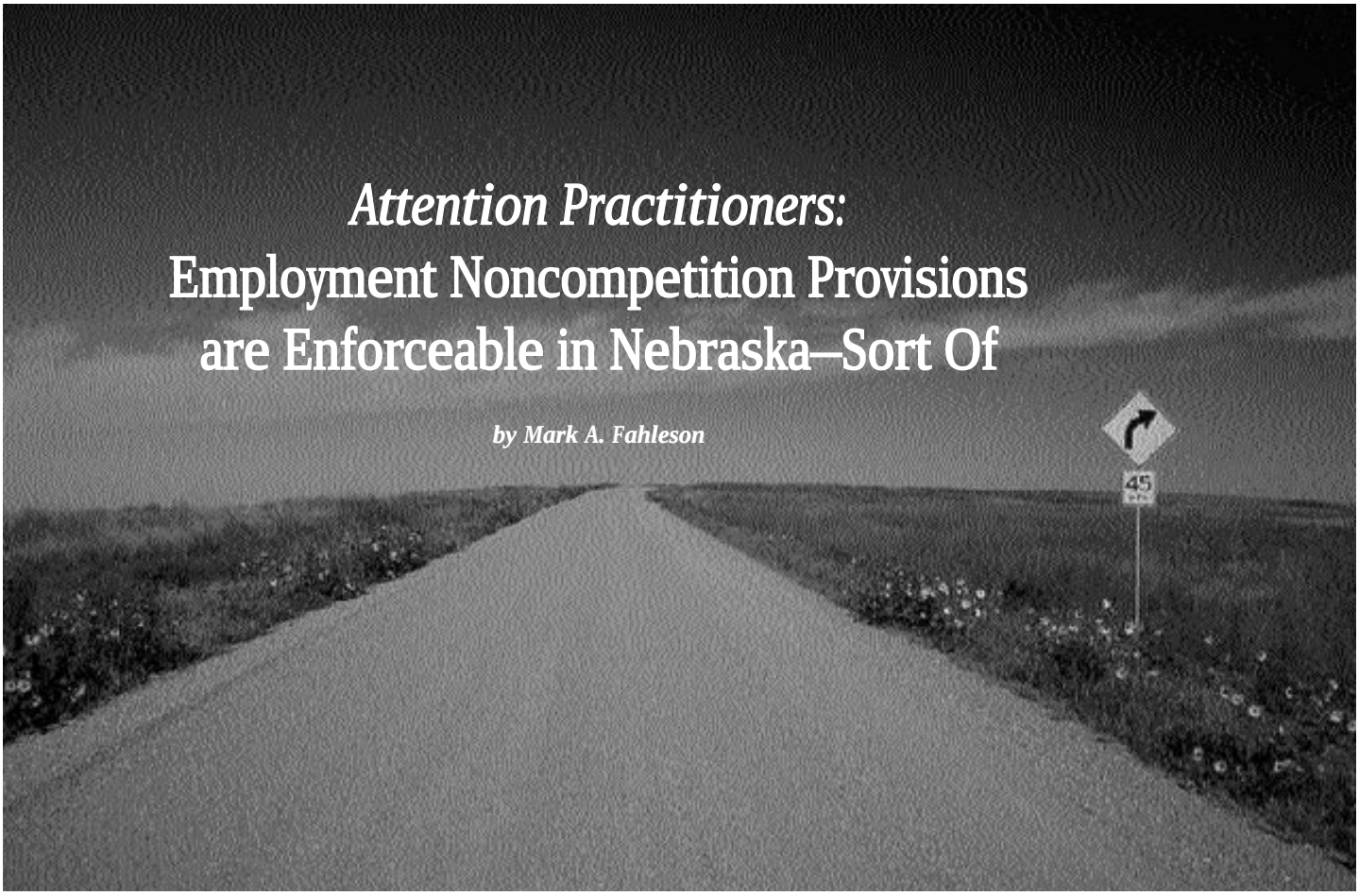

Attention Practitioners: Employment Noncompetition Provisions are Enforceable in Nebraska–Sort Of

by Mark A. Fahleson

I. Introduction

Chances are, most of us have been there before.

The client, owner of a growing company, wants to know what she can do to protect the investment she has made in training her employees and generating good will among her clients and to prevent her employees from jumping ship with this training and good will "in head" to work for a competitor.

Or the client is an employee of this same growing company, wanting to know what he can and can't do as he prepares to terminate his employment with the company to start a new business that will compete directly with his soon-to-be former employer.

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Soon, the discussion with either client turns to the topic of noncompetition agreements. For both, our reaction is likely the same, *i.e.*; noncompetition provisions are of limited utility in Nebraska given our judiciary's strict scrutiny of and reluctance to enforce such provisions.

This result is unfortunate. Well-drafted noncompetition agreements can serve as useful tools in protecting our clients' interests and are enforceable in Nebraska. What is needed is a better understanding among practitioners of the public policy justifications behind such provisions and a roadmap to assist practitioners in navigating Nebraska's confusing case law with respect to the enforceability of these provisions.[1]

The purpose of this article is to analyze the policy justifications behind noncompetition agreements in the employment setting[2] and their treatment under Nebraska law with the goal of aiding Nebraska practitioners in drafting enforceable noncompetition provisions that satisfy their clients' objectives. The article briefly addresses the history of and policy justifications behind noncompetition provisions. Next, the article surveys the treatment of noncompetition provisions under Nebraska law and provides several suggestions to Nebraska practitioners in drafting enforceable noncompetition agreements. Finally, the article concludes that even with a clear understanding of Nebraska's common law in hand, practitioners may not be comfortable utilizing noncompetition agreements absent greater certainty regarding their enforceability, a result that may require legislative action.

II. History of and Policy Considerations Behind Employment Noncompetition Provisions

Noncompetition provisions ancillary to an employment agreement vary greatly in scope and purpose. Some broadly attempt to bar an employee from competing at all or within a specific geographic area with his employer during and for a specified time period after the termination of the employment relationship. Others narrowly attempt to protect a specific interest of the employer, such as a "nonsolicitation" provision wherein the employee agrees to not solicit customers of the employer for a specified period of time after the employment relationship has ended.

Whatever the precise form, it is clear that employers have attempted to use and courts have closely scrutinized noncompetition provisions for nearly 600 years.[3] Despite six centuries of common law, noncompetition provisions continue to represent a moving target for courts and practitioners, in large part because of the wide difference of opinion that exists regarding the economic justification and fairness of using noncompetition provisions in the employment context.

Proponents of employment noncompetition provisions argue that such provisions are a necessary tool for protecting an employer's investment in employee training, the trade secrets and proprietary information that are disclosed to the employee, and the employer's good will. Certainly, proponents claim, the employee is free to decide whether or not to enter into a noncompetition agreement and often chooses to do so because of the valuable consideration the employee receives in return. By signing a noncompetition provision, the employee becomes more valuable to the employer, resulting in greater compensation. Moreover, the employee becomes more valuable to future employers, since the employee will receive costly training that the employee likely could not otherwise afford to pay for out-of-pocket.

Certain economic efficiencies are created by the use and enforcement of employment noncompetition provisions. First, enforceable noncompetition provisions yield a better-trained workforce since employers will have a protectable interest in providing training to their employees without fear of employee misappropriation. Second,

"For example, if a secret process requires three steps, there are two methods of maintaining secrecy."

employers may be able to discard less efficient methods of production implemented solely to protect the employer's trade secrets.

> For example, if a secret process requires three steps, there are two methods of maintaining secrecy. One allows one employee to undertake all three steps but binds him by contract not to use the acquired information elsewhere. An alternative is to teach each of the three employees only one of the three steps so that no one employee will know enough to compete with the firm. It is possible, however, that the production process will be more costly if the second method of production is used. (If not, then the second method would always be used, and the law is irrelevant). Thus, if the noncompetition clause is not binding, firms will be forced to use more costly methods of production in some circumstances in order to protect their proprietary information.[4]

Opponents of employment noncompetition agreements often cite the inequitable bargaining position employees have vis-a-vis employers, declaring that enforcing such agreements creates incentives for employers to unfairly exploit their employees. It is economically inefficient to enforce broad covenants not to compete, opponents argue, often citing the California model. The State of California has chosen to statutorily prohibit most forms of employment noncompetition agreements.[5] The free flow of information and the economic efficiencies of employee mobility resulting from this prohibition arguably have "contribute [d] to the success of the Silicon Valley and distinguishe[d] it from other less successful technological areas."[6]

On whole, narrowly tailored employment noncompetition agreements help forward legitimate public policy interests. For those jobs that require specialized training, such agreements encourage employers to make significant investments in training, allowing employees to receive training they might not otherwise be able to afford and creating a better-trained workforce. Moreover, certain efficiencies are created by encouraging employers to provide an employee with the confidential and proprietary information necessary for the employee to efficiently perform the job, including in many instances direct access to trade secrets and direct contact with the employer's clients. Nevertheless, in order to avoid the economic inefficiencies created by opportunistic behavior by employers, noncompetition agreements must be narrowly tailored to protect only the employer's legitimate interests. This could include the employer's investment in specialized training, trade secrets and confidential information, and good will. For over a century, Nebraska's courts have struggled to perform this delicate balancing act, resulting in a common law littered with contradictory decisions and a legal profession unsure as to the enforceability of employment noncompetition agreements.

III. Overview of Nebraska Law: The Whittling Down of an Employer's Protection Interest

The first reported Nebraska decision construing an employment noncompetition covenant occurred in 1918[7] in *Roper v. Pryor, 102 Neb. 709, 169 N.W. 257 (1918)*. Therein, plaintiff R.C. Roper was an attorney practicing law in Butler County, Nebraska. In the fall of 1914, Roper hired defendant Leo Pryor, a recent law college graduate who had just been admitted to the bar. As part of the employment agreement, Pryor was to receive "a salary not in excess of that paid to an ordinary clerk," in exchange for which Pryor agreed that upon the termination of the employment relationship Pryor would not practice law in Butler County for a 10-year period.

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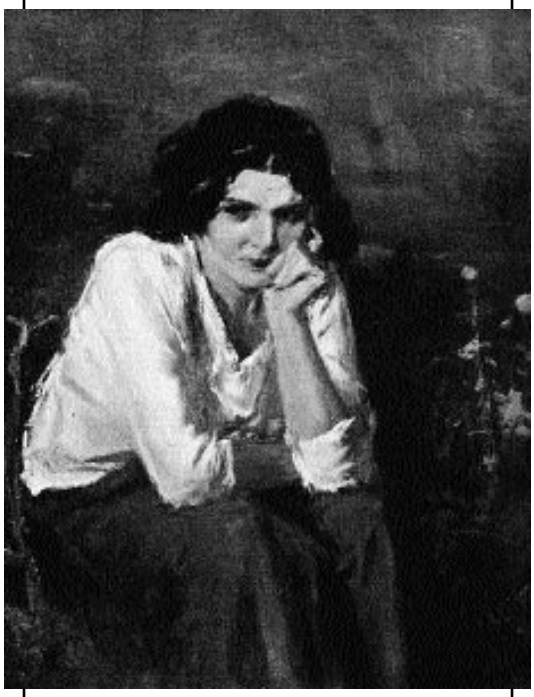
The rest of the story is fairly predictable. Less that two years into the agreement,[8] Pryor terminated the employment relationship and opened a law office in David City, the county seat of Butler County.

Roper filed suit and sought injunctive relief to enforce the terms of the noncompetition agreement. The trial court entered a permanent injunction barring Pryor from practicing law in Butler County, which Pryor appealed.

On appeal, the Nebraska Supreme Court noted that while noncompetition provisions were not uncommon in some lines of business, the Court could find no precedent passing upon the proprietary of a situation "where . . . an established lawyer has sought, in a court of equity, to withhold from a brother practitioner, who has served as his clerk and assistant, the opportunity of engaging in his profession."[9] Although noting that the "defendant did not have an opportunity to come in close contact with the clients of plaintiff " and that "none of such clients had gone over, or threatened to go over, to [the] defendant,"[10] the Court held that a breach had occurred and nominal damages could be recovered. Consequently, the Nebraska Supreme Court affirmed the trial court's award of injunctive relief.

Thus, while the Court provided little analysis in support of its decision, the Court paid special attention to degree of contact the departed employee had with his employer's clients and whether he had misappropriated these clients upon departure. Clearly the Court regarded these employer interests to be legitimate and valuable and therefore worthy of protection.

The next opportunity the Nebraska Supreme Court had to pass upon the validity of an employment noncompetition agreement arose in 1924 in *Dow v. Gotch, 113 Neb. 60, 201 N.W. 655 (1924)*. Therein, plaintiff Sarah Dow owned and operated a beauty parlor in Grand Island where she employed, among others, defendant Lulu Hutton Gotch. Gotch expressed her desire to take postgraduate beauty courses in Chicago. To help defray Gotch's education and travel expenses, Dow offered to pay Gotch $100, in exchange for which Gotch agreed to work for Dow for one year after she completed her postgraduate study. Moreover, Gotch was required to enter into a noncompetition covenant, under which Gotch would not "engage in the business of hair or facial treatment or as manicurist in the city of Grand Island either for herself or for another party, except as an employee of" Dow,[11] without any time limitations on the noncompetition covenant. Gotch went to Chicago, received her training, returned to work for Dow for approximately one-half



year, at which time Gotch requested and was released from her 1-year employment agreement to work in Cheyenne. Gotch worked in Cheyenne for several months, and then returned to Grand Island to compete with Dow.

The Court began its analysis by borrowing from case law construing noncompetition provisions ancillary to the sale of a business. The *Dow Court* noted that "such contracts will be enforced if they are ancillary to a main contract and limited either as to time or space, provided that they are also reasonable in their terms and operation."[12] Applying this test to the case at bar, the Court affirmed the district court's issuance of injunctive relief barring Gotch from competing in Grand Island. The Court placed great emphasis on four factors: (1) Gotch clearly understood the noncompetition agreement and freely entered into it; (2) it would be "well-nigh intolerable" to permit Gotch to receive money from Dow to defray her training expense and then use that training to do "the very thing which she agreed not to do;"[13] (3) the mobility created by railways and automobiles permitted Gotch to obtain employment "in any one of a thousand towns quite similar to Grand Island, and not hard to reach;"[14] and (4) Grand Island had a sufficient supply of beauty parlors.

The *Dow* test remained intact until 1960, when the Nebraska Supreme Court adopted the test which has served a the foundation for every modern employment noncompetition case decided in Nebraska. In *Securities Acceptance Corp. v. Brown, 171 Neb. 406, 106 N.W.2d 456 (1960)*, clarified, *171 Neb. 701, 107 N.W.2d 540 (1961)*, Securities Acceptance operated a consumer loan and finance business from its main office in Omaha and 89 branch offices in some 15 states. Brown worked for Securities Acceptance initially pursuant to a verbal and eventually a written agreement, which contained a number of nondisclosure and noncompetition provisions. Specifically, the agreement provided that for a period of 18 months after the termination of Brown's employment (provided the termination did not take place within the first 6 months of the agreement), Brown would not "engage in any way directly or indirectly in any business competitive with the Employer's business, nor solicit or in any other way or manner work for or assist any competitive business in any city or the environs or trade territory thereof in which the Employee shall have been located or employed by the Employer."[15]

Brown worked as a credit manager out of Securities Acceptance's North Platte office for 7 years until he was promoted to the position of supervisor, which required Brown to move to the company's home office in Omaha. Brown initially accepted the position, but declined to move his family from North Platte, choosing instead to return home on weekends to be with his family. In the 6 weeks following his promotion, Brown worked out of the Omaha home office, several branch offices in Omaha, a Norfolk branch office and a branch office in South Dakota. In large part due to the amount of travel he was now forced to do, Brown terminated his employment with Securities Acceptance and went to work for a North Platte consumer loan and finance company that directly competed with his former employer.

The *Securities Acceptance* Court began its analysis by noting that partial restraints of

trade are enforceable "when they are ancillary to a contract of employment [made in good faith] and are apparently necessary to afford fair protection to the employer." [16] To be enforceable, such partial restraints must satisfy three requirements:

> First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest; and, third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee.[17]

Applying this 3-factor test, the Court noted that, with respect to the first factor, the Court had previously decided that a restriction on employment was not injurious to the public as it relates to a small loan business. In applying the third factor, the Court rejected Brown's claim that enforcement of the noncompetition agreement would be unduly harsh and oppressive, noting that Brown voluntarily terminated his employment and employment in his chosen field was "available in any city of any size."[18]

The Court then focused on the second factor. The Court found that Brown had become familiar with Securities Acceptance's polices, procedures and employment, which Securities had a legitimate interest in protecting. However, an issue existed as to whether the restriction found in the noncompetition provision was reasonable in the sense that it was no greater than was reasonably necessary to protect Securities Acceptance. Noting that the provision prevented Brown from competing for 18 months after he terminated his employment in any city in which he may have been located or employed **throughout his employment** with Securities Acceptance, rather than 18 months from which Brown last worked in that particular city, the Court held the provision was unreasonable and not necessary to protect Securities Acceptance's interests.[19]

Since *Securities Acceptance*, the Nebraska Supreme Court has uniformly adhered to the 3-factor test announced therein. In the fourteen state appellate court decisions since reported,[20] the Nebraska Supreme Court has applied and further refined the *Securities Acceptance* test to require the following:

"Since Securities Acceptance, the Nebraska Supreme Court has uniformly adhered to the 3-factor test announced therein".

1. The noncompetition agreement must be ancillary to an actual employment transaction made in good faith.

Since *Securities Acceptance*, courts have paid little attention to this requirement. Nevertheless, it appears to remain a valid prerequisite for enforcement. It remains to be seen whether an employee could successfully challenge the enforceability of a noncompetition provision by challenging the underlying employment relationship and whether that relationship was entered into, or terminated, in good faith. Some courts, for example, have declined to enforce noncompetition provisions where it was the employer who terminated the employment relationship without cause[21] or in bad faith.[22]

2. The noncompetition restriction is not injurious to the public.

Decisions since *Securities Acceptance* have failed to flesh out this requirement as well, often because the employee failed to introduce evidence into the record demonstrating that enforcement of the noncompetition provision was somehow detrimental to the public.[23] However, in those that have, the state's high court has found evidence of highly competitive industries and the narrowness and specificity of the competitive restraint to be persuasive.[24]

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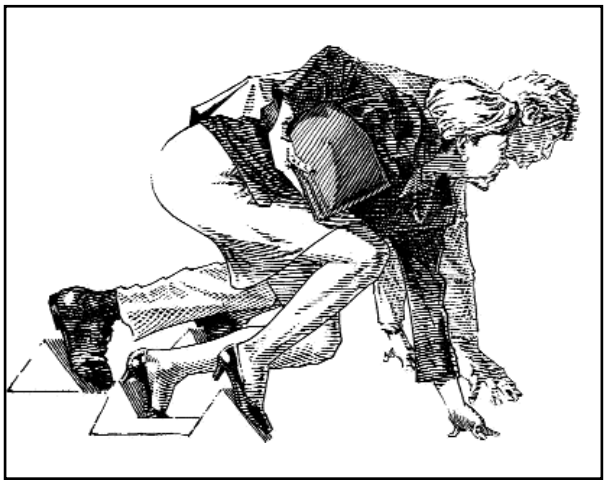
3. The noncompetition restriction is no greater than is reasonably necessary to protect the employer in some legitimate interest.

Under this requirement, an employer seeking enforcement of a noncompetition provision must first establish that it has some legitimate interest deserving protection. Since *Roper* and *Dow*, the Nebraska Supreme Court has severely whittled down what constitutes a legitimate employer interest for this purpose.

In recent years the state's high court has made it abundantly clear that employers have a legitimate interest in protection against "unfair competition," but not "ordinary competition."[25] In an attempt to draw a distinction between the permissible and impermissible, every decision since *Securities Acceptance* has focused on an employer's interest in its good will and whether or not the employee had the opportunity to misappropriate that good will to unfairly compete against the employer. Indeed, in the oft-cited *Polly v. Ray D. Hilderman & Co., 225 Neb. 662, 668, 407 N.W.2d 751, 756 (1987)*, the Nebraska Supreme Court held an employment noncompetition covenant is "valid **only** if it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and has personal contact." (emphasis supplied). Thus, it would appear that the only legitimate employer interest deserving protection through a noncompetition covenant is an employer's interest in its good will.

Once it has been determined that the employer has a legitimate interest deserving protection, *i.e.*, good will, courts look to whether the noncompetition restriction is narrowly tailored to protect that interest. Clearly, a noncompetition agreement will be deemed unreasonable and unenforceable if it restricts an employee from working with or soliciting **all** of a former employer's customers or accounts without any consideration given to the amount of contact or involvement the employee had with those customers or accounts.[26] Moreover, there appears to be a strong reluctance to find noncompetition restraints to be reasonable in traditionally "blue-collar" occupations, unless the restriction is limited to the area in which the worker's personal service was actually performed and does not unreasonably limit "the right of a working man to labor."[27]



4. The noncompetition restriction is not unduly harsh and oppressive on the employee.

In determining whether a noncompetition restraint is unduly harsh or oppressive on an employee, the Nebraska Supreme Court applies a balancing test, weighing the harshness and oppressiveness on the employee against the protection of a valid business interest of the employer. While there is no mathematical formula, the courts generally examine the following factors in applying the balancing test:

- ✔ The degree of inequality of bargaining power between employer and employee;
- ✔ Presence of a risk that the employer will lose customers;
- ✔ The extent of participation by employer and employee in securing and retaining customers;
- ✔ Good faith of the employer and employee;[28]
- ✔ The existence of a customer directory or general knowledge pertaining to the identity of customers;
- ✔ The nature and extent of the job held by the employee and the circumstances of the employee's employment;
- ✔ The employee's training, health, education and needs of the employee's family;
- ✔ The current conditions of employment;
- ✔ The necessity of the employee changing occupations or place of residence;
- ✔ The correspondence of the restraint with the need for protecting the legitimate interests of the employer.[29]

IV. Drafting Considerations

Nebraska's common law addressing the enforceability of employment noncompetition covenants is inconsistent and clouded in many respects. Nevertheless, our courts have never issued a blanket prohibition against employment-based noncompetition agreements. Indeed, at least 3 such provisions have been upheld and enforced during the past 30 years. Without a clear roadmap from our appellate courts, we must discern exactly what Nebraska law permits.

With the overview of Nebraska case law as our foundation, Nebraska practitioners should consider the following issues when drafting enforceable employment noncompetition agreements:

Ensure That Noncompetition Provision is Ancillary to a Good Faith Employment Agreement and Supported by Consideration.

Recall that in Nebraska a noncompetition agreement will be upheld if it is ancillary to an agreement or transaction involving employment that is "made in good faith."[30] Generally, a written contract regarding the terms and conditions of the employee is utilized. While the issue has yet to be decided in Nebraska, practitioners would be advised against relying an oral employment agreement, particularly one for at-will employment.

Since noncompetition provisions are obviously contractual in nature, like all contracts they must be supported by consideration to be enforceable. Clearly a noncompetition provision signed at the inception of employment is supported by adequate consideration. A closer call is where the employment relationship has commenced and the employer desires to have the employee sign the noncompetition agreement "mid-term." Whether continued employment represents sufficient considera-

tion to support the enforcement of a noncompetition agreement has not been addressed head-on by Nebraska courts, although there is some indication that it would suffice.[31] For noncompetition agreements signed after the commencement of employment, it would be prudent for practitioners to include some consideration (*e.g.*, additional pay, benefits, promotion) beyond continued employment and consideration that the employer is already legally obligated to provide to the employee avoid potential challenges for want of consideration.

Define the Employer's Protectable Interest Narrowly.

The purpose of an employment noncompetition provision is to protect an employer's legitimate protectable interest. Clearly, since *Roper* the Nebraska Supreme Court has significantly narrowed what constitutes an employer's protectable interest. It its broadest form, a Nebraska employer "has a legitimate need to curb or prevent competitive endeavors by a former employee who has acquired confidential information or trade secrets pertaining to the employer's business operations."[32] In its narrowest sense, an employer's protectable interest is only in restricting a former employee from working for or soliciting those customers with whom the former employee actually did business and had personal contact.[33] Consequently, practitioners would be well advised to avoid drafting sweeping prohibitions against general competition by the employee after termination of employment in an effort to protect the employer's investment in training and disclosure of confidential information and trade secrets to the employee. Rather, noncompetition provisions should be employee-specific, narrowly constructed to specifically protect the employer's interest in its good will by restricting the employee only from soliciting or doing business with those customers of the employer with whom the employee personally worked with and gained knowledge of while working for the employer. Moreover, because a Nebraska employer likely has a protectable interest only in current, not former, customers,[34] attempts to protect what once was should be avoided.

Narrowly Tailor the Restrictions to Protect Only Employer's Legitimate Interests.

Avoid Geographical Restraints.

Early Nebraska decisions focused on the reasonableness of geographical restrictions imposed by the noncompetition provision, such as a particular area surrounding the city in which the employer was located or the specific territory serviced by the employee. The issue of geographical restraints appeared to become irrelevant as the Nebraska Supreme Court began to narrow an employer's legitimate protectable interest down to only restrict the employee from soliciting or doing business with those customers of the employer with whom the employee actually had knowledge and personally worked with, regardless of where the customer was located. This conclusion appeared logical, particularly given the increased mobility of society and globalization of once parochial markets thanks to technological advances such as the Internet. Nevertheless, the Nebraska Supreme Court's most recent employment noncompetition provision once again raised the issue of whether geographical restrictions are still relevant or valid.[35] In *Professional Business Services Co. v. Rosno, 256 Neb. 217, 589 N.W.2d 826 (1999)*, the Court was called upon to address a hybrid noncompetition provision. Specifically, the covenant not to compete barred the employee from soliciting, contacting or performing work for any of the employer's clients for a 2 year period following termination, including "the area located within twenty-five (25) miles of Lincoln, Nebraska."[36] Without addressing the validity of the geographical restraint, the Court focused entirely upon precedent limiting an employer's legitimate protectable interest to restricting the employee from soliciting or doing business with those customers of the employer with whom the employee actually had knowledge and personally worked with. Based upon that precedent, the court held that the because the employer had alleged that the employee had substantial contacts with virtually all of the employer's clients, the employee's demurrer should have been overruled.

"Based upon that precedent, the court held that the because the employer had alleged that the employee had substantial contacts with virtually all of the employer's clients, the employee's demurrer should have been overruled."

Nevertheless, practitioners would be well-advised to avoid the use of geographical restrictions in employment noncompetition agreements.[37]

Use Defensible Temporal Limitations

Generally, perpetual employment noncompetition agreements constitute unenforceable complete restraints on trade. To be enforceable, such provisions must be effective for only so long as is reasonably necessary to protect the employer's legitimate interest. Since *Dow*, which upheld a perpetual ban within a restricted geographic area, the

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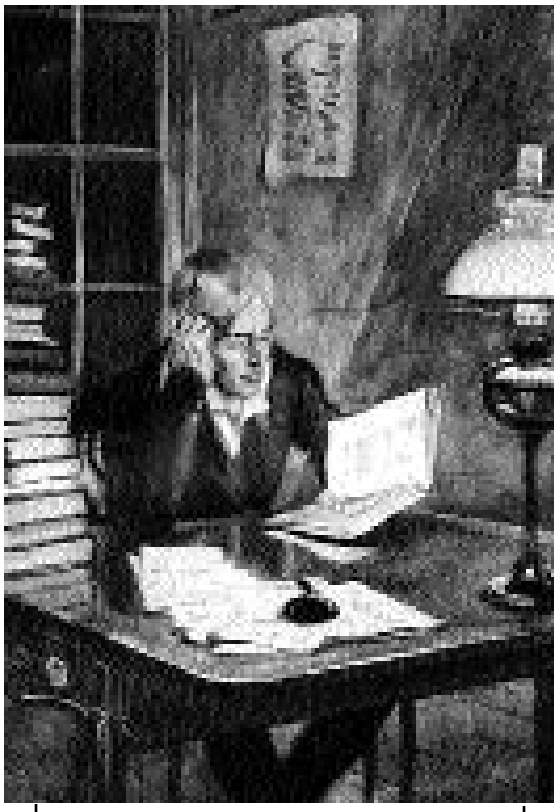
Nebraska Supreme Court has upheld noncompetition restraints that were as long as three years.[38]

However, the length of time the restraint remains in place must be viewed on a case-by-case basis, with particular emphasis on the particular occupation or industry in which the employee worked. Even a one year restriction may be deemed unreasonably long for dynamic industries such asinformation technology.[39]

In addition, in determining whether a temporal restriction is reasonable, courts instinctively weigh the hardship placed upon the employee vis-a-vis what is truly necessary to protect the employer's legitimate interest.

Consequently, practitioners would be well advised to narrowly tailor the temporal limitation to the particular occupation and industry in which the employee worked. So as to lessen any potential hardship to the employee, practitioners may want to consider including a reasonable "buy-out" clause which permits the employee (or the employee's new employer) to compensate the former employer in exchange for termination of the noncompetition covenant. Another, albeit expensive, device that sometimes used is to continue to compensate the former employee until such time she finds employment not prohibited by the restrictive covenant.



Specify Remedies for Breach.

First and foremost on the minds of most employers attempting to enforce a noncompetition covenant is their desire to immediately stop the employee from breaching the agreement. Consequently, most employers seek injunctive relief in the form of temporary restraining orders, and preliminary and permanent injunctions to accomplish this purpose. However, courts are reluctant to grant what they call an "extraordinary remedy." Indeed, the moving must generally establish that there is actual and substantial injury, the right is clear, irreparable harm has or will occur, and the remedy at law is inadequate to prevent a failure of justice.[40]

To aid the employer in obtaining such equitable relief, courts may find it persuasive if the employee has acknowledged in writing that the employer will suffer irreparable harm in the event the employee breaches any of the covenants and that there is no remedy at law that will adequately compensate the employer for the damages it has sustained as a result of the breach.

Another remedial measure is some form of liquidated damages. Under Nebraska law, a valid liquidated damages clause must establish that: **(1)** actual damages are difficult to ascertain; and **(2)** that the contractually specified liquidated damages are a reasonable estimate of the actual damages.[41] Such a provision was it issue, but not addressed, in *Professional Business Services, Co. v. Rosno, supra*, where the agreement contained a clause requiring the employee to pay the employer the total amount of billings the employer received during the 2-year period prior to the employee's violation of the agreement. However, practitioners should note that because one of the essential elements for injunctive relief is that there is no adequate remedy at law, inclusion of a liquidated damages provision will likely make it more difficult for an employer to obtain injunctive relief.

Finally. clauses requiring the employee to pay the employer's attorneys' fees and costs associated with enforcement of the noncompetition provision are likely to be invalid.[42]

Use of Choice of Law Provision May Be Ineffective.

When dealing with parties that reside or operate in multiple states, some practitioners prefer to include a "choice of law" provision that specifies which jurisdiction's law governs the interpretation and enforceability of the noncompetition agreement. However, practitioners should be forewarned that such provisions may be of limited utility in Nebraska. In one particular decision, the U.S. Court of Appeals for the Eighth Circuit upheld the district court's application of Nebraska law for a noncompetition agreement entered into in Nebraska, but containing a choice-of-law provision specifying that the laws of Iowa would govern. In so doing, the federal appeals court noted that "the application of Iowa law would be contrary to the fundamental policy of Nebraska."[43]

Provisions Permitting Judicial Modification Are Ineffective.

Some jurisdictions permit courts to modify unreasonable noncompetition covenants to reasonably protect the interests of the parties. This is typically done through what is referred to as "blue penciling," whereby the reviewing court strikes an unreasonable restriction from a noncompetition covenant if the covenant remains grammatically meaningful after its removal. Some courts permit what is sometimes called the "rule of reasonableness," whereby the reviewing court, rather than merely "penciling through" an offending provision, completely modifies the noncompetition covenant so as to protect the interests of the party seeking enforcement. Regardless of the form of judicial modification sought, Nebraska courts have invariably rejected invitations from parties seeking judicial reformation of noncompetition covenants.[44]

V. Conclusion

Properly drafted employment noncompetition agreements serve legitimate economic and public policy interests. For over a century, Nebraska's courts have struggled to balance protecting an employer's legitimate interests against the potential hardship to the employee and competition, resulting in a common law littered with contradictory

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Appendix "A"
Illustrative Nebraska Employment Noncompetition Cases

Case	Employment/ Industry	Breadth of Restraint	Time Restriction	Geographic Restriction	Test Used by Court	Enforceable?
Dow v. Gotch, 113 Neb. 60, 201 N.W. 655 (1924)	1-year written employment agreement/Beauty parlor	Complete ban on competition within same profession as employer.	None	Grand Island	To be valid agreement must be: (1) ancillary to another agreement; (2) limited either as to time or space; and (3) reasonable in its terms and operation.	Yes
Personal Fin. Co of Lincoln v. Haynes, 130 Neb. 547, 265 N.W. 541 (1936)	Written employment agreement/ Banking & Finance	Complete ban on competition and solicitation.	1 year	Any city, environs or trade territory in which employee had been located or employed within one year to termination.	A contract restricting employment within a competitive business for one year within the city, or the environs or trade territory, is reasonable valid.	Yes, although the court found that the employee had been released from the noncompetition agreement by express waiver by the employer.
Securities Acceptance Corp. v. Brown, 171 Neb. 406, 106 N.W.2d 456 (1960) *clarified*, 171 Neb. 701 N.W.2d 540 (1961).	Initially at will oral agreement: Later substituted by written employment agreement terminable by either party upon 15 days notice/Loan & Finance	Complete ban on competition and solicitation.	18 months after termination of employment	Any city, environs or trade territory in which the employee had been located or employed by the employer	To be valid, a noncompetition agreement must: (1) be ancillary to an actual transaction made in good faith; and (2) be necessary or appropriate to afford fair protection to the former employer; and (3) the restriction must be reasonable in the it is (a) not injurious to the public, (b) no greater than reasonably necessary to protect the employer's legitimate interest and (c) not unduly harsh or oppressive on the employee.	No, agreement was unreasonable in that it prevented an employee from working in any city, environ or territory in which the employee had ever been located or employed for a period of 18 months from the last date the employee was located or employed in such city, environ or territory.
Farmers Underwriters Ass'n v. Eckel, 185 Neb. 531, 177 N.W.2d 274 (1970).	Written agreement terminable at notice/Insurance	Ban on soliciting, accepting or servicing any customer of employer.	1 year after termination of employment	The district the employee serviced.	Employment noncompetition provisions must be "reasaonable a determination made by examining the following factors: (1) degree of inequality in bargaining position; (2) presence of substantial risk that employer would lose customers to former employee; (3) extent of respective participation by employer and employee in securing and retaining customers; (4) good faith of employer; (5) nature, extent and circumstances of employee's employment; (6) the employee's training, education and health; (7) the needs of the employee's family; (8) current conditions of employment; (9) correlation between covenanted restraining and employer's legitimate interests.	Yes. Employer was entitled to injunctive relief.
Diamond Match Div. of Diamond Int'l Corp. v. Bernstein, 196 Neb. 452, 243 N.W.2d 764 (1976).	Written agreement terminable at will by either party upon giving notice/Sales of book matches with advertising	Ban on soliciting orders for same similar products employee sold for employer	2 years after termination	Sales territory of employee	Noncompetition agreement contained choice-of-law provision declaring that it would be governed by New York law, which the Court determined mirrored Nebraska law. Reasonable noncompetition agreements will be enforced when necessary to protect the employer's interests, although employer is not entitled to protection from ordinary competition. The Court then applied the 3-factor reasonableness test first set forth in *Securities Acceptance Corp., supra.*	No. Although employer's business was highly competitive, former employee received no special training was not exposed to trade secrets and had not unusual talents. Enforcing the noncompetitive covenant would produce a hardship for the employee and would not protect the employer from unfair competition.

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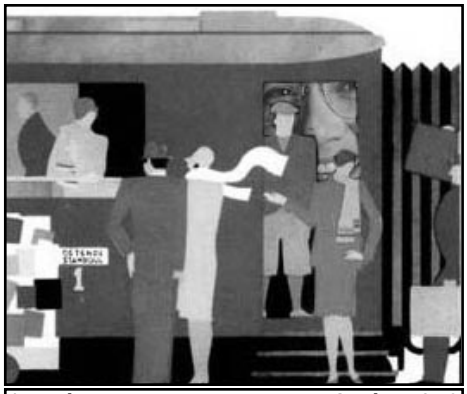
decisions and a legal profession uncertain as to the enforceability of employment non-competition agreements.

The economic costs associated with the uncertainty surrounding the scope of enforceable noncompetition covenants is illustrated in the Nebraska Supreme Court's most recent pronouncement on employment noncompetition covenants. In *Professional Business Services Co. v. Rosno, supra*, the court was asked to enforce a 2-year noncompetition provision for an employee whose employment was terminated in November 1995. After the district court granted the employee's demurrer, the employer appealed, in part due to the uncertainty in Nebraska's common law regarding the enforcement of employment noncompetition provisions. In 1999, the Nebraska Supreme Court ruled that the demurrer was improper and remanded the case to the district court. Today, nearly 5 years after the termination of the employee's employment, the litigation surrounding this covenant continues.

To bring much-needed certainty to the realm of employment noncompetition covenants, Nebraska may be forced to consider joining the growing minority of jurisdictions that have adopted statutory provisions with respect to the enforceability of noncompetition agreements.[45] While this author does not advocate a radical departure from existing common law, such a statutory scheme would bring greater predictability and certainty to the area by precisely defining protectable interests. Moreover, Nebraska could statutorily expand the interests an employer may legitimately seek to protect beyond customer good will. Finally, so as bring greater certainty with respect to enforcement, our legisiature could permit judicial reformation of unreasonable covenants.

**Endnotes available upon request.*



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Case	Employment/ Industry	Breadth of Restraint	Time Restriction	Geographic Restriction	Test Used by Court	Enforceable?
Brewer v. Tracy, 198 Neb. 503, 253 N.W.2d 319 (1977).	Oral at-will agreement/ Garbage collection	Complete ban on competition	5 years after termination	Within 15-miles of Hebron, Nebraska	The Court applied the 3-factor reasonableness test first set forth in *Securities Acceptance, Corp., supra*. Most importantly, the Court expressly held for the first time that "a contract to restrict a laborer from engaging in an occupation, if valid at all, must be restricted to the area in which the personal service was performed."	No. The Court noted there were 9 other communities within the 15-mile radius to which the employer did not provide service. Because the employee possessed no special skills, training or knowledge of secrets, the 5-year agreement "was an unreasonable limitation on the right of a working man to labor."
Welcome Wagon Int'l, Inc. v. Hostesses, 199 Neb.27, 255 N.W.2d 865 (1977)	Written employment agreement, duration of employment unknown/ Personal service	Complete ban on competition	5 years after termination	Anywhere in the United States where employer operated or had intent to operate	The Court appeared to apply the 3-factor reasonableness test first set forth in *Securities Acceptance Corp., supra*, and the requirement set forth in *Brewer, supra* that a contract to restrict a laborer from engaging in an occupation if valid at all, must be restricted to the area in which the personal service was performed.	No
Boisen v. Peterson Flying Service, Inc., 222 Neb 239, 383 N.W.2d 29 (1986).	Written employment agreement, duration of employment unknown/ Crop dusting	Complete ban on competition	10 years from date of employment agreement or termination, whichever occurred last	50 mile radius of Minden, Nebraska	First issue that must be addressed is whether the noncompetition restraint is reasonably necessary to protect some legitimate interest of the employer. Courts must distinguish between ordinary competition and unfair competition. In doing so, the focus is often on the employee's opportunity to appropriate the employer's goodwill by initiating personal contracts with the employer's customers.	No. Employer did not show a legitimate business interest protected by the non-competition covenant. The employee received no specialized training, was not exposed to confidential information or trade secrets, and had no personal or business-based contact with the employer's customers. The court declined the employer's invitation to judicially modify the covenant.
Nat. Farmers Union Serv. Corp., v. Edwards, 220 Neb. 231, 369 N.W.2d 76 (1985).	3-year written employment agreement/ Insurance	Complete ban on competition and solicitation	1 year from termination of employment	25 mile radius of St. Paul Nebraska	Balancing test used to determine whether restraint was "reasonable," *i.e.*, not unduly harsh or oppressive on employee; (1) degree of inequality in bargaining position; (2) risk that employer would lose customers to former employee; (3) extent of respective participation by employer and employee securing and retaining customers; (4) good faith of employer; (5) nature, extent and circumstances of employee's employment; (6) the employee's training education and health; (7) needs of the employee's family; (8) current conditions of employment; (9) necessity of employee changing his calling or residence and (10) correlation between restraint and employer's legitimate interests.	No. Geographical constraint was in unreasonable in that it encompassed Grand Island, Nebraska, a substantial market in which the employee did not conduct services for the employer.

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Nat. Farmers Union Serv. Corp. v. Edwards, 220 Neb. 231, 369 N.W. 2d 76 (1985)	3-year written employment agreement/ Insurance	Complete ban on competition and solicitation	1 year from termination of employment	25 mile radius of St. Paul, Nebraska	Balancing test used to determine whether restraint was "reasonable," *i.e.*, not unduly harsh or oppressive on employee: (1) degree of inequality in bargaining position; (2) risk that employer would lose customers to former employee; (3) extent of respective participation by employer and employee in securing and retaining customers; (4) good faith of employer; (5) nature, extent and circumstances of employee's employment; (6) the employee's training, education and health; (7) the needs of the employee's family; (8) current conditions of employment; (9) necessity of employee changing his calling or residence; and (10) correlation between restraint and employer's legitimate interests.	No. Geographical constraint was unreasonable in that it encompassed Grand Island, Nebraska, a substantial market in which the employee did not conduct services for the employer.
American Sec. Serv. Inc., v. Vodra, 222 Neb. 480, 385 N.W. 2d 73 (1986).	Written employment agreement duration of employment unknown/ Sale and service of security services	Barred solicitation of or contracting or employment with any customer or former customer of employer or any other security guard company or individual where employee had; (1) physically worked upon the customer's premises; (2) acted in a supervisory capacity with respect to customer's premises; and (3) acted as a salesman for the employer in soliciting the customer's business.	3 years after termination	None	Court applied the 3-factor reasonableness test first set forth in *Securities Acceptance Corp., supra*. With respect to the second prong of test, the court Courts cited *Boisen v. Petersen Flying Serv., supra*, for the proposition that the focus is often on the employee's opportunity to appropriate the employer's goodwill by initiating personal contacts with the employer's customers. For the third prong, the court applied the balancing test set forth in *Nat. Farmers Union Serv. Corp., supra*.	Yes. Restraint was not injurious to public and was narrowly tailored to public and was narrowly tailored to protect employer's good will. Futhermore, the restraint was not unduly harsh on the employee, who had no training or experience in the industry prior to working for employer and who gained access to customer by virtue of his employment with employer.
Polly v. Ray D. Hilderman & Co., 225 Neb. 662, 407 N.W.2d 751 (1987)	Written employment agreement, duration of employment unknown/ Account Services	Employer could consider employee to be a "competing accountant and bookkeeper" if employee practiced public or private accountancy or bookkeeping services	3 years after termination	35 miles form any office maintained by employer	Court applied the 3-factor reasonableness test first set forth in *Securities Acceptance Corp., supra*. With respect to the second prong of test, the court Courts cited *Boisen v. Petersen Flying Serv., supra*, for the proposition that the focus is often on the employee's opportunity to appropriate the employer's goodwill by initiating personal contacts with the employer's customers.	No. Non-competition provision attempted to restrict employee from soliciting employer's clients with whom employee did not work and did not know and, consequently, was greater than reasonably necessary to protect employer's legitimate interest in customer good will. Court declined employer's invitation to reform covenant.
Ecolab, Inc. v. Morisette, 879 F.2d 325 (8th Cir. 1989.)	Unknown	Employee barred from competing for any of employer's customers or former customers, including those with whom employee had not previously worked for or not.	Unknown	Unknown	Cited *Polly, supra*, and *Boisen, supra.*	No. Court affirmed district court's decision to decline employer's invitation to reform overly broad covenant.
Rain v. Hail Ins. Serv., Inc. v. Casper, 902 F.2d 699 (8th Cir. 1990).	Written employment agreement, duration of employment unknown/ Insurance	Upon employee's resignation from employment, employee was barred from engaging in the marketing and servicing of any competitive corporation company or individual.	2 years from resignation	Employee's assigned territory for employer	Despite choice of law provision in favor of Iowa law, district court applied Nebraska law reasoning that application of Iowa law would be contrary to Nebraska's public policy. Court cited *Polly, supra.*	No. Noncompetition provision deemed overly broad because identity of employer's customers was not a trade secret and employer's agreements with its customers were not exclusive. Also, the district court found the restriction to be unreasonably harsh and oppressive on the employee.
Vlasin v. Len Johnson & Co., Inc. 235 Neb. 450, 455 N.W.2d 772 (1990).	Written employment agreement, duration of employment unknown/ Insurance	Complete ban on competition in the insurance business	3 years after termination of employment for any reason other than termination by employer without just cause	50-mile radius of Ogallala, Nebraska	Court applied 3-factor reasonableness test first set forth in *Securities Acceptance Corp., supra*. With respect to the second prong test, of the test, the court cited *Boisen v. Petersen Flying Serv., supra*, for the proposition that the focus is often on the employee's opportunity to appropriate the employer's goodwill	No. Because covenant attempted to restrict employ - ee from soliciting or working with anyone within 50-mile radius, rather than just those employer's clients with whom the employee did business and had personal contact, it

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Case	Employment/ Industry	Breadth of Restraint	Time Restriction	Geographic Restriction	Test Used by Court	Enforceable?
					by initiating personal contacts with the employer's customers. Quoting *Polly, supra*, the court held that as as general rule "a covenant may be valid only if it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and has personal contact."	was unreasonable. The court reversed the trial court's decision to reform the covenant to bar the employee from competing in Perkins County, Nebraska, only.
Chambers-Dobson, Inc. v. Squier, 238 Neb. 748, 472 N.W. 2d 391 (1991).	Written employment agreement, duration of employment unknown/ Insurance	Employee could not solicit or accept business from any of employer's customers nor act as an advisor, consultant or risk manager for any of employer's customers	2 years after termination	None	Court applied the 3-factor reasonableness test first set forth in *Securities Acceptance Corp., supra*.	Yes. With respect to the first prong of the *Securities Acceptance Corp.* test, the court cited *Dow, supra,* noting that covenant only related to customers of employer while employee was employed, leaving a large pool of potential customers. The court noted that the absence of a geographical limitation was not a problem since the covenant identified a specific pool of a specific pool of customers whom the employee could not solicit.
Brockley v. Lozier Corp., 241 Neb. 449, 448 N.W.2d 556 (1992).	Written employment agreement, duration of employment unknown/ Marketing of store	Employee forfeited deferred compensation if prior to payment thereof employee in	Until all deferred compensation had been paid to employee (4-5 years)	None	Court noted that forfeitures of deferred compensation for post-employment competition are treated in the same manner as general non-competition covenants. Court applied the 3-factor reasonableness test set forth in *Securities Acceptance Corp., supra.*	No. Under second prong of *Securities Acceptance Corp*., test, court noted that 4-5 years was not reasonable period to protect a legitimate interest of employer. Court declined employers invitation to reform noncompetition clause.
Terry D. Whitten, D.D.S., P.C. v. Malcolm, 249 Neb. 48, 541 N.W.2d 45 (1998).	2-year written employment agreement/Dentistry	Complete ban on competition in the practice of dentistry	1 year after termination	Within a 25-mile radius of Falls City, Nebraska and Sabetha, Kansas	Court applied the 3-factor reasonableness test first set forth in *Securities Acceptance Corp., supra*. With respect to the second prong of the test, the court cited *Boisen v. Petersen Flying Serv., supra*, for the proposition that the focus is often on the employee's opportunity to appropriate the employer's goodwill by initiating personal contacts with the employer's customers. Quoting Polly, supra, the court held that as a general rule "a covenant may be valid only if it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and has personal contact."	No. Although employer had a legitimate interest in portecting its good will, the noncompetition provision was greater than that reasonably necessary to protect such. The employer did not treat every individual in the 25-mile areas described in the noncompetition agreement. The court declined the employer's invitation to reform the agreement to make it reasonable.
Moore v. Eggers Consulting Co., 252 Neb. 396, 562 N.W. 2d 534 (1997).	Retroactive written employment agreement, duration of employment unknown/ Employee recruiter	Barred employee from: (1) soliciting or accepting business from any client of employer whom employee worked with or had knowledge of because of employment with employer during last 3 years of employment: and (2) soliciting or accepting business in the area of executive or employee employee recruiting in the continental United States	1 year after termination	Second part of noncompetition provision was limited to continental United States	Court applied 3-factor reasonableness test first set forth in *Securities Acceptance Corp., supra*. With respect to the second prong of the test, the court cited *Boisen v. Petersen Flying Serv., supra*, for the proposition that the focus is often on the employee's opportunity to appropriate the employer's goodwill by initiating personal contacts with the employer's customers.	No. Although employer had legitimate business interest in protecting its good will, the covenant sought to restrict the employee for soliciting any customer of the employer that the employee had knowledge of, including those the employee never worked with nor met. Moreover, restriction on competing anywhere in continental United States was unreasonable. Court declined employer's invitation to reform agreement.
Professional Bus., Serv., Co. v. Rosno, 256 Neb. 217, 589 N. W.2d 826 (1999).	1-year written employment agreement with successive 1-year term/Accounting services.	Barred employee from soliciting, contracting or performing services for any of employer's clients	2 years after termination	Limitation "include[ed] the area located within twenty-five (25) miles of Lincoln, Nebraska."	Court applied 3-factor reasonableness test first set forth in *Securities Acceptance Corp., supra*. With respect to the second prong of the test, the court cited *Boisen v. Petersen Flying Serv., supra*, for the proposition that the focus is often on the employee's opportunity to appropriate the	Maybe. Court was called upon to determine propriety of demurrer entered in favor of employee. Because employer alleged employee had substantial contact with all of the employer's clients, employer stated a valid cause of

Test Used by Court	Enforceable?
the employer's goodwill by initiating personal contacts with the employer's customers. Quoting Polly, supra, the court held that as a general rule "a covenant may be valid only if it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and has personal contact."	action and should be permitted to present evidence.