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LOOSENING THE RUST BELT: WHY OHIO SHOULD RE-EXAMINE ITS CURRENT STANDARD FOR DETERMINING THE ENFORCEABILITY OF COVENANTS NOT TO COMPETE CONTAINED IN EMPLOYMENT AGREEMENTS

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I. INTRODUCTION

The financial crisis of 2008 and ensuing global recession triggered by the collapse of the United States housing market is an event that forever changed the landscape of the global economy.[1] The economic downturn resulted in a stalled housing market, high levels of unemployment, increased regulation of the financial industry, frozen credit markets, and an overriding sense of anxiety regarding the state of economic affairs both in the United States and abroad.[2] Now more than five years removed from the initial collapse, the U.S. economy continues to feel its effects as the financial industry and accompanying sectors adapt to the new economic environment.[3] One of the more dramatic and controversial outcomes of the recession, however, was the near-failure of General Motors and the subsequent "bailout" of the American automotive industry facilitated by the federal government in 2009.[4] The decision to subsidize a private entity with federally funded capital was unprecedented when it was made, and continues to provide a source of political and economic debate even years after its implementation.[5] While federal intervention in private industry is an inherently controversial political topic, the failure of General Motors, and the struggles of the automotive industry as a whole, signified a larger economic trend.

As the American auto industry stalled to the point of requiring government subsidization in order to remain viable, a rhetorical term began to emerge within the political and economic conversation that occurred as the U.S. set out on its path to economic recovery. Economists, scholars and political pundits began using the term "Rust Belt" to refer to the once heavily industrialized areas of the Midwest and

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[1] *See* Richard Florida, *How the Crash Will Reshape America*, THE ATLANTIC (Mar. 2009), *available at* http://www.theatlantic.com/magazine/archive/2009/03/how-the-crash-will-reshape-america/307293/.

[2] David Luttrell, Tyler Atkinson & Harvey Rosenblum, *Assessing the Costs and Consequences of the 2007-09 Financial Crisis and Its Aftermath*, 8 ECONOMIC LETTER: FEDERAL RESERVE BANK OF DALLAS (Sept. 2013), *available at* http://www.dallasfed.org/assets/documents/research/eclett/2013/el1307.pdf.

[3] Patrick Sims, *Since Lehman, the Financial Sector has Changed – for the Better*, THE AMERICAN BANKER (Sept. 12, 2013, 11:56 AM), http://www.americanbanker.com/bankthink/since-lehman-the-financial-sector-has-changed-for-the-better-1061992-1.html.

[4] *See* Bill Vlasic & Annie Lowery, *U.S. Ends Bailout of G.M., Selling Last Shares of Stock*, N.Y. TIMES DEALBOOK (Dec. 9, 2013 4:37 PM), http://dealbook.nytimes.com/2013/12/09/u-s-sells-remaining-stake-in-gm/?_r=0.

[5] Dan Gearino, *Debate still rages over auto bailout*, COLUMBUS DISPATCH (Oct. 14, 2012), http://www.dispatch.com/content/stories/business/2012/10/14/debate-still-rages-over-auto-bailout.html.

Northeast United States that, as of the most recent recession, experienced "abandonment of factories, unemployment, outmigration . . . and overall decline."[6] Even today, many continue to categorize Ohio as a "rust belt" state,[7] whose economic decline can be linked at least in part to the number of jobs lost as a result of the failure of U.S. automakers. In 2001, General Motors was Ohio's largest employer, providing jobs for nearly 26,000 residents.[8] In March of 2008, during the preliminary phases of the economic downturn, that number of General Motors' jobs in Ohio stood at 12,300.[9] As of 2012, General Motors employed just 9,533 Ohioans, a figure that represents a stark departure from the company's presence within the state in the time leading up to the financial crisis.[10] As economies in Ohio and other rust belt states continue to recover, it is clear that a dramatic shift has taken place within this region that was once so heavily dependent on manufacturing.[11]

The decline of the American automotive industry, accelerated by the frozen credit markets in the time following the financial crisis, naturally resulted in a decline in the strength of the manufacturing sector in Ohio.[12] Jobs that can generally be classified as part of the "service industry," such as education, healthcare, and other professional occupations, are replacing the manufacturing jobs that the Ohio population relied on for more than a century.[13] The increased presence in Ohio of newly discovered sources of energy production, such as natural gas and oil, is driving increased investment and creating new jobs in areas outside of the traditional manufacturing sector.[14] In addition

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[6] *Rust Belt*, THE COLUMBIA ELECTRONIC ENCYCLOPEDIA, SIXTH EDITION, *available at* http://www.answers.com/topic/rust-belt?cat=biz-fin; *see Rust Belt Definition,* THE FREE DICTIONARY, http://www.thefreedictionary.com/Rustbelt.

[7] *See* Scott Cohn, *Is Ohio in the midst of a rust belt rebound?*, CNBC (Dec. 10, 2014, 7:33 AM), http://www.cnbc.com/id/102252242#.

[8] *General Motors Operations in Ohio*, THE PLAIN DEALER (Sept. 25, 2009), http://blog.cleveland.com/pdextra/2007/09/25FGGM.pdf (citing statistics from the General Motors Corporation and the Ohio Department of Development).

[9] Paul Roderick Gregory, *Ohioans Are No Fools: Obama Did NOT Save Your Automotive Jobs*, FORBES (Oct. 28, 2012, 5:36 PM), http://www.forbes.com/sites/paulroderickgregory/2012/10/28/ohioans-are-no-fools-obama-did-not-save-your-automotive-jobs/.

[10] *Id.* It should be noted, however, that GM's decision to decrease its presence in Ohio from 2001 to 2008 may suggest that the recession was not the pure cause of the loss of manufacturing jobs within the state, but that the economic situation merely accelerated an inevitable shift that would have taken place (regardless of the state of the economy) at some point in the future.

[11] Cohn, *supra* note 7.

[12] *See generally* Greg R. Lawson, *The Grand Shift – Ohio's Economy Must Look Forward, Not Back*, THE BUCKEYE INST. FOR PUB. POL'Y SOLUTIONS (Jan. 12, 2012), http://buckeyeinstitute.org/the-liberty-wall/2012/01/12/the-grand-shift-ohios-economy-must-look-forward-not-back/ (arguing that "manufacturing will likely never again be the main driver of full employment in the future.").

[13] *Id.*

[14] Nelson D. Schwartz, *Boom in Energy Spurs Industry in the Rust Belt*, N.Y. TIMES (Sept. 8, 2014), http://www.nytimes.com/2014/09/09/business/an-energy-boom-lifts-the-heartland.html.

to a surge in the energy sector, Ohio is enjoying growth in other fields that require a high level of technical expertise, such as the biomedical industry.[15] Given this growth in new, non-traditional industries, Ohioans are hopeful that the presently occurring shift will result in cutting edge companies continuing their business in Ohio and that those contemplating new ventures will consider Ohio as a starting point.[16] As these "non-traditional" economic sectors continue to grow, new opportunities for employment will arise, as cutting edge businesses will be required to hire talented individuals in order to keep up with the demand of these naturally fast-paced industries.[17]

If the technology, healthcare, and energy sectors continue to thrive, a logical consequence of this growth will be that established or newly formed Ohio businesses in these fields will continue to hire employees. An ever present, yet controversial, aspect of the hiring process is the negotiation of restrictive covenants contained in a new employee's employment agreement.[18] These restrictive provisions, commonly referred to as "Covenants Not to Compete ("CNC")" or "Non-Competes," at their essence restrict an employee's right to engage in particular conduct after the employment relationship subject to the contractual arrangement is terminated.[19] A typical non-compete might prohibit an employee from leaving his or her company to go work for a competitor within the industry. CNCs can take many different forms, and many of these provisions that become part of employment agreements vary significantly from the "boilerplate" terms of a "standard" non-compete. Employers and employees are able to negotiate post-employment restrictions that contain a combination of durational limitations,[20] geographical restraints,[21] or most commonly,

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[15] Robert L. Smith, *Cleveland's biomedical industry growing by billions*, THE PLAIN DEALER (Apr. 13, 2014), http://www.cleveland.com/business/index.ssf/2014/04/clevelands_biomedical_industry.html.

[16] *See generally* Jay Foran, *Northeast Ohio Capitalizes on Assets and Opportunities*, THE TRUST BELT (June 2013), http://www.trustbelt.com/northeast-ohio-capitalizes-on-assets-and-opportunities/.

[17] *Ohio Among Top States for Tech Job Growth*, THE BUSINESS JOURNAL (Dec. 7, 2012), http://businessjournaldaily.com/economic-development/ohio-among-top-states-tech-job-growth-2012-12-7.

[18] *See generally* Louis J. Papa, *Employee Beware! Employment Agreements and What the Technology Related Employee Should Know and Understand Before Signing That Agreement: A Practical Guide*, 19 TOURO L. REV. 393 (2003).

[19] *See* Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960). For a sample of a covenant not to compete, see § 2:219. Sample non-compete provision, Tex. Prac. Guide Emp. Prac. § 2:219.

[20] Many post-termination restrictions will contain language that prohibits the former employee from engaging in certain activities for a specified period of time following the end of the contractual employment relationship.

[21] A geographical restriction might establish that a former employee is prohibited from re-entering a particular industry if the new employer is located within a particular region.

restrictions that relate to the former employee's use of proprietary or confidential information obtained during the course of employment.[22]

Regardless of the inherently controversial concept of limiting an employee's ability to gain new employment after leaving a company, the legal community has continued to struggle in its effort to determine the extent to which an employer should be able to enforce a CNC against a former employee, if at all. Non-competes, and other post-termination restrictions, contained within otherwise enforceable employment agreements remain a highly litigated issue in state courts around the country.[23] Because this litigation is almost always brought under a breach of contract theory, a threshold issue in many cases is whether, and to what extent, an employer has the legal right to enforce the restrictive covenant contained in a departing employee's employment agreement. While courts across the United States deploy different analyses in determining the enforceability of a CNC, the majority of states will simply enforce these restrictive covenants to the extent that they are "reasonable."[24] In requiring this "rule of reason" approach, state courts that are willing to enforce only some CNCs do afford these restrictive covenants a higher level of scrutiny than other commercial contracts.[25] Though the majority of state courts have the same basic standard for enforceability, the nature of a "reasonability" test and the common use of an analysis requiring state courts to balance various factors has led to uncertainty for attorneys litigating post-termination restrictions and the judges tasked with ruling on a provision's enforceability. As a result, the "reasonability" test might not result in the level of scrutiny intended by state courts adopting this approach.

In 1975, the Ohio Supreme Court joined the majority of the United States by establishing its doctrine for non-compete enforceability in the now-landmark case, *Raimonde v. Van Vlerah*.[26] In other states, such as Colorado, California, and North Dakota, courts are far less willing (and in some instances unable) to enforce a CNC contained in an employment agreement.[27] In this minority of states where courts do

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[22] CNCs contained in employment agreements will commonly contain a clause that prohibits the employee from accessing or using any information obtained during the course of employment at his or her new position.

[23] Ruth Simon & Angus Loten, *Litigation Over Noncompete Clauses Is Rising*, WALL ST. J. (Aug. 14, 2013), http://www.wsj.com/articles/SB10001424127887323446404579011501388418552 (noting "a more than 60% rise over the past decade in the number of departing employees who are getting sued by their former bosses for breaching [noncompete agreements].").

[24] Viva R. Moffat, *Making Non-Competes Unenforceable*, 54 ARIZ. L. REV. 939, 946 (2012) (stating that "many states leave the evaluation of non-competition agreements to common-law development" and that "[a]lthough the particulars differ to some extent, most of these states apply a rule of reason . . . and regularly enforce non-competition agreements.").

[25] This heightened scrutiny can result from state courts' application of a balancing test, requiring an employer to prove that the non-compete is necessary to enforce a "protectable interest" or requiring more than a "peppercorn" of consideration. *Id.* at 947.

[26] Raimonde v. Van Vlerah, 325 N.E.2d 544 (Ohio 1975).

[27] *See* Moffat, *supra* note 24, at 943 (citing Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 677-78 (2008)) (noting that some states "refuse to enforce virtually all" varieties of non-competition agreements).

not readily enforce non-competes, CNC enforceability is determined within the parameters of state legislation that works to prevent employers from utilizing these common contractual arrangements.[28] One of the main policy justifications for legislation that essentially prohibits the use and enforcement of CNCs is the desire for increased "employee mobility."[29] The public policy of promoting "employee mobility" is important to note, particularly in light of the upcoming discussion of the enforceability of CNCs in the context of an evolving economic environment.

While the connection between non-compete enforceability and economic prosperity may not be immediately apparent, the economies in the states taking a more restrictive approach to CNCs seem to be recovering more rapidly than Ohio, where CNCs are enforced under the "reasonableness" standard.[30] The hastened recovery and increased level of economic growth within these particular states can be attributed in large part to increased activity in the energy and technology sectors.[31] As the economic recovery in Ohio lags behind the rebound taking place in other parts of the country,[32] it appears that our state is ready, willing and able to foster growth in new industries such as energy and tech.[33] It is in noting the differences in state courts' standards and analyses for determining the enforceability of non-competes contained in employment agreements where the basic premise of this Note is found. There appears to be a connection between a state's willingness to enforce CNCs and the rate of economic growth and speed of recovery. Given the economic performance in those states where enforcement of non-competes is difficult, and Ohio's need to foster the growth of new industries, not only would a shift in thinking about Ohio's view of non-competes be justified, but such a change also may be necessary in order to ensure that Ohio does not find itself left behind when the U.S. economy eventually makes a full recovery.

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[28] *Id.* at 944.

[29] Edwards v. Arthur Andersen LLP, 189 P.3d 285, 288 (Cal. 2008) (stating that California courts "have consistently affirmed that [California's statute prohibiting the use of non-compete agreements] evinces a settled policy in favor of open competition and employee mobility.").

[30] *See* Alexander E.M. Hess & Michael Sauter, *Top states with the fastest growing economies*, U.S.A. TODAY (June 15, 2013), http://www.usatoday.com/story/money/business/2013/06/15/states-with-the-fastest-growing-economies/2416239/.

[31] *Id.*; Dominic Rushe, *Technology sector found to be growing faster than rest of US economy*, THE GUARDIAN (Dec. 6, 2012, 11:23 AM), http://www.theguardian.com/business/2012/dec/06/technology-sector-growing-faster-economy.

[32] *See* Robert L. Smith, *Ohio still years away from economic recovery, study shows*, THE PLAIN DEALER (July 30, 2013), http://www.cleveland.com/business/index.ssf/2013/07/ohios_economic_recovery_could.html; Bruce Watson, *Economic Recovery: Which States Are Bouncing Back Fastest?*, DAILY FINANCE (June 27, 2013, 5:00 PM), http://www.dailyfinance.com/2013/06/27/states-recovering-lost-jobs-recession/.

[33] *See* Jay Miller, *Regional council is banking on Northeast Ohio's potential*, CRAIN'S CLEVELAND BUSINESS (Nov. 16, 2014 4:30 AM), http://www.crainscleveland.com/article/20141116/SUB1/311169964/regional-council-is-banking-on-northeast-ohios-potential; Michelle Jarobe McFee, *Business groups hope study of Ohio's potential oil and gas boom shows fuel for economic growth*, THE PLAIN DEALER (Sept. 6, 2011), http://www.cleveland.com/business/index.ssf/2011/09/business_groups_hope_study_of.html.

II. AN OVERVIEW OF COVENANTS NOT TO COMPETE, AND THEIR ENFORCEABILITY IN CERTAIN STATES

Before analyzing a potential shift in Ohio's standard for determining the enforceability of CNCs and examining the analysis used by courts presented with a contested non-compete, it is important to have a basic understanding of non-competes and how courts treat these provisions. In determining whether a non-compete contained in an employment agreement[34] is enforceable, most courts are tasked with balancing the interests of the employer seeking enforcement with the interests of the employee who is attempting to take action following the termination of the employment relationship at issue.[35] Courts also consider the public policy promoted by judicial enforcement of covenants not to compete, and often note that enforcing these provisions flies in the face of certain community values.[36] Understanding an employer's motivations for making use of CNCs, as well as the potential burden that can result for former employees is critical in analyzing courts' treatment of these powerful contractual tools.

A. Use of Covenants Not to Compete In Employment Agreements: Interests of the Employer, Burden on the Employee

1. Why Do Employers Use Non-Competes?

Defined generally, a non-compete is a "promise, usually in a sale-of-business, partnership, or employment contract, not to engage in the same type of business for a stated time in the same market as the buyer, partner, or employer."[37] Though an employer and prospective employee are free to negotiate and tailor the terms of the provision to meet specific needs and protect particular interests, all CNCs are entered into with this basic purpose in mind. There are several reasons why an employer might find it beneficial to negotiate and ultimately enter into a CNC with a new employee.

Employers use non-competes almost exclusively[38] in an attempt to regulate the conduct of an employee after their employment relationship with the company is terminated. Most commonly, the conduct addressed by the CNC relates to the use by a former employee of company property or information that could be valuable in the hands of a competitor within the industry. In other situations, an employer will use a non-compete simply to prevent an employee from working for another competing entity for a certain amount of time or within a specific geographic area. For companies who utilize non-competes, the overarching purpose of these provisions is the protection from unfair competition.[39] When a former employee continues to work in

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[34] In this Note, I analyze non-compete clauses contained in employment agreements, which can be distinguished from a separate "non-compete" agreement.

[35] *See* Blake, *supra* note 19 at 648-49 (outlining the formulation of the test of the validity of postemployment restraints contained in the *Restatement of Contracts*).

[36] *Id.* at 650 (arguing that the enforcement of postemployment restraints "has inevitable effects which in some degree oppose commonly shared community values.").

[37] *Covenant*, BLACK'S LAW DICTIONARY (9th ed. 2009).

[38] As noted, companies use non-competes under other circumstances, such as during the sale of a business.

[39] William M. Corrigan & Michael B. Kass, *Non-Compete Agreements And Unfair Competition – An Updated Overview*, 62 J. MO. B. 81 (2006) (noting that "[t]he purpose of

the employer's industry, his or her ability to the former employer's property could be detrimental to the former employer that expended resources in developing the former employee's knowledge of the field. The unfair competition that an employer seeks to avoid through the use of a non-compete could also stem from a failure to protect particular assets, such as customer bases, trade secrets, and any other information that has been (or will be) critical to its overall success as an entity.[40] By attempting to restrict or completely prohibit a former employee's ability to use information[41] following the termination of the employment relationship, a company can use a non-compete to help to minimize the possibility of unfair competition as a result of misuse of information in which the company has a proprietary interest.[42]

As noted above, non-compete provisions are often used by employers as a mechanism for protecting particular types of proprietary information that would be detrimental to a business in the hands of a competitor. In many instances, employers use non-competes to protect information in the form of customer lists, general client information, intellectual property, trade secrets, and data relating to business strategy and planning.[43] Information relating to the established clients of a particular business, such as a customer list, is acquired by an employee only through their employment with the company, and a CNC provides employers with at least some assurance that this learned information will not be disseminated to other competitors within their industry. Oftentimes non-compete provisions operate in concert with other restrictive provisions contained in the employment agreement. In addition to a CNC that prohibits an employee from making use of proprietary information, a standard employment agreement may contain non-disclosure or confidentiality provisions. While a CNC focuses on a former employee's use of company information during the course of his or her new employment venture, these non-disclosure provisions operate more generally to prohibit an employee from disseminating proprietary information to *any* third party. In negotiating these restrictions on the use of proprietary information, employers have the ability to make the prohibitions as broad or as narrow as they deem necessary to protect their interest, and in some instances employers feel justified in including a lengthy, specific list of information that the former employee must refrain from using following termination. By ensuring that certain information remains proprietary, employers view non-competes and non-disclosure agreements as a way of protecting the information that has (or could potentially) made their business valuable.

In addition to mitigating the risk for unfair competition created by certain conduct of a departing employee, employers may justify the use of a non-compete as a way to

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enforcing a non-compete agreement 'is to protect an employer from unfair competition by a former employer.'").

[40] Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 676 (2008).

[41] *See* Syncom Industries, Inc. v. Wood, 920 A.2d 1178 (N.H. 2007) (an example of a company's use of a non-compete to protect its information from misuse by former employees).

[42] *See* Howard Kurman, *Should your company use non-compete agreements?*, THE DAILY RECORD (Sept. 26, 2014), http://thedailyrecord.com/2014/09/26/should-your-company-use-non-compete-agreements/ (offering an illustrative example of potential misuse of company information by a former employee that would result in unfair competition to the employer).

[43] *Id.*

protect their investment in a particular employee. In today's business environment, companies who invest more resources in training and developing their employees enjoy a noticeable return on their investment in the form of increased profit margins.[44] Non-competes contained in employment agreements offer a way for companies to protect both prior investment in employee development and any future investment in the employee, and ensure that they (and not a competitor) realize their full potential return on investment in the form of enhanced training and development.[45] A company may be unlikely to fully invest in a new employee if it is possible for the employee to acquire a skillset through the employer's investment, terminate the employment relationship, and later apply this skillset for the benefit of an industry competitor. Accordingly, a new employee's willingness to enter into a CNC as part of his or her employment agreement could actually serve as an incentive for employers to devote additional resources to train or develop the new hire. Potential employees might benefit from an employer's willingness to invest in staff members by adding to their skillset while gaining valuable on-the-job experience, ultimately making them more valuable to a company's operation.

2. Potential Burdens Imposed On Employees By Non-Competes

While employers undoubtedly benefit from the use of CNCs, it is important to understand that by entering into a non-compete, an employee will be subject to certain burdens that do not affect "fully mobile" employees. First, many employees feel that by agreeing to be bound by a non-compete, they are effectively limiting their bargaining power during any future negotiations with the employer.[46] For employees, one of the primary sources of leverage during any negotiation regarding the employment relationship is the freedom to terminate the relationship and the accompanying threat to the employer that a valuable employee might later use his or her talent for the benefit of a competitor.[47] Second, the recent pronounced increase in non-compete litigation standing alone burdens employees in several ways. Because there are a high number of instances where non-compete disputes evolve into litigation, observant potential employees are aware of the threat of a lawsuit that arises upon entering into the covenant. Entering into a CNC, especially in the case of higher-level employees whose non-compete might be strenuously negotiated, could lead to mutual feelings of distrust between the employer and employee even before the first day on the job. In the event that the parties do in fact end up litigating the enforceability of the CNC, some argue that a potential lawsuit is less of a burden on employers (due

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[44] Emad Rizkalla, *Not Investing In Employee Training Is Risky Business*, THE HUFFINGTON POST (June 30, 2014, 4:33 PM), http://www.huffingtonpost.com/emad-rizkalla/not-investing-in-employee_b_5545222.html (citing a report by *HR Magazine* showing that "companies investing $1,500 or more per employee per year on training average 24 percent higher profit margins than companies with lower yearly training investments.").

[45] *See* Pivateau, *supra* note 40 (arguing that "a noncompete agreement encourages employers to invest in their employees.").

[46] Blake, *supra* note 19, at 627.

[47] Kevin G. Powers & Linda Evans, *Non-Compete Agreements: A Proposal for Fairness and Predictability*, THE EMPLOYMENT LAWYERS, http://www.theemploymentlawyers.com/Articles/Noncompetition.htm#_ednref16 (last visited Jan. 8, 2014).

to their level of resources) and would likely impose a great hardship on the employee who is party to the suit.[48] In addition to facing the potentially unaffordable costs of litigation, a former employee in the middle of litigation with a former employer might ultimately be a less desirable candidate for future employment with another firm.[49]

Entirely separate from the tangible burdens discussed above, a non-compete places limits on the employee that may run counter to certain accepted public policy ideals. By entering into a CNC with an employer, an employee is effectively placing a self-imposed limit on his right or ability to gain employment after the termination of the contractual relationship. The ability to find another job, otherwise known as "employee mobility," can be greatly diminished by a stringent, yet readily enforceable non-compete. While courts in states using the "reasonability" standard of enforceability take the interests of the departing employee into account, these courts readily uphold limits on employee mobility if an employer purports to be using the restraint to protect a recognized interest. However, courts in those states where CNCs are not readily enforceable place great emphasis on an employee's personal freedom to follow his or her own interests,[50] and are careful to limit an employer's ability to hinder an employee's mobility. Non-compete clauses in employment agreements can also have adverse effects on economic competition. By limiting employee mobility, the broad enforcement of CNCs can lessen competition by "intimidating potential competitors and by slowing down the dissemination of ideas, processes, and methods."[51] Scholars have conducted studies on non-competes and their effect on employee mobility, the findings of which will be discussed later in this Note. While the use of non-competes may be necessary for employers in some contexts, the potential burdens imposed on employees by these provisions should not be overlooked, and may provide justification for a shift in the standard for determining their enforceability.

B. The Treatment of Covenants Not To Compete Under Ohio Law and In Other Jurisdictions

As mentioned, courts across the United States apply a variety of standards and analyses in determining whether a non-compete clause is enforceable. These different approaches, each of which in turn impacts how frequently employers utilize non-competes, can each be traced back to the common-law courts' initial analysis of post-employment restraints. Courts have been discussing and analyzing the permissibility of the use of non-competes, or "restraints of trade" as they were known during the traditional common-law era, for more than 500 years.[52] As economic industry and business methods have evolved, courts have facilitated changes in their analysis in order to formulate a standard that accurately reflects the prevalent social and economic values of a particular time frame.[53] After reviewing the evolution of judicial treatment of non-competes from the common-law era to the present day, it becomes increasingly

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[48] *Id.*

[49] *Id.*

[50] Edwards v. Arthur Andersen LLP, 189 P.3d 285, 288 (Cal. 2008).

[51] Blake, *supra* note 19, at 627.

[52] *Id.* at 626.

[53] *Id.* at 626-27.

clear that the stage is set for courts to facilitate another change in the way they handle these restrictive covenants.

1. The Origin and Evolution of the Common-Law Restrictive Doctrine

For nearly 250 years, courts analyzing the enforceability of a CNC relied almost exclusively on an English court's holding in *Mitchel v. Reynolds*. The court in *Mitchel* analyzed a contractual covenant in which a baker promised not to practice his craft for a certain period of time following the transfer (sale) of his business, and eventually established a presumption of invalidity with regard to "restraints of trade."[54] The court reasoned that this presumption of invalidity was justified by the potential "mischief" that could result from restraints of trade such as the non-compete at issue.[55] After weighing the potential societal harms stemming from the use of restraints of trade with the right of private parties to freely enter into a binding contractual arrangement, the court ultimately concluded that the presumption of invalidity attached to restrictive covenants could be overcome and that a covenant in the context of the transfer of the baker's business was enforceable.[56]

In its analysis of the interests of and potential harm to both parties to the agreement and to society as a whole, the *Mitchel* court articulated the first standard for non-compete enforceability based on the "reasonableness" of the provision. The factors weighed by the court in its determination are substantially similar to those taken into account by modern courts analyzing a CNC. In addition to providing the framework for subsequent inquiries into the validity of non-competes, the *Mitchel* court also made an important note when it addressed these provisions in the context of employment agreements. The court noted that when a non-compete is contained in an employment agreement, the potential for harm and abuse may increase.[57] In addressing the distinction between restraints imposed on a party to the sale of a business and restrictive covenants contained in employment contracts, the court inferred that it would be more difficult for a party to make a showing that a covenant falling into the latter category is "reasonable" and thus should be enforced.[58]

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[54] Mitchel v. Reynolds, (1711) 24 Eng. Rep. 347 (Q.B.).

[55] The "mischief" being referred to by the *Mitchel* court was the possible loss of the employee's means of earning a living and the possibility that society as a whole might lose the services of a useful member. The court also noted that the ready enforcement of such provisions could result in abuse by corporations seeking to establish a monopoly in an industry. In noting these potential harms and using them in the ultimate analysis of enforceability, the *Mitchel* court established that its decision was based primarily on public policy. It is this public policy against the use of restraints of trade that forms the basis for later courts' analysis of non-competes. *Id.*; Blake, *supra* note 19, at 629.

[56] Blake, *supra* note 19, at 629. The court justified its finding that the provision should be enforced despite the presumption of invalidity of restraints of trade by holding that "to refuse to enforce reasonable restraints accompanying the transfer of a business would result in unnecessary hardship or loss" to the baker, who would only be able to sell his business to a buyer who could be protected by an enforceable non-compete. *Id.*

[57] *Id.* at 629-30. The *Mitchel* court stated that employers may abuse the right to include restrictive covenants in employment agreements by using them in a way that would allow an employer to control an apprentice in his future employment.

[58] *Id.* at 675.

The *Mitchel* court would also influence the modern analysis of non-competes by analyzing a pre-existing judicial distinction between two different types of restrictive trade covenants. In *Rogers v. Parrey*, an earlier English court made a distinction during its analysis between "general restraints" and "particular restraints."[59] In the context of employment agreements, a "general restraint" could be defined as a restriction on one's right to gain employment that extended over a broad geographic area, or that would bind an employee for an indefinite amount of time.[60] A "partial restraint," like the one at issue in *Mitchel*, is a covenant whose geographic and durational scope would be limited so as to apply only to a small number of people within a specific industry.[61] The *Mitchel* court concluded that a "general restraint" could never be valid[62], and that it could only uphold a "partial restraint" under particular circumstances.[63] In addressing the difference in how these two types of restraints should be viewed, the *Mitchel* court essentially established that CNCs would only be enforced when it was reasonable to do so under the circumstances.

Through the nineteenth century, American courts would apply the *Mitchel* holding in their analysis of CNCs contained in employment agreements.[64] However, as industry and the nature of the employment relationship evolved, it became increasingly difficult for courts to articulate a sound and predictable analysis within the vague "reasonableness" framework of *Mitchel*. More specifically, courts in the United States found difficulty in the distinction between "general" and "partial" restrictions, and were beginning to place more emphasis on protecting the employee from the potential harm imposed by these provisions.[65] While working through these difficulties, courts began to depart from the *Mitchel* standard and instead began to analyze the facts and circumstances under which the parties entered into a non-compete.[66] In considering the specific interests of the employer and employee in their analysis as opposed to classifying the restrictive provision, courts eventually adopted the first version of the "reasonableness" approach to determining enforceability.[67]

Under the common-law "reasonableness" approach adopted in some form by the majority of states today, the main task for a court is to balance the interests of the employer with the interests of the employee in light of society's interest in promoting

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[59] *Id.* at 630 (citing Rogers v. Parrey, (1613) 80 Eng. Rep. 1012 (K.B.)).

[60] *Id.*

[61] *Id.*

[62] *Id.* (citing Mitchel, 24 Eng. Rep. at 349). Because it would never be reasonable to prevent one from practicing his trade in cases where neither party benefits, the court held that general restraints were "only oppressive" and thus never valid.

[63] *Id.* (citing Mitchel, 24 Eng. Rep. at 347-52). The court would only find a partial restraint to be valid if there was "good and adequate consideration" offered and in circumstances under which the court could find that the parties entered into a "just and honest contract." *Id.* at 352.

[64] *Id.* at 638-39.

[65] *Id.* at 643-44.

[66] *Id.* at 647.

[67] *See id.* at 648-49 (providing an overview of the formulation of the common-law reasonableness test for determining the validity of post-employment restraints).

open and fair competition.[68] As discussed earlier, employers have an interest in preventing unfair competition that may result from actions of a former employee, and employees have an interest in maximizing mobility.[69] As a society, we are thought to have a general interest in promoting an economic environment with open competition in order to maximize innovation and to facilitate the free exchange of ideas. In keeping these competing interests in mind, courts adopting the common-law reasonableness test are willing to enforce non-competes in order to preserve the interests of an employer, but only if the provision does not result in significant harm to employees or important societal values.

In the first part of the reasonableness inquiry, a court analyzing a CNC will consider the employer's motivation or purpose for negotiating the provision with the employee. If the employer can show that it had a "legitimate commercial reason" for entering into the non-compete, it can be said that it has "met its first burden" in establishing that the restriction on an employee's post-termination conduct is "reasonable."[70] In other words, so long as the court finds that an employer used the CNC to protect a legitimate business interest,[71] the provision satisfies the first part of the reasonableness test. The two most common "legitimate commercial reasons" asserted by employers seeking to justify the use of a non-compete are the protection of its goodwill as a business and the protection of trade secrets or other proprietary information.[72] By requiring a finding that the CNC was used by an employer for a legitimate reason, and only enforcing restraints under circumstances where there is some threat of unfair competition, courts adopting the common-law approach mirror the approach taken in *Mitchel* in the first prong of the overall inquiry.

After finding that an employer entered into (and is attempting to enforce) the CNC to protect or promote a legitimate business reason, a court operating under the common-law restrictive doctrine will analyze the express terms of the agreement. The basic task of the court here is to assure that the non-compete is drafted in a way that "is no more extensive than is necessary" to protect the employer's interest purportedly protected by the provision.[73] In making this determination, a court will analyze jurisdiction-specific factors that will ultimately allow it to determine whether the actual scope or reach of the CNC is reasonably necessary to protect the employer.[74] Non-competes imposing restrictions that fall outside of the scope necessary to protect

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[68] Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends And An Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 114-15 (2008).

[69] *Id.*

[70] *Id.*

[71] As opposed to using the covenant for the sole purpose of restricting the employee or limiting competition.

[72] *Id.* at 116.

[73] *Id.* at 117.

[74] In determining the actual "scope" of the CNC, a court might consider the duration of the provision, the geographic area to which the restriction applies, and the types of activity prohibited by the clause. If the court determines that it would have been reasonable for the employer to protect its interests using a provision with a more narrow scope, the provision will be deemed invalid. *Id.* at 117-18.

the employer – such as those that generally prohibit an employee from working for a particular competitor or that prohibit an employee from entering an industry in which the employer is not directly involved – are invalid.[75] In this portion of the analysis, a court is essentially weighing the potential burden placed on the employee by the CNC against the interests of the employer seeking enforcement, a consideration first articulated by the English courts.

Courts using the traditional common-law approach have adopted several procedural rules and requirements that exemplify judicial reluctance to strict CNC enforcement. In adopting what is now termed the "blue pencil doctrine," courts have the power to sever and enforce the valid covenants contained within a larger and otherwise unenforceable non-compete.[76] However, a court does not have the power to *modify* the terms of an otherwise unenforceable non-compete in a manner that would result in a reasonable restriction. By requiring a finding of reasonability before the exercise of the blue pencil power, courts prevent employers from drafting overly broad restrictions knowing that a court would change language to make the covenant enforceable. Procedurally, courts adopting the common-law approach have adopted certain safeguards that make it difficult for an employer to succeed in proving that a non-compete is reasonable under the overarching inquiry. Furthermore, the enforceability of a CNC is held to be a question of law, but showing that a provision is reasonable requires the employer to make a relatively specific factual showing. After proving that a non-compete is reasonable, an employer would also have to establish irreparable injury in order to obtain injunctive relief, a remedy commonly sought in the context of non-compete litigation.

The basic common-law analysis and accompanying procedural rules combine to form a standard for enforceability that creates a heavy presumption of invalidity of CNCs contained in employment agreements. Under the traditional approach a non-compete is subject to a high level of scrutiny during a court's initial analysis, making it difficult for an employer to show that a questionable provision is reasonable. However, this "employee-friendly" standard has been modified by courts in recent years and many CNCs are now subject to a more relaxed standard of reasonableness. As the economic and legal systems have continued to evolve in the United States, courts in many jurisdictions are continuing to facilitate a shift to a more "employer-friendly" analysis. As a result of these changes, it is now far easier in many places for employers to enforce restrictive covenants contained in employment agreements.

2. The Modern Approach: The Ohio Relaxed Reasonableness Requirement as an Employer-Friendly Standard

Whether caused by social, economic, or purely legal development, courts across the U.S. are departing from the analysis first announced in *Mitchel* and the "traditional" common-law reasonableness requirement under which CNCs have been analyzed for so many years. Courts have and continue to modify their standards for non-compete enforceability as they alter their analyses in hopes of formulating a process that better reflects the current economic and social climate. For the most part, these changes can be classified as attempts by the court to adopt a more permissive standard for determining enforceability. A common example of this departure is evidenced by the willingness of many courts to broaden the permissible scope of

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[75] *Id.*

[76] *Id.* at 118-19.

CNCs by expanding the definition of an interest deemed to be "legitimate" and worthy of protection through use of a non-compete. Many legal scholars consider changes that have taken place in Ohio courts to be an illustrative example of the shift *away* from the traditional common-law standard and the emergence of a new, more employer-friendly analysis.

Ohio courts' treatment of non-competes in employment agreements can be divided into two separate time periods: pre-1975 and post-1975. Before its decision in *Raimonde*, Ohio state courts followed a "strict version of the common-law reasonableness test" announced by the Ohio Supreme Court in *Briggs v. Butler*.[77] The reasonableness test consisted of a three-part analysis under which a court would enforce a non-compete only if: "(1) the restriction was not beyond that reasonably necessary for the protection of the employer and his business; (2) the provisions were not unreasonably restrictive upon the rights of the employee; and (3) the covenant did not contravene public policy."[78] Ohio courts followed and reinforced this restrictive approach in subsequent cases, such as *Arthur Murray Dance Studios*[79] and *Extine*.[80] Before 1975, CNCs in Ohio were subject to the heightened scrutiny of the traditional common-law approach and in turn were more difficult to enforce. While it is unclear exactly what led the court to change its approach, in 1975 Ohio adopted a watered-down version of the common-law doctrine that can accurately be described as a "relaxed reasonableness" standard of enforceability.

In *Raimonde*, the Ohio Supreme Court departed from the three-step analysis of the restrictive common-law approach and established a new "reasonability test" to be used by courts in determining the enforceability of a CNC contained in an employment agreement. In doing so, the *Raimonde* court established two inquiries or "sub-tests," that combine to make up the more broad reasonableness analysis. When analyzing the validity of a non-compete, Ohio courts apply a three-prong balancing test before weighing a multitude of "reasonableness factors" to make an ultimate determination of whether a CNC is enforceable.[81]

Under the *Raimonde* standard, an employer's non-compete agreement is enforceable "to the extent necessary to protect the employer's legitimate interests."[82] While this standard is seemingly straightforward, the analysis that courts must conduct becomes fairly complicated. *Raimonde* represents Ohio's adoption of the basic "rule

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[77] *Id.* at 123.

[78] Briggs v. Butler, 45 N.E.2d 757, 758 (Ohio 1942).

[79] Arthur Murray Dance Studios of Cleveland, Inc. v. Witter, 62 Ohio Law Abs. 17 (1952). Here, an Ohio court declined to enforce a non-compete against a former employee who wanted to work at a competing dance studio. The court found that the employer did not meet the heavy burden necessary to justify enforcing a "presumptively void" restrictive covenant. The court also relied on the public's interest in prohibiting restraints of trade, noting that these restrictions should be "cautiously considered, carefully scrutinized, looked upon with disfavor, strictly interpreted, and reluctantly upheld."

[80] Extine v. Williams Midwest, Inc., 200 N.E.2d 297 (Ohio 1964). Here, the Ohio Supreme Court used the "blue pencil rule" applied under the traditional common-law approach, giving other courts the power and discretion to fully eliminate unenforceable provisions contained within a non-compete.

[81] Raimonde v. Van Vlerah, 325 N.E.2d 544 (Ohio 1975).

[82] *Id.* at 547.

of reasonableness," a standard under which a non-compete is enforceable if a court determines that the provision is "reasonable." In making its determination, a court is instructed to balance the potential undue hardship on the employee that results from enforcement of the provision with the need for the employer to protect its legitimate interests through judicial enforcement of the non-compete.[83] Accordingly, the *Raimonde* court held that a non-compete 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."[84] *Raimonde* instructed courts to conduct this balancing test based on the facts of each particular case and if the facts show that the provision is "reasonable," a court may enforce the provision.

The *Raimonde* inquiry does not end here, however. In addition to the three-part balancing test, the court also outlined eight separate factors that support a finding that a CNC is "reasonable" or a finding that the restriction is unreasonable and thus invalid.[85] The appropriate role intended by the *Raimonde* court of these factors, which are mentioned by the court following a discussion of its departure from the "blue pencil test," within the overall reasonableness analysis is unclear. While courts applying the *Raimonde* decision have continued to struggle to determine the appropriate role of the reasonableness factors within the three-part balancing test, four of the eight factors listed by the court are almost always discussed during the analysis. These four factors – the geographic scope of the restraint, the duration of the covenant, the benefit and detriment of employer and employee, and the public interest – seem to have become a consistent part of the enforceability inquiry in Ohio courts.[86] While these factors are most often discussed by Ohio courts, it is unclear whether they have formally become part of the analysis because they relate to commonly used restrictive provisions in non-competes, or whether Ohio courts discuss them because they think that *Raimonde* compels them to do so.

The Ohio Supreme Court's holding in *Raimonde*, which discarded the common-law restrictive doctrine for determining enforceability established by *Briggs*, signaled the beginning of an era during which Ohio courts would develop and use a far more "employer-friendly" standard in determining the enforceability of a CNC. Though the practical result of the *Raimonde* opinion clearly indicates a shift in thinking about CNCs and their enforceability, the court implies in the language of the opinion that it

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[83] *Id.*

[84] *Id.*

[85] "Among the factors properly to be considered are: '(t)he absence or presence of limitations as to time and space; whether the employee represents the sole contact with the customer; whether the employee is possessed with confidential information or trade secrets; whether the covenant seeks to eliminate competition which would be unfair to the employer or merely seeks to eliminate ordinary competition; whether the covenant seeks to stifle the inherent skill and experience of the employee; whether the benefit to the employer is disproportional to the detriment to the employee; whether the covenant operates as a bar to the employee's sole means of support; whether the employee's talent which the employer seeks to suppress was actually developed during the period of employment; and whether the forbidden employment is merely incidental to the main employment.'" *Id.* (citations omitted).

[86] *See* Pierre H. Bergeron, *Navigating the "Deep and Unsettled Sea" of Covenant Not to Compete Litigation in Ohio: A Comprehensive Look*, 31 U. TOL. L. REV. 373, 376-81 (2000) (discussing Ohio courts' treatment of four particular factors contained in the *Raimonde* analysis).

is facilitating a shift to a more employer-friendly analysis. In replacing the traditional blue-pencil test for a more relaxed rule of reasonableness, the *Raimonde* court noted that it was moving away from the traditional common-law doctrine because of its impracticability.[87] However, the court seems to justify its shift in thinking based on its view that the common-law doctrine has not worked well in practice for *employers*, yet offers no discussion on the effects of the shift on employees. The court was concerned that under the traditional common-law doctrine of *Briggs*, "employees may gain the benefit of overly-lenient employment restrictions."[88] The *Raimonde* court also rejected the argument that this new standard would "allow employers to dictate restraints without fear," concluding that most "employers who enter contracts do so in good faith, and seek only to protect legitimate interests."[89]

While the *Raimonde* court departed from the traditional common-law enforceability analysis by imposing a less stringent definition of a "reasonable" non-compete, courts in other jurisdictions have established new standards that differ in other ways. Instead of making it easier for an employer to prove that the scope of the CNC is "reasonable," some states have liberalized the first part of the traditional common-law analysis. Recall that a court operating under the common-law restrictive doctrine must first determine whether the employer made use of the non-compete in an attempt to protect a "legitimate" business interest.[90] By expanding the definition of a "legitimate" business interest, courts in some states have modified their enforceability analysis in a way that eases the burden placed on employers in proving the overall reasonableness of a CNC.[91] State courts have expanded this definition by allowing businesses to use non-competes to protect information that is not defined as a traditional "trade secret,"[92] and to protect an interest in employer investment in general employee training.[93]

In cases following the *Raimonde* decision, the Ohio Supreme Court mirrored the willingness of courts in other states to expand the list of business interests considered to be "legitimate" for the purposes of the non-compete analysis. In *Rogers v. Runfola*, the court seemingly made another stark departure from the traditional common-law doctrine by validating an otherwise unreasonable non-compete because of the nature of the interest the employer sought to protect by imposing the restraint.[94] The court

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[87] *Raimonde*, 325 N.E.2d at 546.

[88] *Id.*

[89] *Id.*

[90] Garrison & Wendt, *supra* note 68, at 128.

[91] *Id.* at 129.

[92] *See, e.g.*, L.M. Saliterman & Assocs. v. Finney, 361 N.W.2d 175, 178 (Minn. Ct. App. 1985) (holding that an employer may enforce a non-compete to protect confidential information that does not fall within the traditional definition of a "trade secret").

[93] Under the traditional common-law analysis, an employer would be deemed to have a "legitimate" business interest to protect its investment in company education or training by which the employee acquires a unique, specialized skill. Some courts now enforce non-competes used by an employer to protect an investment in more general training and education. *See* Borg-Warner Protective Servs., Corp. v. Guardsmark, Inc., 946 F. Supp. 495 (E.D. Ky. 1996).

[94] Rogers v. Runfola & Assocs., Inc., 565 N.E.2d 540 (Ohio 1991).

applied the three-part balancing test from *Raimonde* and concluded that the non-compete at issue was unreasonable because it imposed an undue hardship on the employees subject to the provision.[95] However, the court went on to analyze the interest that the employer sought to protect. The court found that the employer was seeking to enforce the CNC to protect its interest in training provided to the departing employees, an interest it deemed to be "legitimate."[96] Thus the court held that the non-compete was enforceable, despite the fact that it was unreasonable under the balancing test and was used to protect an employer's interest only in "general training."[97] The *Rogers* holding symbolizes the willingness of Ohio courts to expand the definition of a "legitimate" business interest, and, furthermore, the willingness of the court to elevate these legitimate interests over any burden placed on the employee by a CNC.

The relaxed standard of reasonableness applied in Ohio and other states represents a sizeable departure from the rigid common-law restrictive doctrine used through the 1970s. This new, more "employer-friendly" standard has made it far easier for employers to use and enforce non-competes against former employees.

3. The Alternative Modern Approach: Limiting Non-Compete Enforcement via Statute: Treatment of CNCs Under Statutes in California and Other States

As courts in Ohio and a majority of other states have established and continued to apply a less rigid standard for determining the enforceability of non-competes, other states have deviated from the traditional common-law doctrine in an entirely different way. Most notably, state legislatures in California and North Dakota have enacted statutes that effectively prohibit employers from using non-compete provisions in employment agreements.[98] The enactment of statutory limits on the enforcement of CNCs seems to be motivated by a strong public policy favoring employee mobility. As a result of the state legislatures' willingness to promote the free flow of employees within the economy, some jurisdictions have created a standard for the enforceability of non-competes that remains more in line with the traditional common-law doctrine and its presumption of unenforceability that attaches to "restraints of trade" within the context of employment relationships.

In California, the combination of antitrust legislation, statutory prohibitions on the use of non-competes, and court decisions interpreting these provisions has virtually eliminated the use of CNCs by employers. Section 16600 of California's Business & Professions Code is part of the state's first antitrust statute, and imposes a general prohibition on contracts "by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind."[99] Courts have interpreted this provision as being in place to offer broad protection for "one of the most cherished commercial

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[95] *Id.* at 544.

[96] *Id.*

[97] *Id.*

[98] *See* CAL. BUS. & PROF. CODE §16600; N.D. CENT. CODE §9-08-06 (2006). More recently, interest groups in Michigan, Washington, and Massachusetts are engaged in an effort to enact similar legislation in hopes of limiting the use of non-competes by employers. Phillip Korovesis, *Korovesis and Fuhs: Defending Non-Compete Agreements*, THE DETROIT NEWS (Mar. 20, 2015), http://www.detroitnews.com/story/opinion/2015/03/20/korovesis-fuhs-non-compete-agreements/25039965/.

[99] *Id.*

rights we possess – the important legal right of persons to engage in businesses and occupations of their choosing."[100] By protecting the right of California citizens to freely seek employment, state courts have interpreted Section 16600 in a more specific manner, holding that the statute operates as "an absolute bar to postemployment restraints."[101] Under the California statute, a non-compete is void if as a result of enforcement the employee subject to the restrictions is "not as free [to engage in a competing business] as he would have been if he were not bound by it."[102] It is clear from both the enactment of the statute and the subsequent judicial interpretation that the use of non-competes is strongly disfavored in California.

Despite California's strong public policy against the enforcement of CNCs, some courts interpreting Section 16600 facilitated a shift away from the general prohibition on non-competes by creating exceptions under which a court could enforce a restrictive covenant. In a series of decisions beginning in the late 1980s, the Ninth Circuit developed a class of "narrow restraint exceptions," under which an employer might be able to enforce a non-compete despite the statutory prohibition contained in Section 16600. The development of these "narrow restraint exceptions" can be traced to the Ninth Circuit's holding in *Campbell v. Board of Trustees*, where the court concluded that the prohibition contained in Section 16600 applied only to particular types of CNCs. In *Campbell*, the court held that Section 16600 would only invalidate a non-compete that prohibited a departing employee from engaging in an entire profession, trade or business.[103] Non-competes that barred an employee from "pursuing only a small or limited part of the business, trade, or profession,"[104] the court said, were enforceable under the statute.[105] By distinguishing between broad prohibitions and "narrow restraints," the Ninth Circuit effectively returned to the traditional common-law distinction that had long been rejected by courts interpreting CNCs. In doing so, the court "undercut the 'wise and salutary' effect of Section 16600's bright-line rule"[106] and created a more employer-friendly standard under which courts applying the statute would analyze non-competes.

Unlike in Ohio and other states where courts have moved away from an "employee-friendly" CNC analysis, the changes effectuated by the court in *Campbell* were not permanent. The "narrow restraint exceptions" created in *Campbell* existed and applied only until the California Supreme Court's re-examination of Section

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[100] Morlife, Inc. v. Perry, 66 Cal. Rptr. 2d 731, 734 (Cal. Ct. App. 1997); Metro Traffic Control, Inc. v. Shadow Traffic Network, 27 Cal. Rptr. 2d 573, 577 (Cal. Ct. App. 1994) (holding that section 16600 provides that "every citizen shall retain the right to pursue any lawful employment and enterprise of their choice.").

[101] KGB, Inc. v. Giannoulas, 164 Cal. Rptr. 571, 577 (Cal. Ct. App. 1980).

[102] Todd M. Malynn, Edwards v. Arthur Andersen LLP*: The End of Judicially Created Restraints on Competition*, 18 No. 1. COMPETITION: J. ANTI. & UNFAIR COMP. L. SEC. ST. B. CAL. 35, 44 (2009) (quoting Chamberlain v. Augustine, 156 P. 479, 480 (Cal. 1916)).

[103] Campbell v. Bd. of Trs. of Leland Stanford Jr. Univ., 817 F.2d 499, 502 (9th Cir. 1997).

[104] *Id.* (citing Boughton v. Socony Mobil Oil Co., 41 Cal. Rptr. 714, 716 (Cal. Ct. App. 1964).

[105] *Id.* The *Campbell* court also placed the burden on the employee subject to the non-compete to prove that the restriction operating as a prohibition on engaging in an entire profession.

[106] Malynn, *supra* note 102, at 45.

16600 in *Edwards v. Arthur Andersen LLP*. In *Edwards*, the court rejected the Ninth Circuit's "narrow restraint exceptions" and re-established Section 16600's "bright-line" prohibition against non-competes contained in employment agreements.[107] The court reinforced California's policy in favor of free competition and employee mobility,[108] and concluded that "section 16600 prohibits employee noncompetition agreements unless the agreement falls within a statutory exception."[109] Because Section 16600 provided exceptions for non-competes in the context of the sale or dissolution of corporations, partnerships, and limited liability corporations,[110] the court interpreted the plain meaning of the statute as prohibiting an employer from using a contract to restrain a former employee from engaging in his or her profession, trade, or business.[111] By eliminating judicially created exceptions to Section 16600 and reinforcing California's public policy in favor of employee mobility, the *Edwards* court established the most "employee-friendly" standard for analyzing CNCs.[112]

III. OHIO SHOULD RE-EXAMINE THE *RAIMONDE* STANDARD AND FACILITATE A SHIFT BACK TO THE MORE "EMPLOYEE-FRIENDLY" COMMON-LAW RESTRICTIVE DOCTRINE

While California's general prohibition on non-competes does not precisely mirror the common-law restrictive enforceability analysis, it seems to be far more similar than Ohio's relaxed reasonability standard. In fact, California's current standard might actually be *more* "employee-friendly" than the original common-law analysis in that it has essentially resulted in the illegality of all non-competes contained in employment agreements. The differences in the standards applied in California and Ohio are notable, particularly given the economic environment and growth of particular industries in each state. The basic premise of this Note is that in order for Ohio to keep up with the national pace of economic recovery, it will need to continue to foster growth in sectors such as technology and energy. As evidenced by the growth of Silicon Valley and California's fast-paced alternative energy sector, these two areas are thriving and will likely continue to thrive with the evolution of the economy. While the growth in these sectors cannot be attributed entirely to California's non-compete standard, the connection between the use of these provisions and economic growth should not be understated. Below, I outline several arguments in support of the notion that the time is right for Ohio to depart from the *Raimonde* standard and shift back

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[107] Edwards v. Arthur Andersen LLP, 189 P.3d 285, 293 (Cal. 2008).

[108] *Id.* at 291.

[109] *Id.* at 288.

[110] *Id.* at 290-91.

[111] *Id.* at 291.

[112] While not explicitly mentioned in the opinion, the timing of the California Supreme Court's decision in *Edwards* is interesting. The opinion was handed down in 2008, in the midst of the economic downturn mentioned in the introduction of this note. Though the court supported its reasoning by stating California's policy in favor of open competition, it is possible that the court might have been influenced by the fact that unemployment was reaching high levels. It might have been difficult for the court to continue to apply the "narrow restraint exceptions" during this turbulent economic time, as it would be making it harder for people to gain employment at a time where job opportunities were becoming increasingly scarce.

toward the more "employee-friendly" principles of the traditional common-law enforceability analysis.

A. Justification for a Re-Examination of Raimonde *in Ohio*

1. Problems with the Current *Raimonde* Standard

The *Raimonde* standard and analysis for determining the enforceability of non-competes that continues to be applied in Ohio courts today creates problems for all parties at various points in the process of deploying restrictive covenants.[113] This confusion reaches attorneys tasked with drafting non-competes for employers or negotiating employment agreements for prospective employees, as lawyers are unable to predict with a high level of certainty whether a non-compete will be enforceable in an Ohio trial court.[114] In the event that an employee whose employment relationship is subject to a CNC terminates his or her employment relationship, both the employee and employer remain unsure of the proper scope of the restrictive covenant contained in the agreement.[115] Furthermore, in the event that litigation ensues over a non-compete, judges applying the *Raimonde* standard face confusion in determining how to properly apply the Supreme Court of Ohio's analysis.[116]

The main source of this confusion as it relates to the *Raimonde* standard is the Ohio Supreme Court's apparent adoption of two different standards for determining the enforceability of a non-compete. While expressly adopting the three-part analysis of the non-compete,[117] the *Raimonde* court also articulated a list of eight "reasonableness" factors for courts to weigh before making an ultimate determination of enforceability.[118] As a result of these two seemingly separate standards contained within the *Raimonde* opinion, Ohio trial courts do not analyze non-competes in a uniform fashion. One court may properly analyze the provision using the three-step reasonableness analysis, but will only consider the "reasonableness factors" if it needs to modify the non-compete in order to make it "reasonable" under the full analysis.[119]

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[113] *See* Adam V. Buente, *Enforceability of Noncompete Agreements in the Buckeye State: How and Why Ohio Courts Apply the Reasonableness Standard to Entrepreneurs*, 8 OHIO ST. ENTREPRENEURIAL BUS. L.J. 73, 74 (2013).

[114] *Id.* at 86-87 (noting that "the Ohio Supreme Court's lack of decisions directly addressing noncompete agreements since *Raimonde* has only compounded the confusion for Ohio's trial attorneys.").

[115] Confusion for employers and employees surrounding non-competes manifests itself in the example of an employee being unsure of whether certain post-employment activity will be permissible under the terms of the CNC.

[116] Bergeron, *supra* note 86, at 375-76 (The *Raimonde* standard "has contributed to confusion in the lower courts.").

[117] Recall that *Raimonde* instructs a court to analyze whether the scope of the non-compete is greater than what is required for the employer's protection, whether it imposes an undue burden on the employee, and whether it is injurious to the public. Raimonde v. Van Vlerah, 325 N.E.2d 544, 547 (Ohio 1975); *see supra* Part II.B.2.

[118] Raimonde, 325 N.E.2d at 547.

[119] Bergeron, *supra* note 86, at 376. *See, e.g.*, Am. Bldg. Serv., Inc. v. Cohen, 603 N.E.2d 432, 434-35 (Ohio Ct. App. 1992). In *American Building Services*, the court analyzed a non-compete provision under the three-step *Raimonde* analysis and concluded that "certain restraints and the resultant hardship on [the employee] do exceed that which is reasonable to protect [the

Other Ohio courts use the three-step analysis and "reasonableness factors" in conjunction to conduct a combined analysis of enforceability.[120] Furthermore, the Ohio Supreme Court has remained relatively silent on the issue of non-compete enforceability.[121] Ohio trial and appellate courts are thus tasked with determining how to properly apply the *Raimonde* standard, yielding inconsistent results in CNC litigation throughout the state.[122]

While it is clear that there is general confusion among lower Ohio courts as to the proper application of *Raimonde*, this confusion manifests itself in more specific inconsistencies in non-compete cases. Under the current standard, it is unclear whether *Raimonde* works to prohibit the enforcement of an overly broad geographic restriction contained in a CNC. Under *Raimonde*, a geographic restriction on post-employment activity (however broad) is not *per se* unreasonable.[123] In *Ganguly v. Mead Digital Systems*, an Ohio appellate court enforced a non-compete that contained an unlimited geographic restriction.[124] The *Ganguly* court justified the enforcement of a worldwide geographic restriction based in part on the employer's international reach.[125] Given the employer's interests across the globe and the fact that the employer was seeking to protect against the international dissemination of its confidential information, the court found the restriction to be reasonable.[126] In subsequent decisions, Ohio courts have routinely held that unlimited geographic restrictions are *un*enforceable.[127] In

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employer's] legitimate business interests." *Id.* at 434. After making this initial determination of reasonability, the court applied and analyzed the eight *Raimonde* reasonability factors to modify a specific portion of the CNC to bring it into the realm of a "reasonable" non-compete under the initial three-step analysis. *Id.* at 435.

[120] *See, e.g.*, HCCT, Inc. v. Walters, 651 N.E.2d 25, 27 (Ohio Ct. App. 1994). The court in *HCCT*, after articulating the initial three-step analysis, stated that "the court in *Raimonde* also noted the following factors to consider in determining the 'reasonableness' of employee covenants." *Id.* In ultimately holding that the non-compete at issue was not reasonable (and thus, unenforceable), the court supported its conclusion by noting that "(1) the covenants seek to eliminate ordinary competition, not unfair competition; (2) the benefit to the employer is disproportional to the detriment to the employee; and (3) . . . [the employer's] weak interest in enforcing the covenants." *Id.* In supporting its finding that the non-compete was not reasonable through its analysis of the eight "reasonability factors," the *HCCT* court provides an illustrative example of Ohio courts that read *Raimonde* to require a combined "reasonableness" test.

[121] Bergeron, *supra* note 86, at 376.

[122] *Id.* (noting that as a result of the confusion surrounding the *Raimonde* standard, "few, if any courts, embark on a consideration of all of the listed factors," and that as a result of the inconsistent results within state courts, "practitioners are able to find support for just about any position they wish to advance.").

[123] *Id.*

[124] Ganguly v. Mead Digital Sys., No. 82-1499, 1984 WL 3858, at *7 (Ohio Ct. App. Sept. 20, 1984).

[125] *Id.* at *5 (noting that the employer's business was "thriving in the United States, Germany, The [sic] Netherlands, and Japan.").

[126] *Id.* at *7.

[127] *See* Am. Bldg. Serv., Inc. v. Cohen, 603 N.E.2d 432, 434 (Ohio Ct. App. 1992) (holding that a geographic restriction which "prohibited [the employee] from working for any business

comparing these inconsistent results, it appears that an employer is free to enforce an otherwise unreasonable geographic restriction as part of a non-compete so long as it can demonstrate some sort of market presence in the area(s) to which the restriction applies. Tasking courts with determining the extent of a "market presence" that is sufficient so as to justify the enforcement of an overly broad geographic restriction requires courts to conduct an analysis far outside of the *Raimonde* framework, and could lead to further inconsistencies.

Ohio courts have also been inconsistent in their application of *Raimonde* to analyze the enforceability of non-competes that contain durational or time-based restrictions.[128] While *Raimonde* did not establish any concrete length of time for enforceable time limitations, attorneys and judges applying the standard often look to the court's holding in *Rogers v. Runfola & Associates* for guidance.[129] After finding a non-compete containing a two-year post-employment restriction to be unreasonable and refusing to enforce a restriction that prohibited employees from working with the employer's clients for the rest of their lives, the *Rogers* court modified the non-compete to include a restriction that lasted only one year.[130] Though the *Rogers* court did not explicitly adopt a two-year maximum time limit for non-competes, an attorney drafting a CNC might reasonably interpret the opinion as limiting these restrictions to twenty-four months. In analyzing Ohio courts' treatment of these limits following *Rogers*, however, it is clear that there is still a high level of uncertainty as it relates to durational restrictions. One court found a one-year prohibition in a non-compete to be unreasonable,[131] while another allowed an employer to enforce a CNC that would restrict the employee's activity for five years.[132] Moreover, Ohio courts seem to fly in the face of *Rogers* by routinely enforcing restrictions with durations of longer than two years[133] while subjecting one- to two-year limits to a higher level of scrutiny.[134]

It is clear after an analysis of Ohio courts' application of *Raimonde* that the standard under which a non-compete will be judged is far from uniform and can sometimes produce wildly inconsistent results. As courts wrestle with *Raimonde*, participants in non-compete litigation are unable to accurately predict the enforceability of time or geographic restrictions. Furthermore, Ohio courts struggle in analyzing the interests of the employer and employee as it relates to the non-

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which…competes with [the employer] in any county in which [the employer] has any customer or perspective customer" to be "too unreasonable.").

[128] Bergeron, *supra* note 86, at 377 (noting that "Ohio courts are nevertheless remarkably inconsistent in determining what type of time limitations are reasonable.").

[129] *See* Rogers v. Runfola & Assocs., Inc., 565 N.E.2d 540, 544 (Ohio 1991).

[130] *Id.* at 544.

[131] Basicomputer Corp. v. Scott, 791 F.Supp. 1280, 1289 (N.D. Ohio 1991) (modifying a one year restriction to six months).

[132] Parma Int'l Inc. v. Herman, No. 54243, 1989 WL 12928, at *4 (Ohio Ct. App. Feb. 16, 1989).

[133] Bergeron, *supra* note 86, at 378 ("A survey of Ohio cases reveals that many courts have enforced covenants of two years or longer.").

[134] *Id.*

compete[135] and seem to be unsure about whether Ohio's public policy favors the enforcement of reasonable CNCs.[136] While there is inherent uncertainty due to the flexible nature of a rule of reason, the level of confusion surrounding non-competes in Ohio is cause for concern.

2. National Trends: More Jurisdictions Are Moving Toward a More "Employee-Friendly" Standard of Non-Compete Enforceability

In jurisdictions across the United States, courts and legislatures alike are taking steps to implement standards for determining the enforceability of CNCs contained in employment agreements that result in a heightened level of judicial scrutiny of these restrictions. While courts in Ohio are departing from the restrictive common-law doctrine by broadening the number of non-competes that would be "reasonable" and enforceable, other states are facilitating shifts back *toward* the restrictive approach. As opposed to widening the definition of an enforceable non-compete, these states are restricting the scope of permissible post-employment restrictions. By reworking the framework under which state courts are required to analyze non-competes, and by implementing statutory schemes that work to prevent the enforcement of CNCs, these states are making "employee-friendly" standards of enforceability far more common.

In some states, courts are implementing a more "employee-friendly" standard for determining the enforceability of non-competes by limiting the expansion of the definition of a "legitimate business interest." By limiting the interests that an employer is able to protect through use of a non-compete, courts in states such as New York are effectively narrowing the circumstances under which a court will enforce a restrictive covenant. In New York, where non-competes are analyzed under a reasonableness standard very similar to *Raimonde*, courts would routinely find an employer's interest in customer relationships to be "legitimate" for the purposes of the enforceability analysis.[137] Most commonly, New York courts would allow employers within traditional professional sectors such as medicine to restrict an employee's ability to make use of a customer list following termination. In *BDO Seidman v. Hirshberg*, an employee challenged the enforceability of a non-compete that prohibited contact with any of the employer's clients.[138] The accounting firm seeking enforcement argued that as an employer within a professional field analogous to medicine, it had a legitimate business interest in its customer list that justified enforcement of the non-compete.[139] However, the court in *BDO* refused to extend the "doctrine of unique skills" to

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[135] *See id.* at 379-80 (discussing how courts balance the employer's and employee's interest under *Raimonde*).

[136] *See id.* at 380-81 (discussing whether courts applying Ohio non-compete law find that the public has an interest in the enforcement of reasonable non-competes).

[137] *See, e.g.*, Reed, Roberts & Assoc., Inc. v. Strauman, 353 N.E.2d 590, 593 (N.Y. 1976) (recognizing that an employer has a legitimate interest in "safeguarding that which has made his business successful" and that restrictive covenants "will be enforceable to the extent necessary to prevent the disclosure of trade secrets or confidential customer information."). In *Reed*, the New York Court of Appeals noted that employers are able to use non-competes to protect their interest in customer relationships from former employees "whose skills or services were unique or extraordinary." Garrison & Wendt, *supra* note 68, at 136.

[138] BDO Seidman v. Hirshberg, 712 N.E.2d 1220, 1222 (N.Y. 1999).

[139] *Id.* at 1226.

professions such as accounting. In holding that the employer could only protect its interest in customer relationships learned by the employee during the course of his employment,[140] the court issued a ruling which signals a shift back toward the more narrow common-law definition of a protectable employer interest.

Other jurisdictions are limiting the scope of enforceable non-competes by implementing procedural rules that effectively require courts to subject these provisions to a higher level of scrutiny than that of the standard reasonability analysis. More specifically, some courts are beginning to revisit the modern legal phenomenon known as the "blue pencil doctrine," under which a court is afforded the power to reform an overly broad non-compete that would otherwise be unenforceable. A primary example of this shift can be seen in Arizona, where in a recent decision the state Supreme Court "limited the power of courts to reform an overbroad non-compete agreement under the blue pencil doctrine, preferring to continue with the more restrictive common-law approach."[141] In limiting the court's ability to modify non-competes initially found to be overly broad, the Arizona Supreme Court noted the potential for abuse where a judge has free reign to modify a CNC in order to make it reasonable. A broad application of the blue pencil doctrine, the court said, could result in a standard under which employers "may create ominous covenants, knowing that if the words are challenged, courts will modify the agreement to make it enforceable.[142] In more recent opinions, courts in Idaho[143] and New Hampshire[144] have imposed similar limitations on reformation power; evidence that shifts toward the restrictive common-law approach may be becoming more commonplace.

As some jurisdictions are facilitating a shift toward a more "employee-friendly" standard through activity within the judiciary, in other states, legislatures have become the primary vehicle for change. A brief analysis of legislative activity reveals that in some states, legislatures are enacting (and courts are interpreting) statutes that limit an employer's ability to use non-competes in employment agreements. Nearly fifteen years ago, the Oklahoma legislature enacted a statute which has been coined by one author an "extremely restrictive employee noncompete statute."[145] Oklahoma Code Sections 219A and 219B work in combination to offer employers only one option should they desire to impose post-employment restrictions on an employee. While Section 219A imposes a general prohibition on non-competes,[146] Section 219B

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[140] *Id.*

[141] Garrison & Wendt, *supra* note 68, at 141 (referencing the Arizona Supreme Court's decision in *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1286 (Ariz. 1999); *see also* Varsity Gold v. Porzio, 45 P.3d 352, 359 (Ariz. Ct. App. 2002) (applying the limits on the court's reformation power first established in *Valley Medical*).

[142] *Valley Medical*, 982 P.2d at 1286.

[143] *See* Freiburger v. J-U-B Eng'rs, Inc., 111 P.3d 100, 109 (Idaho 2005).

[144] *See* Merrimack Valley Wood Prods., Inc. v. Near, 876 A.2d 757, 764-65 (N.H. 2005).

[145] Garrison & Wendt, *supra* note 68, at 145.

[146] 15 OKLA. STAT. § 219A (2001) (mandating that "a person who makes an agreement with an employer . . . not to compete with the employer after the employment relationship has been terminated, shall be permitted to engage in the same business as that conducted by the former employer or in a similar business as that conducted by the former employer as long as the former employee does not directly solicit the sale of goods, services or a combination of goods and services from the established customers of the former employer;" and that "[a]ny provision in a

permits contractual provisions that would prohibit a former employee from soliciting the employer's customers during the course of a new venture.[147] Read in combination, the only permissible post-employment restrictions in Oklahoma are specific non-solicitation clauses. Similar statutory limitations on the use of non-competes have been enacted in North Dakota, Louisiana, and California. Though the limitations contained in these statutes are not as rigid as Oklahoma's, courts in these states are narrowly interpreting the language of the laws and rejecting arguments for exceptions advanced by employers.[148]

As evidenced by the shifts outlined above, it is becoming clearer that a shift in thinking regarding the enforceability of non-competes is taking place in jurisdictions across the country. As courts and legislatures begin to change the way non-competes are scrutinized to better resemble the restrictive common-law approach, they are establishing a legal environment where employees are not as burdened by post-employment restrictions. While it may still be too early to determine whether a similar change to Ohio's standard would eliminate the confusion and unpredictability seen under the *Raimonde* standard, Ohio may be well suited to take note of (and try to emulate) these shifts in thinking.

3. Economic Benefit: A More Restrictive Analysis of Non-compete Enforceability Would Result In Increased Employee Mobility and Could Help to Promote Growth In New Economic Industries

In addition to the fact that many other states are working to establish more "employee-friendly" standards for determining when an employer is able to enforce a non-compete, Ohio could justify similar changes to its analysis by pointing to the potential economic benefit that could follow. There exists a plethora of economic and legal literature that attempts to analyze the connection between the standard of CNC enforceability and its effect on employee mobility. Defined generally, "employee mobility" is a measure of the ability for workers to move from one job to another. While the willingness of courts within a particular state to enforce post-employment restrictions has an obvious connection to overall employee mobility, some scholars are beginning to analyze the effects of high levels of worker mobility on the economic well being of certain regions. There is research to suggest that by increasing employee mobility within the state, Ohio could avail itself of a range of economic benefits that could facilitate a more rapid recovery.

One of the more well-known arguments as it relates to the connection between employee mobility and regional economic prosperity was advanced by Ronald Gilson, a law professor at Stanford and Columbia. Professor Gilson suggests that the rapid growth and wild success of Silicon Valley's technology sector can be traced to California's treatment of non-competes.[149] To illustrate his hypothesis, Gilson compares Silicon Valley to an area just outside of Boston known as the "Route 128

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contract between an employer and an employee in conflict with the provisions of this section shall be void and unenforceable.").

[147] 15 OKLA. STAT. § 219B (2001).

[148] Garrison & Wendt, *supra* note 68, at 146-47.

[149] *See generally* Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 578 (1999).

Corridor." Silicon Valley and the Route 128 Corridor are similarly situated, each having the resources and talent needed to develop a thriving hub for the tech industry. However, growth in Silicon Valley has far outpaced that of the Route 128 Corridor. Gilson maintains that this disparity in development can be explained primarily by the different treatment of CNCs under the legal schemes of each state.[150] Under California's standard for non-compete enforceability, it is "extremely unlikely that postemployment covenants not to compete will be enforced."[151] In Massachusetts, courts apply a version of the "reasonableness" analysis used in the majority of other states.[152] Gilson argues that because of the inability to use non-competes, California tech companies were able to adopt different growth strategies that Massachusetts firms were unable to visualize and ultimately implement.[153] These strategies would prove to play an essential role in the explosion of tech firms in California, and the strategies were made possible by California's general prohibition of post-employment restrictions.[154]

By shifting back toward a standard for determining the enforceability of non-competes that increases employee mobility, Ohio might open itself up to benefits that could positively impact sectors other than technology. In legal environments where employers are unable to readily enforce CNCs, labor resources are able to "freely flow to their highest and best use," innovation is rewarded, and new businesses "grow, flourish, and mutually benefit from innovative ideas."[155] Facilitating the free exchange of ideas through employee mobility is particularly important in fast-paced industries such as technology, biotechnology, and energy. In these "modern" sectors, many types of highly technical information are only valuable for one year, maybe two.[156] By limiting an employee's mobility for even one year following the termination of an employment relationship, employers are potentially stifling innovation within their particular industry. While Ohio does have an interest in protecting the legitimate competitive interests of entities doing business within the state (particularly in newer industries), this protection is possible without the strict enforcement of non-competes.[157] If Ohio can increase employee mobility by implementing a more "employee-friendly" standard for analyzing non-competes, it would be taking a

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[150] *Id.* at 613.

[151] *Id.* at 608.

[152] *Id.* at 604.

[153] *Id.* at 608-09.

[154] *Id.*

[155] Malynn, *supra* note 102, at 45 (citing Gilson, *supra* note 149, at 603-09); *see also* Mark A. Glick et al., *The Law and Economics of Post Employment Covenants: A Unified Framework*, 11 GEO. MASON L. REV. 357, 403 (2002) (noting that "[i]nnovation is perhaps the competitive motivator for technologically based economies, and restraints on the mobility of the innovators may stifle innovation and therefore competition.").

[156] Gilson, *supra* note 149, at 603 ("Given the speed of innovation and the corresponding telescoping of product life cycles, knowledge more than a year or two old likely no longer has significant competitive value.").

[157] *Id.* at 610. (analyzing Alan Hyde's argument that the rapid growth of the Silicon Valley can be attributed to California's system for protecting trade secrets).

significant step toward creating an environment conducive to growth in new industries.

Gilson's theory that less stringent non-compete enforcement eventually leads to a better environment for economic growth through increased employee mobility has been verified empirically. In a Harvard Business School study, three professors analyzed growth in Michigan's technology industry during two different time periods.[158] More specifically, the study sets out to analyze "whether there is a 'brain drain' of talented engineers and scientists who leave states that allow non-competes and move to states that don't." Prior to 1985, Michigan courts analyzing CNCs were required to do so within the boundaries of a statutory scheme similar to the one currently in effect in California. In 1985, the Michigan legislature brought the state's policy on non-competes into line with the majority of states who adopted a permissive analysis of the provisions by passing the Michigan Antitrust Reform Act.[159] Under the act, which repealed an antiquated statute that contained a general prohibition on the use of non-competes, employers were free to make use of the once presumptively invalid post-employment restrictions in employment agreements.[160] In analyzing the ten years leading up to and following the legalization of non-competes in Michigan, the Harvard professors found a connection between the enforceability of CNCs and the rate at which talented professionals were taking their expertise elsewhere. As a result of the new legislation, Michigan's "rate of emigration" increased to a level nearly five times that of the previous scheme.[161] During the same time period, the rate of emigration in states where non-competes are unenforceable slightly decreased.[162] Additionally, the study found that those leaving Michigan during the time period were more likely to move to those states where employee mobility was far less limited.[163]

In addition to fostering an economic environment that creates opportunity for newer industry, a re-examination of Ohio's non-compete standards could make it more likely that talented employees continue to contribute to the state for a longer period of time. With these possible benefits on the table, Ohio would be more than justified in at least contemplating a shift back toward the common-law restrictive doctrine of CNC enforceability. In the wake of the 2008 economic downturn, it is clear that Ohio's economy needs to continue to change and remain versatile in order to keep up with the national pace of recovery. As the state continues to improve its business environment by attempting to foster growth in emerging industries, contemplating

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[158] Carmen Nobel, *Non-competes Push Talent Away*, HARVARD BUSINESS SCHOOL: WORKING KNOWLEDGE (July 11, 2011), http://hbswk.hbs.edu/item/6759.html (discussing Matt Marx et al., *Noncompetes and Inventor Mobility: Specialists, Stars and the Michigan Experiment*, HARVARD BUSINESS SCHOOL DEPARTMENT OF RESEARCH (Jan. 17, 2007), *available at* http://www.hbs.edu/faculty/Publication%20Files/07-042.pdf).

[159] *Id.*

[160] *Id.*

[161] *Id.* ("The paper explains that from 1975 to 1996 – the period surrounding the 1985 policy reversal – the rate of emigration grew in Michigan (0.24% to 1.18%).").

[162] *Id.*

[163] *Id.*

changes to its non-compete standard could be a reform that helps to complete the turnaround beginning to accelerate across the state.[164]

4. Other Public Policy Justifications

In addition to the problems with Ohio's current standard, the emerging national trends relating to treatment of non-competes, and the potential for economic benefit under a new analysis, there are public policy arguments that support a change in Ohio. One policy justification, often overlooked in the CNC discussion, is that CNCs are no longer suited to protect the interests of the parties to the modern employer-employee relationship. While employers had heavy interest in using non-competes in a traditional manufacturing-based economy, the nature of the typical employment relationship has changed in ways that make the use of non-competes seem counterintuitive. Prior to the information revolution of the 1980s, employers and employees forming new relationships were primarily concerned with longevity and consistency.[165] Employers wanted their employees to remain with the company for an extended period of time, and employees sought commitment, the ability to grow within the structure of the firm, and job security. As a result, both parties would enter into new employment relationships with a mutual understanding that the employer would provide this stability in exchange for employee-loyalty. To better facilitate this exchange, firms would commonly invest in their employees through training and development programs that provided an incentive for the employee to continue working for the company.

However, the nature of the typical employment relationship has drastically shifted as our economy has moved into the "Information Age" and is now far more dependent on fast paced industries. As opposed to longevity and stability, this new relationship between firm and worker can be characterized as a highly mobile one, with limited security and a lower expectation of long-term loyalty.[166] In addition to changes in the interactions and expectations of parties to an employment relationship, companies in this modern economy are changing the way they do business. These changes – such as increased flexibility in strategy, downsizing, and cost-cutting – reflect modern firms' desire to remain as competitive as possible to ensure long term viability.[167] As

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[164] Jackie Borchardt, *New business filings in Ohio increased for fifth year in a row*, THE PLAIN DEALER, Jan. 15, 2015, http://www.cleveland.com/open/index.ssf/2015/01/new_business_filings_in_ohio_i_1.html#incart_river ("New business filings increased in 2014 for the fifth year in a row" according to the Ohio Secretary of State's office); Joe Bargmann, *Medicine, Manufacturers, and Furniture-Makers Turned Cleveland Into an Innovation Hub*, POPULAR MECHANICS, Jan. 2015, http://www.popularmechanics.com/technology/gadgets/news/cleveland-startup-city-framework-furniture-makers-17612064 (analyzing Cleveland's growth in small manufacturing and medical and biotech hardware and software).

[165] Katherine V.W. Stone, *Knowledge at Work: Disputes Over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721, 725 (2002) (noting that to promote longevity in an employment relationship, "[o]ur labor and employment laws have been constructed on the basis of a view of the employment relationship that saw the employment relationship as a long-term relationship between a firm and an employee in which the employer gave the worker an implicit promise of lifetime job security and opportunities for promotion along clearly-defined job ladders.").

[166] *Id.* at 762; Garrison & Wendt, *supra* note 68, at 166.

[167] Garrison & Wendt, *supra* note 68, at 166.

a result, the stability of the traditional employment relationship has become a relic of the past and employees are adapting to an environment where employee mobility is not only common but also necessary. One of the long-standing justifications for the enforcement of non-competes is that these provisions allow employers to protect their investment in employees.[168] However, the utility of strict enforcement of CNCs as applied to today's uncertain employment relationship seems limited given employers' lack of interest in promoting longevity through investment in employees.

B. Proposed Solution: Ohio Should Implement a Non-compete Analysis that Creates a Rebuttable Presumption of Unenforceability

To recap, the basic theory of this Note is such: less stringent enforcement of non-competes contained in employment agreements would lead to increased employee mobility, which in turn would create more fertile ground in Ohio for economic growth in emerging sectors that will be necessary for a complete economic recovery. Given the problems with the *Raimonde* standard and Ohio's need to capitalize on any possibility for economic growth, a re-analysis of judicial treatment of CNCs seems more than justified. Accordingly, there are several methods by which the state of Ohio could facilitate a change in thinking with regard to use and enforcement of these restrictive covenants that would bring its standard in line with the more employee-friendly courts of other states. Ohio courts could start by implementing a refined analysis of non-compete enforceability. In mirroring changes made in other jurisdictions, such as narrowly defining the list of "protectable employer interests" and limiting reformation power, Ohio courts would find that some non-competes sufficient under the *Raimonde* standard would no longer be enforceable.

A second possible change could come from the state legislature. By enacting a statute that requires courts to treat CNCs within a statutory framework, courts would have guidance that could eliminate confusion and unpredictability. The legislature of course could take more drastic measures by mandating that all non-competes are *per se* unenforceable, similar to the schemes in effect in California and North Dakota. The third and most practical option, and the suggestion advocated for by this Note, consists of a combination of judicial and legislative action. By implementing legislation that would effectively spell out the enforceability analysis to be used by courts, and allowing courts to interpret and develop this legislation as cases are litigated, Ohio can effectively modify the *Raimonde* analysis in hopes of moving toward a more permissive non-compete standard.

1. Potential Solutions

a. Purely Court Facilitated

Ohio courts could take matters into their own hands and resolve to change their overall stance by declining to extend *Raimonde* and instead apply a new judicially-created analysis. Through this change in thinking, Ohio courts could use other precedent (taking the lead of other jurisdictions who have already affected similar changes) to implement a more "employee-friendly" standard of enforceability to increase employee mobility. As a starting point, Ohio courts at various levels would need to clear up the current confusion surrounding *Raimonde* by overruling the

[168] *See generally* Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93 (1981) (claiming that employers need not competes to protect their interest in "human capital" that they have invested in and developed over time).

opinion or clarifying the seemingly two separate standards that were announced in 1975. The extent to which the court could choose to change the standard would be entirely dependent on its ability to work within the grove of *Raimonde* precedent. While this would be a tall task, clarifying the relationship between the three-part analysis and "reasonability" factors would seem like a logical place to begin. A clarifying opinion would eliminate many of the inconsistencies in CNC litigation and would make it far easier for parties to these restrictive clauses to accurately predict the extent to which they would be enforceable in the event of litigation.[169]

In handing down this clarifying opinion, the Ohio Supreme Court could change the *Raimonde* analysis by holding that the list of "reasonability" factors should be treated by lower courts as an elaboration of the initial three-step analysis. Recall that Ohio courts treat these eight factors either as part of the overall reasonableness inquiry or as support for modifying a CNC that is unreasonable by its terms. By explicitly requiring lower courts to apply these factors as part of their initial three-part inquiry, employees would be given a better opportunity to make an argument as to why the non-compete is unreasonable at the critical first juncture, as opposed to after the fact. Employees would be allowed to make use of the "reasonableness" factors in every non-compete inquiry rather than under the current interpretation of *Raimonde* that makes limited use of this broad range of factors.[170]

Treating the "reasonableness factors" as an elaboration of the three-step *Raimonde* analysis would result in a more employee-friendly analysis. There are some Ohio jurisdictions which are already analyzing CNCs under this slightly different standard, and in those courts an employer's ability to enforce restrictive covenants seems to be far more limited. *HCCT Inc., v. Walters* provides an illustrative example of how a court would apply the *Raimonde* reasonableness factors as part of the overall reasonability analysis, instead of independently or in the context of reformation.[171] The appellate court in *HCCT* affirmed a trial court ruling that a non-compete between a hair stylist and her former employer was unenforceable under *Raimonde*.[172] In reviewing the lower court decision, the court read the *Raimonde* opinion to require the

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[169] Increased predictability would potentially benefit an employee deciding whether entering into a non-compete would be in his or her best interest by effectively increasing the bargaining power during the employment negotiation process. If an employee is able to make an educated decision in negotiating the terms of the employment and any restrictive covenant, the likelihood that he or she will simply sign the agreement for fear of missing out on a job opportunity would decrease. A more predictable standard will allow an employee in the midst of negotiation to better analyze the CNC and make a more informed decision. Increased predictability would also benefit employers, attorneys, and judges, as a higher level of certainty would ultimately save time and money in the event of litigation.

[170] In considering the "reasonableness" factors as a part of the overall enforceability analysis, Ohio courts could be forced to consider these factors when analyzing every dispute over a non-compete. In courts where judges are unsure of the proper role of the eight factors, they play a limited role in the initial three-step *Raimonde* inquiry. While an employee seeking to avoid enforcement is free to use these factors in arguing that the non-compete is unreasonable, a court will not consider them independently and instead will consider them within the framework of the three larger questions. As a result, employees seeking to stress one of the secondary factors in arguing unenforceability seem to face a more challenging task.

[171] HCCT, Inc. v. Walters, 651 N.E.2d 25, 27 (Ohio Ct. App. 1994).

[172] *Id.*

court to consider the "reasonableness" factors "in determining the 'reasonableness' of employee covenants."[173] The court then conducted an analysis of each of the eight factors under the overall three-step reasonableness inquiry. While it found that some of the factors supported enforcement of the provision, the court based its ultimate determination on the fact that three of the eight factors weighed in favor of the employee.[174] The *HCCT* court seemed to use the eight factors in its analysis of the first three questions of the "reasonableness" analysis, as opposed to deploying them after determining whether the restriction was reasonable on its face. In looking at the reasoning of this court and others across the state who have taken the same approach, it becomes increasingly clear that incorporating the "reasonableness" factors into the initial inquiry results in the court applying a standard where a finding of enforceability becomes less likely.[175]

In addition to clarifying the *Raimonde* analysis, Ohio courts could follow the lead of other jurisdictions in taking steps to refine Ohio's standard in a way that results in more scrutiny for non-competes. As discussed, courts across the country are beginning to make small changes by issuing rulings under the "reasonableness" analysis that signal a shift back toward a more restrictive approach to CNCs. Recall that these basic shifts include limiting the interests that a business can legitimately seek to protect through use of a non-compete, restricting the permissible scope of CNCs, and limiting judicial reform power. Currently, Ohio courts seem to be engaged in a continuous expansion of the list of "legitimate interests" protectable under non-competes.[176] By narrowing their definition of a protectable employer interest, taking the lead of states

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[173] *Id.*

[174] *Id.* ("This court agrees with the trial court that (1) the covenants seek to eliminate mere ordinary competition, not unfair competition; (2) the benefit to the employer is disproportional to the detriment of the employee; and (3) in view of appellant's weak interests in enforcing the covenant, the contract is unreasonable and unenforceable.").

[175] *See, e.g.*, Mark Philips Salon/Spa v. Blessing, No. 23875, 2011 WL 332755 (Ohio Ct. App. 2011) (holding a non-compete to be unenforceable while noting that "[a] court determining the enforceability of a covenant not to compete must analyze 'whether the covenant seeks to eliminate competition which would be unfair to the employer or merely seeks to eliminate ordinary competition.'"); Moda Hair Designs, Inc. v. Dechert, No. 2005CA00192, 2006 WL 337373 (Ohio Ct. App. 2006) (analyzing "the trial court's assessment in light of the enumerated factors set forth in *Raimonde*" and finding that after weighing the factors, the non-compete provision was not enforceable); Busch v. Premier Integrated Med. Assoc., Ltd., No. 19364, 2003 WL 22060392 (Ohio Ct. App. 2003) (holding a non-compete to be unenforceable after noting that "[a]mong the factors that *Raimonde* identified as relevant to this inquiry is 'whether the covenant seeks to eliminate competition which would be unfair to the employer or merely seeks to eliminate ordinary competition.'"). *But see, e.g.*, Hilb, Rogal & Hamilton Agency of Dayton, Inc. v. Reynolds, 610 N.E.2d 1102 (Ohio Ct. App. 1992).

[176] *See, e.g.*, Owusu v. Hope Cancer Ctr. of Northwest Ohio, Inc., No. 19364, 2011 WL 3890516 (Ohio Ct. App. 2011) (holding that an employer had a legitimate interest in protecting physician referral connections, citing the Sixth District Court of Appeals in *Wall v. Firelands Radiology, Inc.*, 666 N.E.2d 235 (Ohio Ct. App. 1995)); Life Line Screening of Am., Ltd. v. Calger, 881 N.E.2d 932 (Ohio Ct. C.P. 2006) (holding that the employer had protectable interests in its testing protocols, technician training methods, and marketing strategies); Brentlinger Enterprises v. Curran, 752 N.E.2d 994 (Ohio Ct. App. 2001) (holding that an employer had a legitimate business interest in retaining relationships with existing customers); Rogers v. Runfola & Assocs., Inc., 565 N.E.2d 540 (Ohio 1991).

where these changes have already occurred,[177] Ohio courts could begin to limit circumstances under which an employer could readily enforce a non-compete. As it relates to the issues posed by judicial reformation power, Ohio's remedy might lie in establishing that the reasonableness factors are to be part of the initial reasonability inquiry, and should not be used to support a finding that a CNC warrants modification.[178] To limit reformation power further, Ohio courts could pull in the reigns on this authority in a manner similar to that which has occurred in states like Arizona by establishing a firm list of circumstances where reformation is permitted.

b. Legislative Overhaul

Given the Supreme Court's apparent desire to avoid revisiting or altering *Raimonde*, a more effective route for change may be found in the Ohio legislature. By enacting legislation that expressly prohibits or severely limits the enforceability of non-competes, Ohio lawmakers could play their part in effectuating a shift back toward a more restrictive enforceability analysis.

The first legislative option would be Ohio's enactment of a statutory scheme that is identical or very similar to Section 16600 of the California Business Code.[179] This statute could contain a flat prohibition on the use and enforcement of non-competes or limit their utility by narrowly defining circumstances in which a restrictive covenant is enforceable. Whether highly restrictive or slightly less permissive than the *Raimonde* standard, a statute would be beneficial if drafted in a way that increases employee mobility while reducing the confusion under the reasonableness analysis. It would still be up to the Ohio courts to interpret and apply the statute, which creates room for flexibility if needed due to further unforeseen changes to the economy. While a statute with a general prohibition on non-competes would undoubtedly help to maximize employee mobility, there are legitimate concerns regarding employers' ability to protect proprietary information learned by employees. As a supplement to the non-compete statutes, Ohio would be wise to revisit its trade secrets protection scheme. Employers may see less of an incentive to use non-competes if their intellectual property is adequately protected.[180] A wholesale legislative change to a California-like scheme would require a large amount of political capital, and given the current political climate, would be highly unlikely.

A second, less drastic option for legislative change would be Ohio's adoption of a statutory scheme similar to that currently in effect in Colorado. A statute that places firm limits on non-compete enforcement but does not impose an outright ban on the clauses might be more attractive than the "all or nothing approach" of California. Under the Colorado restricted enforcement statute, one is guilty of a misdemeanor

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[177] *See* BDO Seidman v. Hirshberg, 712 N.E.2d 1220, 1226 (N.Y. 1999); Frieburger v. J-U-B Engineers, Inc., 111 P.3d 100, 105 (Idaho 2005) (holding that an employer had a narrow protectable interest in "customer relationships its former employee established and nurtured while employed with the former employer.").

[178] Ohio courts have already recognized that reformation of an unreasonable non-compete is not mandatory. Graphics v. Lake-Perry, No. 70696, 1997 WL 35568 (Ohio Ct. App. 1997).

[179] *See* CAL. BUS. & PROF. CODE §16600.

[180] For example, employers who use non-competes for the primary purpose of protecting company information could simply rely on the statutory scheme and avoid using restrictive covenants.

penalty if they are found to have entered into a non-compete.[181] The statute goes on to outline four, narrowly and specifically defined exceptions for situations where the general prohibition is not applicable. The exceptions include situations where use of the non-compete relates to: the purchase or sale of a business or business assets;[182] trade secret protection; recovery of training expenses for employees of less than a two-year tenure; and (4) executive or management employees and their professional staff.[183] By imposing a general prohibition with well-defined exceptions, the Colorado legislature has taken much of the guess-work out of the judicial non-compete analysis. The general prohibition promotes the employee's interest in mobility and the exceptions protect certain employer interests that are pre-defined as "legitimate", while the statute as a whole promotes the general public policy of the state as defined by elected representatives. As one commentator notes, the Colorado scheme "strikes the necessary balance between providing a clear rule that addresses both policy and predictability concerns and acknowledging the need for the enforcement of covenants not to compete in certain situations."[184]

c. Combination

Should Ohio choose to rethink its approach to the enforceability of non-competes, its most attractive option would be implementing a solution that combines the alternatives discussed above. By advocating for and eventually passing legislation that would create a more well-defined standard for enforcement, Ohio could move out of the *Raimonde* era and provide a more-employee friendly environment to promote growth in emerging industries. The proposed statutory scheme, which is discussed below, would create a statutory framework within which courts analyzing CNCs would be required to operate. The statute would leave some room for judicial application and interpretation and avoid an overly formalistic or mechanical analysis. By leaving certain aspects of the analysis up to the discretion of those trained in the law, the standard would remain flexible enough to change as the economy evolves and public policy embraces new values.

2. The New Standard: A Rebuttable Presumption of Unenforceability

Through a new legislative scheme and judicial interpretation and application, Ohio can create a standard under which non-competes contained in employment agreements are *per se* unenforceable. Creating a presumption of unenforceability would help to shift Ohio's standard back toward the more restrictive common-law approach and would mirror the judicial analysis used when non-competes first appeared. This presumption would take the form of a rebuttable presumption, a concept most easily illustrated using a common tort law example. In tort, a violation of a particular statute

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[181] COLO. REV. STAT. §§8-2-113 – 115 (2014).

[182] In fact, Ohio courts already seem to carve out a similar exception when analyzing non-competes in the context of the sale of a business. Ohio courts generally view these clauses with a lower level of scrutiny that a CNC contained in an employment agreement. *See* Century Business Servs., Inc. v. Urban, 900 N.E.2d 1048 (Ohio Ct. App. 2008).

[183] *Id.*

[184] Christine M. O'Malley, *Covenants Not to Compete in the Massachusetts Hi-Tech Industry: Assessing the Need for a Legislative Solution*, 79 B.U. L. REV. 1215, 1233 (1999) (arguing that Massachusetts should adopt a statute similarly modeling Colorado's scheme).

creates a rebuttable presumption of negligence on the part of the defendant.[185] The defendant is able to overcome this presumption by making a showing to the court that the violation of the statute is excusable and should not be considered "negligent" under the particular set of circumstances when the alleged tort occurred. My proposed standard for non-compete enforceability would mirror this basic tort law principle. The proposed statute would borrow from Colorado in that it would establish a set of narrow, well-defined circumstances under which an employer could rebut the presumption of unenforceability. The statute would also afford an employer the opportunity to rebut the presumption by showing that although one of the defined exceptions does not apply, the circumstances surrounding the non-compete justify its enforcement.

To briefly summarize, under my proposed standard a CNC would be *per se* illegal. An employer however, would be able to rebut the presumption of unenforceability by showing that a statutory exception exists or that "reasonableness factors" weigh in favor of enforcement. The main aspect and "teeth" of my proposed statutory scheme would be the presumption of unenforceability. As noted, the statutory language would effectively work to make any post-employment restrictive covenant that is used in an employment agreement *per se unenforceable*. Like the analysis deployed by California courts, Ohio courts would be required to analyze non-competes with a high level of initial skepticism. Unlike in California, however, this presumption would be rebuttable under the statute. Thus the initial burden is placed on the employer under all circumstances to make a showing to the court as to why the court should enforce the non-compete under the circumstances of the particular action. In not requiring an employee to make a showing that the provision is *un*reasonable, courts operating under this standard would provide employees with somewhat of a "head start" should a non-compete dispute evolve into litigation.

In recognizing that non-competition clauses are still valuable to employers for the protection of certain interests (such as trade secrets), there will be a variety of ways in which an employer could make a showing sufficient to rebut the presumption. An employer could rebut this presumption by demonstrating exceptional circumstances that motivated the use of the non-compete and justify its enforcement. These circumstances would include restrictions used in the context of the sale or transfer of businesses, or for restrictions in place primarily to protect intellectual property or trade secrets. If an employer can show, by a preponderance of the evidence, that one of these exceptions exists, a court will have the power to mandate enforcement of the CNC. In addition to the listed exceptions within the statute that will essentially result in an automatic rebuttal of the unenforceability presumption, the statutory scheme will also provide a list of other factors to be considered by a reviewing court. These other factors, which would mirror the reasonableness factors announced in *Raimonde*, would in practice be used in combination by an employer to rebut the presumption.

The latter portion of the statute would operate as follows in the context of a non-compete contained in an employment agreement. A non-compete that an employer is attempting to enforce following the termination of an employment agreement would be unenforceable by its terms. The employer would then make a showing to the court that the *Raimonde* "reasonableness" factors weigh in favor of the employer and that the enforcement of the restriction would be reasonable. The employer could show, for

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[185] *See generally* "PRIMA FACIE" NEGLIGENCE AND NEGLIGENCE "PER SE," 70 OHIO JUR.3D *Negligence* §4 (outlining the basic principles of negligence per se).

example, that the non-compete does not limit ordinary competition and that the employee possesses confidential company information at risk of misuse for the benefit of a third party. The court would then analyze the remainder of the factors and make an ultimate determination regarding whether the presumption is overcome. The court would be required to give equal weight to each factor, essentially resulting in an equal balancing of employer and employee interests. Furthermore, the court could use existing *Raimonde* precedent for instruction on whether certain facts tip a particular factor in favor of the employer or employee. Overall, the standard would result in more predictability and less confusion, as employers, employees and attorneys would be clear on which factors would be used by the court in its determination. Instead of simply determining whether a non-compete in an employment agreement is "reasonable," courts will instead be tasked with determining whether the clause is structured in a way and used under circumstances that overcomes the presumption of unenforceability.

IV. CONCLUSION

While the field of non-compete litigation is muddled and unpredictable in Ohio, the state would go a long way in at least considering a shift in thinking. By considering the arguments and alternatives presented above, Ohio could rework its CNC standard in a way that would maximize the potential for employee mobility and economic growth. The shifts taking place in Ohio's economic climate and the onset of growth in emerging industries such as technology, healthcare, and energy show that Ohio might be on the cusp of unparalleled economic development. The need to continue growth in these sectors and keep pace with economic development in other regions alone is sufficient justification for a contemplation of change. Creating a more "employee-friendly" standard and increasing employee mobility is one proactive step that our state can take to make sure that we are not left behind when the book is closed on the 2008 financial crisis. While other economic development is undoubtedly necessary to ensure a full recovery, increasing employee mobility and creating a more attractive environment for new businesses is certainly a start.