PROTECTING EMPLOYER INVESTMENT IN TRAINING: NONCOMPETES VS. REPAYMENT AGREEMENTS

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INTRODUCTION

In an economy with more and more opportunities for workers who possess sophisticated skills and technical aptitude, American companies must fight to recruit, train, and retain the market's most talented employees.[1] Saddled with the challenge of competing for top talent, employers frequently use noncompetition clauses ("noncompetes")[2] in employment agreements to guard against employee defections. These clauses have become increasingly popular in recent decades and have been the subject of considerable controversy and debate. At this debate's core is often the question of what specific employer interests should noncompetes protect. In response to shifting market conditions that affect employer–employee relationships,[3] states continually reevaluate the degree to which they choose to uphold these noncompetes.[4]

To take an example, Louisiana has recently re-assessed which employer interests should be "protectable." Historically, Louisiana law rejected all contracts restraining anyone "from exercising a lawful profession, trade or business of any kind,"[5] but made an exception for agreements by an employee "to refrain from carrying on or engaging in" a business in competition with his employer (i.e., noncompetes).[6]

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1. *See* PETER CAPPELLI, THE NEW DEAL AT WORK 1–16 (1999) (discussing economic factors driving change in employer–employee relations).

2. Traditionally, noncompete agreements restricted an employee from competing with an employer within a specified geographic region and for a finite term after the employment period ended. *See generally* Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960) (defining noncompetition agreements and tracing the legal enforceability of noncompetes throughout English and American law).

3. *See infra notes* 33–43 and accompanying text.

4. *See infra* Part II.B.

5. LA. REV. STAT. ANN. § 23:921(A)(1) (West 2003).

6. *Id.* § 23:921(C).

In 2001, in its controversial *Swat 24*[7] decision, the Louisiana Supreme Court interpreted this exception narrowly, holding that a noncompete will be unenforceable if it restricts an employee from working for a business competitor.[8] In contrast, the court agreed to uphold noncompetes that prevent an employee from starting his own business.[9] Thus, under *Swat 24*, companies could not restrict an employee from working for an existing competitor but could prevent an employee from opening a shop across the street.[10] This ruling left Louisiana employers with much less protection against their loss of investment in employees. In dissent, Justice Chet Traylor mentioned this concern, arguing that without broader enforcement of noncompetes "employers can not [sic] afford to invest optimally in product development or in their employees."[11]

In reaction to this holding, the Louisiana legislature statutorily overruled *Swat 24* in June 2003. To do so, it enacted a provision that permitted enforceability of noncompetes against employees who are "employed by a competing business, regardless of whether or not that person is an owner or equity interest holder of that competing business . . . ."[12] In other words, the enforceability of noncompetes was expanded to allow restrictions both from working as an employee of a competing business and from opening one's own business.[13]

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7. Swat 24 Shreveport Bossier, Inc. v. Bond, 808 So.2d 294 (La. 2001).

8. *See* Jennifer A. Faroldi, *What's Still Brewing in the 2003 Legislative Session?*, LA. EMP. L. LETTER, June 2003, at 4 ("[Y]ou currently can't prevent former employees from working for a competing business.").

9. *Swat 24*, 808 So.2d at 296. The facts of the case are fairly straightforward. The employee had been promoted by the employer, a construction company, to the position of production manager, a status that required him to sign a noncompete agreement. The noncompete agreement had stipulated that the employee would not "serve as an officer, employee, director, agent or consultant of any business, which is in direct or indirect competition with" the employer. *Id.* at 296–97. In striking down this contract, the court examined the legislative records behind section 23:921 and concluded that the statute's legislative intent demanded that the exception in subsection (C) only applied to employees who establish their own competing businesses, not to employees who chose to work for already-existing competitors. *Id.* at 302–07.

10. *Id.*

11. *Id.* at 313 (Traylor, J., dissenting).

12. 2003 La. Sess. Law Serv. 428 (West).

13. This tension between the legislature and the courts is common in the area of noncompete law. In the late 1980s and early 1990s, the state of Texas endured a similar conflict. The Texas Supreme Court had interpreted the state's noncompete statute narrowly, refusing to enforce noncompetes against at-will employees. The Texas legislature followed this decision with a law specifically including at-will employees under the purview of the noncompete statute. For a detailed description of this conflict, see Katherine V.W. Stone, *Knowledge at Work:*

In the Louisiana House of Representatives debates regarding this provision, a number of arguments were made in support of the bill.[14] House Representative Jack Smith justified broader enforceability of noncompetes by cautioning against the risk of an unrestricted employee sharing trade secrets and customer lists.[15] A number of representatives also expressed concern that employer investment in employee training might be squandered if companies could not enforce noncompetes.[16] Thus, they argued, Louisiana law should be expanded to allow businesses to protect investment in employee training through the enforcement of noncompete agreements.[17] This desire to protect employer investment in training marks a considerable departure from the current law in many states.[18]

Louisiana is correct in recognizing the importance of protecting an employer's investment in training. Yet, this Note argues that using a per se enforceability standard for traditional noncompetes to effect this goal limits employees' post-employment job prospects disproportionately compared to what employers need to protect their training investment. In contrast to traditional noncompetes, repayment agreements offer a sensible alternative whereby an employer's level of protection moves in lockstep with the cost of, and value derived from, the training. That is, repayment agreements more closely approximate the degree of protection required to encourage employer investment in training.

Part I of this Note discusses the increased importance of training investment in today's workforce and the need for judicial protection of that investment. Part II traces both the policy arguments supporting and condemning noncompetition agreements and the tests courts commonly use to evaluate enforceability. Part III.A analyzes training investment in the context of traditional noncompete

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Disputes over the Ownership of Human Capital in the Changing Workplace, 34 CONN. L. REV. 721, 744–46 (2002).

14. La. House Chamber Proceedings Day 20, Discussion of House Bill 1770 (May 7, 2003) (statement of Rep. Jack Smith), *available at* http://house.louisiana.gov/rmarchive/2003/May2003.htm.

15. *Id.*

16. *Id.*

17. *See id.* ("Look at the company. They're going to make an investment in that individual, they're going to give him an education, they're going to train him . . . and all they want in return is 'don't compete against me for two years' . . . . I think it's a fair trade.").

18. *See infra* Part III.A.

agreements, and Part III.B argues that repayment agreements are a more sensible alternative to traditional noncompetes.

I. TRAINING INVESTMENT IN TODAY'S ECONOMY

In the American workplace, investment in training is essential if businesses hope to keep pace with competition. According to Department of Labor research on the changing dynamics of the U.S. job market,[19] technological improvements continue to transform the American workplace in dramatic fashion.[20] Employers are constantly looking for more efficient ways to manage their businesses as technology and speed become critical to business success.[21] As a result, companies demand employees that are equipped to contribute meaningfully in a fast-paced business setting.[22] With technological innovation accelerating in the twenty-first century, jobs will require more sophisticated workers; "[t]he demand for 'knowledge' workers across a wide spectrum of occupations is forecasted to increase."[23] Economic innovation will affect all jobs; certain technology-related jobs, namely computer software and support specialists, network systems analysts, and database administrators, will become more abundant during the twenty-first century and will be especially affected.[24]

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19. *See generally* U.S. Dep't of Labor, Strategic Plan FY 2003–FY 2008 (2003) [hereinafter U.S. Dep't of Labor Plan] (describing the changing American workforce and the Department's goals for improving labor conditions), *available at* http://www.dol.gov/_sec/ stratplan/main.htm.

20. *See* U.S. Dep't of Labor, Report on the American Workforce 5 (2001) [hereinafter U.S. Dep't of Labor Report] (describing the twentieth-century innovations that have transformed the American workplace, including "[c]ommunication devices, measuring devices, computer controlled equipment, [and] the x-ray"), *available at* http://www.bls.gov/opub/rtaw/ rtawhome.htm.

21. *Id.*

22. *See id.* at 6 (providing that men and women with college degrees earn almost two-thirds percent more than those with only high school degrees). This study also reports that in the year 2000 the unemployment rate for individuals with only a high school degree approached 4 percent, whereas the rate for college graduates approximated only 1.5 percent. *Id.* at 193.

23. U.S. Dep't of Labor Plan, *supra* note 19, at 3; *see also* U.S. Dep't of Labor Report, *supra* note 20, at 3 ("Over the course of the 20th century, the composition of the labor force shifted from industries dominated by primary production occupations, such as farmers and foresters, to those dominated by professional, technical, and service workers.").

24. U.S. Dep't of Labor Plan, *supra* note 19, at 4.

Just as the need for technology-savvy employees grows, so does the need for formal job training.[25] Few would deny that the twentieth century saw "[e]ducation play[] an important role in the advancement of the individual worker, the workforce, and the economy."[26] Employees rely on training opportunities as incentives for choosing a particular line of work or a particular employer.[27] According to one study, 30 percent of those surveyed claimed that training opportunities were an "extremely important" factor in choosing their careers.[28] Likewise, many large professional services firms advertise their training opportunities to help recruit top talent.[29] Just by visiting a company's Web site, one can discover the vast array of educational courses available to its employees. One law firm, King & Spalding, boasts "K&S University," a formal educational curriculum designed to offer attorneys professional development opportunities at all stages of their careers.[30] Broadly speaking, employees recognize that education leads to marketability, marketability leads to professional advancement, and professional advancement leads to personal satisfaction.

With training becoming a necessity for anyone looking to succeed in today's workforce, how does one become trained? More specifically, who should pay for this training? Obviously, formal education plays a major role in helping individuals develop skills that

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25. *See id.* at 3 ("Increasingly, the majority of jobs will need workers who have acquired knowledge and skills via two-year colleges, vocational training, moderate to long-term on-the-job training, and real world experience.").

26. U.S. Dep't of Labor Report, *supra* note 20, at 6. *See also* U.S. Dep't of Labor Plan, *supra* note 19, at 41 ("Knowledge workers now account for a third of the American workforce, outnumbering factory workers by two to one.").

27. *See* Stone, *supra* note 13, at 722 ("Employees see the growth of their human capital and the enhancement of their labor market opportunities as one of the benefits of the job. Jobs are often evaluated and selected on the basis of whether and how much opportunity for learning and skill enhancement are provided.").

28. CAPPELLI, *supra* note 1, at 24. The same study found that 47 percent of workers characterize their interest in professional development as "important." *Id.*

29. Many company Web sites, and especially those of professional service firms, tout their emphasis on employee training to help attract talented workers. *See, e.g.*, AIG, Career Development, *at* http://www.aig.com/careers/about_dev_frameset.htm (last visited June 19, 2005) (on file with the *Duke Law Journal*); Bank of America, Team Bank of America, *at* http://www.bankofamerica.com/teambank/index.cfm?template=tb_leaddev (last visited June 19, 2005) (on file with the *Duke Law Journal*); McKinsey & Company, Broaden Your Career Options, *at* http://www.mckinsey.com/aboutus/careers/undergraduates/broadencareeroptions/index.asp (last visited June 19, 2005) (on file with the *Duke Law Journal*).

30. King & Spalding LLP, K&S University, *at* http://www.kslaw.com/training/training.asp (last visited June 19, 2005) (on file with the *Duke Law Journal*).

will translate into success throughout their careers. Universities, community colleges, and vocational schools, all typically paid for by the employee/worker, provide a foundation of necessary occupational competencies. Government programs also help support the cultivation of the American workforce.[31] Welfare programs and subsidies created through legislation such as the Workforce Investment Act[32] allocate government dollars to assist primarily low-income workers in attaining the job skills required to compete in today's workplace.

Most often, however, American companies accept the burden of educating their own employees.[33] This arrangement seems to work well for both employee and employer. Few employees would disagree that formal education provides the framework within which one builds the expertise necessary to sustain a living. Marketable professional skills, such as how to interpret a company balance sheet or how to weld together two pieces of iron, can be taught and understood in the classroom; often, however, an employee's skills will fully flourish only within their professional context.[34] As Aristotle stated: "For the things which we have to learn before we can do them, we learn by doing."[35] Further, from an employer's perspective, a business will often not realize the full value of an employee until she learns the employer's methods, techniques, and systems. In those situations, formal training is only a jumping-off point. On-the-job

31. *See, e.g.*, Workforce Investment Act of 1998, Pub. L. No. 105-220, 112 Stat. 936 (codified in scattered sections of 20 U.S.C. and 29 U.S.C.).

32. *Id.* In its statement of purpose, the Workforce Investment Act proclaims the following:

> The purpose of this subchapter is to provide workforce investment activities, through statewide and local workforce investment systems, that increase the employment, retention, and earnings of participants, and increase occupational skill attainment by participants, and, as a result, improve the quality of the workforce, reduce welfare dependency, and enhance the productivity and competitiveness of the Nation.

29 U.S.C. § 2811 (2000).

33. Gary Becker argues that employer investment in training is, in actuality, an employee investment, since the employee presumably agrees to a lower salary in payment for the acquired skills. GARY S. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION 33–51 (3d ed. 1993) (discussing specific and general training of employees by their employers).

34. Daron Acemoglu & Jörn-Steffen Pischke, *Beyond Becker: Training in Imperfect Labor Markets*, 109 ECON. J. 112 (Feb. 1999) (noting the advantages of investment in workplace training instead of general education, because on-the-job training allows employers to target specific skill sets required to keep the business on pace with technological progress).

35. ARISTOTLE, NICOMACHEAN ETHICS 34 (Martin Ostwald trans., 1962).

training furthers education by merging classroom study with real-world experience.

Employer investment in such training can take many forms: proprietary training curricula built by the employer specifically for its employees, funding commitments for employees to attend classes taught by a third party, and informal apprenticeship programs are examples of a few of the more common methods.[36] To meet the financial demands of training and retaining an adequate workforce, an employer must allocate an enormous portion of its annual budget to employee development. According to one report, American companies spend more money on education than do all the public school systems in the United States.[37]

Further, once an employer has paid for training, an employee forever retains monopoly power over his skills, which can be used to obtain additional compensation from competing businesses.[38] Much like any other investment, employers will invest in training only if they can recoup that investment by exploiting the skills of those who receive the training.[39] In that sense, human capital is indistinct from nonhuman capital: employers "weigh the costs of investments made in worker skills against the stream of benefits they expect from having more skilled employees."[40] If the costs of investment are enlarged by the risk that an employee can receive the training without any contract or commitment to remain with the employer long enough to provide an investment return, an employer's incentive to invest optimally in training diminishes.[41] This risk is heightened if an

36. In-house training has become less common as companies struggle to assess what skills are required in an ever-changing economy. CAPPELLI, *supra* note 1, at 198–220. Rather, as new degree-specific schools like the University of Phoenix grow in popularity, employers find it more cost effective to outsource training to third parties. In those cases, employers might pay for training in a specific discipline with hopes of building a narrower knowledge base within the company. By Cappelli's account, 72 percent of the University of Phoenix's tuition revenue is derived from employers subsidizing their employees' schooling. *Id.* at 209.

37. David Lange, Guest Commentary, *Training Programs Should Be Seen as Investment, Not Expense*, NASHVILLE BUS. J., Sept. 15, 2003, *available at* http://www.bizjournals.com/nashville/stories/2003/09/15/smallb5.html?t=printable.

38. *See* Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 VA. L. REV. 383, 392–93 (1993) (discussing the risk of employer investment in training if long-term employment contracts are not upheld).

39. CAPPELLI, *supra* note 1, at 46.

40. *Id.*

41. The growing number of opportunities awaiting those who choose to leave their employer after being trained exacerbates this problem. *See id.* at 182–87 (providing examples of

employee has the opportunity not only to leave with skills that the employer subsidized, but also to use those skills against the employer by working for a competitor business.[42]

Other rationales also support the need to protect investment in training. A lack of protection against employee mobility acts as a "double hit" to the employer, which not only loses its monetary investment in developing the employee's skill set but also sacrifices potential market advantage to the competitor who is able to enlist the recently departed employee.[43] Making matters worse is that the loss of trained employees leaves the employer with no residual interest, unlike many traditional forms of business investment. The free-rider principle provides an additional rationale: if the employer has no way to protect its investment, competitors reluctant to invest in training can recruit well-trained employees without having to assume the cost of the training.

Thus, employers seeking to recruit top talent and stay competitive within today's workforce have a significant interest in protecting their investments in training. As discussed in Part III, traditional noncompetes are an ineffective means of doing so, and better alternatives, such as repayment agreements, exist. But to appreciate these alternatives, one must first understand the traditional rationales for noncompetes, the current state of noncompete law, and how regularly courts have enforced noncompetes to protect an employer's training investment.

II. NONCOMPETE AGREEMENTS

A. Public Policy Rationales

Numerous public policy considerations have led to divergent opinions regarding the degree to which a noncompete clause between an employer and an employee should be upheld. For instance, some courts have found that freedom of contract principles support

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the widespread use of "golden handcuffs" and signing bonuses as methods of poaching top talent away from competing businesses).

42. *See* Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163, 1203–04 (2001) ("[D]espite the strategic importance of cultivating internal talent, employers may not make such investments for fear that their efforts will merely aid the competition.").

43. *Id.*

enforcing all contracts made between competent parties, so long as those contracts are neither illegal nor unconscionable.[44] Noncompete agreements between employer and employee, it has been argued, fall under this general rule.[45] Noncompete advocates also argue that restrictions are necessary to subvert attempts by rogue employees to poach trade secrets and customer lists, which could be used to gain advantage over former employers.[46] This seems to follow naturally from the contention that an employer reserves a right to protect investment in its own business.[47]

If noncompetes are not enforced, employers will lack the incentive to spend money creating trade secrets and customer lists.[48] Such investment furthers business goals, creates competition, and contributes to the overall welfare of the economy. Some proponents of strict enforcement go even further and argue that an employer should have a right to use noncompetes to protect any investment in its business, including employee training.[49] Recognizing the significant outlay in training costs, those proponents support the protection of training investment should the beneficiary of the training terminate employment.[50]

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44. *See, e.g.*, UniCredito Italiano SPA v. JPMorgan Chase Bank, 288 F. Supp. 2d 485, 499 (S.D.N.Y. 2003) ("Sophisticated parties . . . are held to the terms of their contracts."); Wiard v. Liberty Northwest Ins. Corp., 79 P.3d 281, 285 (Mont. 2003) ("[T]he parties to a contract may agree to anything that is not illegal, criminal, or immoral . . . ."). *But see* Maureen B. Callahan, Comment, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703, 704 (1985) (suggesting that although American law generally upholds agreements arrived at by competent parties, post-employment restraints do not share this presumption of validity).

45. *See* Stone, *supra* note 13, at 740 ("When an employment relationship includes a covenant not to compete . . . it is reasonable to assume that the employee has consented to restrictions on his or her post-employment activities. Accordingly, there is a strong argument for courts to enforce the covenant . . . .").

46. *See, e.g.*, Water Servs., Inc. v. Tesco Chems., Inc., 410 F.2d 163, 170 (5th Cir. 1969) ("Although covenants not to compete are proper to protect trade secrets they may also be valid simply to prevent a former employee's using his expertise against his former employer."); *see also* Blake, *supra* note 2, at 627 ("From the point of view of the employer, postemployment restraints are regarded as perhaps the only effective method of preventing unscrupulous competitors or employees from appropriating valuable trade information and customer relationships for their own benefit.").

47. *See* Arnow-Richman, *supra* note 42, at 1170 ("[N]oncompetes can be seen as legal tools necessary to preserve key business interests and relationships.").

48. *See* Blake, *supra* note 2, at 627 (suggesting that employers might require covenants to protect investment in research and development).

49. *See infra* Part III.A.

50. *See infra* Part III.A.

On the other hand, those decrying employment noncompetes generally advance four policy rationales.[51] First, some scholars have expressed concern that restrictive covenants are anticompetitive.[52] If employees are hindered from moving laterally between companies, firms can tie up valuable human capital and create a monopoly on market talent.[53] According to Professor Harlan Blake, noncompetes "diminish competition by intimidating potential competitors and by slowing down the dissemination of ideas, processes, and methods."[54]

Second, opponents have criticized noncompetes for hindering a worker's ability to earn a living. Geographic and durational noncompetes, if enforced, could limit an employee's ability to take advantage of her talents and provide sustenance for her family.[55] To the same extent that an employer might be reluctant to invest in employee training if employment noncompetes were unenforceable, an employee who values job transferability might be ambivalent to general job training if a restrictive covenant obstructed that employee from utilizing the newly acquired knowledge outside of her current employment. Such a result could stunt the development of the American workforce.[56]

The final two primary policy considerations are invoked less frequently. Some courts have rejected noncompetes that allow employers to take advantage of superior bargaining positions to the detriment of their employees.[57] Assuming a paternalistic role, courts

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51. Mitchel v. Reynolds, 24 Eng. Rep. 347, 348–50 (Ch. 1711). *See generally* Callahan, *supra* note 44 (arguing that the "restraint-of-trade" rationale, the "employee-protection" rationale, and the "loss-to-society" rationale do not sufficiently warrant unenforceability of noncompetes).

52. Blake, *supra* note 2, at 627.

53. *Id.*

54. *Id.*

55. *See, e.g.*, ABC v. Wolf, 420 N.E.2d 363, 368 (N.Y. 1981) (recognizing that despite a "strict approach to enforcement of . . . covenants," public policy mandates skepticism toward restrictions "impairing the employee's ability to earn a living or the general competitive mold of society"); All-Pak, Inc. v. Johnston, 694 A.2d 347, 351 (Pa. Super. Ct. 1997) ("[I]n determining whether to enforce a post-employment restrictive covenant, we must balance the interest the employer seeks to protect against the important interest of the employee in being able to earn a living in his chosen profession.").

56. *See* Stone, *supra* note 13, at 722 ("Employees see the growth of their human capital and the enhancement of their labor market opportunities as one of the benefits of the job."); U.S. Dep't of Labor Plan, *supra* note 19, at 5 ("The fast pace of technological change will . . . require that workers commit themselves to lifelong learning if [the] Nation's workforce is to remain competitive in the 21st Century.").

57. *See* Schmidl v. Cent. Laundry & Supply Co., 13 N.Y.S.2d 817, 823 (Sup. Ct. 1939) (recognizing a greater differential in bargaining power between employer and employee than

that cite this rationale when striking down restrictions assume that employers, given their in-house legal resources and experience, are more sophisticated bargainers and likely to induce employees into unnecessarily restrictive covenants. Lastly, some courts are reluctant to enforce noncompetes that deprive the public of an employee's effort and productivity;[58] described by one commentator as the "loss-to-society" rationale,[59] this line of reasoning is rare in today's jurisprudence.[60]

B. Case Law

Given the complex policy considerations that are folded into the analysis, it is no surprise that many states have been reluctant to establish a consistent standard for analyzing noncompetition agreements. The American case law in this area has been described by one court as "a sea—vast and vacillating, overlapping and bewildering."[61] Without consistent standards, courts have struggled to find solid footing in a field of legal uncertainty.[62] Often, courts use a balancing test whereby the various policy considerations are weighed to determine the outcome best attuned to the interests of the employee, employer, and the general public.[63] The focus of this test

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between two corporate entities); Arthur Murray Dance Studios v. Witter, 105 N.E.2d 685, 704 (Ohio 1952) (expressing concern that an employee's bargaining disadvantage could produce "a rash, improvident promise"). *But see* Hilb, Rogal, & Hamilton Agency of Dayton v. Reynolds, 610 N.E.2d 1102, 1107 (Ohio Ct. App. 1992) ("While an employment relationship may by definition result in an employer having a slightly better bargaining position than an employee, this disparity in bargaining power is inherent in the relationship and is not sufficient to render a contract unenforceable absent a showing of [abuse].").

58. *See, e.g.*, Tarr v. Stearman, 105 N.E. 957, 961 (Ill. 1914) (finding the interests of the public to be "paramount," and stressing concern for not just "the financial profits to be made from trades or professions, but the convenience of the public as well").

59. Callahan, *supra* note 44, at 712.

60. *See* Blake, *supra* note 2, at 686 (recognizing that the courts usually look at the burden on the employee and "almost never" consider the injury to society separately); Callahan, *supra* note 44, at 706 ("[T]hough [the 'loss to society' rationale] is not much relied upon today, these agreements were once considered a threat to the economy because they could remove a productive person from the work force.").

61. *Arthur Murray Dance Studios*, 105 N.E.2d at 687.

62. *See* Tamara Loomis, *Non-Compete Pacts: Whether These Agreements Hold Up Is Uncertain*, N.Y.L.J., Aug. 24, 2000, at 6 ("At the end of the day, however, the one thing that is certain with a non-compete agreement is that nothing is certain.").

63. *See* Bendinger v. Marshalltown Trowell Co. [sic], 994 S.W.2d 468, 472 (Ark. 1999) ("We review cases involving covenants not to compete on a case-by-case basis."); 42 AM. JUR. 2D *Injunctions* § 138 (2003) ("A court may look at the equities on both sides in deciding whether

becomes the reasonableness of the restraint, considering the needs of both employee and employer.[64] This case-by-case approach not only provides little guidance for future court proceedings, it also hinders the employer's ability to predict which contracts are likely to be upheld in court.[65] Such uncertainty results in a vast amount of litigation over the validity of noncompete agreements,[66] adding another cost to an already-expensive employer investment in human capital.[67]

The degree to which states will enforce noncompetes varies. On one end, a few states favor a rejection of all restraints of trade, leaving room for only a handful of noncompetes that are so narrowly defined as to have a negligible effect on the employee's right to practice his trade.[68] On the other end, Judge Richard Posner has

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to issue an injunction prohibiting a former employee from competing with his or her former employer . . . .").

64. *See, e.g.*, All Stainless Inc. v. Colby, 308 N.E.2d 481, 485 (Mass. 1974) (determining enforceability by weighing "the reasonable needs of the former employer . . . against both the reasonableness of the restraint imposed on the former employee and the public interest").

65. *See* Peter J. Whitmore, *A Statistical Analysis of Noncompetition Clauses in Employment Contracts*, 15 J. CORP. L. 483, 485 (1990) ("[I]t still is difficult for lawyers to predict confidently how a court will react to any given noncompetition clause."); Greg T. Lembrich, Note, *Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants*, 102 COLUM. L. REV. 2291, 2303 (2002) ("The lack of consistency that courts have demonstrated in deciding these cases has led to an atmosphere of uncertainty, which may help to explain why lawyers find it very difficult to advise clients.").

66. *See* Whitmore, *supra* note 65, at 485 ("[T]he ambiguity surrounding the enforceability of these clauses has resulted in vast amounts of litigation and reported appellate decisions.")

67. One factor often undervalued in the determination of noncompete enforceability is the degree to which employer investment must be protected. Put simply, the greater the cost of an investment, the higher the return an employer expects. *See infra* Part III.B. Employer incentive to train employees hinges on seeing a return on that investment. *See supra* Part I. Likewise, employer incentive to establish noncompetes is directly related to the ability to enforce them without costly litigation. Given the difficulty in balancing each of the given policy considerations and the unpredictability of judicial enforcement, this Note stipulates that the employer must assume greater responsibility in ensuring the validity of its noncompetes. *See infra* Part III.B. One type of noncompete that might be more consistently upheld, advocated herein as an alternative to traditional noncompetes, is the post-employment repayment agreement, discussed *infra* Part III.B.

68. California law, for instance, stipulates that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." CAL. BUS. & PROF. CODE § 16600 (West 1997). California courts have interpreted this statute to accept not even "reasonable" restraints of trade. *See, e.g.*, Metro Traffic Control v. Shadow Traffic Network, 22 Cal. App. 4th 853, 859 (Cal. Ct. App. 1994) ("Section 16600 has specifically been held to invalidate employment contracts which prohibit an employee from working for a competitor when the employment has terminated, unless necessary to protect the employer's trade secrets."). Courts will, however, allow a very limited exception if the employee is "barred from pursuing only a small or limited part of the business, trade or profession." IBM

advocated per se enforceability of noncompetes subject only to the traditional doctrines of fraud, duress, or unconscionability.[69] Further, many states even allow a "blue pencil" test, whereby portions of the employment contract deemed too restrictive may be removed from the agreement, leaving the rest of the noncompete enforceable.[70]

Despite some inconsistency between states, common frameworks have emerged to settle issues of enforceability. As previously described, most courts are wary of upholding contracts that restrict an individual's right to pursue a trade.[71] In addition, although many courts disfavor noncompetes,[72] some courts find

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v. Bajorek, 191 F.3d 1033, 1040 (9th Cir. 1999) (quoting Campbell v. Bd. of Trs. of The Leland Stanford Junior Univ., 817 F.2d 499, 502 (9th Cir. 1987)). Other states, such as Alabama and North Dakota, have devised similar statutory prohibitions of noncompetes. ALA. CODE § 8-1-1(a) (1975); N.D. CENT. CODE § 9-08-06 (1987) (voiding noncompetes, and making statutory exceptions only for the sale of a business or the dissolution of a partnership).

69. *See* Outsource Int'l., Inc. v. Barton, 192 F.3d 662, 670–71 (7th Cir. 1999) (Posner, J., dissenting) (advocating widespread enforcement of noncompetes and the application of a reasonableness test only to address questions of fraud, duress, or unconscionability); *see also* Eraser Co. v. Kaufman, 138 N.Y.S.2d 743, 750–51 (Sup. Ct. 1955) ("Negative covenants in employment contracts are not presumptively invalid and will be enforced in the absence of proof that they are unconscionable, inequitable, or in contravention of public policy."); Callahan, *supra* note 44, at 725 ("[T]he doctrine of unconscionability provides an appropriately limited mechanism for protecting employees in those narrow circumstances where judicial scrutiny of contracts is actually justified.").

70. The "blue pencil" test has been applied in a few variations. Some courts take a restrictive approach by removing only the unreasonable provisions of a contract that are easily severable from the valid provisions. *See, e.g.*, Hahn v. Drees, Perugini & Co., 581 N.E.2d 457, 461–62 (Ind. Ct. App. 1991) (eliminating an easily removable phrase that suggested an employee would not be allowed to deal with clients obtained prior to his employment); Bridgestone/Firestone, Inc. v. Lockhart, 5 F. Supp. 2d 667, 683 (S.D. Ind. 1998) (reserving the right to remove overly broad restrictions from the terms of a contract when doing so does not expand the original language of the agreement). More commonly, modern courts exercise greater freedom to modify or rewrite unreasonable provisions that are unenforceable as written. *See, e.g.*, Nestle Food Co. v. Miller, 836 F. Supp. 69, 78 (D.R.I. 1993) (applying Rhode Island's "rule of partial enforcement" to modify the terms of a noncompete when necessary to protect the employer's interests).

71. Courts are generally more likely to uphold noncompetes for sale of businesses than for employment contracts. In the former situation, a noncompete will restrict the seller of a business from competing with the buyer for a particular duration after the sale is consummated. The sales price of a business will include the value of that business' goodwill. Serena L. Kafker, *Golden Handcuffs: Enforceability of Noncompetition Clauses in Professional Partnership Agreements of Accountants, Physicians, and Attorneys*, 31 AM. BUS. L. J. 31, 33 (1993).

72. *See, e.g.*, Amex Distrib. Co. v. Mascari, 724 P.2d 596, 600 (Ariz. Ct. App. 1986) ("Restrictive covenants which tend to prevent an employee from pursuing a similar vocation after termination of employment are disfavored."); Poole v. Incentives Unlimited, Inc., 548 S.E.2d 207, 209 (S.C. 2001) ("[C]ovenants will be critically examined and construed against the employer."); Modern Env'ts, Inc. v. Stinnett, 561 S.E.2d 694, 695 (Va. 2002) ("[C]ovenants in restraint of trade are not favored, will be strictly construed, and, in the event of an ambiguity,

that policy interests warrant enforceability under certain circumstances.[73]

In assessing such circumstances, courts commonly use a two-part test to delineate between enforceable and unenforceable provisions.[74] First, noncompetes are permitted when the employer can demonstrate that the contract is necessary to protect an employer's legitimate business interests.[75] If the employer establishes a protectable interest, the noncompete will become presumptively enforceable and the burden will shift to the employee.[76] Second, to overcome this presumption and void the contract, the employee must show that the agreement is unreasonable in its scope, geographic boundaries, or duration, or that it is particularly injurious to the interests of the general public.[77] If these unreasonableness factors sufficiently outweigh the employer's protectable interests, the noncompete will be voided.[78]

This reasonableness test generally involves weighing the need to protect the employer's business against the agreement's oppressive effects on the employee.[79] Excessive geographic and time restrictions

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will be construed in favor of the employee."); *see also* Gillian Lester, *Restrictive Covenants, Employee Training, and the Limits of Transaction-Cost Analysis*, 76 IND. L.J. 49, 54 (2001) ("As a presumptive matter, contracts restricting postemployment employee mobility are unenforceable at common law.").

73. *See supra* notes 61–70.

74. RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981) characterizes this test as follows:

> (1) A promise to refrain from competition that imposes a restraint that is ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade if (a) the restraint is greater than is needed to protect the promisee's legitimate interest, or (b) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public.

75. For examples of cases demonstrating this analysis, see Blake, *supra* note 2, at 651–84.

76. *Id.*

77. Though many scholars agree that the "loss-to-society" rationale is not favored by most contemporary courts, at least a handful of cases have employed this policy argument when determining the enforceability of restrictive covenants against physicians and dentists. *See* Kafker, *supra* note 71, at 37–41 (discussing cases that anticipate the injury to society resulting from enforceability of noncompetes against physicians and dentists). It is worth mentioning that the public interest argument works both ways for these cases: courts might strike down a noncompete for restricting a doctor's ability to provide medical services to a particular region, but conversely courts might uphold a noncompete that will distribute doctors to other areas of the state. *Id.*

78. Blake, *supra* note 2, at 651–84.

79. Lester, *supra* note 72, at 54–57; *see also, e.g.*, Availability Inc. v. Riley, 336 So. 2d 668, 669–70 (Fla. Dist. Ct. App. 1976) (upholding a noncompete restricting an employee from working within a one-hundred-mile radius when the employer conducted 85 percent of its

are the factors that will most often result in unenforceability,[80] but provisions that unreasonably restrict an employee's range of activities may also be invalidated.[81] Further considerations, such as whether the employee was involuntarily discharged[82] or whether the employee provides a unique service to the business,[83] may also factor into the reasonableness calculus.

Questions arise over what types of employer interests are likely to be protectable. Many commentators agree that the two interests most in need of protection are trade secrets and customer lists.[84] By providing companies with trade secret protection, the Uniform Trade Secrets Act helps companies to guard information that "derives independent economic value, actual or potential, from not being generally known to . . . other persons who can obtain economic value from its disclosure or use, and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."[85] However, because the statute does not fully protect the employer from disclosure,[86] further protection, in the form of restrictive covenants, is needed.

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business within that radius and when the employee was "otherwise well able to support himself and his family"); Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376, 382 (Iowa 1983) ("Proximity to customers is only one aspect. Other aspects, including the nature of the business itself, accessibility to information peculiar to the employer's business, and the nature of the occupation which is restrained, must be considered along with matters of basic fairness.").

80. For a general discussion of time, geography, and scope restrictions, see Blake, *supra* note 2, at 674–84.

81. *Id.*

82. *See, e.g.*, Ma & Pa, Inc. v. Kelly, 342 N.W.2d 500, 502 (Iowa 1984) (distinguishing the discharge of an employee from an employee resignation and finding a "discharge [to be] a factor opposing the grant of an injunction").

83. *Compare* Ticor Title Ins. Co. v. Cohen, 173 F.3d 63, 70–72 (2d Cir. 1999) (applying New York law to uphold a noncompete when the employer seeking enforcement demonstrated that the employee had built unique relationships with a limited group of clients in the real estate title insurance industry and that those clients had been developed at the employer's expense) *with* Vander Werf v. Zunica Realty Co., 208 N.E.2d 74, 77 (Ill. App. Ct. 1965) (refusing injunctive relief to an employer when there was "no showing by defendant that [the employer's] methods of doing business were original or unique").

84. *See, e.g.*, Lester, *supra* note 72, at 54–55.

85. UNIF. TRADE SECRETS ACT § 1, 14 U.L.A. 433 (1990).

86. Whereas the Trade Secrets Act merely provides a tort remedy for an employer once trade secret disclosure occurs, a restrictive noncompete ideally prevents disclosure from occurring in the first place. Also, if charges are brought against an employee for breach of trade secret law, the employer risks disclosure of the protected asset in court. Lester, *supra* note 72, at 53. For these reasons, noncompetes "fill a gap where other legal and extra-legal mechanisms fall short." *Id.* For a general discussion of the need for noncompetes in trade secret law, see *id.* at 52–53.

Similarly, courts have been willing to uphold noncompetes that protect an employer's investment in procuring and maintaining client relationships.[87] Sales-intensive businesses, like technology consulting or insurance companies, are driven by customer relationships; such businesses often spend huge sums of money to develop these relationships. By one account, costs of customer relationship management software, commonly used by businesses to track contact with customers and analyze purchasing patterns, can range from several thousand dollars for a basic system to $50,000 per salesperson for more sophisticated products.[88] Because of this significant investment in developing customer data, employers do not want salespeople to depart with clients that the company spent significant money to develop. Otherwise, companies have little incentive to invest at the outset. Accepting this rationale, courts have upheld covenants narrowly drawn to protect investments in customer data.[89]

Despite courts' general willingness to protect employer investment in trade secrets and customer lists, a more controversial question is whether judges should protect employer investment in employee training. Most courts see investment in training as an employee expense, not an employer cost, the judicial protection of which is not a legitimate concern.[90] A small minority of courts allows companies to protect investments in training, if the protection is narrowly constructed.[91] The remainder of this Note addresses the issue of noncompetes as an effective means of protecting employer

87. The misappropriation of customer lists generated for both sales of services, such as accounting or consulting companies, and sales of fungible goods have been deemed as "protectable interests." *See, e.g.*, Farr Assoc., Inc. v. Baskin, 530 S.E.2d 878, 881 (N.C. Ct. App. 2000) (finding that a behavioral consulting firm had a protectable interest in limiting the risk of client misappropriation by a consultant-employee when "work require[d] that its Consultants develop an intimate relationship with its clients"); Arnow-Richman, *supra* note 42, at 1176 n.40 ("Cases which are particularly convincing to courts are those in which the product sold is fungible or where it is easy for the customer to mistake the sales person with the actual employer.").

88. *See* Erika Morphy, *The Real Cost of CRM*, NEWSFACTOR TECHNOLOGY NEWS (Oct. 29, 2001) ("[P]er-seat costs for high-complexity projects that have 1,000 users start at around US$50,000 and slowly drop to about $15,000 as the number of users increases to 5,000.") *at* http://www.newsfactor.com/story.xhtml?story_id=14447 (on file with the *Duke Law Journal*); Emma Nash, *The High Cost of CRM*, COMPUTERWEEKLY.COM (Aug. 17, 2001) (describing the rising cost of CRM software) *at* http://www.computerweekly.com/Article105058.htm (on file with the *Duke Law Journal*).

89. *See supra* note 87.

90. *See infra* Part III.A.

91. *See infra* Part III.A.

investment in training and questions whether repayment agreements provide a more suitable alternative.

III. NONCOMPETES VS. REPAYMENT AGREEMENTS

With employers hard-pressed to protect their investments in training, they often look to noncompete agreements as a means of protection. However, the area of noncompete law is in a constant state of flux; states, continually reevaluating their noncompete laws, play a perennial game of "catchup" as market conditions revolutionize employment patterns and practices. This environment has resulted in employer confusion in predicting whether covenants will be upheld and court frustration at having to constantly revise employment law doctrine.[92] Repayment agreements offer a less risky, and more suitable, method for protecting employer training investment.

A. Traditional Noncompetes Are Unsuitable Protection Against Training Investment Loss

The increasing volume of employee training suggests that employers will continue to use noncompete agreements as a way to protect their training investments. However, courts have historically disfavored covenants designed solely to protect an employer's investment in training.[93] A survey of 105 noncompete cases did not even find the employer's investment in training significant enough to warrant discussion.[94] Although some contemporary courts have occasionally held these investments to be protectable when the cost is

92. *See* CAPPELLI, *supra* note 1, at 1–16.

93. *See, e.g.*, USAchem, Inc. v. Goldstein, 512 F.2d 163, 167 n.4 (2d Cir. 1975) ("[T]he fact that a former employee was trained by the employer is not a basis for granting an injunction enforcing a restrictive covenant."); Kelsey-Hayes Co. v. Maleki, 765 F. Supp. 402, 407 (E.D. Mich. 1991), *vacated*, 889 F. Supp. 1583 (E.D. Mich. 1991) (holding that "whatever expertise defendant developed as a computer programmer at Kelsey-Hayes, with the assistance of on-the-job instruction and published manuals, has been his alone, historically, and would not fall within the proscription of contracts protecting an employer's propriety or confidential information"); Clark Paper & Mfg. Co. v. Stenacher, 140 N.E. 708, 711–12 (N.Y. 1923) (refusing to protect an employer's investment in the general training of a wrapping paper salesperson); Kidde Sales & Serv., Inc. v. Peairson, 493 S.W.2d 326, 330 (Tex. Civ. App. 1973) (stating the court's unwillingness to enforce noncompetes to protect training "even if the training was complex and extensive").

94. Stone, *supra* note 13, at 751 (citing Peter J. Whitmore, *A Statistical Analysis of Noncompetition Clauses in Employment Contracts*, 15 J. CORP. L. 483, 524–25 & n.243 (1990)).

significant,[95] courts generally have not accorded investment in training the same "protectable" status granted to trade secrets and customer lists.[96]

This has left scholars to debate whether investment in training should be a protectable interest. Perhaps the most recognized theory attacking covenants protecting employer investment in training is Professor Gary Becker's human capital model.[97] Becker begins with the premise that two distinct types of training exist: general training, which increases an employee's marketability to many firms,[98] and specific training, which enhances an employee's value only to the firm providing the training.[99] According to Becker's model, neither of

95. *See, e.g.*, Borg-Warner Protective Serv. Corp. v. Guardsmark, Inc., 946 F. Supp. 495, 501 (E.D. Ky. 1996) (finding a private security firm's investment in fire safety and security training videos for guards, an eighty-hour on-the-job formal training course, and time off for guards to grow accustomed to a new client site, taken together, rose to the level of a judicially protectable interest).

An interesting comparison can be made between the need to protect an investment in training, as has been discussed throughout this article, and the protection of an investment in public image. In the case of *Beckman v. Cox Broad. Corp.*, 296 S.E.2d 566 (Ga. 1982), the Georgia Supreme Court upheld a noncompete restricting a news meteorologist from competing "on air" against his employer for six months after the employment period ended. *Id.* at 569. In reaching its decision, the court observed the significant investment of $750,000 made by the employer news station to develop and promote the weatherman's public persona. *Id.* at 567, n.2. The employer argued that the publicity generated through the promotional campaign enhanced the weatherman's image, making him more marketable to competing news stations and eradicating the employer's investment. *Id.* at 569. Much like human capital of skills and aptitude, the court recognized the weatherman's ownership of his own image and personality created by the employer's promotion; the employee was free to take the investment with him to his new employer. *Id.* at 569. However, the court also found that the news station's interest in protecting its investment in the weatherman's image outweighed the cost imposed upon the weatherman by the noncompete. *Id.* This case merely serves as a reminder that the analysis presented can be applied across a broad cross section of fact patterns relating to employer investment.

96. *See* Arnow-Richman, *supra* note 42, at 1192–93 ("Since the proper inquiry is whether confidential information has been transmitted, it has been held that even where the employer expends funds to support formalized training, such expenditures are insufficient to support a noncompete if the employee gains only generalized knowledge or experience."); Lester, *supra* note 72, at 57 ("Even where an employer can demonstrate costly training expenditures, a court is unlikely to enforce a covenant to protect them absent the additional presence of trade secrets, confidential information, or protectible client relationships.").

97. BECKER, *supra* note 33, at 33–51.

98. *Id.* at 33.

99. *Id.*

these training investments should be protectable through noncompetes.[100]

With regard to general training, Becker argues, employers are unwilling to invest in general training when an employee can leave with newly acquired skills and earn a higher salary from a competing business that is not financially burdened with sponsoring the training.[101] Thus, in a perfectly competitive market, firms pay less to employees who receive general training, since every dollar that the employer spends on training is one less dollar that the employer will pay in salary.[102] The cost of in-house training, then, is actually imputed to the employee, who will earn a lower salary while receiving the training but pocket the future wage potential resulting from the improved skill set.[103] Because the employer has no investment to protect, Becker argues, there is no need for a noncompete agreement.[104]

Unlike general training, Becker argues, the investment in specific training[105] is shared by the employer and the employee. Since this firm-specific training is useful only to the employer who provides it,[106] the employee presumably values it less than general training.[107] Given that "no rational employee would pay for training that did not benefit him,"[108] the employer must assume at least some of the cost of specific training.[109] But even if a firm were to pay for all of the specific training, an employee might still quit after the investment has been

100. *See id*. at 46 (arguing that investments in specific training lost when employees leave do not accrue to new employers); *id* at 40 ("The property right of the worker in his skills is the source of his incentive to invest in [general] training by accepting a reduced wage during the training period and explains why an analogy with unowned innovations is misleading.").

101. *Id.* at 34.

102. *See id.* at 34 ("Hence it is the trainees, not the firms, who bear the cost of general training and profit from the return.").

103. *Id.*

104. *Id.* at 40. To observe how this theory plays out within a "real world" hypothetical, see Lester, *supra* note 72, at 62–63.

105. Establishing the difficulty in drawing lines between specific and general training, Becker points out that "[m]uch on-the-job training is neither completely specific nor completely general but increases productivity more in the firms providing it and falls within the definition of specific training." BECKER, *supra* note 33, at 40.

106. Examples of firm-specific training might include education in how to use a firm's proprietary software, follow operating procedures, or sell the firm's products or services.

107. BECKER, *supra* note 33, at 40–42.

108. *Id.* at 42.

109. *Id.*

made.[110] Thus, to protect the employer against the risk of loss, an employee is forced to accept a somewhat reduced salary to share in the cost of the specific training.[111] By sharing the cost, "[e]mployees with specific training have less incentive to quit, and firms have less incentive to fire them."[112] This conclusion obviates any need for a noncompete agreement because the employee investment in training binds him to the employer until the employee recoups his investment.[113]

Numerous revisions and criticisms have been asserted against the Becker model. Professors Paul Rubin and Peter Shedd point out that a different type of general training, namely, that which involves a combination of skill development and trade secrets, can be imparted to the employee in a short amount of time but is more expensive than what the employee is able to self-finance up-front through wage concessions.[114] The difference between what the employee will pay and what the training is worth must be supplemented by the employer. However, encouraging an employer to invest in this kind of general training might require a restrictive covenant.[115] Since courts are likely to have difficulty distinguishing between this general training and the type that only involves skill development,[116] Professors Rubin and Shedd conclude that the courts' current system of protecting only trade secrets, not general training, is appropriate.[117] Other critics agree that some employee wage concessions are disproportionate to, in the sense that they do not cover, the value of

110. *Id.* at 42–46.

111. *Id.*

112. *Id.* at 46.

113. *See* Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93, 96 (1981) ("If training is truly specific, the employer needs no assurance that the worker will continue to work for him, for there is no other market in which the employee can sell his skill.").

114. *Id.* at 96–97.

115. *Id.* at 97–99.

116. *Id.*

117. *Id.* at 105–07.

general training provided.[118] Thus, firms often absorb costs for investments in general training.[119]

Assuming these criticisms of Becker's model are accurate and that employers do invest in employee general training, many scholars miss another important and rather fundamental argument for unenforceability. Traditional noncompetes protecting training investment restrict an employee from working for a competitor for a defined duration after employment is terminated.[120] Distinguished from other, alternative noncompete agreements,[121] traditional noncompetes are generally intended to bind the employee throughout the entire duration of employment. Nevertheless, at some point during an employee's tenure, the employer will earn back its investment in training the employee.[122] Under a traditional noncompete, the employee will be bound from competing against the employer even after the employer has safely recouped its investment. Because an important justification for upholding a traditional noncompete is to foster investment in training by helping employers protect that investment, a noncompete barring an employee from competing once the investment has been recovered seems patently unfair. Put differently, traditional noncompete agreements provide a windfall to the employer when they continue in force after the training investment has been repaid.

Consider the following hypothetical. A technology consulting firm decides to invest in developing a business division dedicated to the sale and implementation of a newly released software program. Before hiring and training employees to accommodate this new business, the employer prepares a cost-benefit analysis to determine the number of employees and amount of training necessary to earn a

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118. *See* Acemoglu & Pischke, *supra* note 34, at 4 (alluding to studies that "do not find lower wages for workers in training programs, and even when wages are lower, the amounts typically appear too small to compensate firms for the loss").

119. *See id.* at 5:

> There are also many examples of firms that send their employees to college, MBA or literacy programs, and problem-solving courses, and pay for the expenses while the wages of workers who take up these benefits are not reduced. In addition, many large companies, such as consulting firms, offer training programs to college graduates involving general skills. These employers typically pay substantial salaries and bear the full monetary costs of training, even during periods of full-time classroom training.

120. *See supra* note 2.

121. These are discussed *infra* Part III.B.

122. This argument assumes training occurs in discrete periods, as opposed to continually throughout the period of employment.

profit. Part of this calculation might include the imposition of noncompete agreements for each new hire, a guarantee that the training investment would be protected if an employee leaves the firm. Then, assume that an employee is hired and signs a two-year noncompete agreement. Within the first month, the employer finances $15,000 worth of training regarding the specifications of the new software; this is a sizable amount and probably enough to make the employee much more attractive to competing firms. Imagine, however, that the employee decides not to take advantage of opportunities elsewhere and instead remains with his employer, implementing the software for five years, during which he receives only minimal additional training. Presumably, the original investment made by the employer has long been recompensed. Nonetheless, under a traditional noncompete agreement, if the employee decided to leave the firm he would still be bound against competing with his employer for two years.[123]

Some might argue that courts inherently evaluate the amortization of the training investment when assessing the validity of a noncompete under the popular "reasonableness" calculation.[124] Indeed, a few courts have.[125] However, many courts are reluctant to look beyond scope, duration, and geography when assessing the reasonableness of a noncompete.[126] But, where the reasonableness test would become frustratingly imprecise, an opportunity emerges for employers to look for less conventional means of protecting their investments. Put another way, given the degree of inconsistency in U.S. noncompete jurisprudence, why would any employer choose to

123. This problem seems particularly troublesome in industries in which training is front-loaded in an employee's career. Occupations that require sizable up-front training, with little need for further training to keep pace with market needs, seem to be quite vulnerable to restrictions imposed by traditional noncompetes. On the other hand, careers in which the required employee skill sets are constantly evolving might have more of a demand for ongoing training; for those careers, this problem seems less daunting.

124. RESTATEMENT, *supra* note 74, § 188.

125. *See, e.g.*, Orkin Exterminating Co. v. Foti, 302 So. 2d 593, 598 (La. 1974) (finding that an employer expense of $261.50 to furnish one day of training in 1970 did not justify restricting an employee from competing in 1973 and 1974, since "the employer had long received the benefit of its investment through the employee's two years of managerial service afterwards").

126. *See, e.g.*, Brunswick Floors, Inc. v. Guest, 506 S.E.2d 670, 672–73 (Ga. App. Ct. 1998) (rejecting an employment contract on grounds that a noncompete restriction imposed throughout an eighty-mile radius exceeded what was necessary to protect an employer's investment in a business training trip, but ignoring whether the amount spent on training had been recovered over the course of the employee's eighteen-month tenure after the training was received); *see also supra* notes 79–83 and accompanying text.

chance enforceability with a traditional noncompete when a more judge-friendly alternative exists?

B. Repayment Agreements More Closely Align Training Investment with Employers' Need for Protection

Other forms of protection have found their way into contemporary employment contracts as alternatives to the uncertainty of traditional noncompetes. Repayment agreements, which require employees to pay back training expenses if they quit before the employer recoups its investment, have become increasingly prevalent in employment contracts.[127] This form of noncompete can help employers establish proportionality between their outlay in training and their restrictions on employees,[128] making them a formidable alternative to traditional noncompetes.

While cases involving repayment agreements are uncommon,[129] perhaps because "[e]nforcement actions have not usually been necessary,"[130] courts adjudicating the validity of these agreements have shown a willingness to enforce them.[131] For example, in *Milwaukee Area Joint Apprenticeship v. Howell*,[132] a repayment clause was upheld when it required an electrical apprentice to repay the cost of his training to an apprentice training trust fund when he chose to

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127. Anthony W. Kraus, *Repayment Agreements for Employee Training Costs*, 1993 LAB. L.J. 49, 49 (1993). Further alternatives to noncompetes exist. Popular in Great Britain, "garden-leave" contracts require employees to provide employers with a specified period of notice prior to departing, but in return employers agree to pay the employee's salary during that time to ensure that the employees do not compete. *See, e.g.*, Lembrich, *supra* note 61, at 2314 ("Given the uncertain enforceability of restrictive covenants in the United States and the success that garden leave has enjoyed in England, it is not surprising that many American employers have begun inserting garden leave clauses into the employment contracts of their key employees."). Another option advocated by some companies requires an employee to obtain a specified degree or amount of training before being hired, shifting training costs to the employee. CAPPELLI, *supra* note 1, at 204–05.

128. For a discussion of how repayment agreements are typically devised, see *id.* at 49–50.

129. Kraus, *supra* note 127, at 51 ("To date, very few cases appear to have considered training cost repayment agreements under restrictive covenant law.").

130. *Id.* at 50.

131. *See, e.g.*, National Training Fund v. Maddux, 751 F. Supp. 120, 121–22 (S.D. Tex. 1990) (requiring an employee to repay the cost of training after acquiring a new skill at his employer's expense); *see also* COLO. REV. STAT. ANN. § 8-2-113(2)(c) (West 2003) (enforcing noncompetes that "provid[e] for recovery of the expense of educating and training an employee who has served an employer for a period of less than two years").

132. 67 F.3d 1333 (7th Cir. 1995).

work for an employer that did not contribute to the fund.[133] Though rarely the source of litigation, repayment agreements designed merely as penalties against the employee for the breach of a noncompete have also found some judicial support.[134]

There are limits to the judicial enforcement of repayment agreements. In *Brunner v. Hand Industries, Inc.*,[135] an Indiana state court refused to uphold a repayment agreement because it was unreasonably restrictive.[136] There, the employee had agreed to a three-year repayment schedule, during which time the amount to be repaid by the employee would increase with the amount of training provided by the employer.[137] The court judged the agreement invalid because the employee potentially could have been liable for an amount exceeding the total wages received throughout the employment.[138] Thus, the court seems not to have rejected the repayment agreement per se but rather condemned the increasing scale of repayment amounts used by the employer. Perhaps a more modest system would have been enforced.[139]

Despite this limit, repayment agreements can serve as an effective means of addressing the issue of amortized training costs. Perhaps the strongest rationale supporting their use is the ease with which they can be created. Before investing in training, employers undoubtedly will have performed a cost-benefit analysis to assess the profit potential from such an investment.[140] In fact, back-end computing software available to most companies facilitates this process.[141] Companies that use this type of software can also evaluate

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133. *Id.* at 1335.

134. *See, e.g.*, Dental East, P.C. v. Westercamp, 423 N.W.2d 553, 555 (Iowa App. 1988) (enforcing a noncompete that required a payment penalty if the employee, a dentist, chose to break the agreement for one year after termination); Holloway v. Faw, Casson & Co., 572 A.2d 510, 525–26 (Md. 1990) (upholding a "fee equivalent remedy" that required an accountant to repay his former partnership in the event that the partner competed within a prescribed geographic area).

135. 603 N.E.2d 157 (Ind. Ct. App. 1992).

136. *Id.* at 161.

137. *Id.* at 158–59.

138. *Id.* at 161.

139. *See* Stone, *supra* note 13, at 755 ("[T]o be enforceable, a training repayment agreement must be written narrowly.").

140. *See supra* text accompanying note 39.

141. This holds especially true for companies that reserve significant budgets for training expenses. Software products such as Oracle or Peoplesoft provide comprehensive financial budgeting software that allows businesses to manage training expenses and forecast the

how their human resources are generating revenue for the business through the use of such training. In the consulting firm scenario presented in Part III.A, the fictional employer might use Oracle (database software) to track the number of hours the employee has billed each month for the past five years, as well as the number of those hours that leveraged the initial investment made in the employee's education. Thus, because the employer would have the ability to compute the cost of training and the revenue generated from that employee's use of the training, the employer can also determine when it has broken even. With this information, the employer should be able to generate a repayment plan that accurately predicts the amount to be repaid by the employee at each stage of his employment should he choose to leave the firm. If designed properly, the repayment amount at each step would reflect the break-even point at which the employee's repayment would fully compensate the employer. Repayment agreements, therefore, more so than traditional noncompetes, are an equitable means of making the employer whole.

Admittedly, none of the aforementioned repayment cases deal with the issue initially presented: that is, how repayment agreements can be used to circumvent problems relating to the amortization of training costs over the duration of employment. Some might argue that the absence of legal precedent is a function of the relative novelty of repayment agreements in an employment law context. Perhaps as technology continues to become more readily available, employers will take advantage of budgetary tools to experiment with the form of future noncompetition agreements. Regardless, a number of scholars have agreed that repayment agreements are building a strong foundation in the field of employment law.[142]

In sum, repayment agreements provide a strong alternative to traditional noncompetition agreements in that they inherently weigh the value of training to the employee against the cost of training to the employer. Though rarely litigated, these agreements seem to offer

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feasibility of effective training. *See* Oracle, Oracle E-Business Suite, *at* http://www.oracle.com/applications (last visited June 6, 2005) (on file with the *Duke Law Journal*).

142. *See* Lester, *supra* note 72, at 76 ("I would share with a handful of other commentators some optimism about a hybrid approach in which restrictive covenants are deemed unenforceable by statute, with an explicit exception made for discrete training repayment contracts."); Stone, *supra* note 13, at 755–56 (arguing that the enforcement of a repayment agreement, "unlike enforcement of a broad covenant not to compete, does not undermine [the] psychological contract" between employer and employee).

employers a better chance of enforceability because courts can more closely evaluate the nexus between the dollars spent and the value derived from an investment. To strengthen the case for enforceability, it is wise for employers to remember that "the amount of any repayment for the cost of training should be commensurate with its actual original cost to the employer."[143] In doing so, the employer is more likely to defeat any challenge brought on the ground that the amortization of the training was not considered in the "reasonableness" calculus.

CONCLUSION

Following in the footsteps of the Louisiana legislature, courts and lawmakers will undoubtedly be confronting the question of whether training deserves recognition as a protectable interest long into the future. One analyst has noted that "[t]here are some early signs that the long-standing judicial hostility to covenants may be on the wane."[144] Until (or unless) this decrease in hostility actually occurs, employers should find alternate methods of protecting their investment in training. Judicial enforceability of noncompetition agreements is a "crapshoot," according to one New York practitioner.[145] With the need to stay competitive in a marketplace ever-hungry for dynamic, well-trained employees, companies must continue to invest in training; the onus must then fall on companies to ensure that their investments will be protected. By anticipating enforceability problems and designing alternatives that more closely align company investment with employee tenure, employers can increase the likelihood of convincing judges that training investments warrant protection.

143. Kraus, *supra* note 127, at 51.

144. William R. Groth, *Response to Gillian Lester and Steward J. Schwab: An Indiana Perspective*, 76 IND. L.J. 77, 78 (2001).

145. Loomis, *supra* note 62, at 5 (quoting David A. Weisberg, who was then a partner in the now-defunct firm of Brobeck, Phleger & Harrison LLP).