2006

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Elizabeth E. Nicholas
University of Kentucky

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Elizabeth E. Nicholas

I. INTRODUCTION

"James Pilger, the owner of a luxury hair salon in Plainview, NY, never saw it coming. In the space of three months, the cream of his staff jumped to a new salon started by a trusted employee of 17 years." With his best employees now working for a competitor, Mr. Pilger was forced to close his business and take a job at a nearby salon. Because of his employees' disloyalty, Mr. Pilger became aware that a non-solicitation clause is an important tool for an employer in preventing an ex-employee from damaging the employer's business interests. Mr. Pilger's loss exemplifies why Kentucky employers should require key employees to sign non-solicitation agreements. Such agreements prohibit individuals from recruiting others to a competitor's business using information obtained from, and to the detriment of, their former place of employment.

A "non-solicitation" agreement in an employment contract "seeks to prohibit employees from soliciting their co-workers for a period of specified years after the employee leaves his or her former employment." Without a non-solicitation covenant or the broader and often accompanying non-compete covenant, an employee is free to leave employment . . . recruit and hire away employees, and compete with a former employer so long as no confidential information is used." Thus, requiring key employees to sign non-solicitation agreements and knowing how Kentucky courts will

1 J.D. expected 2007, University of Kentucky College of Law; M.B.A. 2003, University of Kentucky; B.B.A. 2001, University of Kentucky. The author would like to thank her family for their constant love and support.

2 David Koeppel, Lose the Employee, Keep the Business, N.Y. TIMES, May 5, 1990, at C5 (Mr. Pilger stated, "Twenty five of my key people took 44 of my top 50 paying clients . . . I went from $50,000 a week to $25,000 a week.").

3 Id.


enforce these agreements may be crucial to protecting an employer's business interests.

The purpose of this Note is to provide Kentucky practitioners with an overview of the factors courts frequently use to determine whether non-solicitation agreements are enforceable. While non-solicitation agreements offer protections to employers, because of the burdens they impose on ex-employees, courts nonetheless may be reluctant to enforce them. "As a result, if an employer fails to take proper care in drafting these agreements, they may not be worth the paper on which they are written." For this reason, this Note will analyze why certain jurisdictions uphold non-solicitation agreements and the motivations behind their decisions. Then, based on these lines of reasoning, this Note will attempt to predict how Kentucky courts will analyze non-solicitation agreements and will suggest steps practitioners should take to maximize the effectiveness of these covenants. Part II of this Note provides general background information on non-solicitation agreements and provides examples of the consequences that may occur when an employer brings an action against a party that induces his or her employees to leave employment. Part III explains the approach Kentucky courts take in determining the validity of restrictive employment covenants. Then, in an attempt to provide guidance to drafters of these agreements, Part IV analyzes the various approaches taken by five different jurisdictions. Part V compares the various approaches and provides useful guidance to the Kentucky practitioner on how to draft enforceable non-solicitation agreements. Part VI concludes that without an enforceable mechanism with which to protect an employer's interests, pirating and raiding by former employees may be detrimental to one's business.

II. WHAT IS AN EMPLOYEE NON-SOLICITATION AGREEMENT?

A. General Rules Regarding Enforcement of Restrictive Covenants

The enforceability of restrictive covenants is a fact-specific determination. Some jurisdictions disfavor restrictive covenants because they inter-
fere with an individual's ability to earn a living, conflict with the notion of a free economy, and provide undue protection to the employer who establishes his operation in the area first.\textsuperscript{15} Nevertheless, restrictive covenants are generally enforceable where they are reasonable, meet contractual prerequisites, and, if regulated by statute, comply with statutory requirements.\textsuperscript{16} For instance, covenants not to compete, being a partial restraint of trade, are not always favored in the law, but such covenants have a better chance of enforcement "if they are reasonably necessary to protect an employer's legitimate business interests, without imposing undue hardship on the employee or adversely affecting the public interest."\textsuperscript{17} On the other hand, if the true purpose of the anticompetitive covenant is to prevent the employee from leaving rather than protecting the business, the covenant is unenforceable.\textsuperscript{18}

Generally, the reasonableness of an anticompetitive covenant is determined on a case-by-case basis, "and the courts, in determining whether unreasonable restrictions may be modified, usually take into account various factors, such as the territorial scope and duration of the restraints, as well as the activities that are prohibited."\textsuperscript{19} Although an unreasonable covenant against competition is not enforceable, modification of the duration and territorial scope of the unenforceable restriction enhances enforcement.\textsuperscript{20} As mentioned, partial enforcement of unreasonable restrictions still requires the resulting restriction to be consistent with public policy, not injurious to the public interest, not unduly harsh to the employee, and only operate to such extent as is reasonably necessary to protect the interests of the employer.\textsuperscript{21}

\textbf{B. Non-solicitation Agreement versus a Non-compete Agreement}

There are several types of contractual restraints, as well as prophylactic measures, an employer could put into place before an employee announces that he or she is departing.\textsuperscript{22} For example, if Mr. Pilger had "asked his employees to sign written commitments to refrain from competing against

\begin{itemize}
\item 54A AM. JUR. 2D Monopolies and Restraints of Trade \S 888 (2006).
\item Id.
\item Id.
\item Id.
\item Id.
\item See Koeppel, \textit{supra} note 2.
\end{itemize}
him or otherwise undermining his franchise," he may still be in business.23

These contractual protections fall into two broad categories: non-compete and non-solicitation agreements. "Non-compete agreements bar employees from competing directly with their former [employers, while] non-solicitation agreements prohibit employees from recruiting employees or clients of the business they left."24 A traditional non-compete agreement generally states that, upon the termination of employment from that business, the employee will not engage in specific activities competitive with the former employer's business for a specified time period within a specified geographic area.25 Unlike non-compete agreements, non-solicitation agreements do not restrict a former employee from working for a competitor. Rather, they typically prohibit solicitation of customers, employees, or both.26 A customer non-solicitation agreement "prohibits terminated employees from soliciting business from the customers and prospective customers of his or her former employer," which protects the employer's interest in developing customer relationships and contacts.27 Restrictions on a former employee from recruiting his co-workers after he leaves his employment is the second type of non-solicitation covenant,28 which primarily protects the employer's interests in maintaining a stable workforce.

Because non-solicitation agreements do not prevent the former employee from competing altogether, but merely require him or her to hire employees in some other manner or from some other source, courts consider non-solicitation agreements less anticompetitive than non-compete covenants.29 Courts also may give non-solicitation agreements more deference because they are more narrowly tailored to an employer's legitimate business interests.30 However, because non-solicitation agreements place some limitation upon the competitive freedom of employees, such a pro-

23 Id.
24 Id.
25 Funkhouser, supra note 7.
27 Id.
28 Id.
29 2 LOUIS ALTMAN, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES § 16:44 (4th ed. 2006) (citing Smith, Barney, Harris Upham & Co. v. Robinson, 12 F.3d 515 (5th Cir. 1994) (noting that the former employee is free to recruit employees on behalf of his new employer anywhere, any time, and from any organization, save only that small class comprising the former employer's employees); Loral Corp. v. Moyes, 219 Cal. Rptr. 836, 843 (Ct. App. 1985) ("This does not appear to be any more of a significant restraint on his engaging in his profession, trade or business than a restraint on solicitation of customers or on disclosure of confidential information.").
vision may be subject to some of the same restrictions as those placed on non-compete covenants.31

G. Why Should an Employer Require a Key Employee To Sign a Non-solicitation Agreement?

If an employee solicits co-employees to join him or her in a competing enterprise prior to termination, the employee has breached his duty of loyalty to the employer.32 However, this result changes upon termination. Once the employment relationship ends, if no non-solicitation agreement exists, departing employees may freely "solicit employees of their former employer to come to work for a competitor, so long as unfair or deceptive means are not used."33 However, many jurisdictions will uphold provisions that prohibit a former employee from soliciting former co-workers when that employee has entered into an employee non-solicitation covenant.34

Most employers who utilize a restrictive covenant in an employment agreement do so to prevent the unexpected resignation of a key executive or salesperson who could use client relationships or business expertise gained at the employer's expense to form a competing entity.35 As mentioned, non-solicitation agreements can prevent former employees from competing against their former employers by barring the employees from luring co-workers to a competing business.36 Fortunately for employers, these "non-solicitation covenants have been met with relatively little judicial resistance, as courts have held that it is reasonable for an employer

31 Cf. id. at 417 (explaining that non-competition clauses have been subjected to strict scrutiny because of their limitation on competitive freedom).
32 2 ALTMAN, supra note 29.
33 Compare Larry C. Drapkin & Samantha C. Grant, Strategies for Dealing with Departing Employees: Why Wait Until Then? Let's Think About it Now, in 1233 PRACTISING L. INST., CORPORATE LAW & PRACTICE COURSE HANDBOOK SERIES 261, 269 (2001), with Bancroft-Whitney Co. v. Glen, 411 P.2d 921, 936 (Cal. 1966) (explaining that during employment, an employee has a duty of loyalty to his or her employer which prohibits him or her from soliciting co-workers to leave their employment to work for a competitor: the court held that management-level employees may not take steps to set up a competing business, while still employed, where their actions are harmful to their employer).
34 See Drapkin & Grant, supra note 33; cf. Metro Traffic Control, Inc. v. Shadow Traffic Network, 27 Cal. Rptr. 2d 573, 576–77 (Ct. App. 1994) (holding that "competitors may solicit another's employees if they do not use unlawful means or engage in acts of unfair competition"); Moyes, 219 Cal. Rptr. at 840–41 (holding that the non-solicitation contract was not void on its face under CAL. BUS. & PROF. CODE § 16600).
35 Kenneth J. Vanko, "You're Fired! And Don't Forget Your Non-Compete . . .": The Enforceability of Restrictive Covenants in Involuntary Discharge Cases, 1 DEPAUL BUS. & COM. L.J. 1, 1 (2002).
36 Eric D. Hone, Should You Have Non-compete Agreements?, NEV. EMP. L. LETTER, May 2004, Westlaw 9 No. 8 SMNVEMPLL2
to protect its investment in training its staff and maintaining a competent workforce."  

Employers should consider having a non-solicitation agreement with any employee who could significantly disadvantage the company in the marketplace if they went to work for a competitor. Employees who sign non-solicitation agreements often become subject to litigation when they engage in recruiting employees who currently work for their former employer. Even though litigation over employment agreements can be expensive, these agreements provide enormous value in their ability to deter employees from engaging in employee solicitation.

D. Breach of a Non-solicitation Agreement

If the stakes are high enough, the former employee and his or her new employer could face enormous liability. For instance, when Black & Decker hired David P. Olsen, a former employee of Image Dynamics, the public relations firm claimed that Black & Decker violated their non-solicitation agreement by seeking to raid its employees and force it out of business. Upholding the non-solicitation agreement, a Maryland jury awarded Image Dynamics $940,000 ($645,000 against Black & Decker and $295,000 against Olsen).

For similar reasons, Prudential Securities sued some of its top executives and the firm they joined for violations of the executives' non-solicitation agreements. When the unit head of Prudential's asset-backed securities group and eight other executives, who together accounted for more than ninety percent of the revenue generated by the asset-backed securities group, resigned and joined Credit Suisse First Boston ("CSFB"), Prudential brought suit against the former executives and CSFB to enforce the employees' non-solicitation agreements. Prudential won a temporary

37 Vanko, supra note 35, at 7.
38 See Hone, supra note 36 ("Noncompetition agreements should be used only for employees who could truly hurt your company if they began to work for or become the competition. The key is that the restrictions must be reasonably tailored to protect [the employer's] legitimate business interests. Therefore, the restrictions place on a sales agent almost certainly will be different from those on a director of research and development.").
40 Hone, supra note 36.
41 Kristine Henry, Black & Decker to Pay Brotman $235,000—Court of Appeals Declines to Take Up Long Legal Battle, BALTIMORE SUN (Baltimore, Md.), Feb. 15, 2002 at I1C.
42 Id. The Maryland intermediate appeals court ruled that Black & Decker had intentionally interfered with a non-compete clause when it retained Olsen's newly formed company after pulling its account from Image Dynamics. Id.
43 Prudential Wins Court Bid to Bar Hiring, N.Y. TIMES, Mar. 16, 2000, at C14.
court order that prevented CFSB from hiring more employees and sought monetary damages from CFSB and the individuals.44

When an ex-employee bound by a non-solicitation agreement induces a current employee to resign, the employer has a number of potential claims.45 While a breach of contract claim against an employee who participated in the recruitment may be impractical due to his or her limited financial resources,46 almost all other causes of action rely on, or are enhanced by, the existence of a non-solicitation agreement in the employee’s contract. Employers often bring actions against the new employer under a theory of tortious interference with contractual or business relations.47 Courts may also label this as an action for inducement of breach of contract, interference with contract, interference with advantageous relations, unfair competition,48 or an action for employee piracy or raiding.49 On the other hand, if an ex-employee recruited co-workers for a competitor, the employer may bring an action against the ex-employee for breach of a restrictive covenant50 or under a breach of fiduciary duty theory if the former employee acted against the employer’s interest while still employed.51

III. How Kentucky Courts Interpret Non-solicitation Agreements

Kentucky does not regulate restrictive covenants in employment contracts by statute, thus employers must rely on the courts’ interpretation of restrictive covenants. While Kentucky courts have not specifically addressed the

44 Id.


47 The basic elements of a claim of tortious interference with a business relationship are: (1) The existence of a valid business relation, (2) Knowledge of the relationship on the part of the interferer, (3) Intentional and unjustified act of interference on the part of the interferer, (4) Proof that the interference caused the harm sustained, (5) Damage to the party whose relationship has been disrupted. 45 Am. Jur. 2d Interference § 48 (2005).


50 See Ryan, Elliott & Co., 396 N.E.2d 1009 (involving intentional interference claim against person who hired away two employees who had employment contracts for fixed periods of time).

enforceability of covenants prohibiting the solicitation of employees, several cases have addressed the enforceability of customer non-solicitation clauses. By analogy, these and other cases that apply the general rules of restrictive covenants provide insight as to how Kentucky courts may rule on a violation of an employee non-solicitation agreement.

In general, Kentucky courts hold that contracts in restraint of competition are enforceable if the contracts are (1) reasonable and (2) limited as to territory or duration. A contract restraining competition is reasonable if the restraint is narrow enough to provide protection of the legitimate interests of the party seeking protection and not so broad as to interfere with public interests. Whereas contracts in restraint of trade are not enforceable where they are unlimited as to both time and space—or just unlimited as to space—they are enforceable where they are unlimited as to time but are confined to a reasonable territory.

In Wells v. Merrill Lynch, Pierce, Fenner & Smith, Inc., several stockbrokers alleged that customer non-solicitation provisions in their employment contracts with their former brokerage firm were unenforceable. The employees signed an agreement stating, in part:

In consideration of Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch") employing me in a sales capacity or for a sales position...

In the event of termination of my services with Merrill Lynch for any reason, I will (i) not solicit, for a period of one year from the date of termination of my employment, any of the clients of Merrill Lynch whom I served or other clients of Merrill Lynch whose names became known to me while in the employ of Merrill Lynch in the office of Merrill Lynch in which I was employed, and who reside within one hundred miles of the Merrill Lynch office in which I was employed.

The stockbrokers planned to argue that the non-solicitation portion of the employment agreement was unreasonable and/or vague and lacked con-

52 See Ceresia v. Mitchell, 242 S.W.2d 359 (Ky. 1951); Johnson v. Stumbo, 126 S.W.2d 165 (Ky. 1938).


54 Johnson, 126 S.W.2d at 169; see also Vaughan v. Gen. Outdoor Adver. Co., 352 S.W.2d 562 (Ky. 1962) (holding that a restrictive covenant to prevent competition in trade was valid because it was limited to a city lot for a maximum period of ten years).

55 Calhoun v. Everman, 242 S.W.2d 100, 102 (Ky. 1951).


57 Id. at 1049–50 (emphasis added).
sideration. However, in light of Kentucky case law finding similar contracts valid, the United States District Court for the Eastern District of Kentucky issued a preliminary injunction enjoining the stockbrokers from soliciting business from any client of the firm. Since a temporary injunction required the court to assess whether Merrill Lynch demonstrated a reasonable likelihood of success on the merits, the decision in Wells may indicate that the court believed the customer non-solicitation agreement was valid.

The court in Wells also took the opportunity to define "solicitation" by referencing the definition used in conjunction with proxy solicitations under the Securities Act of 1934. The court concluded, "a mere informational contact between [the employee] and any former client does not constitute a 'solicitation' under the employment agreements. An informational contact would consist of any written or oral contact that provides information about the Plaintiffs' whereabouts and how they may be contacted."

More recently, in Manhattan Associates, Inc. v. Rider, an employer sued an ex-employee for soliciting the employer's customers, notwithstanding the customer non-solicitation and non-compete agreements the employee entered into while employed. The employer brought claims against the employee, in part, for breach of contract; breach of loyalty, good faith, and fiduciary duties; tortious interference with business relationships; and conversion of client/customer accounts. The United States District Court for the Western District of Kentucky found the non-compete and non-solicitation clauses unenforceable and dismissed the employer's breach of contract, tortious interference, and conversion of accounts claims. Without divulging why the agreements were unenforceable, the court noted that under Kentucky law, unenforceable non-compete and customer non-solicitation agreements could not form the basis for a breach of contract claim. Moreover, because the agreements were unenforceable and the contacts

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58 Id. at 1051.
59 See, e.g., Hall v. Willard & Wollsey, P.S.C., 471 S.W.2d 316, 317-18 (Ky. 1971) ("[C]ourts have upheld restrictive covenants where they are reasonable. . . . Reasonableness is to be determined generally by the nature of the business or profession and employment, and the scope of the restrictions with respect to their character, duration and territorial extent. . . . Another test of reasonableness may be whether or not the restraint imposed upon the employee as covenantor is more comprehensive than is necessary to afford fair protection to the legitimate interests of the employer as covenantee."); Calhoun, 242 S.W.2d at 102.
60 Wells, 919 F. Supp. at 1055.
61 Id. at 1051.
62 Id. at 1053.
64 Id. at *1.
65 Id. at *1-2.
66 Id. at *1.
not improper, a claim for tortious interference could not lie against a former employee who contacted and solicited the employer's customers. However, the court did note that to the extent the claims for improper conduct existed independent from the contract, an order finding the non-solicitation and non-compete provisions unenforceable did not preclude the claims alleging breach of loyalty, good faith, and fiduciary duties.

In Ceresia v. Mitchell, the Kentucky Court of Appeals summarized the law in Kentucky regarding contracts that restrain trade or competition in trade. In Ceresia, the Court enjoined the seller of a wholesale fruit market from competing, in violation of the sales contract, with the purchasers of the business. In its decision, the Court relied on the Restatement of Contracts, which provides:

Where a promise in reasonable restraint of trade in a bargain has added to it a promise in unreasonable restraint, the former promise is enforceable unless the entire agreement is part of a plan to obtain a monopoly; but if full performance of a promise indivisible in terms would involve unreasonable restraint, the promise is illegal and is not enforceable even for so much of the performance as would be a reasonable restraint.

The Court thus held that the provision in the sales contract prohibiting the seller from selling fruits and vegetables in Muhlenberg County was enforceable.

The Court also addressed the validity of the restraint on trade and held that “an agreement imposing a restraint reasonably limited in space is not against public policy, although unlimited in time of operation, regardless of the nature of the business or occupation restrained.” The Court further noted that if the restriction is necessary for protection of the purchaser, the agreement will be upheld as reasonable if—on consideration of the subject matter, the nature of the business, and the situation of the parties—the restriction affords fair protection to the interests of the covenantee but is not so large as to interfere with the public interests or impose undue hardship on the party restricted.

The importance of Ceresia is not that the Court upheld the non-compete provision but rather that in enforcing restrictive covenants ancillary to employment contracts, Kentucky courts are likely to follow the Restatement, Corbin on Contracts, or other similar sources.

67 Id.
68 Id. at *1–2.
69 Ceresia v. Mitchell, 242 S.W.2d 359 (Ky. 1951).
70 Id. at 363 (citing RESTATEMENT (FIRST) OF CONTRACTS § 518 (1932)).
71 Id.
72 Id. (citing 17 C.J.S. Contracts § 244 (1951)).
73 Id. at 364 (citing 17 C.J.S. Contracts § 247 (1951)).
While nineteen states regulate restrictive covenants by statute, the remaining states regulate the covenants by common law. As mentioned, Kentucky does not have a statute regulating non-solicitation agreements nor have the courts indicated how they will interpret employee non-solicitation agreements. Therefore, an overview of how other jurisdictions have addressed similar covenants provides guidance for drafting enforceable non-solicitation agreements.

A. Virginia

Virginia courts favor the interests of the employee when determining the validity of a restrictive covenant. In Virginia, an employer seeking to enforce a non-solicitation agreement bears the burden of proving that the restraint is reasonable. The reasonableness standard requires that the terms of the agreement (1) are no greater than necessary to protect the employer in some legitimate business interest; (2) are not unduly harsh and oppressive in curtailing the employee’s legitimate business efforts to earn a livelihood; and (3) are consistent with public policy considerations.

In Microstrategy, Inc. v. Business Objects, S.A., the United States District Court for the Eastern District of Virginia analyzed a non-solicitation agreement using the above standard and held that the contested non-solicitation clause failed each of the three prongs. While the court sided with the

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77 See Winn & Dobbs, supra note 75, at 294 (citing Advanced Marine Enter., Inc. v. PRC, Inc., 501 S.E.2d 148, 155 (Va. 1998)).


79 The agreement in question provided, in part, “I agree that, for the period of one (1) year after termination of my employment with MicroStrategy for any reason, I will not, directly or indirectly, seek to influence any employees, agents, contractors or customers of MicroStrategy to terminate or modify their relationship with MicroStrategy.” Id. at 794.
employer as to the reasonableness of the clause’s duration, it found that the
restraint was ambiguous and therefore “greater than necessary to protect
the [employer’s] legitimate business interests.”\(^8\) The clause violated the
second prong of the test, as it would “restrict the former employee from
obtaining any type of job in this industry for fear that it might modify that
employer’s relationship with MicroStrategy.”\(^9\) Finally, since “[b]oth fed-
eral and state courts in Virginia have held that subjecting the former em-
ployee to such uncertainty offends ‘sound public policy,’”\(^10\) the provision
also failed the third prong.

While Virginia employers have not fared well in enforcing their non-so-
lcitation agreements, the courts’ justifications for invalidating the contracts
provides helpful insight on what to avoid and/or include when drafting a
similar non-solicitation agreement.

**B. Louisiana**

In contrast to Virginia law, Louisiana statutorily prohibits agreements re-
straining persons from exercising a lawful profession, trade, or business.\(^3\)
However, the holding of the Louisiana Supreme Court in *Martin-Parry
Corp. v. New Orleans Fire Detection Service* effectively put employee non-
solicitation agreements outside of the statutory restrictions for non-com-
petition agreements.\(^4\) The current trend of Louisiana courts is to enforce
restrictive covenants that include a provision that the employee will not
solicit former co-workers after the termination of employment.\(^5\)

In *National Oil Service of Louisiana, Inc. v. Brown*, an employer sought to
enjoin three former employees from scheming to “close down the plaintiff’s
business while starting their own, using the same customers, the same key
employees, much of plaintiff’s equipment and some of the capital obtained

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80 Id. at 795.
81 Id.
82 Id. (quoting Power Distrib. Inc. v. Emergency Power Eng’g, Inc., 569 F. Supp. 54, 58
(E.D. Va. 1983)).
thereof, by which anyone is restrained from exercising a lawful profession, trade, or business
of any kind, except as provided in this Section, shall be null and void.”).
84 Craig A. Courville, Validity of Nonsolicitation Clauses in Employment Contracts, 48 LA.
2d 83 (La. 1952) (recognizing that nonsolicitation clauses are different from noncompetitive
clauses in employment contracts).
85 See, e.g., Smith, Barney, Harris Upham & Co. v. Robinson, 12 F.3d 515 (5th Cir. 1994);
Emergency Physicians Ass’n v. Our Lady of the Lake Reg’l Med. Ctr., 635 So. 2d 1148 (La.
Ct. App.), vacated, 642 So. 2d 179 (La. 1994); Nat’l Oil Serv. of La., Inc. v. Brown, 381 So. 2d
1979).
through the sale of plaintiff's oil. Unfortunately, the employees had not signed a non-solicitation agreement. The court noted that Louisiana disfavors non-competition agreements but pointed out that parties who are associated in a business may nevertheless agree that upon termination, they will not hire the employees of the former joint business, and such a contract is not in violation of the prohibition of restraint on trade statute. However, "[i]n the absence of such a contract . . . no basis generally exists for an injunction against the exercise of the basic freedom of association[,] which is inherent in the hiring of employees and the taking of a job with an employer."

While Louisiana courts deem non-competition agreements contrary to public policy, they are reluctant to invalidate a non-solicitation agreement based on public policy. In *Emergency Physicians Association v. Our Lady of the Lake Regional Medical Center*, the disputed provision was an agreement by one hospital that it would not solicit the partners of the Emergency Physicians Association, a partnership formed to render emergency room medical services, during the terms of the contract. Upholding the agreement, the Louisiana Court of Appeals held that because the hospital remained free to negotiate and contract with any other physician or group of physicians, a contract prohibiting the hospital from soliciting individual partners to perform emergency services did not violate public policy or interfere with the hospital's duty to provide high quality emergency room services.

While Louisiana has a statute that regulates restraints on trade, the statute does not directly address the issue of employee non-solicitation agreements. Nevertheless, the courts are willing to uphold employee non-solicitation agreements that meet the other basic requirements of the statute. If, however, an employer does not incorporate a non-solicitation agreement in the employment contract, the Louisiana courts are not willing to imply the provision.

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86 *Nat'l Oil Serv. of La., Inc.*, 381 So. 2d at 1274.
87 *Id.* at 1272.
88 *Id.* at 1274; see § 23:921.
89 *Nat'l Oil Serv. of La., Inc.*, 381 So. 2d at 1274–75.
90 *Emergency Physicians Ass'n*, 635 So. 2d at 1148.
91 *Id.* at 1150.
92 § 23:921(C) ("Any person . . . who is employed as an agent, servant, or employee may agree with his employer to refrain from carrying on or engaging in a business similar to that of the employer and/or from soliciting customers of the employer within a specified parish or parishes, municipality or municipalities, or parts thereof, so long as the employer carries on a like business therein, not to exceed a period of two years from termination of employment . . . ").
C. California

The state of California has a statute that generally prohibits non-competition agreements between an employer and its employees.93 The applicable code section, however, does not invalidate a non-solicitation clause in an employment agreement.94 As a result, in some circumstances a California employer may “contractually prohibit former employees from raiding its workforce for a limited period following termination of employment.”95

The leading case in California validating a non-solicitation agreement is Loral Corp. v. Moyes.96 In Moyes, California’s Sixth District Court of Appeals upheld a contract that prohibited terminated employees from soliciting other employees to join a new business (called “noninterference covenants” in California).97 Most importantly, the decision stands for the proposition that clauses in employment agreements are valid under the common law of restraints of trade since they are reasonable measures for ensuring the stability of an employer’s workforce.98 The court noted that although the limitation may somewhat restrict the former employee’s business practices, the agreement was enforceable because it had no overall negative impact on trade or business, and it did not constitute a covenant not to compete.99 Furthermore, the fact that the covenant continued indefinitely was not controlling. Rather, “enforceability depends upon its reasonableness, evaluated in terms of the employer, the employee, and the public.”100

While California’s statute voiding agreements that restrain one from engaging in a lawful business favors employees, it is interesting to recognize that the California courts treat non-solicitation agreements somewhat differently. The noninterference covenants are not considered direct restraints on trade. Therefore courts will not subject them to the strict standards applied to non-compete agreements.

93 Cal. Bus. & Prof. Code § 16600 (West 2005) (“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.”); see also Christina L. Wu, Non-compete Agreements in California: Should California Courts Uphold Choice of Law Provisions Specifying Another State’s Law?, 51 UCLA L. Rev. 593 (2003).
96 Loral Corp. v. Moyes, 219 Cal. Rptr. 836 (Ct. App. 1985). Specifically, the former employee’s employment contract provided that, after termination, he “[would] not now or in the future disrupt, damage, impair or interfere with [former employer’s business] ... whether by way of interfering with or raiding its employees ... or otherwise.” Id. at 840.
97 Id.
98 2 ALTMAN, supra note 29.
99 Moyes, 219 Cal. Rptr. at 843.
100 Id.
Since Ohio does not statutorily regulate the validity of restrictive covenants in employment contracts, Ohio courts rely upon the "reasonableness" test set forth by the Ohio Supreme Court in *Raimonde v. VanVlerah.* In *Raimonde*, the court held the following:

[A] covenant not to compete which imposes unreasonable restrictions upon an employee will be enforced to the extent necessary to protect the employer's legitimate interests. A covenant restraining an employee from competing with his former employer upon termination of employment is reasonable if it is no greater than is required for the protection of the employer, does not impose undue hardship on the employee, and is not injurious to the public. Courts are empowered to modify or amend employment agreements to achieve such results.

Various factors are considered in determining the validity of the agreement in restraint on trade, including the agreement's geographic and time limitations. The leading case in Ohio applying the *Raimonde* test to a non-compete and non-solicitation agreement is *UZ Engineered Products Co. v. Midwest Motor Supply Co.* In *UZ Engineered Products*, not only did the Ohio Court of Appeals enforce the employee's agreement, but as a result of the new employer's tortious interference with the employment agreement, the court awarded punitive damages to the former employer. In response to the employee's claim that the non-solicitation agreement was invalid, the court held that the first element of *Raimonde*—protection of a legitimate interest of the employer—clearly weighed in favor of the enforcement of the employer's restrictive covenants. As to the second element—that the non-compete clause must not impose undue hardship on the employee—the court found there was a lack of evidence proving that enforcement of the two-year territorial restriction would cause the former employees to

102 Id. at 544-47.
104 Id. at 1068.
105 Specifically, in the non-solicitation clauses, the employee agreed that for the two-year period after the employee left plaintiff's employment, he or she would not solicit plaintiff's other employees to leave their employment with plaintiff. Id. at 1074.
106 Id. at 1083. The court followed the *Restatement (Second) of Torts* § 766 elements of the tort of intentional interference with contract which are "(1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) lack of justification, and (5) resulting damages." Id.
107 Id. at 1080.
suffer undue hardship.\textsuperscript{108} Finally, the court held that the employer met the third element—the public's interest in promoting fair business competition—because the particular industry involved was highly competitive and enforcement of the covenant would not adversely affect business competition in the industry or harm the public.\textsuperscript{109}

While the \textit{Raimonde} analysis provides that a court may reform an unenforceable non-solicitation agreement to protect an employer's legitimate business interest in maintaining stability, the Ohio Court of Appeals, in \textit{Busch v. Premier Integrated Medical Associates., Ltd.},\textsuperscript{110} affirmed the lower court's decision to invalidate a non-solicitation agreement and upheld the lower court's decision refusing to modify the covenant.\textsuperscript{111} After invalidating the non-solicitation agreement between PriMed—a medical practice group—and two cardiologists, the trial court declined to amend the agreement, finding that PriMed had other means to protect its interests.\textsuperscript{112} The other means included a 180-day waiting period for resignation of employees and/or non-competition agreements.\textsuperscript{113} The \textit{Busch} decision is important because the court refused to amend the agreement even though it recognized that (1) PriMed had an interest in maintaining a stable workforce, (2) six of the seven employees the cardiologists hired were former PriMed employees, and (3) per \textit{Raimonde}, the court had the discretion to amend the terms of the non-solicitation covenant to render its restrictions reasonable.

\textbf{E. Florida}

Florida has a comprehensive statute setting forth what constitutes valid restraints on trade or commerce.\textsuperscript{114} The validity of non-solicitation agreements (called "nonpiracy agreements" in Florida) is controlled by this stat-

\begin{itemize}
  \item \textsuperscript{108} \textit{Id.} at 1081.
  \item \textsuperscript{109} \textit{Id.} The industry involved was the "maintenance, repair, and operation (MRO) industry who sell products . . . to businesses, institutions, and agencies that perform maintenance for buildings, machinery, equipment, and vehicles." \textit{Id.} at 1073.
  \item \textsuperscript{111} The nonsolicitation agreement stated, "During the term of this Agreement and for one (1) year thereafter, the Physician shall not, directly or indirectly, hire[,] solicit, encourage to leave the employment of, or engage to cease to work the Employer, any employee of the Employer, or any independent contractor with the Employer, or hire any employee who has left the employment of the Employer." \textit{Id.} at *6.
  \item \textsuperscript{112} \textit{Id.}
  \item \textsuperscript{113} \textit{Id.} The court also made several other recommendations aside from a non-solicitation agreement that would protect PriMed's interest in maintaining stability. One recommendation included entering into written contracts with the employees providing for a specified term of employment. \textit{Id.} "Even when several are hired on the same day, the terms could be of varying lengths of time. Further, the employee would then have an opportunity to decide whether his or her own opportunities should be subject to such a restriction." \textit{Id.} at *7.
  \item \textsuperscript{114} \textsc{Fla. Stat.} § 542.335 (2005).
\end{itemize}
ute. Applying these statutory requirements, the District Court of Appeal of Florida, in *Balasco v. Gulf Auto Holding, Inc.*, upheld a nonpiracy agreement that prohibited a sales manager from soliciting or influencing other employees to leave the car dealership for two years following the manager’s resignation. In upholding the agreement and enforcing a temporary injunction, the court found that the agreement was necessary to protect the dealership’s investment in specialized sales training, supported by consideration of continued employment, and contained a reasonable restraint of only two years.

Thus, based on statutory requirements, courts in Florida will uphold a non-solicitation agreement that protects a legitimate business interest; is not overbroad; is reasonably related to the employer’s line of business; is reasonable in duration (agreement presumed unreasonable if greater than two years); and is supported by adequate consideration.

V. GUIDE TO DRAFTING ENFORCEABLE NON-SOLICITATION AGREEMENTS IN KENTUCKY

A. General Drafting Considerations

Due to the large amount of uncertainties in judicial enforcement of non-solicitation agreements and the uncertainties of judicial reformation of contracts with unreasonable restrictions on competition, an employer should recognize the importance of careful drafting to ensure that such contracts will be enforceable as written. Since enforceability of a non-solicitation agreement is a highly fact-specific determination, an employer cannot definitively know whether its non-solicitation agreement will be upheld in court. Thus, it is important for employers to adequately prepare before a dispute arises to increase the probability that their non-solicitation agreement will be enforceable. As explained in several of the above-mentioned jurisdictions, to be enforceable a non-solicitation covenant should be: in writing; signed by the employee; ancillary to employment; supported by consideration; reasonable; and consistent with the public interest. Simple contract drafting techniques may also help improve the enforceability of a non-solicitation agreement. First, the employer should note the basic tenets of contract construction. Courts generally construe contracts against the drafter; therefore, constructing a clear and unambiguous non-solicitation agreement is essential. Second, the employer should specify that the
non-solicitation agreement is an express condition of employment, thus avoiding challenges to the validity of the agreement if the employee does not sign it until after beginning employment. Third, the employer should make the agreement assignable and allow enforceability by successors and assigns. The agreement should state that its terms survive termination of the employment relationship whether the relationship is terminated with or without cause. Finally, employers should weigh the possible risks and benefits of unnecessarily aggressive restrictions. It is advisable to include only those restrictions that are truly necessary to protect the employer. For example, if an employer is concerned that an employee will quit and attempt to take other employees, "the employer should consider using a narrow non-solicitation agreement, rather than a broad non-competition agreement, to increase the chances the agreement will be enforced to protect the employer's legitimate business interests."

Along these same lines, "rather than using one agreement for all employees, employers should customize agreements for each type of employee." "Customizing the relevant restrictions for each type of employee helps achieve the appropriate balance of maximizing the protections provided to the employer while keeping the burden on the employee reasonable so that a court will be likely to enforce the agreement." Broad boilerplate language applied in every employee's non-solicitation agreement is not the most effective way to draft a reasonable non-solicitation agreement. Specifically tailoring a non-solicitation agreement to the particular circumstances of the employee and job involved is the best way to protect the employer's interests. While a client may perceive a non-solicitation as a cookie-cutter form that can be used without modification for any employee, lawyers should be careful to explain to their clients the risks of using a previously drafted non-solicitation agreement for a new employee without the consideration of counsel.

(providing a notable exemption to this maxim with respect to non-compete agreements, by which courts are expressly prohibited from "constru[ing] a restrictive covenant narrowly, against the restraint, or against the drafter").

120 Porter & Griffaton, supra note 119.
121 Id. at 200.
123 Id.
124 Funkhouser, supra note 7.
125 Id.
126 Id.
127 Id.
128 Id.
129 Hone, supra note 36.
B. Useful Guidance from Other Jurisdictions

It is important to recognize that state law governs the enforcement of non-solicitation agreements. A non-solicitation agreement that is reasonable and enforceable in one state will not necessarily be enforceable in another state.\(^{131}\) Since there is no case law in Kentucky that evaluates employee non-solicitation agreements, it is important to analyze how and why other jurisdictions enforce these agreements. The variations in the ways other courts enforce non-solicitation agreements require the drafter to discern common factors among the courts and then combine these factors with available Kentucky law. While it is evident from prior case law that Kentucky courts will analyze non-solicitation agreements under the general rubric of restrictive covenants (since Kentucky does not govern restrictive covenants by statute), it would be more advantageous to analyze jurisdictions without statutes, jurisdictions with broad statutes regulating restraints on trade, and the judicial interpretations of these statutes.

In Virginia, a state with no statute regulating restrictive covenants, the concern for the well-being of employees and their ability to earn a living seems to drive the Virginia Supreme Court’s decision to invalidate non-solicitation agreements.\(^{132}\) The courts will uphold the agreement only if narrowly construed.\(^{133}\) On the other hand, courts in Ohio, another state with no statute regulating restrictive covenants, do a better job of balancing the competing interests of the employer and the employee. While Ohio courts also require narrow construction of the agreement and that it be no more restrictive than necessary to protect the employer’s interests, the courts also weigh the undue hardship on the employee and the public’s interest in fair competition.\(^{134}\) This approach seems to align better with Kentucky courts’ approach to restrictive covenants. It may also be helpful to look at the factors that motivate Louisiana courts, a state that statutorily prohibits agreements restraining trade.\(^{135}\) The Louisiana courts note that while public policy generally prohibits non-competition agreements, they will not apply public policy arguments to non-solicitation agreements if those agreements do not interfere with the employee’s exercise of an important legal privilege or responsibility.\(^{136}\) Ultimately, what seems to be driving the Louisiana courts’ decision is freedom of contract and freedom of association. As long as the non-solicitation agreement does not unduly restrain competition or violate the applicable statute, then courts will uphold these agreements.

\(^{131}\) See supra notes 74–116 and accompanying text; see also Tinio, supra note 19.

\(^{132}\) See supra notes 75–82 and accompanying text.

\(^{133}\) See Simmons v. Miller, 544 S.E.2d 666, 678 (Va. 2001).

\(^{134}\) See supra notes 101–13 and accompanying text.


\(^{136}\) See supra notes 83–92 and accompanying text.
Aside from the generalities gathered from the case law in these states, it is also helpful to analyze some specific attributes of the contracts that could aid in drafting enforceable non-solicitation agreements.

C. Reasonableness

Courts will enforce contracts restraining freedom of employment when the agreements are reasonable. As mentioned, an employer seeking to enforce a non-solicitation agreement bears the burden of proving that the restraint is reasonable. Most courts agree that reasonableness requires that the terms of the agreement: (1) are necessary to protect the employer's legitimate business interest; (2) do not impose an undue hardship on the employee; and (3) do not violate public policy. However, employers should note that some states are quick to find a non-solicitation agreement invalid because it is ambiguous, offends public policy, or because less restrictive means are available to protect the employer's interests. Furthermore, most states will not enforce a non-solicitation agreement unless it is reasonable in both duration and geographic scope. In making this determination, courts will consider both what is necessary to protect the employer's interests and the burden the agreement imposes on the employee. "These determinations are fact specific and depend on factors such as the nature of the employer, the employer's industry[,] and the skill level and job description of the employee." Typically, an employee non-solicitation agreement is enforceable if it prohibits an ex-employee from soliciting current employees for two years or less after termination of employment. "Geographic restrictions typically prevent activities within a specified geographic area" (e.g., within a 100-mile radius of a city, or within a fifty-mile radius of any of the employer's offices). Geographic restrictions appear less often in non-solicitation clauses because non-solicitation clauses focus on customers and employees whereas non-compete provisions are more concerned with geographic restrictions. As such, employee non-solicitation clauses usually contain implied geographic limitations. Kentucky employers should note

137 Davey Tree Expert Co. v. Ackelbein, 25 S.W.2d 62, 64 (Ky. 1930).
138 See supra note 77 and accompanying text.
139 See supra notes 80–82 and accompanying text.
140 Funkhouser, supra note 7.
141 Id.
142 See supra note 108.
143 Rees, supra note 6. While a three-year restriction is presumptively unreasonable in Florida, both Florida and Ohio courts have held that a two-year restriction is reasonable.
144 Id.
145 Id. (citing Bell Fuel Corp. v. Cattolico, 544 A.2d 450, 458 (Pa. Super. Ct. 1988) (holding that despite having no express temporal or geographic limitations, a reasonable construction of the covenant revealed an implied geographic limitation)).
that in *Calhoun v. Everman*, the Kentucky Court of Appeals held that restrictive covenants are enforceable where they are unlimited as to time yet confined to a reasonable territory. This is not to say, however, that Kentucky courts will approve an employee non-solicitation agreement that continues indefinitely.

### D. Consideration

An agreement not to solicit is enforceable only if the employer gives the employee consideration in exchange for signing the agreement. Typically, if the employee signs an agreement at the start of employment, sufficient consideration exists. If, however, an at-will employee signs the agreement after he or she has already begun working for the employer, continued employment alone is not sufficient consideration—the employer must provide some additional benefit to the employee. If the employer wants an existing employee to sign such an agreement, the employer should offer the existing employee a promotion, raise, bonus or some other benefit that would not otherwise be due to the employee in exchange for signing the agreement. A written contract given to a previously at-will employee allowing termination only for cause also suffices as adequate consideration. However, threat of loss of employment upon refusal to sign a restriction usually does not constitute sufficient consideration to support non-solicitation covenants.

In addition to an offer of employment or some other benefit after employment has begun, the employer should “have the employee acknowledge that the consideration given is adequate and sufficient.” Such an acknowledgement makes it more difficult for an employee later to assert the defense that the consideration given in exchange for the employee’s promises was inadequate.

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146 Calhoun v. Everman, 242 S.W.2d 100 (Ky. 1951).
147 Id. at 102.
149 Robben, *supra* note 130; *see also* Nat’l Risk Mgmt., Inc. v. Bramwell, 819 F. Supp. 417, 429 (E.D. Pa. 1993) (holding that mere continuation of employment was not sufficient consideration for a non-compete agreement despite the fact that the employment relationship was terminable at will of either party).
150 *See* Rees, *supra* note 6 (“Among the items that courts have upheld as sufficient consideration are agreements to pay increased compensation, profit sharing benefits, increased severance benefits, and stock options.”).
151 Porter & Griffaton, *supra* note 119, at 195; *see also* Robben, *supra* note 130.
154 Id.
In some jurisdictions, an overbroad or unreasonable non-solicitation agreement provision will render the entire agreement unenforceable.\footnote{155} In order to provide reasonable protection to a company's legitimate business interests, courts in other jurisdictions, such as Ohio, are empowered to re-draft overbroad agreements.\footnote{156} "In doing so, the court will examine the same factors involved in determining whether the restriction is reasonable as written."\footnote{157}

Another way to enhance enforcement of the employment agreement is by including a "blue pencil" clause.\footnote{158} Blue pencil clauses allow the court to modify an unreasonably restrictive or indefinite covenant, instead of invalidating the entire agreement.\footnote{159} "For example, if a court found that a two-year non-competition agreement was unreasonable, it might choose to enforce the agreement for only a one-year term, if the court believed that this would be reasonable, rather than not enforcing it at all."\footnote{160} "An astute employer will include a judicial modification clause in the non-solicitation agreement since a court will be more likely to blue-pencil an overly broad covenant if the employee has agreed to it in advance."\footnote{161} In addition to a "blue-pencil" clause, it may also be beneficial to include a severability clause in the non-solicitation agreement.\footnote{162} This clause would permit a court to modify an unenforceable agreement.\footnote{163} Counsel, however, should be careful not to draft a non-solicitation agreement in the broadest possible terms and then rely on a court's ability or willingness to redraft the agreement.\footnote{164} Redrafting is not required by the courts, and courts may simply

\begin{footnotes}
\footnotetext[155]{Porter & Griffaton, supra note 119, at 198; see also Wis. Stat. § 103.465 (2005) ("Any covenant . . . imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.").}
\footnotetext[156]{Porter & Griffaton, supra note 119, at 198; see also Raimonde v. Van Vlerah, 325 N.E.2d 544, 547 (Ohio 1975).}
\footnotetext[158]{Gerry Husch, The Truth About Non-competes in Idaho, IDAHO EMP. L. LETTER, Dec. 2003, Westlaw 8 No. 9 SMIDEMPOLL1.}
\footnotetext[159]{Id.}
\footnotetext[160]{Funkhouser, supra note 7.}
\footnotetext[161]{Husch, supra note 158.}
\footnotetext[162]{Porter & Griffaton, supra note 119, at 198; see also Davey Tree Expert Co. v. Ackelbein, 25 S.W.2d 62 (Ky. 1930) (restriction on employment, where capable of being cut down to eliminate unreasonable part, will be enforced as to parts considered reasonable as may be necessary for the full protection of the employer's business).}
\footnotetext[163]{Porter & Griffaton, supra note 119, at 198.}
\footnotetext[164]{Id.}
\end{footnotes}
refuse to enforce the agreement if any provision is overbroad or unreasonable.\textsuperscript{165}

VI. CONCLUSION

When an employee leaves, an employer not only loses the time and money spent training and developing the employee, but it is also faced with the possibility that the employee will join a competing organization and solicit former co-workers to join him or her. The competitor may offer a more lucrative employment package, or the employee could simply be unhappy with his current work environment. Whatever the reason, it is essential that employers protect their own interests and require key employees to sign an employee non-solicitation agreement. It is difficult to tell exactly how and when the courts in Kentucky will uphold these agreements, but by following these general guidelines and the principles derived from the comparative analysis of other jurisdictions, practitioners can enhance the likelihood of judicial enforcement. In addition, because much of the value of these agreements lies in their ability to deter employees from engaging in employee pirating in the first place, simply having the employees sign the contracts may be enough to protect the employer’s interest.

\textsuperscript{165} Id.; see also Prof'l Investigations & Consulting Agency, Inc. v. Kingsland, 591 N.E.2d 1265, 1270 (Ohio Ct. App. 1990).