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A Solution to Utah's Non-Compete Dilemma: Soliciting the Use of Non-Solicitation Agreements

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A Solution to Utah’s Non-Compete Dilemma: Soliciting the Use of Non-Solicitation Agreements

Utah has become a hub for company growth and innovation, especially in an area known as the “Silicon Slopes.” Well-known companies, like Qualtrics, Adobe, and eBay, have offices along the Wasatch Front. With such newfound relevance in the business community, it may seem odd that Utah’s legislature recently passed the Post-Employment Restrictions Act, which some say threatens Utah’s position as a state where businesses thrive. The Act restricts non-compete agreements to periods not greater than one year and automatically penalizes, through attorney’s fees and costs, any employer who tries to enforce a non-compete agreement that a court later finds unenforceable for any reason. The attorney’s fees penalty is particularly troubling for employers because Utah’s common law, which the Act did not affect aside from time restrictions, is difficult to navigate when drafting non-compete agreements. The most problematic common-law elements for employers to meet include whether the non-compete agreement is necessary to protect goodwill and whether the agreement’s geographic scope is reasonable. Misinterpreting these common-law elements could prove extremely costly to employers. This Comment puts forth a solution for employers who want to protect their investment in employee training, proprietary and confidential information, and goodwill, but who are wary of being penalized because a court may find its non-compete agreement unenforceable.

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I. INTRODUCTION

Since the end of the Great Recession, Utah has become a state famous for its slopes—the “Silicon Slopes.”¹ The name derives from California’s famous Silicon Valley, an area near San Francisco that is a hub for technological innovation.² Utah’s Silicon Slopes stretches from Utah County north along the Wasatch Front and includes

1. See Gary R. Herbert, *Technology's New Home Located in 'Silicon Slopes,' Utah*, CNBC (July 9, 2013, 10:59 AM), <http://www.cnbc.com/id/100860405>.

2. *Id.*

several well-known businesses, such as Adobe, Intel, Qualtrics, Boeing, Vivint, DOMO, and eBay.³ Silicon Slopes' software, medical device, and other startup companies drew over \$700 million in venture capital funding during 2015.⁴ Several factors have bolstered this growth, including religious influences,⁵ friendly corporate taxes,⁶ high quality of life,⁷ low cost of living,⁸ an educated workforce,⁹ and a business-friendly environment.¹⁰

3. See *id.*; Andrew Zaleski, *A High-Tech Mecca Rises to Rival Silicon Valley*, CNBC, <http://www.cnbc.com/2016/07/13/a-high-tech-mecca-rises-to-rival-silicon-valley.html> (last updated July 14, 2016, 7:54 AM).

4. Zaleski, *supra* note 3.

5. *Id.* (“The [Mormon] religion’s influence in the state has helped concentrate entrepreneurial talent, since graduates aren’t inclined to move far from where they have grown up. And while a culture that emphasizes family life over business priorities . . . creates some conflict in the fast-paced world of tech, entrepreneurs and start-up boosters said the Mormon Church is a great proving ground for would-be tech founders.”).

6. Herbert, *supra* note 1 (“Our tax policy takes a no-surprises approach. We haven’t increased corporate taxes for 15 years.”). Since Governor Herbert’s article was written, the Utah corporate franchise tax has remained at five percent. UTAH CODE ANN. § 59-7-104 (West 2008).

7. Mark Saal, *Utah Leads the Country in Tech Sector Growth*, STANDARD-EXAMINER (Aug. 31, 2016, 7:00 AM), <http://www.standard.net/Business/2016/08/31/Utah-leads-the-country-in-tech-sector-growth> (“For many millennials, quality of life is a big issue. Being 20 minutes from a ski resort, or 15 minutes from a mountain biking trail, is important to them.”).

8. Tanner Christensen, *Why the Silicon Slopes Are Just Warming Up*, INC. (May 18, 2016), <http://www.inc.com/tanner-christensen/why-the-silicon-slopes-are-just-warming-up.html>.

9. See Ellen Rosen, *Unicorns Help Put Utah's 'Silicon Slopes' on the Tech Map*, SEATTLE TIMES, <https://www.seattletimes.com/business/unicorns-help-put-utahs-silicon-slopes-on-the-tech-map/> (last updated Oct. 16, 2017, 7:46 PM) (“The local universities have played an important role in fostering homegrown talent. Brigham Young, the private university affiliated with the Mormon church, and the public University of Utah have programs intended to develop young entrepreneurs.”).

10. Zaleski, *supra* note 3. Notwithstanding these growth factors, commentators suggest that some factors have slowed this growth from what it could be, especially in regard to drawing outside talent into the state. See Sara Jarman, *Silicon Slopes is Rebranding Utah*, KSL (July 14, 2016, 12:44 PM), <http://www.ksl.com/?sid=40641324&nid=1012&title=silicon-slopes-is-rebranding-utah> (suggesting that Utah’s alcohol laws “scare[] people away” and that outsiders’ perspectives make it harder to attract people to Utah). Tech companies are also worried that infrastructure woes may derail growth. See Lee Davidson, *Lehi, High-Tech Companies Say Utah Owes Them Better Highway, Train Line*, SALT LAKE TRIBUNE (July 20, 2015, 8:09 AM), <http://www.sltrib.com/home/2738453-155/lehis-high-tech-company-say-s-utah-owes>. These negative factors likely will have even less of an impact on industry growth

However, some of these same employers have expressed concern that by recently enacting the Post-Employment Restrictions Act (the “Act”), Utah’s legislature may have harmed the businesses it is trying to attract.¹¹ The Act primarily serves two functions: (1) it limits the duration of non-compete agreements entered into on or after May 10, 2016, to one year, excluding severance agreements and non-compete agreements arising from a business sale, and (2) it automatically requires employers to pay costs and attorney’s fees, along with actual damages, if a court finds an employer’s non-compete agreement unenforceable.¹² The overall effect on businesses remains to be seen¹³ as the law continues to take hold in the economy and the courts, but these two functions will likely affect employers in at least two major ways.

First, although the effect of the duration limitation on employers is unclear,¹⁴ employers may perceive the Act’s one-year provision as a threat to their control over the dissemination of their confidential information.¹⁵ Additionally, the Act may disincentivize employers

in the future as startup and technology businesses continue to grow. *See Jarman, supra* (“It is becoming easier to get people out here, though. As we build up the tech and startup scene more, this aspect combined with the quality of life we can offer, it’s possible.”).

11. *See generally* CICERO, UTAH NON-COMPETE AGREEMENT RESEARCH (2017), https://issuu.com/saltlakechamber/docs/utah_non-compete_agreement_research (finding that employers generally believe non-compete agreements should be allowed because they protect employer interests, and only twenty-nine percent of employers surveyed agree that a time restriction of less than one year is adequate).

12. *See* UTAH CODE ANN. §§ 34-51-101 to -301 (West Supp. 2017).

13. One survey, commissioned by the Utah State Legislature and conducted after the Act’s passage, concluded that “[t]he majority of Employers and Employees were unaware that Utah passed [the Act] in 2016.” CICERO, *supra* note 11, at 27. This indicates that an employer may not recognize the impact the Act may have on the enforceability of its non-compete agreements until it attempts to enforce an otherwise unenforceable agreement.

14. This Comment does not attempt to speculate about the one-year restriction’s overall effect on Utah businesses. It addresses the restriction to introduce and give background to the Act and to explain how the restriction introduces some clarity into the confusing common-law landscape of enforceable non-compete agreements.

15. *See* Lisa Petersen & Judson Stelter, Michael Best & Friedrich, *Op-ed: Non-Compete Clauses Help Utah Companies Grow Their Businesses*, SALT LAKE TRIBUNE (March 2, 2016, 4:51 PM), <http://archive.sltrib.com/article.php?id=3586305&itype=CMSID> (“[I]f an employer cannot prevent an employee from working for a competitor for a reasonable time, there is little doubt that the former employee will inevitably share confidential information with his or her new employer or in his or her new business, even if the employee is technically prohibited from doing so.”); *see also* CICERO, *supra* note 11, at 58 (“69% percent of Employers

from investing in employee development because banning longer non-compete agreements may significantly increase employee mobility.¹⁶ Some disagree and argue that non-compete agreements hurt employers because the agreements actually obstruct employee mobility, which then hinders innovation in a fast-paced information society.¹⁷ Regardless, the majority of legal scholars agree that the limits non-compete agreements place on an employee's freedom to choose his or her employer outweigh the effects on employers.¹⁸

Second,¹⁹ and more important to the focus of this Comment, the Act's automatic award of attorney's fees and costs to the employee clearly has negative implications for businesses.²⁰ Importantly, the Act does not state specific situations when the covenant is unenforceable, but instead dictates only that employers are liable for attorney's fees and costs if the covenant is unenforceable—for *any* reason.²¹ Thus, an employer may be liable for attorney's fees if its non-compete agreement satisfies the one-year requirement of the

believe [the Act] will have a negative impact on their ability to protect proprietary ideas, inventions, or processes.”).

16. See Rachel Arnow-Richman, *Noncompetes, Human Capital, and Contract Formation: What Employment Law Can Learn from Family Law*, 10 TEX. WESLEYAN L. REV. 155, 158–59 (2003) (discussing how employers are now dependent on human capital and how that dependency makes employers vulnerable to employee mobility).

17. See 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, 603 (1999) (“The widespread use and enforcement of covenants not to compete slow down high velocity employment to the point where the level of knowledge spillovers is too low to support a districtwide innovation cycle.”).

18. See ORLY LOBEL, *TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING* 37 (2013) (“But by far the majority of the commentators are concerned . . . that the enforceability of noncompetes from a fairness perspective limits employees’ right to work and to freely choose their employer.”); Phillip J. Closius & Henry M. Schaffer, *Involuntary Nonservitude: The Current Judicial Enforcement of Employee Covenants Not to Compete—A Proposal for Reform*, 57 S. CAL. L. REV. 531, 539–40 (1984) (“Courts—and many legislatures—disfavor restraints of trade and, consequently, courts tend to construe covenants not to compete against the principal seeking its enforcement.”).

19. This Comment will primarily focus on this second aspect of the Act because of its clear implications for Utah businesses.

20. UTAH CODE ANN. § 34-51-301 (West Supp. 2017) (discussing an automatic award of attorney's fees “[i]f an employer seeks to enforce a post-employment restrictive covenant [defined as a non-compete agreement] through arbitration or by filing a civil action and it is determined that the post-employment restrictive covenant is unenforceable”).

21. *Id.*

Act but violates even one common-law requirement, to which determining compliance is often difficult.²²

This Comment does not purport to argue that non-compete agreements in general are constructive or destructive for Utah businesses. However, this Comment does contend that the Act damages Utah businesses because it imposes automatic liability for attorney's fees on employers who make good-faith efforts to comply with a confusing common law landscape but are found deficient. This Comment first provides an overview of the methods and reasoning behind non-compete agreements. Then it examines the current state of the law in Utah regarding non-compete agreements, including both the common law landscape and the Act. Finally, this Comment proposes a possible solution for employers who want to protect their interests in company goodwill, employee training, and confidential information but worry about automatic liability for attorney's fees.

II. NON-COMPETE AGREEMENTS: THEIR USE, BENEFITS, AND DRAWBACKS

Non-compete agreements, first established over 500 years ago in England,²³ spread in popularity in the United States during the Industrial Revolution.²⁴ The agreement “typically provides that the employee shall not work for a competitor or set up a competitive business for himself [or herself] for a specified period of time in a

22. See *infra* Part III; see also *Arthur Murray Dance Studios v. Witter*, 105 N.E.2d 685, 687 (Ohio Ct. Com. Pl. 1952) (discussing non-compete common law as “a sea—vast and vacillating, overlapping and bewildering. One can fish out of it any kind of strange support for anything, if he [or she] lives so long”).

23. Hui Shangguan, *A Comparative Study of Non-Compete Agreements for Trade Secret Protection in the United States and China*, 11 WASH. J. L. TECH. & ARTS 405, 409 (2016).

24. *Id.* at 409–10. Often, technology, sales, and managerial employees are required to sign a non-compete agreement as a condition to employment. Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 625–26 (1960). Currently, “18 percent, or 30 million, American workers are . . . covered by non-compete agreements.” WHITE HOUSE, NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGE, POTENTIAL ISSUES, AND STATE RESPONSES 3 (2016), https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf. In one study, approximately 17.85% of Utah employees were currently covered by non-compete agreements, and nearly half of Utah employers reported using non-compete agreements. CICERO, *supra* note 11, at 12–13.

designated geographical area.”²⁵ Employers usually enforce non-compete agreements at the state level, with statutes and common law governing the boundaries of the agreements.²⁶

This Part examines the benefits to the employer and drawbacks to the employee of using non-compete agreements, a useful analysis when determining their value in light of the fees and cost obligations that the Act imposes. This Part will then briefly discuss the ways other states regulate non-compete agreements to contextualize Utah's recent Act within a national framework.

A. The Benefits and Drawbacks of Non-Compete Agreements in Employer-Employee Relationships

1. Benefits to employers

Recently, more and more employees no longer see themselves as restricted to climbing one particular corporate ladder; rather, a decline in manufacturing trades and a rise in information-dependent industries has led to increased employee mobility within different industries.²⁷ For employers, any advantages of increased employee mobility, such as an increased talent pool of employees, is likely countered by the risk of losing current employees, whose skills are the employers' "most valuable assets."²⁸ Four main reasons explain why employers utilize non-compete agreements to combat this new trend. Each will be discussed below.

*a. Non-compete agreements protect an employer's trade secrets.*²⁹ Trade secrets include any "business information that is kept confidential to maintain an advantage over competitors."³⁰

25. Blake, *supra* note 24, at 626.

26. Shanguan, *supra* note 23, at 410.

27. Arnow-Richman, *supra* note 16, at 157; Matt Marx, *The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals*, 76 AM. SOC. REV. 695, 695 (2011).

28. See Marx, *supra* note 27, at 696.

29. See *Stuart C. Irby Co. v. Tipton*, 796 F.3d 918, 924 (8th Cir. 2015).

30. *Trade Secret*, BLACK'S LAW DICTIONARY (10th ed. 2014). Additionally, the Restatement (Third) of Unfair Competition defines "trade secret" as "any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others." RESTATEMENT

Protecting an employer's trade secrets has been deemed "[t]he main economic and societally beneficial use[] of non-competes,"³¹ likely because trade secrets have independent, economic value that depends in pertinent part on their confidentiality.³²

However, employers frequently use non-compete agreements even if protecting trade secrets is not obviously a legitimate goal. Those situations include jobs in which employees do not need four-year college degrees or earn significant compensation.³³ Because almost thirty percent of non-compete agreements occur in situations in which trade secret protection is likely inapplicable,³⁴ trade secret protection alone cannot justify employers' growing use of non-compete agreements.³⁵

*b. Non-compete agreements promote an employer's goodwill.*³⁶ An employer's goodwill is defined as

(THIRD) OF UNFAIR COMPETITION § 39 (AM. LAW INST. 1995). By these definitions, "trade secrets" also includes customer lists because customer lists are often confidential and obviously valuable to the company. As such, customer lists are expressly included in this discussion of trade secrets.

31. WHITE HOUSE, *supra* note 24, at 4.

32. *See Trade Secret*, BLACK'S LAW DICTIONARY (10th ed. 2014).

33. *See* WHITE HOUSE, *supra* note 24, at 4 ("If protection of trade secrets were the main explanation for non-compete agreements, then one would expect such agreements to be highly concentrated among workers with advanced education and occupations entrusted with trade secrets. However, 15 percent of workers without a four-year college degree are subject to non-competes, and 14 percent of workers earning less than \$40,000 have non-competes. This is true even though workers without four-year degrees are half as likely to possess trade secrets as those with four-year degrees, and workers earning less than \$40,000 possess trade secrets at less than half of the rate of their higher-earning counterparts.").

34. *Id.* (twenty-nine percent of non-compete agreements occur in occupations where employees earn less than \$40,000 per year plus occupations where employees did not earn a four-year degree). In Utah specifically, thirteen percent of food preparation employees are asked to sign non-compete agreements. CICERO, *supra* note 11, at 17. Additionally, fourteen percent of Utah employees with less than a high-school education sign non-compete agreements. *Id.* at 20.

35. Some authors argue that protecting trade secrets is inappropriate no matter the situation. *See, e.g.*, Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CALIF. L. REV. 241, 245 (1998) (arguing that "[n]either the fact that a trade secret is information nor the fact that it is secret provides a convincing reason to impose liability for a nonconsensual taking").

36. *See* Radio One, Inc. v. Wooten, 452 F. Supp. 2d 754, 758 (E.D. Mich. 2006) (finding that the plaintiff had an "interest in protecting its business good will" through a non-compete agreement).

the advantage . . . acquired by an establishment, beyond the mere value of the capital, stocks, funds or property employed therein, in consequence of the general patronage . . . it receives from . . . habitual customers on account of its location, or local position or reputation for quality, skill, integrity or punctuality.³⁷

A former employee could harm this goodwill by drawing away recurring customers from the former employer or by spreading negative information about the former employer to its current customers.³⁸ A non-compete agreement limits this possibility by restricting the former employee to work in markets that are not simultaneously occupied by the former employer.

*c. Non-compete agreements protect an employer's investment in employee training.*³⁹ Many employers invest significant resources into specialized employee training.⁴⁰ Some argue that without non-compete agreements, employers will lose the incentive “to invest time, money and training in their employees if they can simply leave with that skill and training and go to work for a direct competitor.”⁴¹ Non-compete agreements protect an employer's investment in employee training by providing the employee with a perceived constraint commitment⁴² to stay in the employee-employer relationship. In other words, non-compete agreements make it more difficult for the employee to leave the employer and, from the

37. Peterson v. Jackson, 2011 UT App 113, ¶ 35, 253 P.3d 1096, 1106 (Utah Ct. App. 2011) (quoting Jackson v. Caldwell, 415 P.2d 667, 670 (Utah 1966)).

38. See generally Allen v. Rose Park Pharmacy, 237 P.2d 823, 827–28 (Utah 1951) (“[A] covenant not to compete is necessary for the protection of the goodwill of the business when it is shown that although the employee learns no trade secrets, he may likely draw away customers from his former employer, if he were permitted to compete nearby.”).

39. See generally Borg-Warner Protective Servs. Corp. v. Guardsmark, Inc., 946 F. Supp. 495 (E.D. Ky. 1996) (finding employee training as an interest which non-compete agreements may protect).

40. William R. Knowlton, *Implementing Noncompete Agreements in Utah: Protecting Business Trade Secrets, Goodwill, and Investment in Employees*, UTAH Bus. J., May/June 2014, at 16, 17.

41. Petersen & Stelter, *supra* note 15.

42. In relationships, including employer-employee relationships, “constraint commitment reflects feelings of entrapment or barriers to exiting a relationship.” Michelle Givertz, Chris Segrin & Alesia Hanzal, *The Association Between Satisfaction and Commitment Differs Across Marital Couple Types*, 36 COMM. RES. 561, 564 (2009).

employer's perspective, waste the time and resources it provided to the employee during training.

*d. Non-compete agreements foster company research and development.*⁴³ Theoretically, by allowing non-compete agreements to protect trade secrets, employers are encouraged to “pursu[e] technological, medical, and other advances, inasmuch as society as a whole would continue to benefit from such advances.”⁴⁴ According to employers, this pursuit of additional research and development should “support the growth of business.”⁴⁵ However, some research indicates that non-compete agreements are associated with decreased spending on research and development,⁴⁶ a lack of employee motivation,⁴⁷ and a general dearth of startup companies.⁴⁸ These indications largely refute the claim that non-compete agreements are good for business by fostering research and development.⁴⁹

2. Drawbacks to employees

Even with the perceived benefits and interests to employers that non-compete agreements may protect, courts are still reluctant to enforce non-compete agreements, primarily because of the effects of

43. Abigail Shechtman Nicandri, Comment, *The Growing Disfavor of Non-Compete Agreements in the New Economy and Alternative Approaches for Protecting Employers' Proprietary Information and Trade Secrets*, 13 U. PA. J. BUS. L. 1003, 1013 (2011).

44. Jessica Lee, *The Inevitable Disclosure Doctrine: Safeguarding the Privacy of Trade Secrets*, 33 COLO. LAW. 17, 17 (2004).

45. Petersen & Stelter, *supra* note 15.

46. Nicandri, *supra* note 43, at 1013 (“[E]nforcement of CNCs [non-compete agreements] actually tends to be accompanied by *decreased* spending on R&D [research and design].”).

47. *Id.* at 1013–14 (stating that an employee’s motivation “to develop new ideas for an existing employer” may decrease “since the employee knows he [or she] will not be able to profit from the idea or start a new business using that concept”).

48. *Id.* at 1014.

49. Regardless, employers still use the research and development argument as support for non-compete agreements, and thus the argument is included here. *See id.* at 1013; WHITE HOUSE, *supra* note 24, at 2 (“The main rationale for these agreements is to encourage innovation . . .”).

non-compete agreements on employees.⁵⁰ Two main drawbacks are addressed below.

*a. Non-compete agreements promote an imbalance of bargaining power.*⁵¹ Employees generally have less bargaining power than employers because their livelihood is tied to a good-paying job.⁵² Therefore, employers can exploit this imbalance of power by imposing non-compete agreements on employees who otherwise would not accept them.⁵³ The imbalance grows when an already-hired employee enters into a non-compete agreement with a current employer because the “threat of discharge” exists.⁵⁴

*b. Non-compete agreements hinder employee mobility and restrict employee choice.*⁵⁵ Society generally favors employee mobility because it ensures that employees will have the best chance of being productive members of society and achieving success.⁵⁶ However, by their nature, non-compete agreements restrict movement by preventing employees from working in certain geographical areas for some amount of time or from working for other employers for specified amounts of time.

50. Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power Via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963, 965 [hereinafter Arnow-Richman, *Cubewrap Contracts*].

51. See Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements*, 52 WM. & MARY L. REV. 873, 882 (2010) (discussing standard-form contracts, including non-compete agreements, as “the product of vastly unequal bargaining power”).

52. Arnow-Richman, *Cubewrap Contracts*, *supra* note 50, at 963–64.

53. *Id.* at 966–67.

54. Michael J. Garrison & John T. Wendt, *Employee Non-Competes and Consideration: A Proposed Good Faith Standard for the “Afterthought” Agreement*, 64 U. KAN. L. REV. 409, 412–13 (2015) (“An employee’s bargaining power is substantially diminished after employment has commenced, and the threat of discharge is a potent weapon that employers can use to secure an afterthought agreement (a non-compete agreement signed after employment commences).”).

55. Lee, *supra* note 44, at 17.

56. Norman D. Bishara & Michelle Westermann-Behaylo, *The Law and Ethics of Restrictions on an Employee’s Post-Employment Mobility*, 49 AM. BUS. L.J. 1, 7–8 (2012).

*B. States' Regulation of Non-Compete Agreements*⁵⁷

State laws regarding non-compete agreements are as varied as the reasons for having non-compete agreements. Commentators generally separate these laws into three different groups: (1) laws that allow non-compete agreements if the agreements meet a reasonableness standard, (2) laws that prohibit non-compete agreements with some exceptions, and (3) laws that ban employer-employee non-compete agreements altogether.⁵⁸ Utah's Act creates a hybrid of these different approaches that presents some difficulties.⁵⁹

Many states follow some sort of common-law reasonableness approach based on the historical development of non-compete agreements "as restraints on trade."⁶⁰ Consequently, the reasonableness approach scrutinizes non-compete agreements more thoroughly than traditional contract law.⁶¹ Presumably, the reasonableness approach tries to balance non-compete agreements' competing benefits to employers and detriments to employees by establishing an enforceability formulation: "[A] covenant in an agreement between an employer and a former employee restricting

57. This section only attempts to categorize the many different state laws regarding non-compete agreements to provide context and background for the discussion in Part III of Utah's Act. Each approach to non-compete agreements has its proponents and detractors, a discussion of which would be too expansive for the scope of this Comment. For a discussion of the benefits of a complete ban on non-compete agreements, see LOBEL, *supra* note 18; On Amir & Orly Lobel, *Driving Performance: A Growth Theory of Noncompete Law*, 16 STAN. TECH. L. REV. 833 (2013); Gilson, *supra* note 17. For scholars who question the reasoning and data in support of bans on non-compete agreements, see Norman D. Bishara & Evan Starr, *The Incomplete Noncompete Picture*, 20 LEWIS & CLARK L. REV. 497 (2016); Jonathan M. Barnett & Ted Sichelman, *Revisiting Labor Mobility in Innovation Markets* (Univ. S. Cal. Ctr. for Law and Soc. Sci. Research Papers Series, Paper No. CLASS16-13, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2758854.

58. Viva R. Moffat, *Making Non-Competes Unenforceable*, 54 ARIZ. L. REV. 939, 941 (2012).

59. See discussion *infra* Part III.

60. Moffat, *supra* note 58, at 945. Of these states, some "have non-compete statutes that essentially restate the common-law rule of reason." *Id.* at 948.

61. See generally Daniel P. O'Gorman, *Contract Theory and Some Realism About Employee Covenant Not to Compete Cases*, 65 SMU L. REV. 145, 184 (2012) ("[B]ecause [non-compete] agreements were considered in restraint of trade and therefore had to be 'reasonable' to be enforced, such agreements would never be welcomed fully into the realm of pure contract and its related idea of 'freedom of contract.'").

the former employee's working activities is enforceable only if it is reasonably tailored in scope, geography, and time to further a protectable interest of the employer."⁶² Virginia, New York, Texas, and Delaware are some of the states that follow the reasonableness standard.⁶³

A minority of states, like Colorado,⁶⁴ Louisiana,⁶⁵ and Nevada,⁶⁶ generally prohibit non-compete agreements between employers and employees unless the agreements fall within specific exceptions. These states have a desire "to prevent an individual from contractually depriving himself [or herself] of the ability to support himself [or herself] and consequently becoming a public burden."⁶⁷ However, they also recognize "limited instances in which a contract can restrict the exercise of a lawful profession,"⁶⁸ such as promoting an employer's goodwill.

California leads the small number of states that have banned non-compete agreements entirely,⁶⁹ joined only by Montana,⁷⁰ North

62. RESTATEMENT (THIRD) OF EMP'T LAW § 8.06 (AM. LAW INST. 1999). Many states utilize some form of these factors. *See, e.g.*, *Senture, LLC v. Dietrich*, 575 F. Supp. 2d 724, 728 (E.D. Va. 2008) (discussing that Kentucky law takes into account geographic and time restrictions when determining reasonableness in non-compete agreements); *Nat. Organics, Inc. v. Kirkendall*, 860 N.Y.S.2d 142, 143 (N.Y. App. Div. 2008) ("A non-compete agreement must also be reasonably limited temporally and geographically.").

63. For an extensive survey of all states and their non-compete laws, see *Employee Noncompetes: A State by State Survey*, BECK REED RIDDEN LLP, <https://www.faircompetitionlaw.com/wp-content/uploads/2017/07/Noncompetes-50-State-Survey-Chart-20170711.pdf> (last updated July 11, 2017) (except for the states mentioned here, the accuracy of this survey has not been independently verified).

64. COLO. REV. STAT. ANN. § 8-2-113 (West 2013). In Colorado, covenants not to compete are void unless contracted to protect trade secrets, among other exceptions. *Id.*

65. LA. STAT. ANN. § 23:921(C) (2010 & Supp. 2017). In Louisiana, non-compete agreements are unenforceable unless agreed upon within a specific area and during a specific time frame not to exceed two years. *Id.*

66. NEV. REV. STAT. § 613.200 (2015). In Nevada, any employer who willfully prevents any employee from gaining employment elsewhere "is guilty of a gross misdemeanor and shall be punished by a fine of not more than \$5,000." *Id.* Excepted from this restriction is an agreement that prevents the employee from directly competing with the former employer or disclosing to a future employer any trade secrets of the former employer. *Id.*

67. *USI Ins. Servs., LLC v. Tappel*, 09-149, p. 7 (La. App. 5 Cir. 11/10/09); 28 So. 3d 419, 423 (La. Ct. App. 2009).

68. *Id.*, 28 So. 3d at 424.

69. *See* CAL. BUS. & PROF. CODE § 16600 (West 2017) ("Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession,

Dakota,⁷¹ and Oklahoma.⁷² By banning the agreements, these states demonstrate that, for their state policies, “open competition and employee mobility” and protecting “the important legal right of persons to engage in businesses and occupations of their choosing”⁷³ outweigh the benefits that non-compete agreements give to employers.

III. THE CURRENT STATE OF NON-COMPETE AGREEMENTS IN UTAH

Utah, however, does not fit comfortably in any of the above categories. Unlike states that have generally prohibited or entirely banned non-compete agreements, Utah law allows for non-compete agreements,⁷⁴ which situates Utah closer to states that follow the common-law reasonableness approach. However, Utah non-compete agreements are not entirely governed by the reasonableness standard because although time restrictions greater than one year may be

trade, or business of any kind is to that extent void.”). Exceptions do not involve employee-employer non-compete agreements but instead involve non-competes in relation to the sale of a business, § 16601, the dissolution of a partnership, § 16602, or the sale of a limited liability company, § 16602.5. California clearly has had success while employing this model, but the other states following the model have not had the same success. Thus, other factors must be contributing to California’s growth that minimize the effect that California’s ban on non-compete agreements is having on businesses in the state. *See, e.g.*, Brad Templeton, *The Real Secret Behind Silicon Valley’s Success*, FORBES (July 11, 2012, 5:00 PM), <https://www.forbes.com/sites/singularity/2012/07/11/the-real-secret-behind-silicon-valleys-success/#408a39b775e1> (summarizing several factors contributing to Silicon Valley growth in California and hypothesizing that a strong sense of the American dream in immigrant business founders is a leading factor); Neil Koenig, *Next Silicon Valleys: How Did California Get It So Right?*, BBC (Feb. 9, 2014), <http://www.bbc.com/news/technology-26041341> (interviewing several Silicon Valley experts “why they thought the area had been so successful”).

70. MONT. CODE ANN. § 28-2-703 (West 2009) (“Any contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind . . . is to that extent void.”).

71. N.D. CENT. CODE § 9-08-06 (2006) (“Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void . . .”). North Dakota has the same exceptions as California with regards to selling a business or partnership. *Id.*

72. OKLA. STAT. ANN. tit. 15, § 219A (West 2013).

73. *Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 291 (Cal. 2008).

74. *See* UTAH CODE ANN. § 34-51-201 (West Supp. 2017).

reasonable in some circumstances under the common law,⁷⁵ the Act summarily rejects those restrictions.⁷⁶ Thus, Utah law is not entirely comparable to the common-law reasonableness states. The outright rejection of all non-compete agreements greater than one year is more like the policy of states that ban non-compete agreements altogether. Therefore, because Utah utilizes both statutory requirements and common-law reasonableness, and bans some non-compete agreements all together, Utah is a hybrid of the different approaches to non-compete agreements.

Like states that either ban non-compete agreements entirely or severely restrict their use, Utah, through the Act, seems to prioritize employee mobility and employee right to choose their employers and occupations. Representative Mike Schultz, one of the Act's sponsors in the House of Representatives, stated that the Act will "mak[e] it so that the employees of our state have the opportunity to go out and start their own businesses if they would like" and can "move to another job to . . . be able to provide for their families."⁷⁷ However, Representative Schultz also stated that, regarding the attorney's fees mandate of the Act, "those who have legitimate reasons for their non-compete agreements will be just fine."⁷⁸ Unfortunately, Representative Schultz's statement ignored the intricacies of Utah's statutory-and-common-law world for non-compete agreements. The following discussion will show that, although the Act was enacted based on compelling policy reasons, the confusing state of the common law—which was in large part unremedied by the Act—leaves a difficult task for employers when determining how to craft enforceable non-compete agreements that will avoid automatic attorney's fees and costs.

75. See, e.g., *Sys. Concepts, Inc. v. Dixon*, 669 P.2d 421, 426 (Utah 1983) ("The subject [anticompetition] covenant contains a two-year time restriction, which is clearly, or at least 'probably' reasonable . . .").

76. See § 34-51-201.

77. *Utah 2016 General Legislative Session, House - Day 44 2016 Part 3*, at 2:20:08, UTAH STATE LEGISLATURE, http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=20219&meta_id=629364 (last visited Dec. 2, 2017) (House Floor Debate on 10 H.B. 251, Post-Employment Restrictions Amendments, held Mar. 9, 2016) (statement of Rep. Schultz).

78. *Id.* at 2:21:40.

*A. The Common-Law Requirement(s) of
Enforceable Non-Compete Agreements*

Currently, Utah's common law governing non-compete agreements seems to follow two competing tests, each stemming from a Utah Supreme Court case decided in 1951, *Allen v. Rose Park Pharmacy*.⁷⁹ These competing standards will be discussed in turn, followed by an analysis of the most difficult factors in each test that an employer must meet to draft an enforceable non-compete agreement.

1. The Rose Park standard

In *Rose Park*, an employee signed a non-compete agreement upon beginning employment as a manager for a pharmacy.⁸⁰ The non-compete agreement stated that for a period of five years after termination, the employee would not work for a pharmacy or drug store within a two-mile radius of the pharmacy.⁸¹ After only one year of employment, the pharmacy terminated the employee.⁸² The employee sued to determine if the non-compete agreement was enforceable, presumably because the employee wished to operate a competing business within the two-mile radius.⁸³ The court held that the non-compete agreement was valid because the agreement (1) was supported by adequate consideration, (2) was not negotiated in bad faith, (3) was "necessary to protect the good will of the

79. See *Allen v. Rose Park Pharmacy*, 237 P.2d 823 (Utah 1951). This case, and the two competing standards that come from it, seems to illustrate the belief that "the ambiguity surrounding the enforceability of [non-competes] has resulted in vast amounts of litigation and reported appellate decisions. Despite this abundance of legal precedent, it still is difficult for lawyers to predict confidently how a court will react to any given noncompetition clause." Peter J. Whitmore, *A Statistical Analysis of Noncompetition Clauses in Employment Contracts*, 15 J. CORP. L. 483, 485 (1990) (citations omitted).

80. *Rose Park*, 237 P.2d at 824.

81. *Id.*

82. *Id.* at 824–25.

83. *Id.* The employee sued "for a declaratory judgment to determine the validity of [a non-compete agreement] in the contract of employment." *Id.* The employer had not yet tried to enforce the non-compete agreement, so the employee was not challenging the enforceability of the non-compete agreement. Instead, the employee likely wanted to preemptively make sure the agreement would not be enforceable before operating the competing business.

business,” and (4) was “reasonable in its restrictions as to time and area.”⁸⁴

2. *The Robbins standard and subsequent cases*

Even though the *Rose Park* opinion succinctly stated the factors that the court examined while determining enforceability, a later opinion muddied the waters. In *Robbins v. Finlay*, a hearing aid salesman quit his job and immediately started a rival business selling hearing aids.⁸⁵ This action directly violated his non-compete agreement, which stated that the salesman would not compete with the employer in Utah for one year after terminating employment.⁸⁶ The employer sued to enforce the agreement, but the court held that the agreement was unenforceable because the salesman did not possess trade secrets that were afforded protection.⁸⁷ In so holding, the court seemed to add additional requirements to the *Rose Park* factors:

Covenants not to compete are enforceable if carefully drawn to protect only the legitimate interests of the employer. The reasonableness of a covenant depends upon several factors, including its geographical extent; the duration of the limitation; the nature of the employee's duties; and the nature of the interest which the employer seeks to protect such as trade secrets, the goodwill of his business, or an extraordinary investment in the training or education of the employee.⁸⁸

In *Robbins*—contrary to *Rose Park*—the Court neglected consideration and bad faith as factors to consider but introduced employee duties, employer trade secrets, and employee training.⁸⁹

84. *Id.* at 828.

85. *Robbins v. Finlay*, 645 P.2d 623, 624 (Utah 1982).

86. *Id.* at 624 n.2.

87. *Id.* at 628.

88. *Id.* at 627. The court cited as the first authority for this position a case from Pennsylvania. *Id.* The court only cited *Rose Park* as additional support for its position, along with cases from Nebraska, and the Fourth Circuit Court of Appeals. *Id.* By not citing *Rose Park* as the first authority and limiting its statement to the requirements therein, the court seemed to expand upon the holding in *Rose Park*.

89. *See id.* But *see Rose Park*, 237 P.2d at 828.

Soon after *Robbins* was decided, the Utah Supreme Court appeared to remedy the *Robbins* decision in *System Concepts, Inc. v. Dixon* by requiring non-compete agreements to satisfy the specific standards set forth in *Rose Park*,⁹⁰ not *Robbins*. *Dixon* seemed to implicitly return the standard to *Rose Park* by adding consideration and bad faith to the equation and removing employee duties, trade secrets, and employee training.⁹¹ But *Dixon* did not specifically overturn the additional factors in *Robbins*.

Therefore, while courts in a majority of cases have applied the *Rose Park* standard,⁹² some courts still follow the *Robbins* factors. For example, in *Systems West Performance, LLC v. Farland*, a Utah federal district court held that a non-compete agreement was reasonable, and therefore enforceable, because the agreement satisfied all the *Robbins* factors.⁹³ Additionally, in *Scenic Aviation, Inc. v. Blick*, the same court found a restrictive covenant unenforceable because the covenant was not “carefully drawn to protect only the legitimate interests of the employer,” specifically the employer’s trade secrets and goodwill as required in *Robbins*.⁹⁴ Other cases follow these examples.⁹⁵ Thus, because of the competing *Rose Park* and *Robbins* standards, Utah employers may be unsure of which standard their non-compete agreements should be structured to meet.

90. *Sys. Concepts, Inc. v. Dixon*, 669 P.2d 421 (Utah 1983). For a non-compete agreement to be enforceable, the “requirements are that: (1) the covenant be supported by consideration; (2) no bad faith be shown in the negotiation of the contract; (3) the covenant be necessary to protect the goodwill of the business; and (4) it be reasonable in its restrictions as to time and area.” *Id.* at 425–26.

91. *See id.*

92. *See, e.g.*, *Elec. Distributions, Inc. v. SFR, Inc.*, 166 F.3d 1074 (10th Cir. 1999) (applying Utah law); *Bad Ass Coffee Co. of Haw., Inc. v. JH Enterprises, L.L.C.*, 636 F. Supp. 2d 1237, 1245–46 (D. Utah 2009); *TruGreen Cos. v. Mower Bros.*, 2008 UT 81, 199 P.3d 929.

93. *Sys. W. Performance, LLC v. Farland*, No. 2:14-cv-00276-DN-BCW, 2015 WL 4920962, at *3–5 (D. Utah Aug. 18, 2015).

94. *Scenic Aviation, Inc. v. Blick*, No. 2:02-CV-01201 PGC, 2003 WL 26060445, at *5 (D. Utah Aug. 4, 2003).

95. *See, e.g.*, *First Am. Title Ins. Co. v. Nw. Title Ins. Agency, LLC*, No. 2:15-cv-00229-DN, 2016 WL 6902473 (D. Utah Nov. 23, 2016); *Hunt v. Key*, No. 2:13CV83, 2014 WL 722487 (D. Utah Feb. 24, 2014); *Kasco Servs. Corp. v. Benson*, 831 P.2d 86 (Utah 1992) (discussing both the *Robbins* and *Rose Park* standards).

3. Inconsistency within the factors

Even if a court applies the standard that an employer anticipates, some factors within the standards are often applied inconsistently.⁹⁶ Each such factor is examined below.⁹⁷

a. Goodwill. Courts have a difficult time determining whether a non-compete agreement is necessary to protect a company's goodwill in large part because of "a strong connection between [an employer's] ability to stop a former [employee] from competing and [the employer's] goodwill."⁹⁸ In *Bad Ass Coffee Co. of Hawaii v. JH Nterprises, L.L.C.*, the court found that a non-compete agreement was enforceable because the agreement protected a coffee shop's goodwill.⁹⁹ The court reasoned that two factors contributed to the necessity of the non-compete agreement in protecting the coffee shop's goodwill: (1) the employee opening a competing coffee shop could be seen as a negative message about the coffee shop to the market, and (2) allowing the employee to open a competing shop could send a message to other employees that the behavior was acceptable.¹⁰⁰

96. The other factors left undiscussed are applied relatively consistently in Utah.

97. Some have written that consideration may also be applied inconsistently in the future. See Darren Nadel & Stephen E. Baumann, II, *Utah Enacts Post-Employment Restrictions Act*, LITTLER (March 31, 2016), <https://www.littler.com/publication-press/publication/utah-enacts-post-employment-restrictions-act> ("Adequate consideration will be a fluid concept. In fact, the final version of the Act excluded a proposed definition of '[a]dequate consideration' that was limited to 'compensation, stocks, or anything of economic value that is paid, granted, given, donated, or transferred to an employee in a single transaction and that equals or exceeds 5% of the annual salary of the employee determined as of the day on which a post-employment restrictive covenant is signed.'"). Current case law indicates that consideration has been applied consistently so far. This makes some intuitive sense because non-compete agreements are often part of employment contracts. Employment contracts are rarely unsupported by consideration because "an employer's promise of employment under certain terms and for an indefinite period constitutes . . . the employer's consideration for the employment contract. The employee's performance of service pursuant to the employer's offer constitutes . . . the employee's consideration for the contract." *Johnson v. Morton Thiokol, Inc.*, 818 P.2d 997, 1002 (Utah 1991). Therefore, this factor was not discussed in detail in this Comment.

98. *Bad Ass Coffee Co. of Haw., Inc. v. JH Nterprises, L.L.C.*, 636 F. Supp. 2d 1237, 1245-46 (D. Utah 2009).

99. *Id.* at 1246.

100. *Id.*

The employee, in defense of his position that the non-compete agreement failed to reasonably protect the coffee shop's goodwill, argued that the plain language of the agreement meant that the employee could not open any store, shop, restaurant, or other establishment that happened to sell coffee and thus compete with the coffee shop.¹⁰¹ The employee believed that this plain language pointed to the non-compete agreement restricting activities that were unrelated to the coffee shop's goodwill.¹⁰² The court disagreed, reasoning that, in Utah, "courts avoid reading covenants not to compete in a manner that would render them unreasonable,"¹⁰³ and the employee's proposed reading would render the agreement unreasonable.¹⁰⁴

However, the court failed to consider a key principle underlying the *Robbins* factors when deciding that Utah courts do not read non-compete agreements in a way that would create unreasonable agreements: "Covenants not to compete are enforceable if *carefully* drawn to protect only the legitimate interests of the employer."¹⁰⁵ The *Robbins* court indicated that the plain language of the non-compete agreement should be carefully drawn to avoid limiting competition.¹⁰⁶ Therefore, if a non-compete agreement is designed primarily to limit employer competition or restrain choice, the non-compete agreement is unenforceable because limiting competition and restraining choice likely are not legitimate interests.¹⁰⁷ These statements seem to contradict the *Bad Ass Coffee* court's decision to avoid reading the covenant in an unreasonable way. Of course, the *Bad Ass Coffee* court was applying the *Rose Park* standard,¹⁰⁸ so perhaps the *Robbins* standard requires carefully-drawn agreements

101. *Id.*

102. *Id.*

103. *Id.*

104. *See id.* at 1246–47 (declaring, after discussing the employee's proposed reading, that employees "are unlikely to convince a court (or arbitrator) that the non-compete clauses at issue here are unenforceable").

105. *Robbins v. Finlay*, 645 P.2d 623, 627 (Utah 1982) (emphasis added).

106. *See id.* ("In this case, the covenant [not to compete] served no purpose other than restricting an employee from competing with a former employer.").

107. *See id.*

108. *See supra* note 92 and accompanying text.

when examining its goodwill factor, while the *Rose Park* standard allows courts to avoid unreasonable renditions of non-compete agreements while analyzing its own goodwill factor. But this distinction is not clear from the *Bad Ass Coffee* court's analysis.¹⁰⁹

b. Limitations on scope. Both the *Robbins* and *Rose Park* standards require reasonable limitations on time and area restrictions.¹¹⁰ The reasonableness of these restraints is "determined on a case-by-case basis, taking into account the particular facts and circumstances surrounding the case" and the non-compete agreement.¹¹¹ When circumstances are taken into account on a case-by-case basis, uncertainty about the legality of non-compete agreements increases.¹¹² This uncertainty, in turn, leads courts to apply inconsistent limitations on the scope of non-compete agreements. Uncertainty in both time and geographic limitations are examined below.

(1) *Uncertainty about how courts evaluate limitations on time has produced widely varied results.* Courts generally uphold a time limitation if it is "necessary in its full extent for the protection of some legitimate interest of the promisee, and it must not be unduly harsh and oppressive to the covenantor."¹¹³ However, courts have been inconsistent in their application of this rule. For example, Utah courts have declared non-compete agreements valid with one-year to twenty-five-year time restrictions.¹¹⁴ The facts of these cases range from a one-year provision for title company office managers¹¹⁵ to a

109. See generally *Bad Ass Coffee Co.*, 636 F. Supp. 2d 1237.

110. *Robbins*, 645 P.2d at 627; *Allen v. Rose Park Pharmacy*, 237 P.2d 823, 828 (Utah 1951).

111. *Elec. Distributions, Inc. v. SFR, Inc.*, 166 F.3d 1074, 1085 (10th Cir. 1999) (quoting *Sys. Concepts, Inc. v. Dixon*, 669 P.2d 421, 427 (Utah 1983)) (applying Utah law). One important consideration in this determination is "the location and nature of the employer's clientele." *Id.* (quoting *Sys. Concepts*, 669 P.2d at 427).

112. See Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CALIF. L. REV. 1580, 1655 (1983) ("Any type of a case-by-case approach would greatly increase business uncertainty.").

113. *Elec. Distributions*, 166 F.3d at 1085.

114. Christopher Mack, Note, *Postemployment Noncompete Agreements: Why Utah Should Depart from the Majority*, 2015 UTAH L. REV. 1201, 1204.

115. See *First Am. Title Ins. Co. v. Nw. Title Ins. Agency, LLC*, No. 2:15-cv-00229-DN, 2016 WL 6902473, at *17 (D. Utah Nov. 23, 2016).

twenty-five-year agreement relating to the sale of a mortuary.¹¹⁶ These mixed results provide little guidance to employers trying to draft enforceable non-compete agreements.

(2) *Uncertainty about how courts determine the reasonableness of geographic limitations makes it difficult for employers to structure the limitation.* “Ordinarily, a covenant is enforceable if it specifies an area no greater than that to which the business extends, and it is unenforceable if it specifies a territory broader than encompassed by the . . . business.”¹¹⁷ But determining the area in which a business extends is a difficult task.¹¹⁸ For example, in *Electrical Distributors, Inc. v. SFR, Inc.*, the court held that a restriction not to compete in the entire state of Utah for seven years was reasonable because the company enforcing the non-compete agreement had customers in several different cities throughout the state.¹¹⁹ However, the court admitted that the question of “where the bulk of the customers were located” was left unanswered.¹²⁰ In that case, the question was not enough to call into doubt the reasonableness of the restriction,¹²¹ but under a different set of circumstances, it may be enough to tip the scale toward unreasonableness.¹²²

However, the customers’ location may not be as important as the employee’s operating region within the company’s geographical area. For example, in *Vivint, Inc. v. Dahl*, a Utah state district court case,

116. See *Valley Mortuary v. Fairbanks*, 225 P.2d 739, 741–42 (Utah 1950).

117. *Elec. Distribs.*, 166 F.3d at 1085.

118. Kyle B. Sill, *Drafting Effective Noncompete Clauses and Other Restrictive Covenants: Considerations Across the United States*, 14 FLA. COASTAL L. REV. 365, 380 (2013) (“Courts have upheld—and conversely rejected—distances from a few miles, to cities, entire states, countries, and the world.”).

119. *Elec. Distribs.*, 166 F.3d at 1085.

120. *Id.*

121. See *id.*

122. For example, imagine a company that has thousands of clients in Nevada, Utah, and Idaho. That same company has only a few hundred clients in California, but these clients are spread out from San Francisco southward to San Diego. The company requires its employees to sign a non-compete agreement as a condition to employment. The agreement states that the employee, for a certain number of years, will not perform work in the company’s industry in the states of Nevada, Utah, Idaho, and California. Even though the company has clients in California, the minimal number of clients compared with the loss of employee mobility (not being able to work in California, with its millions of residents) may persuade a court to reason differently than the court in *Electrical Distributors*.

the court granted a former employee's Motion for Partial Summary Judgment on the issue of whether a restrictive covenant was unenforceable.¹²³ The restrictive covenant provided that the employee would not compete against Vivint by convincing any customer to cease dealing with the company.¹²⁴ In granting the motion, the court reasoned that the employee, who sold alarm systems to customers in only two states, could not be restricted from competing against his former employer by coming into contact with any customer in essentially any area of the United States.¹²⁵ This restriction, even though limited to only Vivint customers, was not "reasonably tailored to protect the interests of Vivint."¹²⁶

While the agreement in question did not specify a geographic area, the court imputed one to the agreement by inferring from the circumstances that Vivint intended to restrict the employee to non-competition in any area where the company also operated.¹²⁷ Thus, in contrast with *Electrical Distributors*, in which the court analyzed the reasonableness of a geographic limitation by examining the number of customers in a particular area, the *Vivint* court analyzed the reasonableness of a geographic limitation by the actual contact that an employee had with the company in a geographic area.

But, in *Systems West Performance*, a Utah federal district court found that a non-compete provision devoid of any geographic restrictions was still "reasonably limited by certain activity restrictions."¹²⁸ Specifically, the activity restrictions forbade the employee "from working for any client or prospective client of [the employer]."¹²⁹ This limitation was even broader than the unreasonable restriction in *Vivint* not to contact its customers,

123. In this case, the covenant seems to combine non-solicitation and non-compete agreements together. The court analyzed both under the *Rose Park* standard. See Order Granting Defendant's Motion for Partial Summary Judgment at 2-5, *Vivint, Inc. v. Dahl*, No. 130401309 (4th Dist. Ct. Utah Mar. 21, 2016).

124. *Id.* at 2.

125. *Id.* at 5.

126. *Id.*

127. *Id.*

128. *Sys. W. Performance, LLC v. Farland*, No. 2:14-cv-00276-DN-BCW, 2015 WL 4920962, at *4 (D. Utah Aug. 18, 2015).

129. *Id.*

because this limitation also included prospective customers. Yet, the court here found that the restriction was reasonable.¹³⁰

These three cases highlight some of the difficult uncertainties that employers face when drafting enforceable, reasonable geographic restrictions: uncertainty as to (1) the area in which a business operates, (2) the importance of the employee's involvement in that area, and (3) the interpretation of provisions that limit non-compete agreements in ways other than geographical restrictions.

B. The Act and its Possible Effects

1. A review of the Act as currently enacted

The Post-Employment Restrictions Act became effective on May 10, 2016.¹³¹ The Act applies to only one subset of post-employment restrictions—non-compete agreements—and does not apply to non-solicitation agreements, non-disclosure agreements, or confidentiality agreements.¹³² Additionally, the legislature specifically exempted severance agreements and non-compete agreements related to selling a business from the Act.¹³³

The Act generally leaves the common law as is,¹³⁴ with one major exception: “[A]n employer and an employee may not enter into a [non-compete agreement] for a period of more than one year from the day on which the employee is no longer employed by the employer.”¹³⁵ Thus, the Act added certainty to the common law in this area.¹³⁶ Any agreements entered into after the effective date that

130. *See id.* at *5 (“Because each of the six factors Utah courts use to determine the reasonableness of non-compete clauses weigh[s] in favor of enforceability, the non-compete clause is reasonable and therefore enforceable, based on the pleadings.”).

131. UTAH CODE ANN. §§ 34-51-101 to -301 (West Supp. 2017).

132. *Id.* § 34-51-102(1)(b).

133. *Id.* § 34-51-202(2).

134. *See id.* § 34-51-201 (“In addition to any requirements imposed under common law . . .”).

135. *Id.*

136. Theoretically, a court could still decide that a non-compete agreement with less than a one-year time restriction is unreasonable according to the particular facts and circumstances of a case. *See generally* Sys. Concepts, Inc. v. Dixon, 669 P.2d 421, 427 (Utah 1983).

violate the one-year provision are void.¹³⁷ Additionally, and most importantly for purposes of this Comment, if a non-compete agreement is deemed unenforceable by a court or arbitrator, “the employer is liable for the employee’s: (1) costs associated with arbitration; (2) attorney fees and court costs; and (3) actual damages.”¹³⁸

2. The effects of the Act’s attorney’s fees provision

While the Act is laudable for the compromises represented in its passing,¹³⁹ it leaves at least three significant questions about its effects on Utah employers. First, the Act clearly states that courts must not apply the one-year provision retroactively,¹⁴⁰ but the Act does not state whether courts should apply the attorney’s fees provision retroactively to non-compete agreements entered into before May 10, 2016. Therefore, agreements entered into before the Act was even introduced to the legislature may still be subject to the Act’s attorney’s fees provision. This concerning possibility is compounded by the fact that courts may see the legislature’s decision to limit non-competes to one year as persuasive evidence that any non-competes with longer restrictions are unreasonable. Thus, despite the language of the Act, its provisions may retroactively punish all non-compete agreements exceeding one year.

Second, the Act fails to address court remedies, such as bluelining¹⁴¹ and redlining,¹⁴² that reform unenforceable non-

137. UTAH CODE ANN. § 34-51-201.

138. *Id.* § 34-51-301.

139. *Utah 2016 General Legislative Session, House – Day 44 2016 Part 3*, at 2:19:52, UTAH STATE LEGISLATURE, http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=20219&meta_id=629364 (last visited Dec. 2, 2017) (House Floor Debate on 10 H.B. 251, Post-employment Restrictions Amendments, held Mar. 9, 2016) (statement of Rep. Schultz) (discussing finding “a solution that is compatible to most people”).

140. *See* UTAH CODE ANN. § 34-51-201.

141. *Raimonde v. Van Vlerah*, 325 N.E.2d 544, 546 (Ohio 1975) (explaining that bluelining, or the blue-pencil doctrine, “provides that if unreasonable provisions exist in [a non-compete agreement], they may be stricken, if devisible, [sic] but not amended or modified”).

142. John S. Beckmann, *Business Torts and Non-Compete Agreements*, in 5A MINNESOTA PRACTICE SERIES, METHODS OF PRACTICE § 2, § 2.36 (Roger S. Haydock & Peter B. Knapp eds., 4th ed. Supp. 2017) (explaining that redlining is the process of taking an overly broad

compete agreements into enforceable ones. A court can apply both remedies on its own or through a separate contractual provision requiring reformation of the non-compete agreement.¹⁴³ No Utah case has applied these doctrines to non-compete agreements, but courts are not yet required to disregard the doctrines either. Thus, a court could decide in the future to redline or blue-line a non-compete agreement in an effort to create an enforceable agreement. In such a situation, though the court would necessarily declare the original agreement unenforceable to reform the agreement, the end result of the case would be an enforceable agreement.¹⁴⁴ Whether the attorney's fees provision of the Act would apply in that case is unclear.

Finally, the Act risks imposing attorney's fees on employers who make good-faith efforts to comply with the common-law requirements, because attorney's fees are imposed where "the post-employment restrictive covenant is unenforceable"—for any reason.¹⁴⁵ The Act compounds this result by regulating only one factor of the common law regarding non-compete agreements and leaving the other factors open to continued court interpretation. Attorney's fees are generally "recoverable only if authorized by contract or statute."¹⁴⁶ Before the Act, the parties to a contract could freely negotiate for an attorney's fees provision in non-compete agreements. Now, however, the Act unilaterally imposes attorney's fees in an area where fees were previously at the discretion of the parties.

geographic or temporal scope and "slashing their tenure [or] more tightly circumscribing their territorial limitations" to create a reasonable scope).

143. See *id.*; Alina Klimkina, Note, *Are Noncompete Contracts Between Physicians Bad Medicine? Advocating in the Affirmative by Drawing a Public Policy Parallel to the Legal Profession*, 98 KY. L.J. 131, 134 (2009).

144. See generally UTAH CODE ANN. § 34-51-301 (West Supp. 2017) (requiring an award of attorney's fees if "the post-employment restrictive covenant is unenforceable," but not discussing whether remedial tactics will delay this award).

145. *Id.*

146. *Giles v. Mineral Res. Int'l, Inc.*, 2014 UT App 259, ¶ 17, 338 P.3d 825, 829–30.

IV. A SOLUTION TO THE AUTOMATIC ATTORNEY'S FEES PROVISION: LEAN ON NON-SOLICITATION AGREEMENTS

Because of the many risks associated with using non-compete agreements in light of the automatic attorney's fees provision and the already confusing common law, some employers may be leery about using non-compete agreements to protect their interests. However, employers can protect many of these interests by another common restrictive covenant—non-solicitation agreements.¹⁴⁷ Non-solicitation agreements primarily prohibit a former employee from soliciting a business's customers or current employees to leave the business.¹⁴⁸ Non-compete agreements and non-solicitation agreements are both considered restrictive covenants¹⁴⁹ and are both analyzed under the same common-law standards of *Rose Park* or *Robbins*.¹⁵⁰ Thus, both are still subject to the same dizzying effects of the common law as discussed in Part III, though non-solicitation agreements receive greater deference because they are more specific than non-compete agreements.¹⁵¹ But unlike non-compete

147. Other methods also exist that may adequately substitute for non-competition agreements. See Nicandri, *supra* note 43 (discussing the inevitable disclosure doctrine, the Uniform Trade Secrets Act, The Computer Fraud and Abuse Act, garden leave clauses, forfeiture-for-competition clauses, and no-poach agreements). However, some of these methods often contain more searching standards of review than a relatively orthodox contract provision such as a non-solicitation agreement. See *id.* at 1019 (“Employers often enter into a [non-compete agreement] in order to avoid having to prove the elements of trade secret misappropriation [under the Uniform Trade Secrets Act] . . .”). Other methods are far more difficult to implement. See *generally id.* at 1025–32. This Comment focuses on non-solicitation agreements due to these perceived deficiencies.

148. *Nonsolicitation Agreement*, BLACK'S LAW DICTIONARY (10th ed. 2014).

149. See Brinton M. Wilkins, *Enforcing Reasonable Restrictive Covenants Against Former Employees*, UTAH EMP. L. LETTER, Nov. 2015, at 4.

150. See *Scenic Aviation, Inc. v. Blick*, No. 2:02-CV-01201 PGC, 2003 WL 26060445, at *5 (D. Utah Aug. 4, 2003) (analyzing a non-solicitation agreement under the *Robbins* standard). *But see* *Sys. W. Performance, LLC v. Farland*, No. 2:14-cv-00276-DN-BCW, 2015 WL 4920962, at *3–5 (D. Utah Aug. 18, 2015) (analyzing a non-solicitation agreement under the *Rose Park* standard).

151. Elizabeth E. Nicholas, Note, *Drafting Enforceable Non-Solicitation Agreements in Kentucky*, 95 KY. L.J. 505, 508 (2006) (discussing non-solicitation agreements generally); see also M. SCOTT McDONALD & JACQUELINE C. JOHNSON, UNFAIR COMPETITION AND INTELLECTUAL PROPERTY PROTECTION IN EMPLOYMENT LAW: CONTRACT SOLUTIONS AND LITIGATION GUIDE 626 (2014) (“[N]onsolicitation clauses are more commonly viewed as something different and more readily enforced [than non-compete clauses].”).

agreements, non-solicitation agreements are excepted from the automatic attorney's fees provision of the Act.¹⁵² Therefore, an employer will not be automatically penalized if an employer fails to navigate the common-law landscape to draft an enforceable non-solicitation agreement. This Part will discuss the benefits and drawbacks of relying on non-solicitation agreements to protect employer interests and examine some practical ways to balance non-solicitation and non-compete agreements to effectuate this goal.

*A. Non-Compete Agreements and
Non-Solicitation Agreements: A Comparison*

Non-compete and non-solicitation agreements are “similar instruments”¹⁵³ because non-solicitation agreements also protect most of the employer's four interests protected by non-compete agreements.¹⁵⁴ First, non-solicitation agreements also promote an employer's goodwill by preventing an employee from drawing away the customers and other employees that partially define this goodwill.¹⁵⁵ In fact, one court, commenting on the nuances of company goodwill, said, “[Goodwill] is the probability that old customers will resort to the old place or seek old friends”¹⁵⁶ If an employee were to leave and pull away customers and “friends,” or other employees, company goodwill would thus be damaged. Non-solicitation agreements prevent this from happening.

Second, non-solicitation agreements also protect an employer's investment in employee training by persuasively constraining employees from leaving the employer for greener pastures after the

152. See *supra* note 131 and accompanying text.

153. Erin E. Gould, Comment, *Read the Fine Print: A Critical Look at Oregon's Noncompete and Nonsolicitation Agreement Laws*, 88 OR. L. REV. 515, 518 (2009).

154. See discussion *supra* Part II. Non-compete agreements protect an employer's trade secrets, promote an employer's goodwill, protect an employer's investment in employee training, and foster company research and development.

155. See generally *Allen v. Rose Park Pharmacy*, 237 P.2d 823, 827–28 (Utah 1951) (“[A] covenant not to compete is necessary for the protection of the goodwill of the business when it is shown that although the employee learns no trade secrets, he may likely draw away customers from his former employer, if he were permitted to compete nearby.”).

156. *Peterson v. Jackson*, 2011 UT App 113, ¶ 35, 253 P.3d 1096, 1106 (quoting *Jackson v. Caldwell*, 415 P.2d 667, 670 (Utah 1966)).

employee completes the training.¹⁵⁷ On its face, the agreement does not restrict an employee from working in a particular area or for a particular company like a non-compete agreement. But non-solicitation agreements may increase relocation costs enough to disincentivize the employee from leaving because non-solicitation agreements prevent employees from taking an established client base to another company—often a base with which the employee has spent time developing relationships.¹⁵⁸ Additionally, discovering that another employer's employee is under a non-solicitation agreement may discourage a possible employer from hiring that employee.¹⁵⁹

In addition to protecting an employer's investment in a specific employee's training, non-solicitation agreements may also protect an employer's investment in the training of all employees. Many non-solicitation agreements contain two parts: "agreements not to solicit employees, and agreements not to solicit clients."¹⁶⁰ Thus, even if an employee decides that the benefits of moving to another company outweigh the difficulty of developing a new client base, the non-solicitation agreement will prohibit the employee from pulling away other employees to work with him or her at the new company, thereby protecting an employer's investment in those other employees' training.

However, except for the employer's customer lists that are impliedly protected under the agreement, non-solicitation agreements do not provide strong protection against an employee

157. See MCDONALD & JOHNSON, *supra* note 151, at 674 (justifying non-solicitation clauses because they protect against "conversion of . . . specialized training").

158. As an example, imagine a salesperson who signs a non-solicitation agreement before beginning employment with a medical device company. The salesperson then expends a significant amount of time finding clients and developing professional relationships with these clients, most of whom are doctors. The clients are pleased with the salesperson and the products being sold, so the clients refer the salesperson to others. If this salesperson were to leave the medical device company and work for a competitor, the salesperson would be prohibited from selling to any former clients, and thus, again, the salesperson would have to spend time finding clients and building professional relationships.

159. See Mary L. Mikva, *Drafting Confidentiality, Non-Compete, and Non-Solicitation Agreements: The Employee's Wish List*, PRAC. LAW., June 2004, at 11, 14 (A non-solicitation agreement "can and often does interfere with a departing employee's ability to get another job.").

160. *Id.*

misappropriating an employer's trade secrets.¹⁶¹ To shore up this lack of protection, employers could utilize specific confidentiality agreements in their employee contracts designed to prohibit misappropriation of trade secrets.¹⁶² Employers could also rely on the limited non-compete agreement discussed below to provide the requisite amount of protection.

Finally, non-solicitation agreements foster research and development more effectively than non-compete agreements. Many employers still adhere to the belief that non-compete agreements promote research and development by incentivizing employers to spend more on employee training "without fear that . . . competitors will poach knowledgeable employees."¹⁶³ But "[a] growing number of recent empirical studies on innovation and economic growth overwhelmingly suggest that the flow of people and information have significant positive effects, or *spillovers*, on markets."¹⁶⁴ This flow may "actually drive further innovation,"¹⁶⁵ contrary to employer beliefs. Using non-solicitation agreements will encourage spillovers by allowing employees to freely move between employers, thus increasing research and development.

*B. Balancing the Use of Non-Compete Agreements and
Non-Solicitation Agreements to Create Strong Employer Protection
with Minimal Risk*

Even in light of the new risks brought by the Act, non-compete agreements still have value for employers. They can narrowly tailor non-compete agreements to sufficiently protect employer interests that are not covered by non-solicitation agreements. The following

161. See William G. Porter, II & Michael C. Griffaton, *Identifying and Protecting Employers' Interests in Trade Secrets and Proprietary Information*, 68 DEF. COUNS. J. 439, 446 (2001) (quoting *Abraham Zion Corp. v. LeBow*, 593 F. Supp. 551, 569 (S.D.N.Y. 1984) ("[A] former employee may not solicit the customers of his former employer if they would be unknown to the employee but for information obtained during his prior employment.")).

162. See Mack, *supra* note 114, at 1211 ("A confidentiality agreement is '[a] promise not to disclose trade secrets or other proprietary information learned in the course of the parties' relationship.'").

163. Nicandri, *supra* note 43, at 1013; see Petersen & Stelter, *supra* note 15.

164. Amir & Lobel, *supra* note 57, at 856.

165. Nicandri, *supra* note 43, at 1014.

discussion illustrates practical ways to protect these interests by using both agreements.

1. Drafting narrowly tailored non-compete agreements

Non-compete agreements may be used primarily to protect trade secrets, an interest that non-solicitation agreements do not protect as strongly as non-compete agreements. Employers can do four things to draft narrowly tailored non-compete agreements that are likely enforceable by Utah courts.

First, employers should incorporate non-compete agreements only into the contracts of employees who actually come in contact with trade secrets. By doing this, employers will ensure that the unique interest that non-compete agreements protect—trade secrets—corresponds with the employees who have access to them. Limiting non-compete agreements to employees who utilize trade secrets will naturally limit the possibility that a court will determine a non-compete agreement unenforceable because fewer non-compete agreements will exist to declare unenforceable.

Second, and more importantly, even if the agreement is adjudicated, a court will consider protecting trade secrets as a legitimate interest.¹⁶⁶ In the non-compete agreement, employers can explicitly state that the purpose for their non-compete agreements is to protect trade secrets because only employees with access to trade secrets signed non-compete agreements.¹⁶⁷ By spelling out “the legitimate business interest [an employer is] trying to protect,”¹⁶⁸ employers may avoid the possibility of a court determining that

166. See *Sys. Concepts, Inc. v. Dixon*, 669 P.2d 421, 426 (Utah 1983) (“We hold that a covenant is valid which protects good will as well as trade secrets.”).

167. However, employers should also be clear that the time restriction in the non-compete agreement applies only to the former employee working for competitors. The proprietary information’s status as trade secrets should survive the termination of the non-compete agreement; otherwise, the trade secrets may no longer be protected under any confidentiality or other agreements to that effect. See Julianne M. Hartzell, *Time Limits in Confidentiality Agreements*, *INTELL. PROP. LITIG.*, Spring 2009, at 1.

168. *Employers May Face New Challenges in Drafting Noncompetes*, 19 *UTAH EMP. L. LETTER*, Oct. 2013, at 4, 6.

the non-compete agreement has an illegitimate interest that is unenforceable.¹⁶⁹

Third, employers can restrict the agreement to a time limit that satisfies the Act and is also reasonable for their particular industries. The Act specifies only that non-compete agreements with temporal restrictions lasting longer than one year are unenforceable;¹⁷⁰ it does not specify that temporal restrictions up to and including one year are automatically enforceable.¹⁷¹ While it is difficult to imagine a situation in which a less-than-one-year time restriction would be unreasonable, it is possible.¹⁷² Thus, employers should determine whether a one-year time restriction is reasonable under the circumstances. Generally, a time period that relates to the time it would take to adequately find and train a replacement is likely a reasonable restriction.¹⁷³

Finally, employers can restrict the geographic area of the non-compete agreement to increase the reasonableness of the restriction. Restricting the area to either the geographic area for which the employee was responsible or the area in which the employee's customers are mainly located will increase the reasonableness of the non-compete agreement's geographic restriction.¹⁷⁴

2. *Drafting aggressive non-solicitation agreements*

If an employer uses non-compete agreements primarily to protect trade secrets, the employer can then use non-solicitation agreements to protect employer goodwill and investment in employees, the two interests that both non-solicitation and non-compete agreements protect.¹⁷⁵ Besides attempting to comply with common law requirements, to draft effective, aggressive non-

169. For example, a primary purpose of restricting employee mobility would invalidate a non-compete agreement. *See Robbins v. Finlay*, 645 P.2d 623, 627 (Utah 1982).

170. UTAH CODE ANN. § 34-51-201 (West Supp. 2017).

171. *See generally id.*

172. *See Bryceland v. Northey*, 772 P.2d 36, 40 (Ariz. Ct. App. 1989) (opining that the time needed to replace an employee, in this case fourteen weeks, would be an appropriate time restriction in a restrictive covenant).

173. Sill, *supra* note 118, at 376.

174. *Id.* at 381.

175. *See supra* Section IV.A.

solicitation agreements, employers should also keep three things in mind.

First, employers should create entirely separate non-solicitation agreements in their employment contracts. Non-solicitation and non-compete agreements are often combined into the same contractual provision because they are so similar.¹⁷⁶ However, combining the two may present a challenge for a court if it must later determine whether it can separate the non-compete aspect of the provision for purposes of the Act. Thus, because separating the two agreements will avoid this problem, employers should consider keeping the two agreements unconnected in their employment contracts.

Second, employers should not leave the term “solicitation” undefined but should instead define the term broadly to encompass areas that a common standard dictionary definition of “solicit” might exclude. In contracts, as in other areas of law, undefined terms are generally given their ordinary and plain meaning.¹⁷⁷ Therefore, if a non-solicitation agreement uses the term “solicit” and does not define it, a court could conclude that “solicit” means “to approach with a request or plea” and “to try to obtain by usually urgent requests or pleas.”¹⁷⁸ Thus, the non-solicitation agreement might not provide any protection for the employer if, for example, a former employee recruits a third party and directs that party to target the employer’s customers since the employee is not the actual person doing the asking. “Solicit” should be well defined to encompass this and any other possibilities not covered by the ordinary meaning.

Third, the agreement should include a favorable choice of venue provision that allows the employer to quickly access a courthouse to file an injunction against any former employees who violate the non-

176. See Gould, *supra* note 153, at 520.

177. See *Hi-Country Prop. Rights Grp. v. Emmer*, 2013 UT 33, ¶ 18, 304 P.3d 851, 855–56 (giving undefined statutory terms their ordinary meaning); *Bear River Mut. Ins. Co. v. Williams*, 2006 UT App 500, ¶ 13, 153 P.3d 798, 801 (looking to ordinary and common meaning of undefined terms in an insurance policy); *Salem City v. Farnsworth*, 753 P.2d 514, 515 (Utah Ct. App. 1988) (giving “[u]ndefined words in a zoning ordinance . . . their plain and ordinary meaning”).

178. *Solicit*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/solicit> (last visited Jan. 3, 2018).

solicitation agreement. For most companies, this means that the choice of venue will be the state where the company has its primary place of business. By including a favorable, close venue, employers can minimize the effects of any wayward past employee who does violate the non-solicitation agreement.

V. CONCLUSION

Companies have flourished in Utah for a variety of reasons, including favorable state corporation laws. However, the Post-Employment Restrictions Act will likely injure Utah businesses who, in good faith, try to enforce non-compete agreements. By passing the Act, the legislature imposes automatic penalties on employers who try to enforce what could be considered reasonable non-compete agreements but instead are held unreasonable through a confusing set of common law requirements. To minimize this risk while still protecting the employer's interests that non-compete agreements are designed to protect, employers can forego aggressive non-compete agreements altogether. Instead, employers can draft narrowly tailored non-compete agreements in conjunction with aggressive non-solicitation agreements that are (1) separated from the non-compete agreements, (2) defined in their scope, and (3) drafted to provide for quick enforcement through favorable choice of venue provisions. Doing so will protect their interests and mitigate the risk of incurring automatic attorney's fees.

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