<sup>78</sup> where a class action is now being pursued, but it will do nothing to address the thousands and perhaps millions of restrictive covenants that will be impermissibly overbroad but never challenged. As any employer knows, the vast majority of employees will treat restrictive covenants as presumptively valid and are likely to abide by their terms even though they may not be legally enforceable.

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<sup>74</sup> To take what is almost a random sample from the cases cited in support of comment *b* to section 8.06 and the distinction between negotiated (or well compensated) employees and others is apparent. See *Campbell Soup Co. v. Desatnick*, 58 F. Supp. 2d 477 (D.N.J. 1999) (director of advertising with substantial salary); *Marcam Corp. v. Orchard*, 885 F. Supp. 294 (D. Mass. 1995) (director of development with a salary of \$177,200); *Zep Mfg. Co. v. Harthcock*, 824 S.W.2d 654 (Tex. App. 1992) (chemist). In contrast, the one case within that section striking down a covenant involved a copier technician. See *DelliGatti v. Mansfield*, 477 S.E.2d 134, 137 (Ga. Ct. App. 1996).

<sup>75</sup> The proliferation of noncompetes on low-level employees has recently attracted widespread public attention, not just through the Jimmy John's case, but also with increased attention to the issue. See, e.g., *Greenhouse*, *supra* note 4. Several members of Congress have also expressed concern about the widespread use of noncompetes, and several legislatures (including Massachusetts) have been exploring ways to limit the growth of noncompetes. See, e.g., Kyle Alspach, *Compromise Hinted over Noncompete Agreements*, BOS. GLOBE (July 1, 2014), <https://www.bostonglobe.com/business/2014/07/01/noncompete/DJSb4HlIkSyDzmD9sOv9NI/story.html>.

<sup>76</sup> Such restrictions are rarely litigated but when they are, they are invariably struck down. See, e.g., *RKR Dance Studios, Inc. v. Makowski*, No. CV084035468, 2008 Conn. Super. LEXIS 2295 (Conn. Super. Ct. Sept. 12, 2008) (invalidating agreement imposed on dance instructors).

<sup>77</sup> See RESTATEMENT OF EMP'T LAW § 8.06 (2015).

<sup>78</sup> See *supra* note 4 and accompanying text

The Restatement neglects this important issue, even though as I noted earlier, many courts are tightening up their review in response to employers' indiscriminate use of noncompetes.<sup>79</sup>

It may be that the Restatement's limitation on protectable interests in section 8.07 can address these issues but it seems like a lot to ask of a single section. Many employers will be able to make a colorable claim that the covenant is designed to protect its "good will" in the form of customer relationships, thus raising, under the Restatement, the prospect that noncompetes will be upheld for the most menial of jobs. Rather than relying on the protectable interests prong, I think it would have been significantly better if the Restatement had directly addressed the problem of imposing agreements on low-level or low-wage employees, perhaps noting that such agreements are presumptively invalid absent some compelling justification or clear and independent consideration. If the Restatement had adopted such a position, it would, I believe, have been consistent with the majority of courts and clearly consistent with what I have defined as an emerging trend in the law.

I also think one would be hard-pressed to find these interests reflected in the cases that are listed in the Reporters' Notes. In my prior essay on the duty of loyalty provisions, I noted that many of the cases included in the Notes were inaccurate characterizations of the law.<sup>80</sup> In the sections on restrictive covenants, that does not seem to be as significant a problem; most (though not all) of the cases are accurate representations of what they purport to stand for, but they are a most curious amalgam of cases. I will here provide a brief description of the cases that are listed in the Reporters' Notes accompanying section 8.07, the section that lists the protectable interests that will support a restrictive covenant. By my count, there are fifty-two cases cited in this section, and in only seven of those cases was the agreement invalidated, and two of those were in the circumstance where an employer had no articulable justification other than to suppress competition.<sup>81</sup> On their face, these cases would provide a clear indication that noncompete agreements are typically, if not routinely upheld, but the cases also seem to comprise a highly unusual collection. Of the fifty-two cases, only twelve date from 2000, and only five arose in the last

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<sup>79</sup> See *supra* notes 34–38 and accompanying text.

<sup>80</sup> See Selmi, *The Restatement's Supersized Duty of Loyalty Provision*, *supra* note 7, at 406.

<sup>81</sup> These are the last two cases presented in the Notes and both involve older cases where the covenant was clearly intended to restrain competition. See *Chavers v. Copy Prods., Inc.*, 519 So. 2d 942, 945 (Ala. 1988) (holding that an employer's interest in keeping its most skilled copy repairman was insufficient to justify a covenant not to compete); *Danieli v. Braverman*, No. 9306532, 1994 WL 879855, at \*4 (Mass. Super. Ct. Jan. 20, 1994) (stating that "[a] nondisclosure agreement which seeks to restrict a former employee's right to use an alleged trade secret which is not such . . . is unenforceable . . .").

decade. The vast majority of the cases came from the 1990s when the case law was less plentiful and often dealt with less controversial employment settings, including negotiated agreements.<sup>82</sup> As has been widely noted, over the last decade, employers have been unilaterally imposing agreements on employees at all levels, and the cases cited in the Reporters' Notes have largely missed this phenomenon.<sup>83</sup> Perhaps most puzzling of all, sixteen of the cases come from Massachusetts, nine of which arise from unreported superior court decisions.<sup>84</sup> Taking all of these limitations into account, it is difficult to see how the cases can be seen as representative of the vast array of case law, particularly the more recent cases, and the fascination with cases from the Massachusetts Superior Court is never explained, though Massachusetts is well known for having a liberal approach to upholding restrictive covenants as reflected in the extensive research regarding the triumph of Silicon Valley over Route 128, which a number of scholars have attributed at least partly to the different approaches to restrictive covenants.<sup>85</sup> In fact, even Massachusetts is trying to move in a different direction, as legislation has been introduced to restrict the use of noncompete agreements.<sup>86</sup>

It is difficult to know what to make of all this, or what attorneys and courts are likely to make of it. The provisions regarding restrictive covenants eschew all of the difficult issues and seem to tilt in favor of upholding agreements despite the recognition in the Notes that the law varies widely among jurisdictions. As a result, the substantive provisions are incomplete and I would suggest inadequate to deal with what is a dynamic area of the law, and because it is so dynamic, the Restatement seemed to miss an opportunity to shape future developments, opting instead for a curiously static approach to noncompete agreements that reflects the state of the doctrine, in some jurisdictions, a decade or two ago.

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<sup>82</sup> See RESTATEMENT OF EMP'T LAW § 8.07 Reporters' Notes (2015).

<sup>83</sup> For a discussion of both the proliferation of restrictive covenants and their negative effects see ORLY LOBEL, *TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING* (2013).

<sup>84</sup> By unreported, I mean not reported in an official reporter. The cases appear to be available on the electronic services, and it appears that the Reporters relied primarily on Westlaw. See, e.g., RESTATEMENT OF EMP'T LAW § 8.07 cmt. b, Reporters' Notes (citing *Bowne of Boston, Inc. v. Levine*, No. Civ. A. 97-5789A, 1997 WL 781444, at \*5 (Mass. Super. Ct. Nov. 25, 1997)).

<sup>85</sup> See ANNALEE SAXENIAN, *REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128* (1994); Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575 (1999).

<sup>86</sup> For a discussion of pressure to change Massachusetts law, see Jeremy Hitchcock, *Noncompete Claws: An Antiquated Restriction is Hurting Tech Growth in Massachusetts*, BOS. GLOBE (Dec. 1, 2013), <https://www.bostonglobe.com/opinion/2013/12/01/noncompete-claws/rHKUbmfe3srzVzmCT2NWGP/story.html>.

## CONCLUSION

Employment law is a fascinating area because of its dynamic quality and because it influences and shapes people's lives to such a great extent. The persistence of at-will employment in the United States, along with the precipitous decline of unions, has rendered the workplace uncertain and in some respects uncharted territories for employers and employees alike. It may be that employers have now overplayed their hand by demanding social media passwords, lurking on the Internet to trap unwary employees for their private speech, through the imposition of arbitration agreements and class-action waivers, and now by the indiscriminate use of noncompete agreements, imposed for no other reason than that they can. These restraints, however, have a serious effect on employee mobility and economic development, not to mention that they can suppress wages (think of the lowly sandwich maker at Jimmy John's and the economic power she will have in face of a two-year restriction on moving to a new employer). The Restatement's failure to grapple with the many difficult issues that are arising with restrictive covenants and trade secrets is hardly to blame for the complex workplace decisions so many employees face, but it will likely limit its influence on the development of the law, and it is also possible that the law has already passed it by.