RESTRICTIVE COVENANTS UNDER ARIZONA LAW: Step Away from the Step-Down Provisions

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INTRODUCTION

Arizona courts take a skeptical approach to restrictive covenants—covenants not to compete, antipiracy agreements, and confidential information agreements—and have good reason for doing so. Restrictive covenants are contrary to fundamental principles of free enterprise,[1] as they place restrictions on free and unrestricted competition. Moreover, "the right of an individual to follow and pursue the particular occupation for which he is best trained is a most fundamental right."[2] And consumers pay a higher price for goods and services when competition is eliminated from the marketplace, even if only temporarily.

But restrictive covenants also play an integral role in protecting an employer's legitimate business interests, including the employer's intangible assets such as its ideas, innovations, goodwill, and relationships. And as the American economy becomes increasingly dependent on

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1. The freedom to compete is fundamental to free enterprise:

> The freedom to engage in business and to compete for the patronage of prospective customers is a fundamental premise of the free enterprise system. Competition in the marketing of goods and services creates incentives to offer quality products at reasonable prices and fosters the general welfare by promoting the efficient allocation of economic resources. The freedom to compete necessarily contemplates the probability of harm to the commercial relations of other participants in the market.

RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 cmt. a (AM. LAW INST. 1995).

2. Amex Distrib. Co. v. Mascari, 724 P.2d 596, 602 (Ariz. Ct. App. 1986) (quoting ILG Indus., Inc. v. Scott, 273 N.E.2d 393, 396 (Ill. 1971)).

intangible assets,[3] the need to protect those assets continues to grow. As a result, the courts have been forced to reconcile the competing policy issues between "an employee's right to work, an employer's right to contract, and the public's right to unfettered competition[,]"[4] an analysis that one court likened to a "swampy morass of conflicting interests and policies."[5]

In Arizona, the law of restrictive covenants has developed almost exclusively through the common law.[6] As the appellate courts have grappled with these competing interests, they have outlined a jurisprudence that seeks to balance the competing interests between employee mobility and the employer's right to protect its intangible business interests. That jurisprudence places an exacting burden on employers to justify their need for a restrictive covenant, prove the scope of their legitimate business interests, *and* narrowly tailor the restrictions to cover only those business interests. While employers have the right to protect their business interests from unfair competition, "[a]n employer may not enforce a post-employment restriction on a former employee simply to eliminate competition *per se*."[7]

This article is broken into three parts. Part I discusses Arizona law related to restrictive covenants. The Arizona courts have shown considerable judicial discomfort with overbroad restrictive covenants. Because restrictive covenants are disfavored in the law, the employer has a heavy burden of showing that the restrictions are limited, reasonable, and no greater than is required to prevent unfair competition. That burden requires the employer to distinguish *unfair* competition (which can be restricted) from competition *per se* (which cannot).

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3. The value of intangible assets continues to grow, to the point where "ideas and innovations have become the most important resource, replacing land, energy and raw materials." *A Market for Ideas*, ECONOMIST (Oct. 22, 2005), https://www.economist.com/special-report/2005/10/20/a-market-for-ideas [https://perma.cc/9QWL-PPX7]. Indeed, one study shows that intangible assets made up eighty-seven percent of the implied value of S&P 500 companies in 2015. News Release, Ocean Tomo, LLC, Annual Study of Intangible Asset Market Value from Ocean Tomo, LLC (Mar. 4, 2015), http://www.oceantomo.com/2015/03/04/2015-intangible-asset-market-value-study/ [https://perma.cc/T238-9Q3B].

4. MARK R. FILIPP, COVENANTS NOT TO COMPETE § 1.01, at 1-3 (Wolters Kluwer, 4th ed. Supp. 2017).

5. Reddy v. Cmty. Health Found. of Man, 298 S.E.2d 906, 917 (W. Va. 1982).

6. The one exception is section 23-494 of the Arizona Revised Statutes Annotated, which prohibits a "broadcast employer" from requiring its employees to sign a noncompete clause "that prohibits the employee from working in a specific geographic area for a specific period of time after leaving employment with the broadcast employer." ARIZ. REV. STAT. ANN. § 23-494 (West 2019).

7. Bryceland v. Northey, 772 P.2d 36, 39 (Ariz. Ct. App. 1989).

Part II discusses how Arizona courts implement the blue pencil rule when interpreting restrictive covenants. Some states grant an interpreting court extensive authority to modify or rewrite a restrictive covenant to make the covenant reasonable. Under Arizona law, however, the blue pencil rule grants a trial court limited authority to eliminate "grammatically severable, unreasonable provisions" from a restrictive covenant but forbids the court to rewrite those provisions.[8] If a valid restrictive covenant remains after excising the unenforceable provisions, the court will enforce the remaining restrictions. Arizona takes this strict approach because of the *in terrorem* effect of an overly broad restrictive covenant.

As a result of Arizona's approach to the blue pencil rule, many Arizona lawyers include step-down provisions in their restrictive covenants to increase the likelihood that a court will find the restrictive covenant to be enforceable. Part III addresses the conflict between step-down provisions and the policies established under Arizona law. Rather than seeking to protect the employer's legitimate business interest from unfair competition, a step-down provision constitutes an *in terrorem* clause that seeks to prohibit competition *per se*. An employer relying on a step-down provision sidesteps its obligation to specifically identify its protectable business interest and narrowly tailor a restriction to meet that interest. Instead, the step-down provision casts a wide net that catches both *unfair* competition and competition *per se*, and then asks the court to do what the employer was unwilling or unable to do for itself: craft a reasonable restrictive covenant. As a result, step-down provisions violate the prohibition against courts using the blue pencil rule to rewrite a restrictive covenant.

I. ARIZONA LAW DISFAVORS RESTRICTIVE COVENANTS

Restrictive covenants are a creature of state law. Though some states—including California,[9] Montana,[10] and Oklahoma[11]—prohibit restrictive

8. Valley Med. Specialists v. Farber, 982 P.2d 1277, 1286 ¶ 30 (Ariz. 1999).

9. CAL. BUS. & PROF. CODE § 16600 (West 2019) ("Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.").

10. MONT. CODE ANN. § 28-2-703 (2019) ("Any contract by which anyone is retrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided for by 28-2-704 or 28-2-705, is to that extent void.").

11. OKLA. STAT. tit. 15, § 217 (2018) ("Every contract by which any one is restrained from exercising a lawful profession, trade or business of any kind, otherwise than as provided by Sections 218 and 219 of this title, or otherwise than as provided by Section 2 of this act, is to that extent void.").

covenants for public policy reasons, most states will enforce some sort of post-termination restriction on employees. While the states may use similar words in defining when a restriction is or is not enforceable, the interpretation they give the restrictions will often vary vastly depending on the state involved.[12]

Restrictive covenants offer an employer a critical tool to protect its intangible assets—its ideas, confidential information, relationships, and goodwill—from unfair competition. Arizona takes a cautious approach to restrictive covenants. Employers using restrictive covenants face a considerable hurdle: restrictive covenants are contrary to basic principles of free enterprise. For that reason, Arizona law disfavors restrictive covenants, particularly when the covenant seeks to prevent an employee from pursuing a similar vocation after termination.[13] "To be enforced, the restriction must do more than simply prohibit fair competition by the employee."[14] The restriction must prohibit *unfair* competition and may not restrict competition *per se*.[15]

Though restrictive covenants can be enforceable, they must be narrowly tailored and no broader than necessary to protect the employer's legitimate business interest. The requirement of narrow tailoring authorizes the court to enforce restrictions that prevent *unfair* competition while at the same time reject those that prohibit competition *per se*.

A. Types of Restrictive Covenants

Any discussion of restrictive covenants requires a familiarity with the three basic types of agreements used: covenants not to compete, non-solicitation agreements, and confidential information agreements.

A *covenant not to compete* prohibits a person from engaging in a specific occupation in a particular geographic area for a limited time period. A covenant not to compete may be given as part of the sale of a business, in which case the courts will give considerable deference to the terms of the

12. Selection of the applicable law often resolves the question of the enforceability of a particular restrictive covenant. An agreement that is enforceable in one state may be unenforceable under the law of another state. See, for example, Pathway Med. Technologies, Inc. v. Nelson, No. CV11-0857 PHX DGC, 2011 WL 4543928, at *2 (D. Ariz. 2011), where a restrictive covenant was enforceable under Washington law but unenforceable under Arizona law.

13. *E.g.*, Amex Distrib. Co. v. Mascari, 724 P.2d 596, 600 (Ariz. Ct. App. 1986).

14. Valley Med. Specialists v. Farber, 982 P.2d 1277, 1281 ¶ 12 (Ariz. 1999).

15. Bryceland v. Northey, 772 P.2d 36, 39 (Ariz. Ct. App. 1989).

agreement.[16] More commonly, however, a covenant not to compete is given in connection with a term of employment. Arizona courts place substantial hurdles on employers seeking to prevent an employee from working in her chosen occupation post-termination.[17] This article focuses on non-compete agreements given in connection with a contract of employment.

Under a *non-solicitation agreement*, the former employee agrees not to solicit customers (and often employees) of his former employer for a specified period of time. These types of agreements—also referred to as *anti-piracy agreements*—"prevent former employees from using information learned during their employment to divert or to 'steal' customers from the former employer."[18]

A *confidential information agreement* is designed to protect an employer's business information, such as trade secrets and confidential customer lists. Proper application of these agreements requires an understanding of the three different types of information used in a business.

First, the company has its trade secrets, which are defined by state[19] and federal law.[20] As long as the trade secret owner takes "reasonable" efforts to protect the secrecy of the information,[21] trade secrets are protected

16. *See id.* As part of the purchase, the buyer acquires the goodwill of the company, which requires that he be allowed to run the business without interference from the former owner. *Valley Med. Specialists*, 982 P.2d at 1282 ¶ 14 ("A restraint accompanying the sale of a business is necessary for the buyer to get the full goodwill value for which it has paid.").

17. *E.g.*, *Amex Distrib. Co.*, 724 P.2d at 600.

18. Olliver/Pilcher Ins. v. Daniels, 715 P.2d 1218, 1219 (Ariz. 1986).

19. See, for example, the Uniform Trade Secrets Act, the Arizona version of which is codified at ARIZ. REV. STAT. ANN. §§ 44-401 to -407 (West 2019). Under Arizona law, a trade secret is:

> information, including a formula, pattern, compilation, program, device, method, technique or process that both: (a) 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. (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Id. § 44-401(4).

20. See, for example, the Defend Trade Secrets Act, 18 U.S.C. §§ 1831–1839 (2018), which creates a private federal right of action for misappropriation of trade secrets.

21. The Arizona Uniform Trade Secrets Act requires that a trade secret be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." § 44-401(4)(b) (West). As a result, information might be the type that deserves trade secret protection (i.e., it is not commonly known in the industry and "derives independent economic value" from not being commonly known by competitors) and still not be a trade secret if the trade secret holder fails to take "reasonable" efforts to maintain the secrecy of the information. The owner is not required to show that he kept the information absolutely secret, but must instead show that "it would be difficult for others to discover the information without using improper means." Enter. Leasing

indefinitely as a matter of law regardless of whether the employer has a written agreement with the employee. Trade secrets make up a small—though extremely valuable—piece of a business's intangible assets.

Second, the business has confidential information that does not rise to the level of a trade secret, but still may be protected by contract. In addition to the protections afforded to trade secrets, "a nondisclosure agreement prohibiting the use or disclosure of particular information can clarify and *extend* the scope of an employer's rights" beyond the protection afforded by trade secret statutes.[22] The key is whether the information truly is confidential. "While there may be substantial overlap between confidential information and trade secrets, 'an enforceable restrictive covenant may protect material not properly characterized as a trade secret' and thus affords broader protection than trade secret law does."[23] The employer may not re-characterize public information as private and confidential. "Information available in trade journals, reference books, or published materials . . . is considered public knowledge and not confidential."[24]

Third, the business relies on the general skills and knowledge that are common in the industry, i.e., the skills and knowledge available to a competent practitioner in the industry. An employer cannot prevent a former employee from using general skills and knowledge, even if the employee acquired those skills by solely working for the employer. An employer may not prevent an employee from using any information she may have learned from her employment; that type of restriction is "nothing more than an unlimited restriction against competing" with the employer.[25]

Co. of Phx. v. Ehmke, 3 P.3d 1064, 1070 ¶ 23 (Ariz. Ct. App. 1999). "Reasonable efforts do not require extreme and unduly expensive procedures to be taken to protect trade secrets against industrial espionage, and the owner of a trade secret does not relinquish its secret by disclosure to employees on a necessary basis or by limited publication for a restricted purpose." *Id.* (citations omitted).

22. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 cmt. g (AM. LAW INST. 1995) (emphasis added).

23. SKF USA, Inc. v. Bjerkness, 636 F. Supp. 2d 696, 711 (N.D. Ill. 2009) (quoting Smith Oil Corp. v. Viking Chem. Co., 468 N.E.2d 797, 800 (Ill. App. Ct. 1984)). Though the law distinguishes confidential information form trade secrets, "the rules governing trade secrets are still relevant in analyzing the reasonableness and enforceability of non-disclosure provisions because, in order to justify the contractual restraint, information subject to non-disclosure provisions must share at least some characteristics with information protected by trade secret statutes." Orthofix, Inc. v. Hunter, 630 F. App'x 566, 568 (6th Cir. 2015) (citations omitted).

24. Orca Commc'ns Unlimited, LLC v. Noder, 314 P.3d 89, 94 ¶ 15 (Ariz. Ct. App. 2013), *aff'd in part, depublished in part by* 337 P.3d 545 (Ariz. 2014).

25. 314 P.3d at 95 ¶ 18.

In similar vein, "[o]ne who has worked in a particular field cannot be compelled to erase from his mind all of the general skills, knowledge and expertise acquired through his experience."[26] Consequently,

> absent an enforceable covenant not to compete, a former employee may utilize in competition with the former employer the general skills, knowledge, training, and experience acquired during the employment, but the employee remains obligated to refrain from using or disclosing the employer's trade secrets.[27]

Or, to put it more bluntly, a former employee "is not required to undergo a prefrontal lobotomy" after leaving his job.[28]

Most business owners overvalue the significance of information used in their business. Information used in a business largely consists of the general skill, training, and experience common to any person who is competent in the field. A small portion of the information used is confidential though not necessarily proprietary. And an even smaller portion of that confidential information makes up a true trade secret. The employer may only protect the latter two types of information.

B. Determining the Enforceability of a Restrictive Covenant

Regardless of the type of restrictive covenant involved, Arizona courts require certain formalities to make an agreement enforceable. Those formalities require that the restriction (1) is reasonably limited to prevent only unfair competition, (2) narrowly protects the employer's legitimate business interest, (3) complies with public policy considerations, and (4) is

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26. Amex Distrib. Co. v. Mascari, 724 P.2d 596, 602 (Ariz. Ct. App. 1986) (quoting ILG Indus., Inc. v. Scott, 273 N.E.2d 393, 396 (Ill. 1971)); *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 cmt. c (AM. LAW INST. 1995) ("Former employees are entitled to exploit their general skill, knowledge, training, and experience, even when acquired or enhanced through the resources of the former employer."). For that reason,

> a nondisclosure agreement that encompasses information that is generally known or in which the promisee has no protectable interest, such as a former employee's promise not to use information that is part of the employee's general skill and training . . . may be unenforceable as an unreasonable restraint of trade.

Id. § 41 cmt. d; *see also* Wright v. Palmer, 464 P.2d 363, 366 (Ariz. Ct. App. 1970) ("[M]atters of public knowledge or of general knowledge in the industry cannot be appropriated by one as his secret.").

27. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 cmt. d (AM. LAW INST. 1995).

28. *Amex Distrib. Co.*, 724 P.2d at 603.

ancillary to an otherwise enforceable agreement. The employer has the burden of proving the existence of each of these requirements.

1. Reasonableness of the Restriction

The touchstone in analyzing a restrictive covenant is whether the restriction is "reasonable under the circumstances to prevent *unfair competition*."[29] Arizona courts will enforce "[r]easonable restraints—those no broader than the employer's legitimately protectable interests."[30] To determine whether a restriction is reasonable, the court must analyze "the nature of the employment, the radius of competition, and the time limit" of the restriction.[31] "What is reasonable depends on the whole subject matter of the contract, the kind, character and location of the business, . . . the purpose to be accomplished by the restriction, and [the totality of] circumstances which show the intention of the parties."[32] Stated another way, a restrictive covenant is *unreasonable* and *unenforceable* "(1) if the restraint is greater than necessary to protect the employer's legitimate interest; or (2) if that interest is outweighed by the hardship to the employee and the likely injury to the public."[33]

Reasonableness focuses on whether the restriction prevents unfair competition or competition *per se*. While an employer may enact a restriction to prevent unfair competition, he "may not enforce a post-employment restriction on a former employee simply to eliminate competition *per se.*"[34] Unfair competition occurs when an employee has gained something from his employment that gives him an unfair advantage when competing in the industry. On the other hand, a restriction seeks to eliminate competition *per se* "when there is no other, valid interest of the employer to protect."[35] Because the employer may not restrict competition *per se,* "a restrictive covenant that goes beyond protecting a legitimate business interest and prevents a former employee from using skills and talents learned on a former job is unenforceable."[36]

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29. Lessner Dental Labs., Inc. v. Kidney, 492 P.2d 39, 41 (Ariz. Ct. App. 1971).
30. *Amex Distrib. Co.*, 724 P.2d at 601.
31. *Lessner Dental Labs., Inc.*, 492 P.2d at 41.
32. Olliver/Pilcher Ins., Inc. v. Daniels, 715 P.2d 1218, 1220 (Ariz. 1986) (quoting Gann v. Morris, 596 P.2d 43, 44 (Ariz. Ct. App. 1979)).
33. Valley Med. Specialists v. Farber, 982 P.2d 1277, 1283 ¶ 20 (Ariz. 1999).
34. Bryceland v. Northey, 772 P.2d 36, 39 (Ariz. Ct. App. 1989).
35. *Amex Distrib. Co.*, 724 P.2d at 604.
36. Orca Commc'ns Unlimited, LLC v. Noder, 314 P.3d 89, 95 ¶ 19 (Ariz. Ct. App. 2013).

The restriction must be reasonable as to the scope and time of the restriction and, in the case of a covenant not to compete, its geographic coverage.[37] Each of these characteristics must be narrowly tailored and limited.

The *scope of the restriction* has two components. First, it references the business interest sought to be protected. As is discussed below, the restriction must be no broader than necessary to protect a specific business interest of the employer.

Second, the restriction must be limited to the employer's particular line of business. The employer may have a legitimate business interest in preventing the employee from diverting business from the employer to a competitor. For example, an insurance brokerage can lawfully prevent a former employee from contacting the customers with whom she worked to sell them insurance products for a competitor. But the employer has little (if any) business interest in preventing the employee from contacting the customers to sell non-competing goods or services such as auto parts or home security. The same analysis would apply if the employer voluntarily chose to leave a particular market or customer demographic. Because the employer is no longer doing business in that market or with that customer demographic, it would have no interest in preventing the employee from doing so.

The *time limitation* must be no longer than necessary to protect the employer's business interest, which necessarily means that the reasonableness of the temporal limitation must be based on the specific facts of each case. As a general rule, a restriction protecting confidential information may last as long as that information remains confidential. If a trade secret remains confidential and secret indefinitely, the employee could lawfully be restrained from disclosing that trade secret indefinitely. On the other hand, if information becomes "stale" over time, the restriction may be no longer than the time the information remains relevant and viable.[38]

> 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

37. *See Valley Med. Specialists*, 982 P.2d at 1284 ¶ 25 ("A restraint's scope is defined by its duration and geographic area.").

38. *See, e.g.*, Bed Mart, Inc. v. Kelley, 45 P.3d 1219, 1222 ¶ 16 (Ariz. Ct. App. 2002) (upholding a six-month restriction in part because the employer updated its "Product Bible" of information approximately every six months).

> new employee to have a reasonable opportunity to demonstrate his effectiveness to the customers.[39]

Though each restriction must be gauged by the particular circumstances of each case, "[c]ourts seldom criticize restraints of six months or a year on the grounds of duration as such."[40]

The *geographic scope* of a restriction arises in connection with a non-compete provision. A reasonable geographic restriction is limited to the area where the particular employee operated.[41] In the case of a sales representative, the geographic scope would be limited to the representative's sales territory. But if the employee had a wider influence—for example, a Regional Sales Director who developed marketing plans and influenced sales throughout the region—the restriction might appropriately extend throughout the entire area of influence, even if the employee was physically located in a single city. And if the employee held a key position at the corporate level—for example, the Vice President of Marketing who developed company-wide plans, policies, and procedures—the restriction might expand to any locale where the company does business.

Before the internet era, the geographic scope of a restriction had greater importance.[42] A sales representative typically had an assigned geographic territory, so it made sense to restrict her from doing business for a competitor in that same territory post termination. With the advent of the internet, however, a single employee may have worldwide influence on an employer's customer base. For that reason, employers are placing greater importance on non-solicitation agreements (which prevent the employee from exploiting relationships with specific customers) instead of non-compete agreements that are tied to a particular geographic area. Indeed, in many circumstances a non-compete provision may be narrowly tailored to the scope of the employee's geographic influence and still constitute an unreasonable restriction.

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39. *Amex Distrib. Co.*, 724 P.2d at 604 (quoting Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 677 (1960)).

40. *Id.*

41. Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 680 (2008) ("Numerous courts have found that a reasonable area consists of the territory in which the employee worked while employed.").

42. *See* Ann C. Hodges & Porcher L. Taylor, III, *The Business Fallout from the Rapid Obsolescence and Planned Obsolescence of High-Tech Products: Downsizing of Noncompetition Agreements*, COLUM. SCI. & TECH. L. REV., Apr. 2005, at 1, 11 (noting that the rise of the internet may allow employers to enforce a larger geographic scope, but that courts will likely balance this with a narrower scope for activity and duration restrictions).

Consider, for example, the case of a sales representative who services multiple corporate accounts across the country. Though the employee has influence with customers nationwide, his influence in the industry is shallow, as he services only a handful of the tens of thousands of prospective purchasers of his product. The employer could not restrict the employee from competing in the industry nationwide, but could lawfully restrict him from contacting the customers with whom he did business while working for the employer. In this particular case, a non-compete agreement would be unreasonable while a non-solicitation provision would be narrowly tailored to meet the employer's legitimate interests.

2. Legitimate Business Interest

A restrictive covenant is enforceable only if it is no broader than the employer's legitimate business interests.[43] A legitimate business interest is more than the employer's desire to protect itself from competition; the interest must implicate "information or relationships which pertain peculiarly to the employer and which the employee acquired in the course of the employment."[44]

The employer may have a legitimate interest in setting a "reasonable amount of time to overcome the former employee's loss, usually by hiring a replacement and giving that replacement time to establish a working relationship."[45] While the states articulate different standards for determining what constitutes a legitimate business interest, that protectable interest typically involves business relationships, goodwill, trade secrets, and other proprietary or confidential information.[46]

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43. *E.g.*, Hilb, Rogal & Hamilton Co. of Ariz. v. McKinney, 946 P.2d 464, 467 (Ariz. Ct. App. 1997).

44. Valley Med. Specialists v. Farber, 982 P.2d 1277, 1281 ¶ 12 (Ariz. 1999) (quoting Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 647 (1960)). An employer has a legitimate interest in preventing a former employee "from appropriating valuable trade information and customer relationships" gained through her employment. Bryceland v. Northey, 772 P.2d 36, 39 (Ariz. Ct. App. 1999) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. b (1981)).

45. *Valley Med. Specialists*, 982 P.2d at 1284.

46. Under North Carolina law, for example, a legitimate business interest is "a business interest, not fictitious, which, when weighed against the public's interest in a free economic arena, is worthy of protection in order to encourage and stimulate business efforts and innovations." United Labs., Inc. v. Kuykendall, 361 S.E.2d 292, 298 (N.C. Ct. App. 1987), *aff'd in part, rev'd in part*, 370 S.E.2d 375 (N.C. 1988).

In Illinois, a "legitimate business interest" is determined by considering "the totality of circumstances." Reliable Fire Equip. Co. v. Arredondo, 965 N.E.2d 393, 403 (Ill. 2011). This

The employer must have a current protectable interest. If the employer's interest is not current, then the court will not enforce the restriction, even if the employer held a protectable interest at the time the parties signed the agreement.[47] "Although [an employer] has a protectable interest in customer relationships when an employee leaves, an employer has no protectable interest in persons or entities as customers when the employer has no business ties to them."[48] The employer likewise has no protectable interest in "either potential customers or former customers."[49]

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approach provides a flexible basis for determining the business interest in each particular case. *Reliable Fire Equipment* overturned a long line of decisions that limited a legitimate business interest to two situations: (1) where the employer had a "near-permanent customer relationship" and (2) where the employee had "acquired confidential information during his employment and subsequently attempted to use it for his own benefit." *Id.* at 402–03. The *Reliable Fire Equipment c*ourt emphasized that these two factors still could be considered in determining the "totality of the circumstances." *Id.* at 403.

Florida statutorily defines a legitimate business interest as follows:

> (b) The person seeking enforcement of a restrictive covenant shall plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant. The term "legitimate business interest" includes, but is not limited to:
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> 1. Trade secrets, as defined in s. 688.002(4).
>
> 2. Valuable confidential business or professional information that otherwise does not qualify as trade secrets.
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> 3. Substantial relationships with specific prospective or existing customers, patients, or clients.
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> 4. Customer, patient, or client goodwill associated with:
>
> a. An ongoing business or professional practice, by way of trade name, trademark, service mark, or "trade dress";
>
> b. A specific geographic location; or
>
> c. A specific marketing or trade area.
>
> 5. Extraordinary or specialized training.
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> Any restrictive covenant not supported by a legitimate business interest is unlawful and is void and unenforceable.

FLA. STAT. § 542.335(1)(b) (2019).

47. *See, e.g.*, *Hilb, Rogal & Hamilton Co.*, 946 P.2d at 467 (holding that a non-solicitation agreement did not prevent an employee from soliciting a former customer of the employer who moved its business to a third-party competitor of the employer without any influence from the employee).

48. Orca Commc'ns Unlimited, LLC v. Noder, 314 P.3d 89, 96 ¶ 21 (Ariz. Ct. App. 2013).

49. *Id.* ¶ 22.

In determining whether a restriction is reasonably tailored to protect the employer's legitimate business interest, the court must focus on *who* is being restrained and *what* conduct is being restricted. Regardless of what conduct is being restricted, the covenant must be narrowly drafted so that it precludes only *unfair* competition while still allowing the employee to compete fairly against the employer. The analysis of a restrictive covenant should start with a single question: Why is it unfair for *this person* to compete in *this way*? If the employer cannot answer this question with specificity, the court should decline to enforce the agreement.

Because the protectable interest will vary depending on the employee involved, the scope of the protectable interest must be analyzed based on the employee's relationship with the claimed business interest, and not the employer's relationship with the interest. That analysis varies widely based on the individualized facts of the restriction. For example, assume that an employer has three sales representatives—Alice, Bertram, and Claudia—who each serve twenty-five customers in their own exclusive sales territory. The sales representatives do not have contact with any customers other than their own.

While the employer has a protectable business interest in the relationship with each of its seventy-five customers, it could only prohibit Alice from exploiting the relationship with *her* customers in her geographic territory.[50] Because the employer paid Alice to develop the relationship with her twenty-five customers, it would be unfair for her to exploit that relationship to compete against the employer. Under this simple fact pattern, however, it would not be unfair for Alice to contact Bertram's customers post termination, as she would be a stranger competing fairly with the employer for Bertram's customers. Nor would it be unfair for her to do business in Bertram's sales territory post termination.

Nonetheless, the analysis also considers *what* is being restricted. So although Alice could fairly solicit Bertram's customers, it would be *unfair* for her to use confidential information (such as customer lists or pricing information) when contacting Bertram's customers, at least as long as the information remained viable and relevant.[51] If she had access to confidential

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50. *See* Pivateau, *supra* note 41, at 680–81.

51. For example, in *Bed Mart, Inc. v. Kelley*, the employer had a legitimate business interest in its "Product Bible," which contained employer-specific information about merchandise, wholesale prices of the merchandise, and unique promotional deals that the suppliers offered the employer. 45 P.3d 1219, 1222 ¶ 14 (Ariz. Ct. App. 2002). The six-month restriction was narrowly tailored to meet this business interest because (1) the employer needed approximately six months to hire and train a new employee to be profitable, and (2) the company updated its "Product Bible" approximately every six months. *Id.* ¶ 16.

information that could be used to unfairly compete against the company, the employer could restrict her from using that information post termination, even if it could not restrict her from doing business with Bertram's clients.

On the other hand, assume that Claudia is the Director of Marketing for the company. Claudia directly supervises both Alice and Bertram and interacts directly with all of the company's customers. She also knows extensive information about the company's current and future marketing strategies, having been intimately involved in formulating those strategies and plans. The employer has a broader and more robust business interest in preventing Claudia from competing unfairly, and the courts will enforce a greater restriction against her post termination.

3. Public Policy Considerations

A restrictive covenant cannot violate public policy.[52] As a general rule, an agreement violates public policy if it is "unreasonably in restraint of trade," which includes those promises that tend to "limit competition in any business or restrict the promisor in the exercise of a gainful occupation."[53] A promise is an unreasonable restraint of trade when "the restraint is greater than is needed to protect the [employer's] legitimate interest," ***or*** "the [employer's] need is outweighed by the hardship to the [employee] and the likely injury to the public."[54] A restrictive covenant violates public policy when it prohibits more than is necessary to protect the employer's legitimate business interest.[55]

Public policy considerations take on additional importance in cases involving professionals, where "public policy concerns may outweigh any protectable interest the remaining firm members may have."[56] A covenant that restricts a physician's practice of medicine raises "strong public policy implications and must be closely scrutinized."[57] Indeed, the American

52. *E.g.*, Phx. Orthopaedic Surgeons, Ltd. v. Peairs, 790 P.2d 752, 755 (Ariz. Ct. App. 1989) ("A restrictive covenant in an employment agreement is valid and enforceable by injunction when the restraint does not exceed that reasonably necessary to protect the employer's business, is not unreasonably restrictive of the rights of the employee, does not contravene public policy, and is reasonable as to time and space.").

53. RESTATEMENT (SECOND) OF CONTRACTS § 186 (AM. LAW INST. 1981).

54. *Id.* § 188.

55. *See, e.g.*, Lessner Dental Labs., Inc. v. Kidney, 492 P.2d 39, 42 (Ariz. Ct. App. 1971) (holding that a restriction violated public policy because it prevented the employee from using her skill and general knowledge).

56. Valley Med. Specialists v. Farber, 982 P.2d 1277, 1282 ¶ 15 (Ariz. 1999).

57. *Id.* at 1282 ¶ 16.

Medical Association "discourages" restrictive covenants, noting that they "are not in the public interest."[58]

"Restrictive covenants between lawyers limit not only their professional autonomy but also the client's freedom to choose a lawyer."[59] That is why the Arizona Rules of Professional Conduct prohibit any agreement that "restricts the right of a lawyer to practice after termination of [a law firm] relationship."[60]

Commercial standards may not be used to evaluate the reasonableness of lawyer restrictive covenants. Strong public policy considerations preclude their applicability. In that sense lawyer restrictions are injurious to the public interest. A client is always entitled to be represented by counsel of his own choosing. The attorney-client relationship is consensual, highly fiduciary on the part of counsel, and he may do nothing which restricts the right of the client to repose confidence in any counsel of his choice. "No concept of the practice of law is more deeply rooted."[61]

In addressing public policy considerations, courts consider the impact that the restriction has on the employee and on the public. Overbroad restrictive covenants violate public policy.

> Whatever restraint is larger than the necessary protection of the [employer] can be of no benefit to either [the employer or the employee]; it can only be oppressive, and, if oppressive, it is, in the eye of the law, unreasonable and void, on the ground of public policy, as being injurious to the interests of the public.[62]

4. Ancillarity

A restrictive covenant must be ancillary to an otherwise enforceable agreement.[63] "A promise to refrain from competition that imposes a restraint that is not ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade."[64] A valid restriction may be ancillary to

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58. *Id.* (quoting AM. MED. ASS'N, CURRENT OPINIONS OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS § 9.02 (1989)).

59. *Valley Med. Specialists*, 982 P.2d at 1283 ¶ 18.

60. ARIZ. RULES OF PROF'L CONDUCT r 5.6(a).

61. *Valley Med. Specialists*, 982 P.2d at 1283 ¶ 18 (quoting Dwyer v. Jung, 336 A.2d 498, 500 (N.J. Super. Ct. Ch. Div. 1975), *aff'd*, 348 A.2d 208 (N.J. Super. Ct. App. Div. 1975)).

62. *Valley Med. Specialists*, 982 P.2d at 1281 ¶ 12 (quoting Mandeville v. Harman, 7 A. 37, 39 (N.J. Ch. 1886)).

63. Am. Credit Bureau, Inc. v. Carter, 462 P.2d 838, 840 (Ariz. Ct. App. 1969).

64. RESTATEMENT (SECOND) OF CONTRACTS § 187 (AM. LAW INST. 1981).

an employment agreement (at will or for a specified term), an agreement granting the employee stock or other benefits, or any other valid agreement.

5. Burden of Proof

As part of its skepticism toward restrictive covenants, Arizona law places a significant burden of proof on the employer seeking to restrict competition. The employer has the burden of proving both the existence and the extent of its protectable interest.[65] The employer also must prove the reasonableness of any restriction imposed and further bears the burden of demonstrating "that the restraint is no greater than necessary to protect the employer's legitimate interest, and that such interest is not outweighed by the hardship to the employee and the likely injury to the public."[66] The employer likewise is required to prove his right to a claimed trade secret or other confidential information.[67] If the employer cannot meet its burden of proof, "the entire covenant will be deemed unenforceable."[68]

II. THE BLUE PENCIL RULE GIVES COURTS LIMITED AUTHORITY TO EDIT OVERBROAD RESTRICTIVE COVENANTS.

The objective in drafting a restrictive covenant is to prepare a document that clearly and unequivocally identifies and protects a narrowly tailored business interest. The best restrictive covenant is one that is so clear and reasonable that the parties never have to litigate its validity.

But what happens when a restrictive covenant is overbroad and, therefore, unreasonable? Can the court rewrite or modify an overly broad restrictive covenant to make it enforceable? The answer often depends on how the jurisdiction interprets the blue pencil rule.

A. The Blue Pencil Rule

The idea behind the blue pencil rule is to grant the court authority to modify, reform, or rewrite an overbroad provision to make the restrictive covenant enforceable. Though the name suggests that the blue pencil rule

65. Amex Distrib. Co. v. Mascari, 724 P.2d 596, 605 (Ariz. Ct. App. 1986).
66. *Valley Med. Specialists*, 982 P.2d at 1286 ¶ 33.
67. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 cmt. d (AM. LAW INST. 1995).
68. Compass Bank v. Hartley, 430 F. Supp. 2d 973, 979 (D. Ariz. 2006).

has a uniform meaning, the scope and implementation of the rule varies dramatically from state to state.

Courts presented with restrictive covenants containing unenforceable provisions have taken three approaches:

> (1) the "all or nothing" approach, which would void the restrictive covenant entirely if any part is unenforceable, (2) the "blue pencil" approach, which enables the court to enforce the reasonable terms provided the covenant remains grammatically coherent once its unreasonable provisions are excised, and (3) the "partial enforcement" approach, which reforms and enforces the restrictive covenant to the extent it is reasonable, unless the circumstances indicate bad faith or deliberate overreaching on the part of the employer.[69]

Some states allow the court to re-write the material terms of a restrictive covenant to remove any unenforceable aspects of the restriction.[70] For example, if the covenant contained a geographic restriction of a 200-mile radius, the court would, in appropriate circumstances, be free to reduce the geographic area to 100 miles, 25 miles, or 2 miles if it found the restriction to be excessive. Other states *require* the trial court to reform certain agreements to make them enforceable.[71]

Arizona takes a much more restrictive approach of the blue pencil rule. As long as the agreement contains a severability clause, the court is authorized to eliminate "grammatically severable, unreasonable

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69. Ferrofluidics Corp. v. Advanced Vacuum Components, Inc., 968 F.2d 1463, 1469 (1st Cir. 1992) (emphasis omitted).

70. In Washington, for example, "a trial court has the power to modify a covenant so that it may be enforced to some extent, rather than invalidating the covenant entirely." Perry v. Moran, 748 P.2d 224, 230 (Wash. 1987); *see also* Armstrong v. Taco Time Int'l, Inc., 635 P.2d 1114, 1118 (Wash. Ct. App. 1981) ("[A] court may modify the covenant even though the offending portion is grammatically indivisible from the remainder of the covenant.").

71. *See, e.g.*, FLA. STAT. § 542.335(c) (2018) ("If a contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interest or interests, a court shall modify the restraint and grant only the relief reasonably necessary to protect such interest or interests."); IDAHO CODE § 44-2703 (2018) ("To the extent any such agreement or covenant is found to be unreasonable in any respect, a court shall limit or modify the agreement or covenant as it shall determine necessary to reflect the intent of the parties and to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement or covenant as limited or modified."); TEX. BUS. & COM. CODE ANN. § 15.51(c) (West 2017) (When an agreement contains unreasonable restrictions, "the court shall reform the covenant to the extent necessary to cause the limitations contained in the covenant as to time, geographical area, and scope of activity to be restrained to be reasonable and to impose a restraint that is not greater than necessary to protect the goodwill or other business interest of the promisee and enforce the covenant as reformed.").

provisions"[72] to make the restriction reasonable. Once the "grammatically severable, unreasonable provisions" are eliminated from the agreement, "the court can enforce the lawful part and ignore the unlawful part."[73] The court may not, however, "add terms or rewrite an agreement to make it enforceable."[74]

The blue pencil rule offers employers a bit of relief amid its heavy burdens to identify its protectable interests and minimize the impact of its restrictions. A simple example illustrates how the blue pencil rule operates. Assume that an employer was considering the following two restrictive covenants for its non-compete agreement with a sales representative:

> For six months after the termination of Employee's employment with Employer, Employee will not directly or indirectly compete in the Business of the Company in Maricopa County, Pinal County, and Yavapai County.

or

> For six months after the termination of Employee's employment with Employer, Employee will not directly or indirectly compete in the Business of the Company within 125 miles of the Company's headquarters in Scottsdale, Arizona.

The two provisions establish similar restricted geographic areas. Assume, however, that a court interpreting the restrictions determined that the Employer's protectable business interest was limited to Maricopa County. An Arizona court could use the blue pencil rule to eliminate "Pinal County" and "Yavapai County" from the first provision, leaving the provision enforceable. The second provision could not be saved, however, as the court does not have the power to eliminate the overbroad 125-mile restriction and replace it with a reasonable restriction (for example, fifty miles).

The blue pencil rule provides an additional benefit to employers. Most agreements with restrictive covenants contain multiple types of restrictions in separate paragraphs. If a reviewing court found one of those provisions (e.g., the non-compete covenant) to be unreasonable, the court could excise that provision and still enforce the non-solicitation and confidential information covenants of the agreement. In similar vein, most confidential information covenants contain lists of protected information. The blue

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72. Valley Med. Specialists v. Farber, 982 P.2d 1277, 1286 ¶ 30 (Ariz. 1999).

73. Olliver/Pilcher Ins. v. Daniels, 715 P.2d 1218, 1221 (Ariz. 1986).

74. Orca Commc'ns Unlimited, LLC v. Noder, 314 P.3d 89, 96 ¶ 23 (Ariz. Ct. App. 2013).

pencil rule allows the reviewing court to excise one or more of the items and still protect the balance of the list. Each of these uses constitutes an appropriate application of the blue pencil rule under Arizona law.

B. The In Terrorem Effect of the Blue Pencil Rule

Arizona's version of the blue pencil rule is consistent with judicial skepticism of restrictive covenants and with the requirement that the employer be able to outline and defend the reasonableness of its restrictions. The Arizona appellate courts have expressed concern that if a trial court were authorized to rewrite restrictive covenants, the court would be enforcing an agreement the parties had not reached. The Supreme Court specifically disapproved of language allowing the court to "rewrite and create a restrictive covenant significantly different from that created by the parties."[75] This prohibition prevents the court from making even "insignificant" changes to the agreement, as "*any* judicial reformation of a restrictive covenant beyond implementation of the 'blue-pencil' rule is a 'significant' modification of the provision that cannot be tolerated."[76]

Allowing courts to rewrite agreements encourages employers to seek overly broad restrictions, knowing that the trial court will "fix" any provisions that it finds to be unreasonable. While the Arizona courts offer employers some relief from the harshness of restrictive covenant jurisprudence, they refuse to rewrite or modify agreements to create new restrictions.

The employer almost always has superior bargaining power in the employment relationship. While the employer may negotiate employment agreements with dozens or hundreds of employees, the employee is limited to a single transaction. The employer is legally obligated to tailor its restriction to be no greater than its protectable business interest. If the employer cannot or will not do so, the court should not do for the employer what he did not do for himself. The Restatement (Second) of Contracts supports this approach:

> [A] court will not aid a party who has taken advantage of his dominant bargaining power to extract from the other party a promise that is clearly so broad as to offend public policy by redrafting the agreement so as to make a part of the promise enforceable. The fact that the term is contained in a standard form

75. *Valley Med. Specialists*, 982 P.2d at 1286 ¶ 32.
76. Varsity Gold, Inc. v. Porzio, 45 P.3d 352, 355 (Ariz. Ct. App. 2002) (emphasis added).

> supplied by the dominant party argues against aiding him in this request.[77]

But even Arizona's strict blue pencil rule may give the employer an unfair drafting advantage. Because the court has the authority to parse through reasonable and unreasonable portions of the restrictive covenant, the court will enforce some agreements that were drafted with unreasonable restrictions. More importantly, the employer unfairly benefits from the uncertainty arising from these overly broad restrictions.

> For every agreement that makes its way to court, many more do not. Thus, the words of the covenant have an *in terrorem* effect on departing employees. Employers may therefore create ominous covenants, knowing that if the words are challenged, courts will modify the agreement to make it enforceable. Although we will tolerate ignoring severable portions of a covenant to make it more reasonable, we will not permit courts to add terms or rewrite provisions.[78]

A restrictive covenant has an *in terrorem* effect when it threatens or intimidates an employee into keeping a dubious restrictive covenant "in terror or warning" or "by way of threat."[79] In his landmark article written nearly sixty years ago, Professor Harlan M. Blake warned of the harm caused by the *in terrorem* effect:

> For every covenant that finds its way to court, there are thousands which exercise an *in terrorem* effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor, or who are anxious to maintain gentlemanly relations with their competitors. Thus, the mobility of untold number of employees is restricted by the intimidation of restrictions whose severity no court would sanction. If severance is generally applied, employers can fashion truly ominous covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable. This smacks of having one's employee's cake, and eating it too.[80]

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77. RESTATEMENT (SECOND) OF CONTRACTS § 184 cmt. b (AM. LAW INST. 1981).

78. *Valley Med. Specialists*, 982 P.2d at 1282 ¶ 31.

79. *What Is in Terrorem?*, LAW DICTIONARY, https://thelawdictionary.org/in-terrorem/ [https://perma.cc/XQD8-XY5G] (last visited May 6, 2019).

80. Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 682–83 (1960). The *in terrorem* effect is real. "Many employees are deterred from testing the legality of unreasonably onerous restrictions because of the expense and vicissitudes of litigation. Thus they are condemned to have legitimate options forever foreclosed because of the fear of a

Other courts express similar policy concerns over allowing a trial court to reform and enforce restrictive covenants:

> Many, perhaps most, employees would honor these clauses without consulting counsel or challenging the clause in court, thus directly undermining the [California] statutory policy favoring competition. Employers would have no disincentive to use broad, illegal clauses if permitted to retreat to a narrow, lawful construction in the event of litigation.[81]

When courts "blue pencil" overbroad agreements, they encourage employers to be lazy in drafting their restrictive covenants.

> Too great a readiness on the part of courts to preserve the valid portions of overbroad restrictions would induce employers to draft such restrictions overbroadly, intimidating the sales force by the ostensible terms of the written contract and relying on courts to enforce the valid portion against an employee who is not intimidated.[82]

The blue pencil rule is not a "get out of jail free" card for employers. Rather, it places a heightened responsibility on the employer to draft a restrictive covenant that is reasonably limited to protect against unfair competition. "[T]he rule requires an employer's counsel to focus upon a bottom line of post-severance validity [where] the burden is placed upon counsel rather than the court to fashion a legitimate restriction."[83]

III. STEP-DOWN PROVISIONS CONFLICT WITH WELL-ESTABLISHED PRINCIPLES OF ARIZONA LAW

After the Arizona Supreme Court decided *Valley Medical Specialists*[84] in 1999, many Arizona lawyers began including "step-down provisions" in their restrictive covenants in an attempt to avoid the strict implementation of the blue pencil rule. A step-down provision seeks to exploit the blue pencil rule by giving the court a series of choices of diminishing scope—for example, a geographic restriction that gradually diminishes from the entire United States, to the state of Arizona, to Maricopa County, to Tempe, and

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violation of an unreasonable and excessive restriction." Sidco Paper Co. v. Aaron, 351 A.2d 250, 261 n.1 (Pa. 1976) (Nix, J., dissenting).

81. Kolani v. Gluska, 75 Cal. Rptr. 2d 257, 260 (Cal. Ct. App. 1998).

82. Webcraft Techs, Inc. v. McCaw, 674 F. Supp. 1039, 1047 (S.D.N.Y. 1987).

83. Amex Distrib. Co. v. Mascari, 724 P.2d 596, 605 n.6 (Ariz. Ct. App. 1986).

84. Valley Med. Specialists v. Farber, 982 P.2d 1277 (Ariz. 1999).

finally to a one-mile radius around the employer's facility—and allows the court the choose the restriction it finds to be most "reasonable."[85]

No Arizona appellate court has addressed the propriety of step-down provisions in a restrictive covenant.[86] Even today, only one published decision has considered the use of step-down provisions under Arizona law. In that case, *Compass Bank v. Hartley*,[87] the district court found that "under limited circumstances carefully crafted that step-down provisions are a permissible application of Arizona's blue-pencil rule, if they permit a Court to cross-out some unreasonable sections in favor of more reasonable ones without rewriting them."[88]

But step-down provisions are inconsistent with the policies encompassed in Arizona jurisprudence. Moreover, as Professor Blake cautioned, step-down provisions encourage employers to "fashion truly ominous covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable."[89]

For purposes of clarity, we reiterate the fundamental aspects of Arizona law related to restrictive covenants. First, restrictive covenants are

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85. A typical step-down provision might read as follows:

> **Non-Compete Covenant.** During Employee's employment with the Company and throughout the Restricted Period, Employee will not compete in the Business of Employer within the Restricted Area.
>
> **Definitions.** For purposes of this Agreement, the following terms have the definitions indicated below:
>
> *"Restricted Period"* means the eighteen months immediately following the termination of Employee's employment with the Company for any reason. In the event that a court of competent jurisdiction finds this duration to be unreasonable for any reason, the temporal limitation shall be limited to the twelve months immediately following the termination of Employees employment with Company for any reason.
>
> *"Restricted Area"* means the area within 150 radial miles of the Company's offices in Phoenix, Arizona. If a court of competent jurisdiction finds this geographic scope to be unreasonable for any reason, the geographic restriction shall be fifty radial miles of the Company's offices in Phoenix, Arizona.

86. The Arizona Court of Appeals declined to consider the enforceability of step-down provisions in *Orca Communications*, holding instead that the restrictive covenants at issue were unenforceable "because the covenants' content is too broad: the covenants restrict too much information and too much activity." Orca Commc'ns Unlimited, LLC v. Noder, 314 P.3d 89, 96 ¶ 22 n.3 (Ariz. Ct. App. 2013).

87. Compass Bank v. Hartley, 430 F. Supp. 2d 973 (D. Ariz. 2006).

88. *Id.* at 981.

89. Blake, *supra* note 80, at 683.

disfavored in the law.[90] They constitute an unreasonable restraint on trade unless they are narrowly tailored to protect an employer's legitimate business interest. Restrictive covenants may properly prohibit unfair competition, but may not be used to restrict competition *per se*.[91]

Second, the employer has the burden of proving that its restrictive covenant is reasonable in all aspects.[92] The court will critically assess whether the employer has met its burden of proof.

Third, the blue pencil rule offers the employer limited relief from an overbroad restrictive covenant by allowing the court to excise any "grammatically severable, unreasonable provisions" from the agreement.[93] But the blue pencil rule cannot be used to rewrite or create a new agreement. The employer alone is responsible for crafting a narrowly tailored restrictive covenant that prevents only unfair competition and allows the employee to compete fairly post termination. The court will not become a scrivener and draft a post-termination restriction that the parties should have agreed to if the employer had given more thought to the scope of the restriction.

Step-down provisions conflict with these fundamental principles of Arizona law because they (1) allow the employer to improperly transfer its burdens to the court, (2) fail to outline the employee's obligations with sufficient specificity, (3) establish conflicting restrictions that cannot in good faith be reconciled as being reasonable, (4) authorize the court to rewrite rather than edit an overly broad restriction, and (5) create an *in terrorem* effect that improperly allows the employer to prevent competition *per se* through an overly broad restriction. We will discuss each of these failings below.

A. Employer Burdens

The employer has the dual burdens of (1) proving the scope of his protectable business interest and (2) narrowly tailoring the restriction to protect that interest. He must do so in a way that only restricts *unfair* competition and does not restrict competition *per se.* And he must do so knowing that the trial court will view his request skeptically. By enforcing step-down provisions, a court allows the employer to improperly transfer to

90. *See supra* text accompanying notes 13–15.
91. *See supra* text accompanying notes 29–41.
92. *See supra* text accompanying notes 65–68.
93. *See supra* Section II(A).

the court his legal duty to prepare a reasonable, enforceable restrictive covenant. This approach is untenable and inconsistent with Arizona law.

Restrictive covenants are justified in part by the need to encourage fair business practices; step-down provisions are contrary to that goal. "Asserting an overbroad and unenforceable restrictive covenant is fundamentally dishonest and unfair."[94] By including a step-down provision, the employer telegraphs that the agreement is overly broad and not narrowly tailored to protect its legitimate business interests.

A well-tailored suit uses only as much material as is needed to properly cover the person wearing the garment. A suit for a 150-pound man uses much less material than does a suit for a 300-pound man. No tailor worth his salt would attempt to make a suit for a man who weighed either 300 pounds or 250 pounds or 200 pounds or 150 pounds and who was either 6′6″ or 6′ or 5′6″ tall (or any combination of the two factors). Rather than prepare a pattern that attempted to cover each of the twelve possible combinations of measurements, a skilled tailor would prepare a single pattern for each combination. And he will use no more and no less material than is required to provide each of the twelve men with a well-fitted suit.

In similar vein, a well-tailored restrictive covenant has restrictions that contain no greater and no lesser coverage than is required for the particular circumstance. A restrictive covenant that is not well tailored is unreasonable and unenforceable.

Before constructing a well-tailored suit, a custom tailor carefully measures and cuts the material before stitching it into a suit that will fit his customer perfectly. The tailor alone is responsible for properly fitting the suit to his client. He would not dream of crafting a suit for a 6′6″, 300-pound defensive tackle when his client is a 5′6″, 150-pound actuary. Nor would he tell the client to have a seamstress retailor the oversized garment so that it fits him. A tailor's job is to prepare a garment that fits the client. Tailors cannot transfer that responsibility to someone else.

An employer is responsible for crafting restrictive covenants that are sufficiently tailored to protect its business interests without preventing competition *per se*. Tailors cannot delegate their responsibilities to a seamstress; an employer cannot transfer its duty to a judge.

A step-down provision indicates that the employer has not given sufficient consideration to either (1) the actual scope of its business interest or (2) the proper method for protecting that interest. The employer has

94. Ray K. Harris & Ali J. Farhang, *Non-Compete Agreements with Step-Down Provisions: Will Courts in "Blue-Pencil" States Enforce Them?*, 23 COMPUTER & INTERNET L., July 2006, at 1, 4.

neglected its duty to narrowly tailor the restriction to its legitimate business interest and has instead turned that duty over to the court. The employer's failure to meet its burden—and its cavalier attitude toward its responsibilities—reflects that it was focused on preventing competition *per se* and not simply avoiding unfair competition. Arizona law precludes the employer from shirking its responsibilities and turning them over to the court.

B. Lack of Specificity

Though the Court of Appeals declined to consider the validity of the step-down provisions in *Orca Communications*,[95] the provisions in that agreement highlight the mischief that step-down provisions can create. The agreement at issue in *Orca Communications* contains multiple extreme—but not uncommon—examples of a step-down provision. For example, the Agreement outlines the duration of its restrictions as:

> the eighteen (18) months immediately following the termination of Employee's employment with The Company for any reason, or, in the event that a reviewing court finds the duration of eighteen (18) months to be unenforceable, for the longest of the following periods immediately following the termination of Employee's employment with The Company for any reason that is found to be enforceable: fifteen (15) months; twelve (12) months; nine (9) months; six (6) months.[96]

Likewise, the Restricted Territory is defined as "the largest of the following geographic areas or combinations thereof that is found to [be] enforceable by a reviewing court."[97] The agreement then lists in alphabetical order all 50 states and the District of Columbia, with the additional geographic restrictions of:

> within 150 radial miles of the Company's offices in Phoenix Arizona; within 100 radial miles of the Company's offices in Phoenix Arizona; within 50 radial miles of the Company's offices in Phoenix Arizona; within 25 radial miles of the Company's

95. Orca Commc'ns Unlimited, LLC v. Noder, 314 P.3d 89 (Ariz. Ct. App. 2013).

96. Confidentiality, Non-Solicitation, and Non-Competition Agreement between Ann Noder and Orca Commc'ns Unlimited, LLC 4 (Oct. 27, 2005) (on file with author).

97. *Id.* at 4.

> offices in Phoenix Arizona; or within 10 radial miles of the Company's offices in Phoenix Arizona.[98]

These broad definitions highlight one of the critical problems with step-down provisions: no one—not even the employer—can tell what the parties intended by their agreement. This lack of specificity violates fundamental principles of contract law.

"It is elementary that for an enforceable contract to exist there must be an offer, an acceptance, consideration, and *sufficient specification of terms so that the obligations involved can be ascertained*."[99] The terms of a contract must be definite and certain so that the parties know what their respective obligations and rights are and can adjust their conduct appropriately. "A distinct intent common to both parties must exist without doubt or difference, and until all understand alike[,] there can be no assent."[100] By their very nature, step-down provisions violate Arizona law because they create doubt about the scope of the restriction.

Courts would not enforce any other contract that contained key provisions that are as vague as those in a step-down provision. No court would enforce an agreement where one party agreed to pay either $50 or $150 or $500 depending on what the court determined was "reasonable" under the circumstances. Step-down provisions ask the court to "do for the employer what it should have done in the first place[—]write a reasonable covenant."[101] If the employer is unable to reasonably and coherently state a limited restriction based on legitimate business interests, it should not ask the court to fix its own failings.

C. Good Faith

The employer has a duty to act in good faith in drafting the restrictive covenant. An employer acts in good faith when it accepts its responsibility to craft a restriction that is narrowly tailored to its legitimate business interest. Though Professor Blake expressed concern that the blue pencil rule would induce employers to prepare "truly ominous" covenants, proper use

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98. *Id.* at 4–5.

99. Savoca Masonry Co. v. Homes & Sons Constr. Co., 542 P.2d 817, 819 (Ariz. 1975) (emphasis added). "For a contract to exist, there must be an offer, acceptance of the offer, consideration, and *terms sufficiently specific so that the obligation[s] created by the contract can be determined.*" Revised Arizona Jury Instructions—Civil, Contract 3 (5th ed. 2015) (emphasis added).

100. Hill-Schafer P'ship v. Chilson Family Tr., 799 P.2d 810, 814 (Ariz. 1990).

101. Prod. Action Int'l, Inc. v. Mero, 277 F. Supp. 2d 919, 932 (S.D. Ind. 2003).

of the rule alleviates that concern. The blue pencil rule "requires an *employer's counsel* to focus upon a bottom line of post-serverance [sic] validity" and places the burden "*upon counsel rather than the court* to fashion a legitimate restriction."[102]

If the employer were confident that he had narrowly tailored the restriction to his legitimate business interest, he would have no need for step-down provisions. The agreement would stand or fall based on a carefully crafted restriction designed to prohibit only unfair competition. By drafting an agreement with step-down provisions of decreasing scope, however, the employer tacitly acknowledges that at least some of the provisions are overbroad. After all, if the employer's interest can be adequately protected with a six-month restriction, the employer cannot in good faith ask the court to expand the restriction to nine, twelve, fifteen, or eighteen months. When a six-month restriction adequately protects the employer's legitimate interest, restrictions of any greater length are overbroad, unreasonable, and unenforceable. The employer cannot in good faith simultaneously believe that it is reasonable for him to demand a restriction that is either eighteen or six months (or fifteen or twelve or nine). By including those overbroad, unreasonable, and unenforceable restrictions in the covenant, the employer procures the restrictions in bad faith.[103] "A covenant exacted other than in good faith [is] subject to attack on that basis alone."[104]

Step-down provisions create a truly ominous restrictive covenant, i.e., a covenant the employer believes "will be pared down and enforced when the facts of a particular case are not unreasonable."[105] Step-down provisions violate the requirement of good faith by ignoring the "bottom line" validity of the restriction *and* requiring the court to act as scrivener to prepare the restriction the parties should have entered into if the employer had done its job. That is why:

> some courts would refuse to enforce a covenant if it were clear that a strong bargaining party included an overbroad and therefore unreasonable provision in the agreement knowing that the

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102. Amex Distrib. Co. v. Mascari, 724 P.2d 596, 605 n.6 (Ariz. Ct. App. 1986) (emphasis added).

103. "[I]t is arguable that inserting an unreasonably broad provision itself constitutes a form of bad faith, especially when the covenantee has had the benefit of legal counsel, since he will (presumably) know that, if the clause is held to be unreasonable, he will still get a reasonable restriction." Harris & Farhang, *supra* note 94, at 7 n.48 (alteration in original) (quoting 6 RICHARD A. LORD, WILLISTON ON CONTRACTS § 13:22, at 825–26 (4th ed. 1995)).

104. *Amex Distrib. Co.*, 724 P.2d at 605 n.6.

105. Blake, *supra* note 80, at 683.

> provision would be unenforceable but seeking to, in effect, trick the other party into believing that the overbroad provision was enforceable.[106]

Step-down provisions violate Arizona law because they are not procured in good faith.

D. Rewrite v. Edit

In *Compass Bank v. Hartley*, the district court justified the use of step-down provisions by holding that they allow the parties to contemplate various options at the time they enter into the agreement.[107]

> If a court subsequently finds the covenant unreasonable and uses the step-down provision to amend the covenant, such a modification is not significant because it has already been contemplated. Thus, there was a meeting of the minds at the initiation of the contract with regard to the alternatives presented by the step-down provision. On the other hand, if the alternatives presented are indefinite and inconsistent with the underlying provision, and are not easily severable from unreasonable provisions, there is no meeting of the minds and the covenant is invalid.[108]

In other words, the court held that the parties already had agreed to all of the terms in the step-down provisions, so those provisions could reasonably be enforced against the employee. But this interpretation mischaracterizes the blue pencil rule.

The blue pencil rule allows courts to *edit* an overbroad restriction, excise any unreasonable portions, and enforce the remaining portions of the restriction. It does not allow the court to *rewrite* the restriction, even if the rewrite is insignificant. Consider the sample provision discussed above:

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106. Harris & Farhang, *supra* note 94, at 7 n.48 (quoting JOSEPH M. PERILLO, 15 CORBIN ON CONTRACTS § 89.8, at 653 (2003)). The *in terrorem* effect is real. While I typically represent employers in connection with restrictive covenants, I regularly meet with employees seeking guidance on how to conduct their affairs post-termination. On numerous instances, we have reviewed covenants that are on their face overly broad and unenforceable. Though I have counseled the clients that they need not fear these unenforceable restrictions, many have replied that they would change industries or work territories so that their former employers would leave them alone.

107. Compass Bank v. Hartley, 430 F. Supp. 2d 973, 981 (D. Ariz. 2006).

108. *Id.*

> For 6 months after the termination of Employee's employment with Employer, Employee will not directly or indirectly compete in the Business of the Company in Maricopa County, Pinal County, and Yavapai County.

If the reviewing court determined that the employer's business interest was limited to Maricopa County only, the "blue-penciled" provision would read as follows:

> For 6 months after the termination of Employee's employment with Employer, Employee will not directly or indirectly compete in the Business of the Company in Maricopa County~~, Pinal County, and Yavapai County~~.

Both before and after using the blue pencil rule, the court is considering all words in the restriction. The restriction is clear and concise.

A court implementing a step-down provision ostensibly uses the blue pencil rule to eliminate an unreasonable restriction and replace it with one that the parties previously agreed was reasonable. But a court giving effect to a step-down provision does not *edit* the provision. Rather, it *rewrites* the provision by deleting the unreasonable portion and replacing it with a different restriction. Consider the following restrictions based on an actual non-compete agreement:

> During the Restricted Period, Employee will not be engaged directly or indirectly in the practice of medicine in the Specialty within the Restricted Area.
>
> The "Restricted Area" shall mean a five-mile radius surrounding each location where Employee provided medical services on behalf of the Employer within two years prior to termination ("Service Location"), *provided however* that if a court of competent jurisdiction determines that a five-mile radius is overly broad, the Restricted Area shall be a three-mile radius surrounding each Service Location, and if a three-mile radius is determined to be overly broad, the Restricted Area shall be a two-mile radius surrounding each Service Location.
>
> The "Restricted Period" means the term of employment and an additional two years after Employee's employment is terminated for any reason; *provided, however*, that if a court of competent jurisdiction determines that the two-year timeframe is overly broad, the Restricted period shall be the term of employment and an additional 18 months after Employee's employment is terminated for any reason; and *provided, further,* that if a court of competent jurisdiction determines that the 18-month timeframe is overly broad, the Restricted period shall be the term of

> employment and an additional one year after Employee's employment is terminated for any reason; and *provided, further,* that if a court of competent jurisdiction determines that the one-year timeframe is overly broad, the Restricted period shall be the term of employment and an additional 6 months after Employee's employment is terminated for any reason.

If the court enforces the most expansive restrictions as written, it would ignore all language after "*provided, however*" in the definitions. The replacement language would be treated as superfluous and unnecessary. In essence, the court would be treating the restrictions as if they read as follows:

> During the Restricted Period, Employee will not be engaged directly or indirectly in the practice of medicine in the Specialty within the Restricted Area.
>
> The "Restricted Area" shall mean a five-mile radius surrounding each location where Employee provided medical services on behalf of the Employer within two years prior to termination ("Service Location"), ~~*provided however* that if a court of competent jurisdiction determines that a five-mile radius is overly broad, the Restricted Area shall be a three-mile radius surrounding each Service Location, and if a three-mile radius is determined to be overly broad, the Restricted Area shall be a two-mile radius surrounding each Service Location~~.
>
> The "Restricted Period" means the term of employment and an additional two years after Employee's employment is terminated for any reason~~; *provided, however*, that if a court of competent jurisdiction determines that the two-year timeframe is overly broad, the Restricted period shall be the term of employment and an additional 18 months after Employee's employment is terminated for any reason; and *provided, further,* that if a court of competent jurisdiction determines that the 18-month timeframe is overly broad, the Restricted period shall be the term of employment and an additional one year after Employee's employment is terminated for any reason; and *provided, further,* that if a court of competent jurisdiction determines that the one-year timeframe is overly broad, the Restricted period shall be the term of employment and an additional 6 months after Employee's employment is terminated for any reason~~.

But if the court determined that the most expansive restrictions were unenforceable, it would have to choose alternate restrictions from smorgasbord of options in the step-down provisions. The blue pencil rule allows the court to excise "grammatically severable, unreasonable

provisions" from the restriction, but does not allow it to excise any other portions of the restriction. If the court enforced the blue pencil rule strictly, the post-revision agreement would be unintelligible.

> During the Restricted Period, Employee will not be engaged directly or indirectly in the practice of medicine in the Specialty within the Restricted Area.
>
> The "Restricted Area" shall mean ~~a five-mile radius surrounding each location where Employee provided medical services on behalf of the Employer within two years prior to termination ("Service Location"),~~ *provided however* that if a court of competent jurisdiction determines that a five-mile radius is overly broad, ~~the Restricted Area shall be a three-mile radius surrounding each Service Location,~~ and if a three-mile radius is determined to be overly broad, the Restricted Area shall be a two-mile radius surrounding each Service Location.
>
> The "Restricted Period" means the term of employment and ~~an additional two years after Employee's employment is terminated for any reason;~~ *provided, however*, that if a court of competent jurisdiction determines that the two-year timeframe is overly broad, the Restricted period shall be the term of employment and ~~an additional 18 months after Employee's employment is terminated for any reason;~~ and *provided, further,* that if a court of competent jurisdiction determines that the 18-month timeframe is overly broad, the Restricted period shall be the term of employment ~~and an additional one year after Employee's employment is terminated for any reason~~; and *provided, further,* that if a court of competent jurisdiction determines that the one-year timeframe is overly broad, the Restricted period shall be the term of employment and an additional 6 months after Employee's employment is terminated for any reason.

The restriction could not be read clearly unless the court interlineated the agreement, using portions of the language of the restriction and excising unneeded language to craft a new, unambiguous restriction:

> During the Restricted Period, Employee will not be engaged directly or indirectly in the practice of medicine in the Specialty within the Restricted Area.
>
> The "Restricted Area" shall mean a ~~five-mile~~ **two-mile** radius surrounding each location where Employee provided medical services on behalf of the Employer within two years prior to termination ("Service Location")~~, *provided however* that if a court of competent jurisdiction determines that a five-mile radius is~~

> ~~overly broad, the Restricted Area shall be a three-mile radius surrounding each Service Location, and if a three-mile radius is determined to be overly broad, the Restricted Area shall be a two-mile radius surrounding each Service Location~~.
>
> The "Restricted Period" means the term of employment and an additional ~~two years~~ **six months** after Employee's employment is terminated for any reason~~; *provided, however*, that if a court of competent jurisdiction determines that the two year timeframe is overly broad, the Restricted period shall be the term of employment and an additional 18 months after Employee's employment is terminated for any reason; and *provided, further,* that if a court of competent jurisdiction determines that the 18-month timeframe is overly broad, the Restricted period shall be the term of employment and an additional one year after Employee's employment is terminated for any reason; and *provided, further*, that if a court of competent jurisdiction determines that the one-year timeframe is overly broad, the Restricted period shall be the term of employment and an additional 6 months after Employee's employment is terminated for any reason~~.

The blue pencil rule allows a court to *edit* grammatically severable components of a restriction if the components are cast in the conjunctive. As discussed above, the court may *edit* Yavapai and Pinal Counties from the list identifying the restricted area of an agreement as Maricopa County, Pinal County, and Yavapai County. When they are identified in the conjunctive, each of the components constitutes part of a single unified restriction, i.e., a geographic restriction of Maricopa County ***and*** Pinal County ***and*** Yavapai County. The blue pencil rule allows the court to interpret the agreement, determine if all components of the restrictions are narrowly tailored to the employer's business interest, and excise any overbroad and unreasonable components of the restriction.

But the blue pencil rule does not allow the court to choose the scope of the restriction from a list of alternatives cast in the disjunctive, e.g., a geographic restriction of five miles ***or*** three miles ***or*** two miles. When an employer drafts a list of alternatives cast in the disjunctive, it fails to specifically identify the scope of its restriction. The step-down provision includes both reasonable provisions prohibiting *unfair* competition (two miles) and unreasonable provisions prohibiting competition *per se* (five miles or three miles). As a result, a reviewing court cannot determine the reasonableness of the agreement as written by the parties, but instead must first choose which (if any) of the restrictions on the list of alternatives reasonably prohibits only unfair competition and then rewrite the agreement consistent with its choice.

When the court chooses the scope of the restriction from a list of disjunctive alternatives, it necessarily *rewrites* the restriction to match its choice. But the court has no power to do what the employer was unwilling or unable to do for itself: craft a reasonable restrictive covenant that prohibits only unfair competition. As the North Carolina Supreme Court explained:

> Allowing litigants to assign to the court their drafting duties as parties to a contract would put the court in the role of scrivener, making judges postulate new terms that the court hopes the parties would have agreed to be reasonable at the time the covenant was executed or would find reasonable after the court rewrote the limitation. We see nothing but mischief in allowing such a procedure.[109]

Step-down provisions violate Arizona law because they require the reviewing court to rewrite—rather than edit—the restrictive covenant.

E. In Terrorem Effect

Arizona courts repeatedly have denounced overbroad restrictive covenants because of the *in terrorem* effect. A step-down provision is perhaps the greatest example of that *in terrorem* effect. With a step-down provision, the parties have no idea what restriction (if any) the court ultimately will impose. Rather than litigate a restriction with an unreasonable step-down provision, many employees will simply succumb to the *in terrorem* effect of the provision. This result is untenable under Arizona law.

Let's analyze the sample restriction above and consider how an employee would attempt to abide by the restriction. The restriction provides that the employee won't practice his specialty of medicine within five, three, or two miles surrounding any location where he provided services for the employer in the previous two years. It further provides that he will not do so for twenty-four, eighteen, twelve, or six months. The covenant establishes twelve possible restrictions that the employer is willing to enforce, as shown in the chart below:

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109. Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC, 784 S.E.2d 457, 462 (N.C. 2016). "Courts are not at liberty to rewrite contracts for the parties. We are not their guardians, but the interpreters of their words. We must, therefore, determine what they meant by what they have said—what their contract is, and not what it should have been." *Id.* (quoting Penn v. Standard Life Ins. Co., 76 S.E. 262, 263 (N.C. 1912)).

Restricted Area	Restricted Period
5 miles	24 months
5 miles	18 months
5 miles	12 months
5 miles	6 months
3 miles	24 months
3 miles	18 months
3 miles	12 months
3 miles	6 months
2 miles	24 months
2 miles	18 months
2 miles	12 months
2 miles	6 months

Because the court will enforce only reasonable restrictions, the employer must argue that each of these twelve restrictions is reasonable and narrowly tailored to protect its legitimate business interests. But by including the lesser restrictions, the employer is tacitly conceding that the larger restrictions really are not reasonable.[110] If the employer were confident that the largest restriction was reasonable, it would not include the lesser, "fall-back" restrictions.

These multiple restrictions highlight the *in terrorem* effect of the step-down provisions. An attorney drafting a restrictive covenant should prepare a restriction that narrowly protects the employer's legitimate business interest from unfair competition and does not prohibit competition *per se*. She carefully crafts the document so that both the employer and the employee understand the scope of the restriction and can adjust their behavior accordingly. In doing so, she follows the timeless advice given to authors:

> A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary parts. This requires not that the writer make all sentences short, or avoid all detail and treat subjects only in outline, but that every word tell.[111]

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110. "By presenting a court with alternative provisions for temporal and geographic scope, the employer seeks to ensure some protection. If the least restrictive time and area provisions will sufficiently protect the employer's legitimate interests, is any broader provision oppressive?" Harris & Farhang, *supra* note 94, at 3.

111. WILLIAM STRUNK JR., THE ELEMENTS OF STYLE 23 (4th ed. 2000).

When the attorney carefully drafts the restrictive covenant for her client, the employee knows where he can go to practice his trade without fear of being sued.[112] Every word in the agreement has meaning.

Honorable employees will abide by reasonable restrictive covenants. But when the covenant contains step-down provisions, the employee cannot be certain what she can and cannot do. Is she precluded from practicing her trade within five miles of each Service Location for two years? Or is she restricted within two miles for six months? Or is the restriction something in between these extremes? While an employer may not fear filing suit to get the trial court to determine the scope of the restriction, most employees are hesitant to do so. So rather than litigate to prove that a reasonable restriction is no greater than two miles for six months, the employee will succumb to the *in terrorem* effect of the step-down provisions and either seek a new trade or practice her trade outside the five-mile restriction for two years. And the employer benefits from the *in terrorem* impact of the restriction, even though it has conceded that five miles and two years are unreasonable restrictions, as witnessed by the inclusion of two lesser geographic restrictions and three shorter temporal restrictions. This result is inconsistent with Arizona law.

Step-down provisions violate Arizona law because of their *in terrorem* effect on employees.

CONCLUSION

Restrictive covenants are critically important tools to protect and employer's legitimate business interests. When used properly, they reasonably and appropriately prohibit *unfair* competition *and* allow the employee to make the highest and best use of her job skills. Because of the

112. Bryan Garner, an advocate for clear and concise legal writing, counsels attorneys to draft their agreements "for an ordinary reader, not for a mythical judge who might someday review the document." BRYAN GARNER, LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES § 31, at 109 (2d ed. 2013). Well drafted agreements help the parties understand their legal rights and responsibilities so that they can appropriately govern their actions. But step-down provisions confuse rather than clarify the rights and responsibilities of the parties. Instead of helping the parties govern their day-to-day interactions, step-down provisions "contemplate[] only the disaster that might occur if litigation were to erupt." *Id.* Rather than prevent litigation (which the client undoubtedly would prefer to avoid), the uncertainty raised by step-down provisions *encourages* the parties to litigate. By using step-down provisions, the attorney "focuses exclusively on the back-end users, with no concern for the front-end users who must administer and abide by the document." *Id.*

constraints of Arizona law, employers have a high burden to prepare narrowly tailored restrictions.

Step-down provisions are inconsistent with the employer's responsibilities and with Arizona law. Attorneys who wish to best protect their clients' business interests will step away from step-down provisions.