

THE SHIFTING LANDSCAPE OF RESTRICTIVE COVENANTS IN OKLAHOMA

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I. INTRODUCTION

Oklahoma is known for its vast energy industry,¹ conservative values,² and Delaware-influenced corporate legal environment.³ These characteristics have enticed many businesses to make Oklahoma their home.⁴ Now, Oklahoma welcomes even more businesses through a

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1. *Business Environment*, GREATER OKLA. CITY, <http://www.greateroklahomacity.com/index.php?submenu=busenvironment&src=gendocs&ref=businessenvironment&category=ExpansionRelocation> [<http://perma.cc/A84S-DCJD>] (last visited Oct. 16, 2015).

2. Walter Hickey, *And Now Here Are the Most Conservative States in America...*, BUS. INSIDER (Feb. 4, 2013, 9:45 AM), <http://www.businessinsider.com/most-conservative-states-2013-2?op=1> [<http://perma.cc/UBS8-SFQK>] (listing Oklahoma as the sixth most conservative state in the United States, with 47.3% of the state’s population identifying as conservative). Conservative values traditionally support businesses in the legislative arena. See WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 87 (1965) (discussing conservative-sponsored antitrust legislation). *But see* Carl Hulse, *Conservatives Viewed Bailout as Last Straw: Unwilling to Continue Bowing to President*, N.Y. TIMES, Sept. 27, 2008, at A1 (“[T]he House Republican[s] revolt[ed] . . . over the Bush administration’s request for \$700 billion [bailout] to prevent an economic collapse.”).

3. Int’l Bhd. of Teamsters Gen. Fund v. Fleming Co., 1999 OK 3, ¶ 13, 975 P.2d 907, 910 (“Oklahoma and Delaware have substantially similar corporation acts.”).

4. See John S. Kiernan, *2015’s Best Cities to Start a Business*, WALLETHUB, <http://wallethub.com/edu/best-cities-to-start-a-business/2281/#complete-rankings> [<http://perma.cc/9G5E-XA2U>] (last visited Oct. 16, 2015) (ranking the best cities in which to start a business based in part on the cities’ business environment—influenced by, among other things, corporate tax structures—and listing Tulsa (second) and Oklahoma City (twenty-first) in the top twenty-five); *see also* Steve Shaw, *Virginia-Based Energy Company Looking to Build Large Wind Farm in OK*, NEWS9.COM (Jan. 17,

decisive move by the state legislature. In 2013, the legislature passed Senate Bill 1031, adding solicitation of employees to the long list of legislatively addressed corporate concerns.⁵ It codified the new law as title 15, section 219B of the Oklahoma Statutes, validating “[a] contract or contractual provision which prohibits an employee or independent contractor of a person or business from soliciting, directly or indirectly, actively or inactively, the employees or independent contractors of that person or business to become employees or independent contractors of another person or business.”⁶ Businesses can now rest easy knowing that their financial interests in employees are statutorily protected.

It seems that “nonsolicitation of employees” agreements have received little statutory recognition among states, mixed judicial recognition, and often-misconceived commentary. However, Oklahoma has taken a stand, along with a few other states, to clarify how businesses can expect governing entities to treat “nonsolicitation of employees” agreements. This is an important move for Oklahoma’s economic development. Indeed, as the nature of the relationship between employees and employers changes, the legislature should continue to update the laws in an effort to retain and attract new businesses and industries.

This Note provides a general discussion of restrictive covenants, but the primary focus is on “nonsolicitation of employees” agreements.⁷ Before addressing the recently enacted Senate Bill 1031, Part II of this Note elaborates on key terms and definitions to clarify the often-confusing concepts related to restrictive covenants. Part III discusses the current state of the new law and looks at a few different states, illustrating the various ways to address restrictive covenants. Part IV reviews the concerns related to enforcing the new law, which include reduced employee mobility and restrained freedom to contract,⁸ and the

2013, 9:22 PM), <http://www.news9.com/story/20619179/virginia-based-energy-company-looking-to-build-large-wind-farm-in-ok> [<http://perma.cc/8EA3-LSEH>].

5. S. 1031, 54th Leg., 1st Reg. Sess. (Okla. 2013).

6. OKLA. STAT. tit. 15, § 219B (Supp. 2015). This provision focuses on the solicitation of employees. Nonsolicitation agreements can, of course, prohibit other forms of solicitation, such as the solicitation of customers, but such agreements are beyond the scope of this Note.

7. This Note does not specifically analyze “nonsolicitation of customers” agreements, restrictive covenants in the sale of a business, restrictive covenants in severance packages or retirement packages, or nonsolicitation agreements with executive employees.

8. See Norman D. Bishara, *Covenants Not To Compete in a Knowledge Economy*:

possible economic impacts the new law may have on employers, employees, and the public. In Part V, this Note concludes by recommending some changes to the arguably ambiguous language of Senate Bill 1031.

II. KEY DEFINITIONS

Courts and individuals have described the law of restrictive covenants as “a sea—vast and vacillating, overlapping and bewildering,” and devoid of “consistent standards.”⁹ The confusing nature of the language related to restrictive covenants is evident from the varied use of the same terms in different publications, statutes, and private contracts throughout the country. Therefore, it is necessary to establish an understanding of some key terms and definitions before delving into a discussion of the recent changes to Oklahoma’s restrictive-covenant law.

A. Restrictive Covenants

Restrictive covenants include many types of agreements.¹⁰ In general, restrictive covenants are provisions in employment contracts that restrict the employee’s actions—and sometimes inactions—during and after employment.¹¹ Thus, the term *restrictive covenant* references a broad range of agreements that are seen as a way for businesses to restrict employees.¹² Courts and legislators generally disfavor these

Balancing Innovation from Employee Mobility Against Legal Protection for Human Capital Investment, 27 BERKELEY J. EMP. & LAB. L. 287, 307 (2006); Katherine V.W. Stone, *Knowledge at Work: Disputes over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721, 740 (2002).

9. Brandon S. Long, Note, *Protecting Employer Investment in Training: Noncompetes vs. Repayment Agreements*, 54 DUKE L.J. 1295, 1305 (2005) (quoting *Arthur Murray Dance Studios of Cleveland, Inc. v. Witter*, 105 N.E.2d 685, 687 (Ohio Ct. Com. Pl. 1952)); see also Bishara, *supra* note 8, at 295 (recognizing the “lack of uniformity” when noting “[t]he American Law Institute’s (‘ALI’) recent work on creating a Restatement on Employment Law is an official recognition that employment law in this country is unwieldy, in part due to differences across states. [In fact], the ALI . . . focus[ed] one of the initial four sections . . . solely on noncompetes.” (footnote omitted)).

10. See, e.g., Thomas M. Hogan, Note, *Uncertainty in the Employment Context: Which Types of Restrictive Covenants Are Enforceable?*, 80 ST. JOHN’S L. REV. 429, 429–30 (2006).

11. Patrick D. Robben, *No Cookie Cutters, Please*, BUS. L. TODAY, Jan.–Feb. 2004, at 35, 35.

12. See *id.*

restrictive agreements.¹³ The types of restrictive covenants relevant here are noncompete agreements, nonsolicitation agreements, and nondisclosure agreements.¹⁴

B. Noncompete Agreements

Employers usually include noncompete agreements, which may be provisions¹⁵ or entire agreements, in employment contracts to restrict the competitive activities of their employees in a specific area and for a specific time.¹⁶ Courts see noncompete agreements as “restraints of trade”¹⁷ and restrictions “on free enterprise”; therefore, they are “disfavored under the law.”¹⁸ The *Restatement (Second) of Contracts* highlights the potential restraints that noncompete agreements can create and gives guidelines to help determine when a restraint becomes unenforceable.¹⁹ A restraint is often unenforceable when a court determines that the restraint is unreasonable;²⁰ however, some

13. *Id.*

14. See Hogan, *supra* note 10; Robben, *supra* note 11, at 35; see also Shogun J. Khadye, Comment, *An Uncertain Future: Georgia’s Policy on Restrictive Covenants in Employment Contracts*, 2 J. MARSHALL L.J. 208, 210–11 (2009). See generally LABOR & EMP’T PRACTICE GRP. & SEC. INDUS. PRACTICE GRP., FOX ROTHSCHILD LLP, NATIONAL SURVEY ON RESTRICTIVE COVENANTS (2013) [hereinafter 2013 NATIONAL SURVEY], <http://www.foxrothschild.com/content/uploads/2015/05/National-Survey-on-Restrictive-Covenants-July-2015.pdf> [<http://perma.cc/Z7G9-9ULP>] (detailing the way that each state treats the different types of restrictive covenants).

15. *Provision*, BLACK’S LAW DICTIONARY (9th ed. 2009) (defining *provision* as “[a] clause in a statute, contract, or other legal instrument”).

16. Khadye, *supra* note 14, at 208 (citing Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 675 (2008)); see also Bishara, *supra* note 8, at 294; Harlan M. Blake, *Employee Agreements Not To Compete*, 73 HARV. L. REV. 625, 626 (1960); William G. Porter II & Michael C. Griffaton, *Using Noncompete Agreements to Protect Legitimate Business Interests*, 69 DEF. COUNS. J. 194, 194 (2002); Jeb Boatman, Note, *Contract Law: As Clear as Mud: The Demise of the Covenant Not To Compete in Oklahoma*, 55 OKLA. L. REV. 491, 492 n.5 (2002).

17. Blake, *supra* note 16, at 626.

18. David L. Johnson, *Effective Use of Non-competition/Non-solicitation Agreements in the Workplace*, BUTLER SNOW (Sept. 1, 2013), <http://www.butlersnow.com/2013/09/effective-use-non-competitionnon-solicitation-agreements-workplace/> [<http://perma.cc/A5W9-Q7F3>].

19. 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, 1173–74 (2001) (citing RESTATEMENT (SECOND) OF CONTRACTS § 188 (AM. LAW INST. 1981)).

20. See *id.* at 1173.

noncompete agreements may be unenforceable even when they are reasonable.²¹ Employers will regularly combine noncompete agreements with general nonsolicitation agreements.²²

C. General Nonsolicitation Agreements

Black's Law Dictionary defines *solicitation* as “[t]he act or an instance of requesting or seeking to obtain something; a request or petition,” and it also defines the term as “[a]n attempt or effort to gain business.”²³ There are two types of general nonsolicitation agreements that are classified based on the type of group the employee is not allowed to solicit—customers or employees.²⁴ A general nonsolicitation agreement can include one or both of these restrictions.²⁵

1. Nonsolicitation of Customers

“Nonsolicitation of customers” provisions or agreements are restrictive covenants where an employee agrees to refrain from soliciting the employer’s customers in a specific area and for a specific time—“both during and after the term of employment.”²⁶ This type of provision is most prevalent in industries where “the customer pool” is limited,²⁷ and such provisions allow employers to maintain a competitive advantage by protecting their significant investments in customer relationships.²⁸ A “nonsolicitation of customers” provision can be a powerful tool for employers because employees are privy to pricing information; therefore, they know how much better a competitor’s pricing “has to be to woo customers away.”²⁹ Although the “wooing” concern is important in the context of “nonsolicitation of customers” agreements, it is of equal—perhaps even greater—significance to the

21. See Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements*, 52 WM. & MARY L. REV. 873, 877 n.5 (2010).

22. See generally Johnson, *supra* note 18.

23. *Solicitation*, BLACK’S LAW DICTIONARY, *supra* note 15.

24. See Lisa Guerin, *Understanding Nonsolicitation Agreements*, NOLO, <http://www.nolo.com/legal-encyclopedia/understanding-nonsolicitation-agreements.html> [<http://perma.cc/FWZ6-N4GJ>] (last visited Oct. 16, 2015).

25. See *id.*

26. Porter & Griffaton, *supra* note 16, at 194; see also Guerin, *supra* note 24.

27. Guerin, *supra* note 24.

28. Khadye, *supra* note 14, at 212.

29. Guerin, *supra* note 24.

practice of soliciting fellow employees.

2. Nonsolicitation of Employees

A “nonsolicitation of employees” provision contractually prohibits employees, “for a limited time and sometimes in a limited geographic area,” from enticing their coworkers to leave their current employment and go work for a competitor.³⁰ Some scholars think of this type of agreement as a “raiding” provision because it prevents a former employee from ““raiding” employees [of] the former employer.”³¹ This type of nonsolicitation provision also serves as a powerful tool for employers because it provides a way for the employer to protect its investment in the training and development of human capital—an asset of the company.³² Additionally, this type of provision allows employers to avoid the pied-piper effect, which occurs when “several lower level employees follow a highly ranked or respected employee to a competitor.”³³

While some courts have compared this type of nonsolicitation provision to nondisclosure agreements,³⁴ a “nonsolicitation of employees” provision is more like a “nonsolicitation of customers” provision because both provisions are seeking to restrict employees from engaging in acts for which there is no protection under the Uniform Trade Secrets Act (“UTSA”).³⁵ An employee not under the restrictions of a “nonsolicitation of employees” provision after employment may invite former coworkers to come to the competitor because the duty of loyalty remains valid only during employment.³⁶ Therefore, this type of

30. Khadye, *supra* note 14, at 212; *see also* Guerin, *supra* note 24.

31. Richard L. Hanna, *Economic Loss in Breach of Post-employment Covenants*, VALUE EXAMINER, Nov.–Dec. 2008, at 12, 12.

32. *See infra* Section IV.A.2.

33. Boatman, *supra* note 16, at 511 (quoting John W. Bowers et al., *Covenants Not To Compete: Their Use and Enforcement in Indiana*, 31 VAL. U. L. REV. 65, 87 (1996)).

34. Amy Beckstead & Meghan Paulk Ingle, DLA Piper, *Protecting Company Resources: Non-compete, Non-solicit, and Confidentiality Agreements for Texas and Multi-state Employers*, Presentation at the Association of Corporate Counsel Event: August CLE Luncheon (Aug. 15, 2013), <https://www.acc.com/chapters/aust/upload/130815-CLE-Presentation.pdf> [<https://perma.cc/4783-34AA>].

35. *See* Long, *supra* note 9, at 1309–10.

36. *See* Rash v. J.V. Intermediate, Ltd., 498 F.3d 1201, 1211 (10th Cir. 2007) (discussing the trial court’s jury instruction that unless the employer consents, an employee must not compete with that employer during the term of employment).

agreement is an additional measure of protection for employers.³⁷

D. Nondisclosure Agreements

Employers will sometimes use nondisclosure agreements to protect trade secrets, confidential information, and proprietary information.³⁸ For example, in *MTG Guarneri Manufacturing, Inc. v. Clouatre*, the employees signed an agreement that required them to maintain confidentiality and to refrain from disclosing any secret information.³⁹ There are other methods to protect confidential and proprietary information; however, the available alternatives provide only limited protection.⁴⁰ Thus, many courts will allow nondisclosure agreements because they seek to provide adequate protection for the valuable business interests that have proven to reasonably outweigh the restraint-on-trade concerns that those agreements can create.⁴¹

III. CURRENT STATE OF RESTRICTIVE COVENANTS AND THE LAW

A. A Brief Historical Look at Restrictive Covenants

*Mitchel v. Reynolds*⁴² introduced one of the first thorough discussions of restrictive covenants, and it eventually became “the most cited case on common-law restraints of trade.”⁴³ Professor Harlan M. Blake⁴⁴ nicely detailed Lord Macclesfield’s decision in *Mitchel*⁴⁵ and

37. 2 LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 16:44 (4th ed.), Westlaw (database updated Aug. 2015).

38. See Robben, *supra* note 11, at 35; Long, *supra* note 9, at 1309.

39. *MTG Guarneri Mfg., Inc. v. Clouatre*, 2010 OK CIV APP 71, ¶ 1, 239 P.3d 202, 205.

40. See Arnow-Richman, *supra* note 19, at 1188 (“Although trade secret law has expanded to protect some forms of business-planning and customer-related information, it historically protected only particular processes or formulae.” (footnote omitted)); see also Long, *supra* note 9, at 1309 (“[B]ecause the [UTSA] does not fully protect the employer from disclosure, further protection, in the form of restrictive covenants, is needed.” (footnote omitted)).

41. See Arnow-Richman, *supra* note 19, at 1173.

42. *Mitchel v. Reynolds* (1711) 24 Eng. Rep. 347, 1 P. WMS. 181.

43. Blake, *supra* note 16, at 629.

44. Many courts and legal scholars cite Professor Blake for his piece in the *Harvard Law Review* entitled *Employee Agreements Not To Compete*. For example, a Westlaw search dated August 29, 2015, indicated that 747 sources—both primary and secondary—cited this article.

emphasized the court's "method of balancing the social utility of certain types of restraints against their possible undesirable effects."⁴⁶ *Mitchel* highlighted several cases that date back to the fifteenth century, demonstrating that restrictive covenants originated in the guild system as a result of the relationship between masters and their apprentices.⁴⁷ In those cases, the masters attempted to reduce competition and to increase the availability of cheap labor by "prolong[ing] the traditional period of subservience of an apprentice" and by "interfer[ing] with [the apprentice's] traditional rights to enter the guilds as a craftsman."⁴⁸

The modern approach to restrictive covenants first appeared in *Mitchel*.⁴⁹ That case focused on the assignment of a five-year lease and a restrictive covenant that prohibited a party from working as a baker in "the same parish" for five years.⁵⁰ The court held that the agreement was valid in part because it did not restrict the party's ability to earn a living.⁵¹ This started a shift in the judicial treatment of restrictive covenants from a blanket rejection of these agreements to the possible approval of covenants that courts found to be reasonable.⁵² *Mitchel* left the English judiciary with the rule-of-reason test, which eventually carried over into the American judiciary.⁵³ The *rule of reason* is a standard that courts apply to restrictive covenants, assessing how reasonable the restriction is compared to what the restriction protects.⁵⁴

"Restrictive covenants in employment contracts are generally disfavored as potential restraints of trade which tend to lessen competition."⁵⁵ Each state has produced several different cases and statutes that deal with restrictive covenants and other various forms of restraint.⁵⁶ Additionally, each state's judiciary applies different analytical factors; thus, there is a drastic variation in the way that states apply the

45. Blake, *supra* note 16, at 629–30.

46. *Id.* at 630.

47. *See id.* at 631–33.

48. *See id.* at 633–34; *see also* Boatman, *supra* note 16, at 494–95.

49. Boatman, *supra* note 16, at 495 (citing 8 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 56 (2d ed. 1937)).

50. *Id.* at 495–96.

51. *Id.* at 496.

52. *Id.* at 495–96.

53. *See id.*; *see also* Arnow-Richman, *supra* note 19, at 1172.

54. *See* Khadye, *supra* note 14, at 211.

55. *Id.*; *see also* Arnow-Richman, *supra* note 19, at 1171.

56. *See* Khadye, *supra* note 14, at 212–13.

rule of reason.⁵⁷ An examination of the different public policies that states consider⁵⁸ demonstrates that restrictive-covenant law is complicated.⁵⁹ The state policies seek to protect employers, employees, or the public;⁶⁰ overall, they have an effect on the way that states form the law.

B. Modern Law on Restrictive Covenants

1. The Legal Spectrum: Restrictive Covenants from Coast to Coast

Scholars and practitioners have prepared surveys that provide a comprehensive look at the national trends regarding restrictive-covenant statutes and case law.⁶¹ In particular, the legal spectrum ranges from favoring employees to favoring employers.⁶² California, for example, strongly favors employees (i.e., covenants not to compete are generally void).⁶³ Despite a strong public policy that favors “competition . . . and employee mobility,”⁶⁴ California courts have mixed opinions when it comes to “nonsolicitation of employees” agreements.⁶⁵ Although confusing, the mixed treatment indicates that even states that generally prohibit restrictive covenants may favor nonsolicitation provisions.⁶⁶

57. *Id.* at 212 (“States have used a variety of approaches to determine the enforceability of non-compete agreements.”).

58. *See id.* at 233.

59. *See, e.g.*, 2013 NATIONAL SURVEY, *supra* note 14. This Note does not fully address the complexities of restrictive covenants as a whole; instead, it focuses on covenants involving the solicitation of employees.

60. *See Khadye, supra* note 14, at 208–09, 233.

61. *See, e.g.*, 2013 NATIONAL SURVEY, *supra* note 14.

62. *See generally id.*

63. *Id.* at 2; *see also* CAL. BUS. & PROF. CODE § 16600 (West 2008 & Supp. 2015); Guerin, *supra* note 24.

64. Guerin, *supra* note 24.

65. *See* 2013 NATIONAL SURVEY, *supra* note 14, at 2 (“An agreement not to interfere with a former employer’s business by interfering with or raiding its employees *may* be valid.” (emphasis added)). *Compare* Thomas Weisel Partners, LLC v. BNP Paribas, No. C 07-6198 MHP, 2010 WL 546497, at *6 (N.D. Cal. Feb. 10, 2010) (discussing the view that a “‘no raiding’ clause [is] equivalent to a ‘no solicitation’ clause” and stating that “[a]n employer has a strong and legitimate interest in keeping current employees from raiding the employer’s other employees for the benefit of an outside entity”), *with* Loral Corp. v. Moyes, 219 Cal. Rptr. 836, 843 (Cal. Ct. App. 1985) (upholding a restrictive covenant in a noninterference agreement that prohibits “raiding” and holding that “enforceability depends upon its reasonableness, evaluated in terms of the employer, the employee, and the public”).

66. *See, e.g., Loral Corp.*, 219 Cal. Rptr. at 844.

On the other end of the spectrum, Delaware has a strong policy favoring employers.⁶⁷ Unlike California, Delaware does not apply a blanket prohibition.⁶⁸ Instead, it requires restrictive covenants to “meet general contract law.”⁶⁹ Delaware also treats nonsolicitation provisions like general contracts, requiring them to “protect[] the employer’s legitimate interests.”⁷⁰ However, the existence of a nonsolicitation agreement does not guarantee its enforceability.⁷¹ In Delaware, the parties must meet the state’s contractual requirements of mutual assent and valid consideration.⁷²

In between the two extremes are Texas and Colorado. Texas generally allows restrictive covenants when they are reasonable,⁷³ but “[a]mid increasing labor fluidity, there is no shortage of debate surrounding the propriety of enforcing restrictive covenants that tie up skills, knowledge, ideas, and expertise.”⁷⁴ Colorado, on the other hand, starts with the general prohibition of restrictive covenants and includes built-in exceptions for “trade secrets [and] the recovery of expenses relat[ed] to training and educating an employee who has been employed for less than two years.”⁷⁵

67. See 2013 NATIONAL SURVEY, *supra* note 14, at 3.

68. See *id.* at 2–3.

69. *Id.* at 3.

70. *Id.*; see also *Hough Assocs., Inc. v. Hill*, No. Civ.A. 2385-N, 2007 WL 148751, at *1, *3 (Del. Ch. Jan. 17, 2007) (stating that “[t]he Non-Competition Agreement plainly prohibit[ed] [the employee] from working in the position in which he [was] . . . employed” and enjoining the employee from working at “any other firm providing services similar to [the employer’s] within 50 miles of [the employer’s] headquarters”).

71. Scott Holt, *Drafting Enforceable Non-solicitation Agreements*, YOUNG CONAWAY STARGATT & TAYLOR, LLP: DEL. NON-COMPETE L. BLOG (Aug. 6, 2014, 8:56 AM), <http://www.delawarenoncompetelawblog.com/2014/08/drafting-enforceable-non-solic.html> [<http://perma.cc/W373-D2HA>].

72. Scott Holt, *So What Makes a Non-compete a Valid Contract?*, YOUNG CONAWAY STARGATT & TAYLOR, LLP: DEL. NON-COMPETE L. BLOG (May 28, 2010, 9:48 AM), <http://www.delawarenoncompetelawblog.com/2010/05/so-what-makes-a-non-compete-a-v.html> [<http://perma.cc/P6VJ-V935>].

73. See 2013 NATIONAL SURVEY, *supra* note 14, at 23; see also TEX. BUS. & COM. CODE ANN. § 15.50(a) (West 2011).

74. *Marsh USA, Inc. v. Cook*, 354 S.W.3d 764, 781 (Tex. 2011) (Green, J., dissenting).

75. 2013 NATIONAL SURVEY, *supra* note 14, at 3; see also COLO. REV. STAT. § 8-2-113 (2015).

2. Oklahoma Law on Restrictive Covenants Prior to Senate Bill 1031

Oklahoma is creating statutory exceptions to the general rule that restrictive covenants are void as a form of restraint on trade—a structure similar to that of Colorado.⁷⁶ The Dakota Territory’s laws served as the model for Oklahoma’s original restrictive-covenant statutes,⁷⁷ which were adopted in 1890.⁷⁸ Section 886 of those particular statutes governed the restraint of employment: “Every contract by which any one is restrained from exercising a lawful profession, trade or business of any kind, otherwise than as provided by [sections 887 and 888], is to that extent void.”⁷⁹ The original language of sections 886, 887, and 888 is currently located in title 15, sections 217, 218, and 219 of the Oklahoma Statutes, respectively.⁸⁰

Section 217 is representative of Oklahoma’s state motto *Labor Omnia Vincit*, meaning “Labor Conquers All Things.”⁸¹ Representative Aaron Stiles, House author of Senate Bill 1031, described the historical treatment of restrictive covenants as aligning with the motto’s view of the labor force in Oklahoma—an employee-friendly stance.⁸² He suggested that the amendments following the enactment of section 217 depict the Oklahoma legislature’s decision to become more employer-friendly in an effort to attract businesses to Oklahoma.⁸³ This measure further increases the state’s economic development.⁸⁴

The judicial interpretation of section 217—the modern version of section 886—has been relatively inconsistent.⁸⁵ *E.S. Miller Laboratories, Inc. v. Griffin*⁸⁶ presented the Supreme Court of Oklahoma with “its first opportunity to interpret . . . section 217.”⁸⁷ In *E.S. Miller*, the court chose

76. See OKLA. STAT. tit. 15, § 217 (2011).

77. See Boatman, *supra* note 16, at 497.

78. See *id.* at 497 n.51.

79. TERR. OKLA. STAT. § 886 (1890).

80. See tit. 15, §§ 217–19.

81. See OKLA. CONST. art. VI, § 35. *But see* H.R. Con. Res. 1024, 53rd Leg., 2d Sess. (Okla. 2012) (positing that the phrase *Labor Omnia Vincit* was not meant to be the official state motto).

82. Interview with Aaron Stiles, Representative (2010–2014), Okla. State Legislature, in Norman, Okla. (Dec. 2, 2014).

83. *Id.*

84. *Id.*

85. Boatman, *supra* note 16, at 497.

86. *E.S. Miller Labs., Inc. v. Griffin*, 194 P.2d 877 (Okla. 1948).

87. Boatman, *supra* note 16, at 497–98.

to strictly adhere to the language of section 217,⁸⁸ holding that the restrictive covenant was void and declining to suggest that the rule of reason had survived the statute's enactment.⁸⁹ It took over two decades, but in *Tatum v. Colonial Life & Accident Insurance Co. of America*,⁹⁰ the Supreme Court of Oklahoma "began to relax this strict reading of Section 217."⁹¹ The court distinguished *Tatum* from *E.S. Miller* because the covenant did not completely prohibit the individual in *Tatum* from practicing his profession.⁹² He could still sell insurance, but he had "to maintain a 'hands-off' policy with respect to those whom he [knew were] 'insureds'" of his former employer.⁹³

In 1977, the Supreme Court of Oklahoma added the rule of reason back into the interpretation of section 217 when it decided *Board of Regents of the University of Oklahoma v. National Collegiate Athletic Ass'n*.⁹⁴ The Oklahoma Court of Civil Appeals reiterated its acceptance and highlighted Oklahoma's continued application of the rule of reason twenty-three years later in *Loewen Group Acquisition Corp. v. Matthews*.⁹⁵ The decision to begin applying the rule of reason was due to a flip in the political makeup of the Oklahoma legislature, which resulted in a flip in the legislature's focus from employees to employers.⁹⁶ Although courts utilize the rule of reason in different ways, the basic standard is the same—reasonable restraint.⁹⁷ Courts will generally consider several factors, which include (1) how much restraint is necessary to protect the employer's interest; (2) employee hardship; (3) the injury, if any, to the public; (4) the restraint's duration; (5) the restraint's geographic scope; and (6) the activity that the covenant restrains.⁹⁸ The "reasonableness" determination is fact intensive;

88. See *E.S. Miller*, 194 P.2d at 878.

89. See *id.* at 878–79.

90. *Tatum v. Colonial Life & Accident Ins. Co. of Am.*, 465 P.2d 448 (Okla. 1970).

91. Boatman, *supra* note 16, at 498.

92. *Tatum*, 465 P.2d at 451.

93. *Id.*

94. See *Bd. of Regents of the Univ. of Okla. v. Nat'l Collegiate Athletic Ass'n*, 561 P.2d 499, 505–06 (Okla. 1977); see also *Bayly, Martin & Fay, Inc. v. Pickard*, 780 P.2d 1168, 1171–72 (Okla. 1989); Boatman, *supra* note 16, at 498.

95. See *Loewen Grp. Acquisition Corp. v. Matthews*, 2000 OK CIV APP 109, ¶ 14, 12 P.3d 977, 980.

96. Interview with Aaron Stiles, *supra* note 82.

97. See *Loewen Grp. Acquisition Corp.*, 2000 OK CIV APP 109, ¶¶ 14–15, 12 P.3d at 980; see also Khadye, *supra* note 14, at 211.

98. *Loewen Grp. Acquisition Corp.*, 2000 OK CIV APP 109, ¶¶ 15, 18–20, 12 P.3d at 980–82; Boatman, *supra* note 16, at 499; see also Michael J. Garrison & John T. Wendt,

however, the general consensus aligns with the finding in *Loewen*: “[A]ny agreement that seeks to prohibit fair competition can never be reasonable.”⁹⁹

In 2001, the Oklahoma legislature amended section 217 to say that “[e]very contract by which any one is restrained from exercising a lawful profession, trade or business of any kind, otherwise than as provided by Sections 218 and 219 of this title, *or otherwise than as provided by Section 2 of this act*, is to that extent void.”¹⁰⁰ The amendment simply added one statement: “or otherwise than as provided by Section 2 of this act.”¹⁰¹ However, sections 218 and 219 are still the primary exceptions to the prohibition on contracts restraining trade.¹⁰² Section 218 allows contracts to restrict trade when the goodwill of a business is sold,¹⁰³ and section 219 allows similar restraints in partnerships.¹⁰⁴

The Oklahoma legislature also enacted section 219A in 2001.¹⁰⁵ Section 219A reads as follows:

A. A person who makes an agreement with an employer, whether in writing or verbally, not to compete with the employer after the employment relationship has been terminated, shall be permitted to engage in the same business as that conducted by the former employer or in a similar business as that conducted by the former employer as long as the former employee does not directly solicit the sale of goods, services or a combination of goods and services from the established customers of the former employer.

The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach, 45 AM. BUS. L.J. 107, 117 (2008); David L. Johnson, *The Parameters of “Solicitation” in an Era of Non-solicitation Covenants*, 28 A.B.A. J. LAB. & EMP. L. 99, 109 (2012) (citing *Abbott-Interfast Corp. v. Harkabus*, 619 N.E.2d 1337 (Ill. App. Ct. 1993)); Porter & Griffaton, *supra* note 16, at 194–98, 201; Robben, *supra* note 11, at 35. *See generally* Bradden C. Backer & John J. Kalter, *Wisconsin Courts Struggle with Geography in Nonsolicitation Agreements*, WIS. LAW., Feb. 2002, at 10 (discussing how some courts have handled the geographic scope of nonsolicitation agreements).

99. *Loewen Grp. Acquisition Corp.*, 2000 OK CIV APP 109, ¶ 21, 12 P.3d at 982.

100. OKLA. STAT. tit. 15, § 217 (2011) (emphasis added); *see also* 2001 Okla. Sess. Laws 3130–31.

101. tit. 15, § 217.

102. *See id.* §§ 218–19.

103. *See id.* § 218.

104. *Id.* § 219.

105. *See id.* § 219A.

B. Any provision in a contract between an employer and an employee in conflict with the provisions of this section shall be void and unenforceable.¹⁰⁶

This statute creates a third exception—“nonsolicitation of customers” agreements. Section 219A accepts “nonsolicitation of customers” agreements in an effort to “resolve the confusion surrounding these types of contracts.”¹⁰⁷ The creation of “an ‘established customers’ standard” is one way the statute resolved confusion; however, that standard does not statutorily validate “nonsolicitation of customers” agreements that include past or future customers.¹⁰⁸ Even with all of these statutory exceptions, the judiciary was still left to determine the validity of “nonsolicitation of employees” agreements since there was no direct exception. With the basis of restrictive-covenant law being an outright invalidation of agreements that operate as restraints, the Oklahoma legislature apparently recognized the need to carve out a fourth exception for “nonsolicitation of employees” agreements.

3. Senate Bill 1031

In November 2011, the Supreme Court of Oklahoma heard *Howard v. Nitro-Lift Technologies, L.L.C.*—a restrictive-covenant-based appeal to determine, in part, whether a noncompete agreement was invalid because it violated public policy.¹⁰⁹ The employer, Nitro-Lift, insisted that enforcement was necessary to protect the company, but the employees successfully convinced the court not to enforce the agreement by arguing that they never received any confidential information from the employer and that the noncompete provision was void “pursuant to [section 217].”¹¹⁰ The court determined that section 219A’s language was “plain, clear, unmistakable, unambiguous, and unequivocal.”¹¹¹ The statute does not allow employers to restrain the employee with noncompete agreements except for the limited exception where “the

106. *Id.*

107. Boatman, *supra* note 16, at 491.

108. *Id.* at 503.

109. *Howard v. Nitro-Lift Techs., L.L.C.*, 2011 OK 98, ¶ 1, 273 P.3d 20, 22–23, *vacated per curiam on other grounds*, 133 S. Ct. 500 (2012).

110. *Id.* ¶ 18, 273 P.3d at 27.

111. *Id.* ¶ 21, 273 P.3d at 28.

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employee may be barred from soliciting . . . *established customers*.”¹¹² The court held that the covenant was clearly unenforceable, emphasizing the provision’s broad language that forbade the solicitation of current and past customers and suppliers.¹¹³ The court went even further to indicate its disapproval of an overly broad nonsolicitation agreement that would prohibit hiring: “Furthermore, it operates to inhibit the employees from employing or engaging any Nitro-Lift officer or employee even where those individuals might seek employment on their own initiative rather than from any intervention by the employees.”¹¹⁴

Although the United States Supreme Court vacated the decision in *Nitro-Lift* on a separate, arbitration-based issue,¹¹⁵ that case remains a clear indication of how the Supreme Court of Oklahoma would rule on the validity of an overly broad nonsolicitation agreement that restricts the hiring of former coworkers.

In reaction to *Nitro-Lift*,¹¹⁶ Senator Anthony Sykes introduced Senate Bill 1031 on February 4, 2013.¹¹⁷ Senate Bill 1031’s floor version, and eventual final version, stated as follows:

A contract or contractual provision which prohibits an employee or independent contractor of a person or business from soliciting, directly or indirectly, actively or inactively, the employees or independent contractors of that person or business to become employees or independent contractors of another person or business shall not be construed as a restraint from exercising a lawful profession, trade or business of any kind. Sections 217, 218, 219, and 219A of Title 15 of the Oklahoma Statutes shall not apply to such contracts or contractual provisions.¹¹⁸

Senator Sykes sought and obtained the support of Representative Aaron

112. *Id.*

113. *Id.* ¶¶ 22–23, 273 P.3d at 29.

114. *Id.* ¶ 22, 273 P.3d at 29.

115. *See Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500 (2012) (per curiam).

116. Interview with Aaron Stiles, *supra* note 82; *see also* R. Scott Thompson, *What Every Business Owner Should Know About Changes to Oklahoma’s Non-solicitation Law*, LL&D: BLAWG (Nov. 8, 2013, 1:56 PM), <http://lldlaw.com/Blawg/BlawgArticle/tabid/83/smId/457/ArticleID/633/reftab/76/Default.aspx> [<http://perma.cc/344H-JL2T>].

117. S. JOURNAL, 54th Leg., 1st Reg. Sess. 230 (Okla. 2013); Interview with Aaron Stiles, *supra* note 82.

118. S. 1031, 54th Leg., 1st Reg. Sess. (Okla. 2013); *see also* OKLA. STAT. tit. 15, § 219B (Supp. 2015).

Stiles.¹¹⁹ Representative Stiles agreed to assist with passing the Bill because, as a private attorney, he had previously encountered the complications associated with navigating the restrictive-covenant laws in Oklahoma.¹²⁰ Representative Stiles said Senate Bill 1031 was the legislature's attempt to clean up restrictive-covenant law in Oklahoma and to ultimately allow nonsolicitation provisions.¹²¹ The Bill was a necessary amendment because section 219A was simply too broad.¹²² Although Senate Bill 1031 validates a limited number of restrictive covenants, Representative Stiles expressed assurance that the current case law will allow courts to continue applying the rule of reason when determining the validity of "nonsolicitation of employees" agreements.¹²³

Although the Bill passed through the Oklahoma Senate without opposition, it met some resistance in the House.¹²⁴ On April 22, 2013, at the Bill's third reading, Democrat Representatives David Perryman, Steve Kouplen, and Wade Rousselot countered Representative Stiles, expressing concerns about the restraint on free enterprise and an overreaching "big government."¹²⁵ Representative Perryman also initiated further debate against the bill.¹²⁶ He focused on Oklahoma's historical treatment of trade restraints, namely, the very limited exceptions or areas in which they have been considered acceptable.¹²⁷ Representative Stiles rebutted each argument, emphasizing the Bill's ability to create more contractual freedom.¹²⁸ He also focused on the extension of independent contractors into the statutorily enforced restriction.¹²⁹ In the end, the Bill passed with seventy-one representatives in support and twenty-two representatives opposed.¹³⁰

On April 29, 2013, Governor Mary Fallin signed Senate Bill 1031

119. Interview with Aaron Stiles, *supra* note 82.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. See House of Representatives, *House Session: Legislative Day 45 Afternoon Session*, OKLA. ST. LEGISLATURE, (Apr. 22, 2013, 1:30 PM), http://okhouse.granicus.com/MediaPlayer.php?view_id=18&clip_id=592 [<http://perma.cc/3SRQ-XUD6>] [hereinafter *House Session: Day 45*].

125. *Id.* (statement of Rep. Rousselot).

126. See *id.* (statement of Rep. Perryman).

127. *Id.*

128. *Id.* (statement of Rep. Stiles).

129. *Id.*

130. H. JOURNAL, 54th Leg., 1st Reg. Sess. 1028–29 (Okla. 2013); see also *House Session: Day 45*, *supra* note 124.

into law as title 15, section 219B of the Oklahoma Statutes.¹³¹ The law became effective November 1, 2013.¹³² Section 219B expressly excludes the application of sections 217, 218, 219, and 219A to “nonsolicitation of employees” agreements.¹³³ That is, “nonsolicitation of employees” agreements are no longer subject to section 217’s no-restraint-on-trade policy. Representative Stiles believes the new law will help make businesses more comfortable by providing them with contractual protection for the time and money that they invest in their employees.¹³⁴ While companies have some protections that accompany employee duties, those protections are confined to situations during employment.¹³⁵ Restrictive covenants, on the other hand, are a definite way to protect the company’s legitimate interests.¹³⁶ Senate Bill 1031 placed Oklahoma among the states that have statutorily addressed “nonsolicitation of employees” agreements.¹³⁷

Although the addition of section 219B clarified how Oklahoma will treat “nonsolicitation of employees” agreements, local attorneys have voiced some concerns over the law’s ambiguity.¹³⁸ Furthermore, as with any new law, the possible economic impact is also a significant concern.

IV. POSSIBLE ECONOMIC IMPACT OF SENATE BILL 1031

With the introduction of a statutory exception for “nonsolicitation of employees” agreements, the Oklahoma legislature has signaled to the state judiciary that not all restrictive covenants will unlawfully restrain trade.¹³⁹ Arguably, a restriction on the solicitation of employees before and after employment does not restrain trade for the contracting employee anyway because the employee is prohibited only from stealing coworkers. Although Senate Bill 1031 may not directly restrain trade, it still has an economic impact on employers, employees, and the public.

131. S. 1031, 54th Leg., 1st Reg. Sess. (Okla. 2013); OKLA. H. JOURNAL, at 1114; *see also* OKLA. STAT. tit. 15, § 219B (Supp. 2015).

132. tit. 15, § 219B; *see also* Okla. S. 1031.

133. tit. 15, § 219B.

134. Interview with Aaron Stiles, *supra* note 82; *see also* Bishara, *supra* note 8, at 305.

135. *See* Bishara, *supra* note 8, at 307.

136. *See* Interview with Aaron Stiles, *supra* note 82.

137. *See* 2013 NATIONAL SURVEY, *supra* note 14.

138. *See* Thompson, *supra* note 116.

139. *See* Bishara, *supra* note 8, at 295.

A. *Economic Impact on Employers*

As the state legislature steers the law in Oklahoma toward a business-friendly atmosphere, it stands to reason that employers will reap the benefits.¹⁴⁰ For Oklahoma, a significant factor in determining how to adjust the law is the relationship between the employees and their employers.¹⁴¹ Historically, employees had the opportunity to work for a single employer for most, if not all, of their lives.¹⁴² But a relationship change has developed as the world has opened up through advances in travel and communication.¹⁴³ As the duration of employment has changed, the relationship between employees and employers has also changed.¹⁴⁴

1. The New Psychological Contract

The *original* psychological contract—an unspoken understanding between an employee and employer regarding the terms of their contract—was that the employee would work loyally for the business in exchange for longevity of employment and the ability to advance within the company.¹⁴⁵ An employee's loyalty was important to the employer because it minimized the risk that an employee would expose trade secrets or confidential information to competing businesses.¹⁴⁶ On the other hand, longevity of employment appealed to an employee because it ensured a steady job that would likely provide a steady income, a place to invest his or her skills, and a chance to advance within the company.¹⁴⁷ Nevertheless, as travel and communication rapidly opened the world to

140. See Kiernan, *supra* note 4.

141. See generally Stone, *supra* note 8 (describing the employment relationship—both new and old—and the importance of these relationships to the value of the company).

142. Bishara, *supra* note 8, at 292.

143. See *id.*; Griffin Toronjo Pivateau, *Preserving Human Capital: Using the Noncompete Agreement to Achieve Competitive Advantage*, 4 J. BUS. ENTREPRENEURSHIP & L. 319, 320 (2011); Long, *supra* note 9, at 1298; Mark Roehling et al., *The Nature of the New Employment Relationship(s): A Content Analysis of the Practitioner and Academic Literatures 2* (Cornell Univ. Ctr. for Advanced Human Res. Studies, Working Paper No. 98-18, 1998).

144. Bishara, *supra* note 8, at 292 (referencing the “changing landscape of the U.S. labor market”); Roehling et al., *supra* note 143, at 2.

145. See Stone, *supra* note 8, at 725, 731; Khadye, *supra* note 14, at 232; see also Bishara, *supra* note 8, at 292.

146. See Stone, *supra* note 8, at 725, 737.

147. See *id.* at 725.

globalization, businesses had to adapt by altering their structure. This adaptation also required the original structure of the psychological contract to change.¹⁴⁸

These changes resulted in the emergence of a *new* psychological contract.¹⁴⁹ The employers have adapted to the new psychological contract by providing training and skill development and facilitating increased employee decision making and communication within the company.¹⁵⁰ Employers are expected to increase the employee's "social capital" . . . through networking opportunities with other departments, vendors and customers."¹⁵¹ However, this shift in the employment relationship eventually resulted in the loss of job security and fewer advancement opportunities within the company.¹⁵² In this new relationship, "employees assume [more] responsibility for developing and maintaining their . . . skills."¹⁵³ They also add value to the company by increasing their understanding of the company's character and business.¹⁵⁴ Yet the employer must sacrifice employee loyalty—a significant benefit of the original psychological contract.¹⁵⁵

A primary reason for the new psychological contract is the progression from manufacturing to service-based industries.¹⁵⁶ Service-based industries require increased knowledge.¹⁵⁷ Increased knowledge, of course, makes employees more marketable.¹⁵⁸ This increased marketability, in turn, creates a higher demand for the employees'

148. Bishara, *supra* note 8, at 292.

149. Stone, *supra* note 8, at 731; *see also* Bishara, *supra* note 8, at 295 (referencing a "new employment dynamic of highly skilled, mobile workers"); Marcie A. Cavanaugh & Raymond A. Noe, *Antecedents and Consequences of Relational Components of the New Psychological Contract*, 20 J. ORGANIZATIONAL BEHAV. 323, 324 (1999).

150. *See* Khadye, *supra* note 14, at 232; Roehling et al., *supra* note 143, at 7 tbl.2; *see also* Long, *supra* note 9, at 1299–1300.

151. Khadye, *supra* note 14, at 232.

152. *See* Stone, *supra* note 8, at 726–28.

153. Roehling et al., *supra* note 143, at 7.

154. *See id.* at 7 tbl.2.

155. *See* Stone, *supra* note 8, at 725–26, 728.

156. Bishara, *supra* note 8, at 291–92; *see also* Khadye, *supra* note 14, at 209.

157. *See* Bishara, *supra* note 8, at 291, 314 (emphasizing the importance of knowledge and noting that employees "are not *creating* . . . knowledge *per se*, rather they are *using* it to provide valuable services"); *see also* Rafael Gely & Leonard Bierman, *The Law and Economics of Employee Information Exchange in the Knowledge Economy*, 12 GEO. MASON L. REV. 651, 659–60 (2004); Pivateau, *supra* note 143, at 320; Khadye, *supra* note 14, at 209; Long, *supra* note 9, at 1298.

158. Pivateau, *supra* note 143, at 321, 325; Long, *supra* note 9, at 1299.

services, increasing the employees' mobility.¹⁵⁹ Employees may leave their employer and start a new company if they have ideas that their employer is not commercializing.¹⁶⁰ Essentially, if an employee with a lot of experience and education creates a commercially viable idea that the employer chooses not to use, the employee may leave to create a commercial avenue for that idea.¹⁶¹ For example, in Silicon Valley, when tech-savvy employees came up with ideas that their companies were not willing or able to pursue, the employees often left the company and created a start-up company.¹⁶²

Overall, this new psychological contract results in the creation of human capital and an increase in knowledge through employer-conducted training and development.¹⁶³ Again, employers no longer offer longevity to employees, so employers must offer another benefit to retain an employee's loyalty.¹⁶⁴ Long-term employment opportunities have decreased due to rapid globalization and the natural progression in the market toward employee replacement.¹⁶⁵ Employees have, nonetheless, become more marketable because of the new emphasis on training and development.¹⁶⁶ Employers also offer the ability to network, which further increases an employee's marketability.¹⁶⁷ An employee's increased marketability is, however, a major problem for this new relationship between employers and employees.¹⁶⁸ Indeed, today's employers need a way to protect the investments they make in their employees because other companies want the employees who are already trained and developed.¹⁶⁹

159. Pivateau, *supra* note 143, at 321, 325.

160. DAVID B. AUDRETSCH, MAX C. KEILBACH & ERIK E. LEHMANN, *ENTREPRENEURSHIP AND ECONOMIC GROWTH* 42–43 (2006). This is an effect of the “spillover of knowledge.” *Id.* at 43.

161. *See id.* at 42–43.

162. *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, 589–91 (1999).

163. Stone, *supra* note 8, at 735; *see also* Long, *supra* note 9, at 1299.

164. Stone, *supra* note 8, at 733.

165. *Id.* at 726.

166. *Id.* at 735.

167. *Id.* at 735–36.

168. *See* Pivateau, *supra* note 143, at 321, 325.

169. *See id.* at 331. Studies pertaining to Silicon Valley's boom and Route 128's bust have heavily publicized the new employment relationship. *See* Gilson, *supra* note 162, at 579 (“[R]ules governing postemployment covenants not to compete . . . help explain the differences in employee job mobility and therefore the knowledge transfer that . . . [has been] identifie[d] as a critical factor in explaining the differential performance of Silicon

2. Protecting an Employer's Investment in Human Capital

The main reason employers want “nonsolicitation of employees” agreements is because their employees are assets in whom the company has invested a substantial amount of time and money.¹⁷⁰ This is known as the human-capital theory.¹⁷¹ “Typically, the employment relationship is the only thing that secures human capital to the organization.”¹⁷² And again, the employment relationship has changed as the world progressed toward a new psychological contract with new terms.¹⁷³

Dissenting in *Swat 24 Shreveport Bossier, Inc. v. Bond*, Justice Traylor noted that without the protection of noncompete agreements, “employers [could] not afford to invest optimally in product development or in their employees.”¹⁷⁴ Employers must, however, invest in training employees to perform the tasks associated with the specific company.¹⁷⁵ Consequently, as the employer continues to devote time and money into employee training, the risk that a competitor will benefit

Valley and Route 128.”); Alan Hyde, *Should Noncompetes Be Enforced?: New Empirical Evidence Reveals the Economic Harm of Non-compete Covenants*, REG., Winter 2010–2011, at 6, 7–9 (discussing the belief that “the rapid flow of information across firm boundaries [was] the crucial factor that had led to Silicon Valley’s surpassing Route 128”). While some studies primarily focus on the knowledge spillover associated with employee mobility, the knowledge-spillover effect is actually due to the new psychological contract. See Bishara, *supra* note 8, at 293 (noting the idea that “[covenants not to compete] can be selectively enforced to create positive spillovers and maximize useful knowledge transfers,” as seen in Gilson’s study involving Silicon Valley); *see also id.* at 293 n.21 (“The concept of spillovers—the externalities or side effects of actions—is [sometimes] used . . . to describe the unintentional consequences of employee mobility or restraints on that mobility.”). This concept is discussed further in Section IV.C.2.

170. See Bishara, *supra* note 8, at 295 (referencing “the value of a company’s work force . . . in the sense of a firm’s intangible value beyond tangible assets”); *see also* Mark J. Garmaise, *Ties That Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment*, 27 J.L. ECON. & ORG. 376, 376 (2009); Pivateau, *supra* note 143, at 320 (providing an excellent discussion about the human-capital theory in the context of a business environment where it is difficult to sustain a competitive advantage).

171. Pivateau, *supra* note 143, at 320; *see also* Bishara, *supra* note 8, at 295 (noting the significance of human capital with the estimation that “[the] positive inflow of human capital from new foreign workers entering the United States has been estimated at roughly \$200 billion each year”); *id.* at 300 (defining human capital).

172. Pivateau, *supra* note 143, at 324.

173. See Stone, *supra* note 8, at 730–31.

174. *Swat 24 Shreveport Bossier, Inc. v. Bond*, 2000-1695, p. 7 (La. 6/29/01); 808 So. 2d 294, 313 (Traylor, J., dissenting).

175. See Long, *supra* note 9, at 1300 (“[A] business will often not realize the full value of an employee until she learns the employer’s methods, techniques, and systems.”).

from this investment drastically increases.¹⁷⁶ This often leads to the employer receiving a double hit.¹⁷⁷ The employer takes the first hit when the employee leaves, which causes the employer to lose its investment.¹⁷⁸ Then, the employer receives a second hit when the competitor hires that employee.¹⁷⁹ Of course, these hits to the employer become more significant with each employee that a competitor takes away from the company. This significant potential for loss of human capital is a major reason for the importance of Senate Bill 1031.

An employer may also face other costs, such as separation costs, training costs for new employees, and the incalculable cost of “socialization for new employees.”¹⁸⁰ This assumes that employers must train their employees; the assumption is reasonable because choosing not to train the employee will presumably result in higher turnover. Employees often change jobs in search of a company that will make them more marketable¹⁸¹—a factor of the new psychological contract.¹⁸²

If a competitor chooses to hire employees away from other competitors—rather than investing in employee training—an additional hit may occur.¹⁸³ This can, of course, be a huge benefit to a competitor.¹⁸⁴ For instance, a recent study considering wine prices discovered that while there was little effect on the quality of wine, there was an increase in the price of current wine when a competitor hired away a prominent winemaker.¹⁸⁵ The prominent winemaker’s reputation increased wine prices without the employer investing in employee training.¹⁸⁶ Thus, hiring away employees who are already well trained and have esteemed reputations is often beneficial to competitors because it saves their resources and ultimately increases their profits.

Some employers have used repayment agreements as an alternative

176. Pivateau, *supra* note 143, at 325; *see also* Long, *supra* note 9, at 1301–02.

177. Long, *supra* note 9, at 1302; *see also* Bishara, *supra* note 8, at 301.

178. Bishara, *supra* note 8, at 301; Long, *supra* note 9, at 1302.

179. Bishara, *supra* note 8, at 301; Long, *supra* note 9, at 1302.

180. Pivateau, *supra* note 143, at 327–28.

181. Long, *supra* note 9, at 1299.

182. *See* Roehling et al., *supra* note 143, at 7 tbl.2.

183. Long, *supra* note 9, at 1302.

184. *See* Bishara, *supra* note 8, at 301.

185. Peter W. Roberts, Mukti Khaire & Christopher I. Rider, *Isolating the Symbolic Implications of Employee Mobility: Price Increases After Hiring Winemakers from Prominent Wineries*, 101 AM. ECON. REV. (PAPERS & PROC.) 147, 150–51 (2001).

186. *Id.* at 151.

to restrictive covenants.¹⁸⁷ A “repayment agreement[] . . . require[s] employees to pay back training expenses if they quit before the employer recoups its investment.”¹⁸⁸ However, the employer does not receive reimbursement—and ultimately risks losing its investment in human capital—if that employee steals coworkers who are not also bound by similar agreements. Additionally, at least one court has declared a repayment schedule to be unreasonable, demonstrating that repayment agreements can fall prey to many of the same issues that plague restrictive covenants.¹⁸⁹ On the other hand, restrictive covenants “have the practical impact of dissuading future employers of key employees from encouraging them to join with the specific intent to poach business or previous members of their team.”¹⁹⁰ Ultimately, it appears that the key to understanding the enforcement of “nonsolicitation of employees” agreements and their effect on employers is to recognize their impact on employees because these concepts work hand-in-hand.

B. Economic Impact on Employees

1. Protecting Employee Mobility

Employee mobility is often cited as an important consideration for the reduced enforceability of “nonsolicitation of employees” agreements.¹⁹¹ *Employee mobility* is the “ease by which a skilled employee can leave one job, join another company, and immediately apply his or her skills.”¹⁹² While it is true that the less powerful people—often the less educated members of society—need protection from large and powerful companies, enforcement of “nonsolicitation of employees” agreements does not primarily affect this class of people.¹⁹³ Specifically,

187. See Long, *supra* note 9, at 1297.

188. *Id.* at 1317.

189. *Id.* at 1318 (citing *Brunner v. Hand Indus., Inc.*, 603 N.E.2d 157, 161 (Ind. Ct. App. 1992)).

190. Paula Rome updated by Tracy Luke, *Confidentiality and Post Termination Restrictions*, in *REVIEWING AND CHANGING CONTRACTS OF EMPLOYMENT* 84, 97 (2005); see also Bishara, *supra* note 8, at 288 (noting an instance when a company was “accus[ed] . . . of poaching other employees”).

191. See Khadye, *supra* note 14, at 234.

192. *Id.* at 231 n.148 (quoting Charles Tait Graves & James A. Diboise, *Do Strict Trade Secret and Non-competition Laws Obstruct Innovation?*, 1 *ENTREPRENEURIAL BUS. L.J.* 323, 324 (2007)).

193. Neil Irwin, *Why American Workers Without Much Education Are Being Hammered*, *N.Y. TIMES: THE UPSHOT* (Apr. 21, 2015), <http://www.nytimes.com/2015>

the employees that are most susceptible to solicitation in the absence of a nonsolicitation agreement are employees that have specialized knowledge or skills.¹⁹⁴ Employees with specialized knowledge or skills are not likely to be the less-educated employees that the proponents of employee mobility are trying to protect.

Society has an “increasingly mobile workforce.”¹⁹⁵ This means that even with the enforcement dynamics currently at play, employees are still noticeably mobile. Nevertheless, some believe that restrictive covenants “stifle innovation by favoring overreaching employers at the expense of employee mobility.”¹⁹⁶ Thus, permitting the enforcement of restrictive covenants is an important consideration for states; it can result in a “chilling effect on innovation because of less employee mobility.”¹⁹⁷ This affects start-ups because it stops employees that leave a company to start a competing business from taking coworkers.¹⁹⁸ While an increase in the enforcement of “nonsolicitation of employees” agreements can negatively affect start-ups, the protection of current businesses is more important when there are substantial industries that need to protect information obtained during employment to retain their competitive advantage.¹⁹⁹

A policy of enforcing restrictive covenants that stifles employee mobility is more appropriate for states that favor industries that need to maintain confidential information and reduce knowledge sharing.²⁰⁰ Although this policy can stifle start-ups, it can also protect current businesses. Oklahoma’s energy industry is a good example. The energy industry is one of Oklahoma’s “key industry ecosystems.”²⁰¹ In fact, the 2014 Fraser Institute’s Global Petroleum Survey ranked Oklahoma as the

/04/22/upshot/why-workers-without-much-education-are-being-hammered.html?_r=0 [http://perma.cc/9JEZ-MENU]; see Khadye, *supra* note 14, at 232.

194. Khadye, *supra* note 14, at 232.

195. Bishara, *supra* note 8, at 297.

196. *Id.* at 298.

197. *Id.* at 307.

198. *See id.* at 318.

199. *See id.*

200. *See id.* at 319.

201. *Oklahoma’s Key Industry Ecosystems*, CAREERTECH, <http://www.okcareer.org/news/video/oklahomas-key-industry-ecosystems> [http://perma.cc/V2FN-YGLH] (last visited Oct. 16, 2015); see also *Energy*, GREATER OKLA. CITY, <http://www.greateroklahomacity.com/index.php?src=gendocs&ref=ProfileEnergy&category=Energy> [http://perma.cc/W4ET-TQJX] (last visited Oct. 16, 2015); *Energy*, OKLA. DEP’T COM., <http://okcommerce.gov/energy/> [http://perma.cc/6Q4F-FG8V] (last visited Oct. 16, 2015).

“Best Place in the World to Do Business in Oil and Gas.”²⁰² Oklahoma has many reasons to protect what is valuable to the energy industry because this industry supports “[\$]39 billion of Oklahoma’s economy.”²⁰³ Trade secrets, like the processes used in exploration, are important to the energy industry.²⁰⁴ The enforcement of restrictive covenants provides effective protection for these trade secrets and other important industry information.²⁰⁵ While knowledge spillover and innovation are beneficial, the ability to protect information that provides a competitive advantage is more valuable to the economy in Oklahoma.²⁰⁶

2. Protecting Freedom of Contract

Employee-mobility concerns appear to provide support for Senate Bill 1031. In addition, Oklahoma and the United States in general have traditionally favored freedom of contract.²⁰⁷ On several occasions, Oklahoma has emphasized its embracement of the freedom of contract.²⁰⁸ *Freedom of contract* is a principle—and often a public policy—that fervently protects an individual’s right to enter into a contract.²⁰⁹ The basic concept is that the state will honor the contracts that people freely enter into because society values people’s choices.²¹⁰ Under Senate Bill 1031, a nonsolicitation agreement is legal.²¹¹ Thus, the Bill furthers the principle of freedom of contract since courts may uphold “nonsolicitation of employees” agreements instead of invalidating these contracts with

202. *Rankings*, OKLA. DEP’T COM., <http://new.okcommerce.gov/smart-move/rankings/> [<http://perma.cc/L58M-DEZL>] (last visited Oct. 16, 2015).

203. *Benefits of Oil and Gas to US States: O - T*, ENERGY GLOBAL: OILFIELD TECH. (June 10, 2014), <http://www.energyglobal.com/news/exploration/articles/Oil-and-gas-benefits-o-t.aspx> [<http://perma.cc/VB82-QN3N>].

204. See Brian Cathey, *Trade Secret Protections*, OIL & GAS FIN. J., Jan. 2014, at 42, 42 (“Virtually every company in the oil and gas industry has trade secrets, and these trade secrets are often some of a company’s most valuable assets.”).

205. Bishara, *supra* note 8, at 294.

206. See Pivateau, *supra* note 143, at 320 (“In the face of this altered business climate, competitive advantage . . . is more vital than ever.”).

207. See David P. Weber, *Restricting the Freedom of Contract: A Fundamental Prohibition*, 16 YALE HUM. RTS. & DEV. L.J. 51, 52, 56–57, 102–03 (2013).

208. See, e.g., *Gray ex rel. Gray v. Midland Risk Ins. Co.*, 925 P.2d 560, 562 (Okla. 1996).

209. See Weber, *supra* note 207.

210. See *id.*

211. See S. 1031, 54th Leg., 1st Reg. Sess., at 1 (Okla. 2013); see also OKLA. STAT. tit. 15, § 219B (2011).

the statutory limitations in section 217.

Representative Stiles insists that, under Oklahoma's common law, the enforcement of "nonsolicitation of employees" agreements will still be subject to the rule of reason.²¹² Although this may seem to restrict people from entering into unreasonable contracts, unreasonable contracts are based on unreasonable terms that stem from the pressure of unreasonable bargaining power.²¹³ Thus, the application of the rule of reason does not interfere with the freedom of contract because parties have not freely entered into an unreasonable contract. The Bill, therefore, does not conflict with the concept of freedom of contract. Furthermore, Representative Stiles expressly argued in the floor debate that allowing these contracts to exist would align with the freedom of contract.²¹⁴ Representative Stiles recognized that employees are generally smart people.²¹⁵ Employees often understand and want to enter into these agreements.²¹⁶ While it is true that there can be unequal bargaining power,²¹⁷ any disparity in the process can be hammered out when determining the enforceability of the agreements based on their reasonableness.²¹⁸

C. Economic Impact on the Public

1. Increased Enforcement Effects on Employee Compensation

A study on the effects of noncompete agreements found that compensation decreases when enforcement increases, resulting in "a heavier reliance on salary."²¹⁹ If compensation decreases, then it logically follows that household consumption and spending will also decrease. One way to counteract the reduced compensation resulting from increased enforcement is for an employee to move to another company.²²⁰ This means that employee movement will increase as compensation decreases.

212. Interview with Aaron Stiles, *supra* note 82.

213. See Stone, *supra* note 8, at 740.

214. *House Session: Day 45*, *supra* note 124.

215. Interview with Aaron Stiles, *supra* note 82.

216. See Stone, *supra* note 8, at 740.

217. See Long, *supra* note 9, at 1304.

218. See Interview with Aaron Stiles, *supra* note 82.

219. Garmaise, *supra* note 170, at 376.

220. This specifically refers to moves that would provide more compensation but would not violate a noncompete agreement.

The resulting increase in employee movement, due to the increase in enforcement, is significant. Employee movement causes “brain drain”—the loss of knowledgeable workers.²²¹ Since the need for knowledgeable workers has increased in the current state of the economy, Oklahoma should be concerned about increasing the movement of workers through reduced compensation, which will likely result from the increased enforcement of “nonsolicitation of employees” agreements. Even though this is a serious concern, other economic concerns—like employers’ willingness to invest in human capital—outweigh that risk.

2. Economic Growth

The most important consideration regarding Senate Bill 1031 is its possible effect on economic growth in Oklahoma. While Oklahoma has fared well through the recent recession, its economic well-being is still a significant concern.²²² Studies indicate that “economic performance is improved by knowledge spillover.”²²³ *Knowledge spillover* literally means knowledge is overflowing so much that it spills over into another area.²²⁴ The knowledge-spillover theory suggests that entrepreneurial opportunities are formed when “new knowledge and ideas created in one context . . . [are] left uncommercialized or [are] not vigorously pursued by the source.”²²⁵ Under this theory, “the source of knowledge and ideas, and the organization actually making (at least some of) the investments to produce these, is not the same as the organization actually attempting to commercialize and appropriate the value of that knowledge—the new firm.”²²⁶

“[A] greater degree of knowledge spillover leads to greater economic growth rates of cities.”²²⁷ Studies seem to indicate that Oklahoma can

221. VASILE CANTARJI & GEORGETA MINCU, CASE - CTR. FOR SOC. & ECON. RESEARCH, NO. 465, COSTS AND BENEFITS OF LABOUR MOBILITY BETWEEN THE EU AND THE EASTERN PARTNERSHIP PARTNER COUNTRIES: MOLDOVA 56 (2013).

222. Joe Wertz, *Now Showing: Oil Downturn's Effect on Oklahoma Employment Numbers*, STATEIMPACT OKLA. (Mar. 23, 2015, 11:52 AM), <https://stateimpact.npr.org/oklahoma/2015/03/23/now-showing-oil-downturns-effect-on-oklahoma-employment-numbers/> [https://perma.cc/7C4U-N9XS].

223. AUDRETSCH, KEILBACH & LEHMANN, *supra* note 160, at 50.

224. *Id.* at 43–44, 82–83 (suggesting that entrepreneurial opportunities are created when “knowledge investments [are] not fully commercialized by the incumbent organizations undertaking those investments”).

225. *Id.* at 39.

226. *Id.*

227. *Id.* at 50.

increase knowledge spillover and facilitate economic growth by reducing the enforcement of “nonsolicitation of employees” agreements.²²⁸ Again, the increase in innovation via knowledge spillover is important for start-up companies. While this is true, “many other important mechanisms [also] facilitate the knowledge spillovers [and] have nothing to do with entrepreneurship, such as the mobility of scientists and workers and informal networks, linkages, and interactions.”²²⁹

It is apparent that start-ups are vital to economic growth, and restrictive covenants have an important effect on these types of businesses. The Oklahoma legislature’s enactment of Senate Bill 1031 and its enforcement of “nonsolicitation of employees” agreements may be prematurely dismissing business start-ups.²³⁰ Start-ups are an important part of economic growth for states because those types of businesses “have the ability to grow and become the large, dominant companies of the future.”²³¹ Oklahoma is not a leader in start-ups.²³² In fact, Oklahoma has the twenty-fourth friendliest policy environment for small businesses and entrepreneurships.²³³ One reason start-ups are important economically is because they can trigger an increase in exports within specific industries.²³⁴ Start-ups “are [also] associated with higher value-added productivity . . . , which, in turn, leads to business expansion and more skilled, high-wage jobs.”²³⁵

However, start-ups face the same risks as the business leaders in an industry. A new energy company must find a way to protect its investment in employees and the information employees learn during employment. Because start-ups can hire away employees that have the knowledge needed to begin operations, it is easy to say that reducing enforcement will draw start-ups to Oklahoma. With that said, start-ups

228. *See id.*

229. *Id.* at 97.

230. *See generally* ROSS GITTELL & JOHN ORCUTT, N.H. COAL. FOR JOB CREATION & ECON. INNOVATION, IMPROVING NEW HAMPSHIRE’S STARTUP ENVIRONMENT (2014) (discussing uncertain restrictive-covenant laws and the troubling business start-up environment in New Hampshire).

231. *Id.* at 5.

232. *See* Catherine Clifford, *10 Best States for Starting a Business*, ENTREPRENEUR (Apr. 30, 2013), <http://www.entrepreneur.com/article/226521> [<http://perma.cc/2S6V-DNBQ>].

233. RAYMOND J. KEATING, SMALL BUS. & ENTREPRENEURSHIP COUNCIL, SMALL BUSINESS POLICY INDEX 2014: RANKING THE STATES ON POLICY MEASURES AND COSTS IMPACTING SMALL BUSINESS AND ENTREPRENEURSHIP 2 (2014).

234. GITTELL & ORCUTT, *supra* note 230, at 5.

235. *Id.*

may eventually desire increased enforcement of “nonsolicitation of employees” agreements once they become large, established companies.²³⁶ Oklahoma has historically provided effective protection for large company investments in the state.²³⁷ Senate Bill 1031 seems to continue this trend, furthering Oklahoma’s policy shift toward an employer-friendly environment. It could also be argued that the Bill provides an incentive for employers to invest in human capital, which further protects employees.

Furthermore, start-ups are “particularly sensitive to the regulatory environment. Complying with legal mandates is disproportionately more expensive for startups than for large, well-established companies.”²³⁸ By enacting Senate Bill 1031, Oklahoma has taken a proactive step toward creating certainty in the context of restrictive covenants. The Bill explicitly notifies start-ups that they can enter into enforceable “nonsolicitation of employees” agreements.²³⁹ This is different from states that do not have similar statutes and lack sufficient case law. In those states, start-ups may need to litigate for enforcement, which is a costly proposition. Thus, Oklahoma has taken a positive step forward in making start-ups cheaper for entrepreneurs.

V. RECOMMENDATION

Even with the benefits of Senate Bill 1031, the statute needs clarification. The Oklahoma legislature unintentionally left ambiguity in section 219B when it retained the wording “actively or inactively.”²⁴⁰ “[S]tates should clarify—and codify—their [restrictive-covenant] policy to maximize the efficient tendencies of [restrictive covenants] while alleviating concerns that noncompetes can harm workers and hinder human capital investment, mobility, and other positive spillovers.”²⁴¹ Codification of restrictive-covenant policies has alleviated many of the

236. *See id.*

237. The UTSA is an example of this historical protection. *See* Richard J. Cipolla, Jr., *A Practitioner’s Guide to Oklahoma Trade Secrets Law, Past, Present, and Future: The Uniform Trade Secrets Act*, 27 TULSA L.J. 137, 137–38 (1991). Oklahoma adopted the UTSA in 1986. *Id.* at 138.

238. GITTELL & ORCUTT, *supra* note 230, at 6.

239. *See* S. 1031, 54th Leg., 1st Reg. Sess., at 1 (Okla. 2013); *see also* OKLA. STAT. tit. 15, § 219B (Supp. 2015).

240. tit. 15, § 219B; *see also* Okla. S. 1031, at 1; Interview with Aaron Stiles, *supra* note 82.

241. Bishara, *supra* note 8, at 294.

potential economic impacts, such as diminished economic development due to harming or deterring start-ups.²⁴²

However, the Oklahoma legislature took the initiative to enact a simple—yet effective—statute, clarifying that Oklahoma will enforce “nonsolicitation of employees” agreements.²⁴³ Employers and employees can now look to the state’s statutory provisions and know with reasonable certainty how state courts will decide disputes over “nonsolicitation of employees” agreements. This is a substantial step forward because the enactment allows Oklahoma to (1) continue its standing as an employer-friendly environment; (2) promote a higher likelihood of economic growth; and (3) provide greater protection of its important industries.

The Oklahoma legislature still needs to take a step back and “craft[] a carefully articulated public policy that provides guidance to the courts, as well as employers and employees.”²⁴⁴ It needs to clarify the wording “actively or inactively” in section 219B to increase appropriate enforcement.²⁴⁵ The words “inactive solicitation” in the new law “seems like something of an oxymoron.”²⁴⁶ The plain meaning of solicitation is “[t]he act or an instance of requesting or seeking to obtain something; a request or petition”; “[a]n attempt or effort to gain business”;²⁴⁷ or “the practice or act or an instance of soliciting.”²⁴⁸ As each definition requires a positive action, the plain meaning of solicitation appears to exclude inactivity.

So what would constitute inactive solicitation? One explanation comes from case law where the court considers inactivity in the act of hiring.²⁴⁹ It can be argued that the act of hiring is isolated from active solicitation when the job is advertised to the entire world without preference to anyone.²⁵⁰ While it is possible that the Oklahoma legislature intended to include hiring in the scope of allowed “nonsolicitation of employees” agreements, Representative Stiles

242. See *supra* Part IV.

243. tit. 15, § 219B.

244. Bishara, *supra* note 8, at 294.

245. tit. 15, § 219B.

246. Thompson, *supra* note 116.

247. *Solicitation*, BLACK’S LAW DICTIONARY, *supra* note 15.

248. *Solicitation*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/solicitation> [<http://perma.cc/9DQA-CG4W>] (last visited Oct. 16, 2015).

249. Thompson, *supra* note 116. See generally *Howard v. Nitro-Lift Techs., L.L.C.*, 2011 OK 98, 273 P.3d 20, vacated on other grounds, 133 S. Ct. 500 (2012).

250. See Thompson, *supra* note 116.

indicated that the legislature did not consider hiring to be within the scope of inactivity.²⁵¹ He further suggested that section 219B is still subject to the standard of reasonableness that section 219A and section 217 are currently held to under the common law.²⁵²

As the law currently stands, even with the reassurances of the House author, the Oklahoma legislature should amend section 219B to clarify its intent. The legislature needs to express that section 219B does not apply to the hiring of former coworkers during general advertising activities. As written, the statute discourages an employer and independent contractor from hiring an applicant who responds to a general job advertisement if the applicant had ever entered into a nonsolicitation agreement with a former employer.²⁵³ This type of restriction would limit the ability of a nonparty to the contract from practicing his or her trade, which is an inadvertent restraint on trade.²⁵⁴

Although this may appear to create a hole in the contract, the balance of interests is relevant. The competing interests are the legitimate business interests of an employer and an employee's interest in the ability to practice his or her trade.²⁵⁵ The legitimate business interest at stake is primarily an employer's investment in the training and development of employees. While such investments are important and are often protected, there is a point when other interests become more important. Looking back at the general treatment of restrictive covenants, the primary concern is restraint on trade.

A policy that prohibits a contracting party from freely hiring an employee when there is no evidence of wrongdoing seems generally unfair. In that situation, the balance of competing interests is off. An unfair restraint on trade and competition will arise through the enforcement of "nonsolicitation of employees" agreements that bar general hiring. That type of broad enforcement would result in the removal of the very protections expected under a general policy against restraint on trade. The policy has been—and should remain—centered on protecting against unfair competition, not fair competition.

251. Interview with Aaron Stiles, *supra* note 82.

252. *Id.*

253. See Thompson, *supra* note 116 ("While it is unclear how broad [the statute's] prohibitions can be, they clearly go beyond the type of direct solicitation allowed with customers.").

254. See Long, *supra* note 9, at 1304 (noting that some have argued against noncompetes for "hindering a worker's ability to earn a living").

255. See Arnow-Richman, *supra* note 19, at 1173–80.

VI. CONCLUSION

While Oklahoma has generally prohibited restrictive covenants, the state legislature has created several statutory exceptions in an effort to increase economic development and to follow the trend in public policy that is moving toward an employer-friendly environment.²⁵⁶ The analysis of an exception for “nonsolicitation of employees” agreements in the newly enacted section 219B (Senate Bill 1031) reveals an ambiguity that may lead to confusion regarding enforcement against the general hiring practices of parties to a nonsolicitation agreement in Oklahoma. The Oklahoma legislature should seek to amend the language of section 219B, notifying courts, employers, and employees that “nonsolicitation of employees” agreements will not be enforced for general hiring purposes.

While opponents of Senate Bill 1031 expressed concerns about employee mobility and freedom of contract in the legislative debate,²⁵⁷ a deeper look reveals that there is protection for employees. More importantly, there is protection for employers that will result in an increased investment in employee training.²⁵⁸ Oklahoma’s move toward protecting employers will also increase economic development and secure the employers’ investment in human capital.²⁵⁹ There are many benefits stemming from the direction the Oklahoma legislature is taking, but employers must continue to contractually protect themselves. As with any restrictive covenant, a nonsolicitation agreement should be “tailored to the specific circumstances of the employee and job involved.”²⁶⁰

256. See OKLA. STAT. tit. 15, §§ 217–219B (2011 & Supp. 2015).

257. *House Session: Day 45*, *supra* note 124 (statements of Rep. Rousselot and Rep. Perryman).

258. See *supra* Section IV.A.

259. See *supra* Sections IV.A.2., IV.C.

260. Robben, *supra* note 11, at 36; see also Pivateau, *supra* note 143, at 339.