ASSIGNABILITY OF COVENANTS NOT TO COMPETE: WHEN CAN A SUCCESSOR FIRM ENFORCE A NONCOMPETE AGREEMENT?

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A covenant not to compete limits an employee’s ability to compete against his former employer.1 When an employer sells his business, the question arises whether the purchaser may enforce the covenant not to compete against the seller’s former employee. Courts generally enforce the assignment2 of a covenant not to compete that expressly permits assignment to a purchaser.3 However, the validity of an assignment of a covenant not to compete that does not address assignability generates controversy in American courts.4

* Associate Editor, Cardozo Law Review, J.D. Candidate (June 2006). I would like to thank my parents and brothers for their support throughout law school. Special thanks to Professor Arthur Jacobson, Jacob Wentworth, Marisa Bocci, and Eve Moskowitz for all of their helpful comments and critiques.

1 See BLACK’S LAW DICTIONARY 392 (8th ed. 2004). A noncompetition covenant is [a] promise, usu[ally] in a sale-of-business, partnership, or employment contract, not to engage in the same type of business for a stated time in the same market as the buyer, partner, or employer. Noncompetition covenants are valid to protect business goodwill in the sale of a company. In other contexts, they are generally disfavored as restraints of trade: courts generally enforce them for the duration of the business relationship, but provisions that extend beyond the termination of that relationship must be reasonable in scope, time, and territory.—Also termed noncompetition agreement; noncompete covenant; covenant not to compete; restrictive covenant; promise not to compete; contract not to compete.

Id. Although most jurisdictions have enforced noncompetes, California and North Dakota have taken a very restrictive stance, allowing them under very limited circumstances. See infra note 66.

2 See BLACK’S LAW DICTIONARY 128 (8th ed. 2004). An assignment is “[t]he transfer of rights or property.” Id.


4 See Traffic Control Servs., 87 P.3d at 1058 (refusing to allow assignment of noncompetes because they are personal between the parties); Hess v. Gebhard & Co., 808 A.2d 912 (Penn. 2002) (same); see also Armstead v. Miller, 52 Pa. D. & C.2d 584 (Ct. Com. Pl. 1971) (holding noncompetes unassignable as personal service contracts). But see Reynolds & Reynolds Co. v. Tant, 955 F. Supp. 547 (W.D.N.C. 1997) (holding that covenants not to compete are associated with the good will that is purchased and can be assigned). When courts decline to enforce the assignment of a covenant not to compete they can do so through either of two contractual mechanisms. They can refuse to allow the assignment or can allow the assignment but refuse
In many jurisdictions the approach to the assignability of these covenants that are silent depends on the form in which the sale of the business has been structured. For example, courts in these jurisdictions treat a purchaser’s enforcement of such a covenant where purchase has been effected by a sale of stock differently than where the purchase has been effected by a sale of assets. Most jurisdictions concur in the enforcement of a silent covenant following a stock sale, permitting the purchaser of the stock to enforce the covenant, reasoning that no assignment took place and that enforcement of the covenant is by the same entity. While that approach can be criticized, it is beyond the

5 This Note will concern itself with asset purchasers attempting to enforce covenants not to compete that were either expressly assigned or implicit in the goodwill purchased. See infra note 52 (stating that covenants not to compete are included with purchase of goodwill even when not expressly assigned).

6 See Corporate Express Office Prods. v. Phillips, 847 So. 2d 406, 414 (Fla. 2003) (holding that under the Florida merger statute, the successor corporation is a continuation of the previous company when there has been a merger or stock purchase, and therefore no assignment is necessary); Sears Termite & Pest Control, Inc. v. Arnold, 745 So. 2d 485 (Fla. 1999) (deciding that a 100% stock purchase does not dissolve the corporate entity, therefore a noncompete is enforceable by the purchasing corporation without an assignment); Norlund v. Faust, 675 N.E.2d 1142, 1152 (Ind. App. 1997) (holding that when noncompete covenants flow from merger, an assignment is unnecessary); Sevier Ins. Agency, Inc. v. Willis Corroon Corp. of Birmingham, 711 So. 2d 995, 1000-01 (Ala. 1998) (finding that noncompetes can be enforced by successor corporations after a merger and explaining that “[t]o hold otherwise would . . . ignore the reality that such agreements are often important assets that businesses intend to transfer during a purchase or merger . . .”).

7 See sources cited supra note 6.

8 The semantic difference between the forms of successor ownership does not always dictate the enforceability of noncompete clauses. Some jurisdictions look at function over form in evaluating the nature of the successor entity. Under this viewpoint, an asset purchase—as opposed to a stock purchase—is a “distinction without a difference.” Cary Corp. v. Linder, 2002 Ohio 6483, ¶ 16 (Ohio Ct. App. 2002). See FLA. STAT. ANN. § 542.335(f) (West 2002) (treating assignees and successors the same for the purposes of restrictive covenants). In the context of labor law, courts do not find a distinction. See Golden State Bottling Co. v. NLRB, 414 U.S. 168, 182 n.5 (1973):

The refusal to adopt a mode of analysis requiring the Board to distinguish among mergers, consolidations, and purchases of assets is attributable to the fact that, so long as there is a continuity in the “employing industry,” the public policies underlying the doctrine will be served by its broad application.

The court went on to say that “[w]hen a new employer . . . has acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor’s business operations, those employees who have been retained will understandably view their job situations as essentially unaltered.” Id. at 184. Following the logic of these jurisdictions, it is easy to argue that “[t]he incorporation of the employer’s business without other change does not abrogate the contract of employment, or alter the liability of the parties’ one to the other.” Seligman & Latz of Pittsburgh, Inc. v. Vernillo, 114 A.2d 672, 673-74 (Pa. 1955); see also Rogers v. Runfola & Assocs., 565 N.E.2d 540, 543 (Ohio 1991) (holding that the incorporation of a sole proprietorship with the same ownership does not place additional burdens on employee and the non-compete should be enforceable).

In the case of incorporation, the corporate change has occurred only on paper and has not affected the relationships the employees have developed. When an asset sale occurs from an
scope of this Note, which will focus on the enforcement of silent contracts following a sale of assets, on which there is substantially less agreement.\footnote{The person trying to avoid enforcement of the noncompete may argue that the agreement was not part of the asset sale. \textit{But see} Fink & Sons, Inc. v. Goldbert, 139 A. 408, 410 (N.J. Ch. 1927) (holding a “restrictive covenant in a contract between employer and employee[e] . . . [is] assignable as an incident of the business even if not made so by express words”)}

Many jurisdictions uniformly refuse to enforce the assignment of silent covenants.\footnote{See \textit{infra} Section II.B.} These jurisdictions’ denial of an asset purchaser’s enforcement rights effectively reduces the market value of the business. It also permits employees to escape even those agreements where the successor’s enforcement of the covenant is in all material respects functionally identical to the predecessor’s. A similar number of jurisdictions uniformly permit enforcement.\footnote{See \textit{infra} Section II.A.} In these, assignment will subject the employee to possible enforcement of the covenant by an employer other than the one with which he contracted. The new employer may administer the covenant in a manner that violates the reasonable expectations formed by the employee when he initially agreed to the covenant.\footnote{The new employer may offer the employee the choice between either a different position in the company, or leaving and not being able to compete. Under the old regime, the employee might have had a \textit{reasonable expectation} that he could remain in a specific job until he, not the employer, wanted to change job functions. Although the former employer \textit{could} have changed the employee’s job function, the employee may have reasonably thought that he would not, based on the employer’s past conduct.} The successor’s situation or characteristics may also functionally alter the covenant’s operation. Both per se default rules, either uniformly refusing or permitting the enforcement of such assignments—will often result in the inequitable treatment of the employer or of the employee.

This Note examines the various per se default rules that jurisdictions apply to the assignment of covenants not to compete that are ancillary to an employment relationship. It compares these rigid rules to the balancing tests used by courts to determine whether to recognize a successor company’s union after an acquisition. Its proposed guidelines, based by analogy on the union recognition test, are
more equitable and flexible than the rigid default rules currently applied. These guidelines preserve the initial agreement between the employer and employee through an examination of the personal nature of the initial agreement and the degree of continuity between the predecessor and successor entities; the current default rules do not account for such factual variations.

Part I discusses the need for covenants not to compete, and provides a brief history of restrictive covenants. Part II details the predominant ways jurisdictions allow or prevent the assignment of covenants not to compete. Part III explores the inequalities suffered by employers and employees resulting from the per se rules. Part IV offers a new method to evaluate these assignments. Through a balancing test, courts can equitably enforce restrictive covenants, while preserving the bargained-for agreement between the employer and the employee.

I. A BRIEF HISTORY OF RESTRICTIVE COVENANTS

Today’s workplace differs from that of past generations. It offers a boundaryless career path in lieu of lifetime employment. This new psychological contract, associated with the rise of a mobile workforce, necessitates the use of restrictive covenants. Employers who invest in human capital fear that the employee may leave, opting to work for the competition, and depart with the employer’s investment in the employee’s skills. To allay these fears, an employer will frequently

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14 Id.
15 The working environment is different today than for the previous generation. Management theorists and industrial relations specialists refer to this new environment as the “new psychological contract,” [and] the ‘new deal at work.” Id. at 3; see also S.W. Polachek & W.S. Siebert, The Economics of Earnings 253 (1993) (noting that between the ages of twenty and sixty, men work for an average of over seven different employers); John Dwight Ingram, Covenants Not to Compete, 36 Akron L. Rev. 49, 49 (2002) (“[Fifty years ago,] most people expected to work for their initial employers for their entire careers . . . . Presently, that is no longer the case. Many people will change employers . . . several times over their working years.”).
16 The human capital model suggests that changing jobs is expensive and employees will only undergo the change when they see it as improving their personal well-being. Matching skill sets between an employer and an employee is imperfect and mobility allows employers and employees to find the best match through trial and error. Ronald G. Ehrenberg & Robert S. Smith, Modern Labor Economics: Theory and Public Policy 364 (7th ed. 2000). Currently, many “employment relationships disavow promises about future tenure.” Karl Klare, Horizons of Transformative Labour Law, in Labour Law in an Era of Globalization: Transformative Practices & Possibilities 3, 16 (Joanne Conaghan et al. eds., 2002). For many firms this changed relationship has led the employees to train themselves as employers have started “devoting fewer resources to training and expecting employees themselves to make
rely on a covenant not to compete, also called a noncompetition agreement or noncompete, to minimize the damage of trained a employee using his skills for the benefit of the competition.17

Previous generations used noncompetes less frequently because the corporate environment encouraged workers to remain with the same firm for the duration of their careers.18 Many modern corporations now operate under a different, dynamic business model where a company varies production according to economic demand.19 To allow for the changes in production capacity, the number of employees fluctuates

greater investments in human capital.” Id. at 16-17.

Alternatively, employers utilize firm-specific instruction. Such instruction allows the employees to become productive members of the team without the ability to effectively transport their knowledge to other corporate environments. See Lisa M. Lynch, The Economics of Youth Training in the United States, 103 ECON. J., No. 420, 1292, 1293 (1993) (“[F]irms may be reluctant to invest in general training if other firms can then hire away trained workers before the firm has recouped its training costs. This problem of poaching or ‘cherry picking’ results in firms more willing to make firm specific training investments rather than general training investments.”); see also John J. Antel, Human Capital Investment Specialization and the Wage Effects of Voluntary Labor Mobility, 68 REV. ECON. & STAT., No. 3, 477, 477 (1986). “The attainment of higher wages has long been considered the primary stimulus for voluntary labor mobility. Contemporary mobility discussions . . . acknowledge firm-specific human capital largely as an inhibitor of job change.” Id.

17 See Ingram, supra note 15. To protect their business, “many employers require at least some of their employees to agree that they will not, upon the termination of their employment, reveal trade secrets or confidential information, or work in a similar position in a geographic area where they would have an opportunity to take away the former employer’s goodwill.” Id. at 49; see also Karen Kaplowitz, Employment Law in the Twenty-First Century, 20 ABTL Report, No. 1 (Sept. 1997), available at http://www.alschuler.com/print/abtl997.html. The report states that:

One consequence of the growing use of independent contractors and temporary workers is heightened mobility of workers which can result in less loyalty and more risk of misappropriation of confidential, proprietary information. Because of the fact that it is difficult under California law to enforce non-compete agreements, absent sale of an ownership interest, employers must become more zealous about the protection of their proprietary information. The well-publicized General Motors/Volkswagen and General Electric disputes reflect the increased mobility of the workforce with resulting risks to proprietary technology and business strategy.

Id.

18 “In the new deal, the long-standing assumption of long-term attachment between an employee and a single firm has broken down. . . . [E]mployees now expect to change jobs frequently.” STONE, supra note 13, at 3. But see David Neumark et al., Has Job Stability Declined Yet? New Evidence for the 1990s, 17 J. LABOR ECON. S29 (suggesting job stability has been relatively constant and it is only a changed perception from the media). Notably, employees changing perceptions are more important than empirical data because this leads to a self-fulfilling prophecy. Today “few believe . . . that younger generations can rely on stable employment.” Massimo D’Antona, Labour Law at the Century’s End, in LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES & POSSIBILITIES 36 (Joanne Conaghan et al. eds., 2002).

19 See Klare, supra note 16, at 17:

Large, primary-sector employers are departing from norms they had observed for decades against shedding workers or reducing pay rates in response to competitive pressures. Insecure jobs . . . are growing . . . . Many employers now combine a highly attached core workforce with a large number of peripheral, low-attachment employees.
with the needs of the company. This model deprives many employees of the job stability that employees once enjoyed. It would be erroneous, however, to view downsizing as the sole reason for employee mobility. The shift in employee attitudes frequently results in a multi-employer career path when the fear of discharge is not present.

Employers use restrictive covenants to protect themselves from the harmful effects of these new attitudes. These agreements take the form of covenants not to compete, non-disclosure, and non-solicitation agreements. These contracts safeguard trade secrets, business

See also Stone, supra note 13, at 67-68. Temporary employment agencies are utilized with increased flexibility since the 1970s, evidence of the changed economy. A survey of private firms of all industries and sizes in 1996 found that seventy eight percent of private sector firms used staffing arrangements. Id.

See sources cited supra note 19.

In the late 1970s, corporations began to make other changes in their human resource practices. In addition to increasingly relying on subcontractors and temporary help, firms changed the nature of the employment relationship for their "regular" employees. They began to emphasize flexibility and versatility rather than stability and longevity. They sought flexibility in their staffing and compensation practices, and fluidity in their workforces. By the 1990’s, it was clear that corporations no longer sought to erect internal labor markets, even for their regular workforces. The world of long-term stable employment, in which an employee was attached to a single large corporation for the duration of his career, was coming to an end.

There is a distinction between employer-initiated separation, layoffs, and employee-initiated separation, quitting. See Kenneth J. McLaughlin, A Theory of Quits and Layoffs With Efficient Turnover, 99 J. POL. ECON. 1, 2 (1991).


Nondisclosure agreements and non-solicitation agreements are frequently found bundled with a noncompete clause.

Restrictive covenants, of which non-disclosure and non-competition covenants are the most frequently utilized, are commonly relied upon by employers to shield their protectible business interests. The non-disclosure covenant limits the dissemination of proprietary information by a former employee, while the non-competition covenant precludes the former employee from competing with his prior employer for a specified period of time and within a precise geographic area.

Hess v. Gebhard, 808 A.2d 912, 917 (Pa. 2002); see also Sevier Ins. Agency, Inc., v. Willis Corroon Corp. of Birmingham, 711 So. 2d 995 (Ala. 1998) (holding that non-solicitation agreements will be viewed as noncompete clauses under the statute). A nondisclosure agreement is defined as:

A contract or contractual provision containing a person’s promise not to disclose any information shared by or discovered from a trade-secret holder, including all information about trade secrets, procedures, or other internal matters. Employees and some nonemployees, such as beta-testers and contractors, are frequently required to sign nondisclosure agreements.—Often shortened to nondisclosure.—Also termed confidentiality agreement.

Black’s Law Dictionary 1079 (8th ed. 2004). A nonsolicitation agreement is defined as:

A promise, usually in a contract for the sale of a business, a partnership agreement, or an employment contract, to refrain, for a specified time, from either (1) enticing employees to leave the company or (2) trying to lure customers away.
contacts, and customer information. Although common, covenants not to compete were not always enforceable.

Courts initially viewed covenants not to compete with skepticism. In *Dyer’s Case,* the earliest known case of a contractual restraint of trade, an English court considered a contract which prevented Dyer from practicing his baking craft for six months to be void. Arguably, the court faced a strong incentive not to enforce the agreement because of then-current craft guild practices. Under the early apprenticeship system a particular trade could not be practiced until completion of the apprenticeship. If a master and apprentice entered into a restrictive covenant, the apprentice would not be able to practice his craft following the apprenticeship. Craft guilds attempted to restrict

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25 See STONE, supra note 13, at 128:
Employers . . . believe that if they have imparted valuable skills or knowledge to employees, they should “own” that human capital in the sense of being able to ensure that it is utilized only on their firm’s behalf. While they cannot compel an employee to remain with their firm, employers attempt to prevent former employees from using knowledge obtained in their employ on behalf of a competitor. Thus employers increasingly impose and seek to enforce post-employment restraints such as covenants not to compete, and they attempt to obtain judicial protection for trade secrets.

See also Alexander & Alexander, Inc. v. Koelz, 722 S.W.2d 311, 312 (Mo. Ct. App. 1986) (stating that covenants not to compete “protect the employer’s legitimate interest in preserving the goodwill of his business”). In addition to covenants not to compete, “an employer’s trade secrets and confidential information may be afforded protection, restraining an employee from misappropriating and using the same, regardless of the existence of a contractual restriction.” James M. Wicks & Eric W. Penzer, *Is Trade Secret Protection Available for Customer Information?*, 4 N.Y. LITIGATOR, No. 2, 6 (1998) (discussing when an employer’s customer information constitutes protectable trade secrets in New York).

26 *Dyer’s Case*, Y.B. 2 Henry 5, fol. 5, pl. 26 (1414). The court in *Dyer’s Case* said that “[t]he obligation is void because the condition is against the common law, and by God, if the plaintiff were present he should rot in gaol till he paid a fine to the King.” Hess, 808 A.2d at 917 (quoting *Dyer’s Case*, Y.B. 2 Henry 5, f. 5, pl. 26); see also Gary Minda, *The Common Law, Labor and Antitrust*, 11 INDUS. REL. L.J. 461, 475 (1989) (discussing *Dyer’s Case* as the first reported case involving contractual restraint of trade).

27 Minda, supra note 26, at 475.
28 *Id. at 476.
29 *Id. at 475.* Shackling apprenticeships to their masters produced situations that many times resembled slavery.

The indenture contract common in the era of guilds required the apprentice to refrain from competing with the master for a specified period of time after the completion of training. In the few cases which raised the issue, the courts consistently held that restraints restricting the right to work were unlawful, without regard to claims of reasonableness or justification. For this reason these cases are usually cited for the proposition that the common law originally treated all restraints as violating the principle of economic freedom and therefore void.

*Id.* The medieval European craft guilds were governed by custom and contract. STONE, supra note 13, at 153. In the fifteenth and sixteenth centuries, “masters began to take on more and more apprentices and bind them for longer periods of time.” *Id.* The master craftsman utilized apprentices as a form of cheap labor but at the same time wanted to avoid future competition. *Id.* To avoid competition, some “craftsmen . . . extracted promises from their apprentices and journeymen not to assume the role of craftsmen upon expiration of the indenture term. These were early forms of employment covenants not to compete.” *Id.* When the masters started using
competition through these covenants but courts were unwilling to enforce them.\textsuperscript{30}

However, courts began to tolerate restrictive covenants following changes in employment relations, and by the early eighteenth century, a balancing test replaced per se invalidity.\textsuperscript{31} In \textit{Mitchel v. Reynolds}, an English court upheld an agreement in which a baker assigned the lease of his shop and promised not to practice his trade in the same parish for the duration of the lease.\textsuperscript{32} The decision distinguished unenforceable general restraints of trade from voluntary partial restraints. In doing so the court considered the “mischief” that could arise from these practices, such as the loss of a livelihood.\textsuperscript{33}

Shortly after \textit{Mitchel}, covenants not to compete crossed the Atlantic. The earliest known case of a restrictive covenant in the United States is \textit{Pierce v. Fuller}, decided in 1811.\textsuperscript{34} Relying on English case

\begin{quote}
these early covenants not to compete, “courts became suspicious . . . because they viewed them as attempts by employers to breach customary understandings of the terms of the employment relationship” and subsequently refused to enforce them. \textit{Id. See generally W.J. Rorabaugh, The Craft Apprentice: From Franklin to the Machine Age in America} (1986) (detailing the lives of apprentices in early American history, the harsh treatment they received from their masters, and the willingness to run away to avoid that treatment).
\end{quote}

\textsuperscript{30} See Minda, supra note 26 (citing Dyer’s Case to hold a six-month trade indenture with master was unenforceable as against common law).

\textsuperscript{31} Mitchel v. Reynolds, 1 P. Wms. 181 (Q.B. 1711). Prior to this case the current rule of law was that:

\begin{quote}
[W]herever such contract \textit{stat indifferenter}, and for ought appears, may be either good or bad, the law presumes it \textit{prima facie} to be bad, and that for these reasons: 1st, in favour of trade and honest industry. 2dly, For that there plainly appears a mischief, but the benefit (if any) can be only presumed; and in that case, the presumptive benefit shall be over-borne by the apparent mischief. 3dly, For that the mischief . . . is not only private, but public. 4thly, There is a sort of presumption, that it is not of any benefit to the obligee himself, because, it being a general mischief to the publick, every body is affected thereby; for it is to be observed, that tho’ it be not shewn to be the party’s trade or livelihood, or that he had no estate to subsist on, yet all the books condemn those bonds, on that reason, \textit{viz.}, as taking away the obligor’s livelihood, which proves that the law presumes it; and this presumption answers all the difficulties that are to be found in the books.
\end{quote}

\textit{Id. at 192}. \textit{Mitchel}, breaking with past precedent, permitted noncompete clauses:

\begin{quote}
To conclude: In all restrains of trade, where nothing more appears, the law presumes them bad; but if the circumstances are set forth, that presumption is excluded, and the Court is to judge of those circumstances, and determine accordingly; and if upon them it appears to be a just and honest contract, it ought to be maintained.
\end{quote}

\textit{Id. at 190}.

\textsuperscript{32} The noncompete agreement in \textit{Mitchel} was ancillary to the sale of a business, not to an employment relationship. \textit{Id. at 181}. Modern courts interpret noncompetes that are ancillary to an employment agreement more narrowly than an agreement ancillary to the sale of a business.

\textit{See infra} note 101.

\textsuperscript{33} \textit{Mitchel}, 1 P. Wms. at 190:

\begin{quote}
[T]he true reasons of the distinction upon which the judgments in these cases of voluntary restraints are founded are . . . the mischief which may arise from them, 1st, to the party, by the loss of his livelihood, and the subsistence of his family; 2dly, to the publick, by depriving it of an useful member.
\end{quote}

\textsuperscript{34} Pierce v. Fuller, 8 Mass. 223 (1811). This is the earliest known American case about a
law such as *Mitchel*, the court distinguished general and partial restraints, upholding the agreement because “sufficient and reasonable consideration” was supplied. The reasoning developed in *Mitchel* and followed by *Pierce* remains generally accepted in the United States today.

Currently, courts uphold covenants not to compete when they satisfy the relevant jurisdiction’s requirements. The majority of jurisdictions agree that a covenant not to compete, ancillary to an employment relationship or the sale of a business that is reasonable in

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35 The language in *Pierce* is very similar to that of *Mitchel*. The court started off with the proposition that the contract can either be good or bad:

It is the *prima facie* presumption of law that the contract is bad, because it is to the prejudice of trade and honest industry;—because the mischief to one party is apparent, and the benefit only presumptive; and because the apparent mischief is not merely private, but also public. Therefore all contracts barely in restraint of trade, where no consideration is shown, are bad. But in cases of a limited restraint of trade, where it appears from the special circumstances that the contract is reasonable and useful, shall be good And [sic] the consideration must always be shown, that the contract may be supported by the special circumstances, which induced the making of it . . . and if, upon them, it appears to be a just and honest contract, it will be maintained. *Pierce*, 8 Mass. at 226.

36 *Id.* (”[B]onds to restrain trade in particular places may be good, if executed for a sufficient and reasonable consideration.”).

37 *Mitchel*’s holding allowed for partial restraints of trade instead of the per se unenforceability which had been the previous rule. *Mitchel*, 1 P. Wms. at 192.

38 See *Ingram*, *supra* note 15 (noting that in “most states today, courts will enforce a covenant not to compete if the covenant is found to be ‘reasonable,’ that is, the length of time, geographic scope, and type of activities restricted are necessary to protect the former employer's business such as preserving the former employer's relationships with its customers”). However, some states, such as California, continue to restrict enforcement of noncompetes. See CAL. BUS. & PROF. CODE §§ 16600–16002 (1997).

39 See sources cited *supra* note 38.

40 The Restatement’s rules on ancillary restraints on competition are as follows:

(1) A promise to refrain from competition that imposes a restraint that is ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade if

(a) the restraint is greater than is needed to protect the promisee’s legitimate interest, or

(b) the promisee’s need is outweighed by the hardship to the promisor and the likely injury to the public.

(2) Promises imposing restraints that are ancillary to a valid transaction or relationship include the following:

(a) a promise by the seller of a business not to compete with the buyer in such a way as to injure the value of the business sold;

(b) a promise by an employee or other agent not to compete with his employer or other principal;

(c) a promise by a partner not to compete with the partnership.

*RESTATEMENT (SECOND) OF CONTRACTS* § 188 (1981). There are some differences between noncompetes resulting from the sale of a business and from an employment relationship. This Note is primarily concerned with noncompetes resulting from an employment relationship, unless specified to the contrary the reader should presume as such. See *infra* note 101 (discussing distinction between noncompetes ancillary to employment and the sale of a business).
both geographic scope and duration will be enforced. Substantial case law exists within each jurisdiction to define reasonableness.

II. CURRENT LAW RELATING TO NONCOMPETE AGREEMENTS

Modern courts narrowly interpret covenants not to compete. Construing these covenants in a light most favorable to employees minimizes the interference with an employee’s ability to earn a living.

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41 See C. T. Drechsler, Annotation, Enforceability of Restrictive Covenant, Ancillary to Employment Contract, As Affected by Territorial Extent of Restriction, 43 A.L.R.2d 94 (1955):
Provisions of this type . . . are in most cases limited to a specified area, varying in extent from a small part of a governmental subdivision, such as a town, village, or city, to whole states, countries, or hemispheres. In some instances, no territorial limitation of the restriction is stated at all, while in other cases the restraint may expressly include the whole world. Not infrequently, the prohibited territory is described by circles with a named radius, such as five or ten miles from a certain city, or it may be described by geographical or even imaginary lines, such as all the states east of the Mississippi, or all the territory west of a line drawn through the city of Detroit. Or, finally, the territory included in the restraint may be described by the business activities of the employer or the employee, such as the area covered by the employer’s business, or the sales territory of the employee.

See also C. T. Drechsler, Annotation, Enforceability of Covenant Against Competition, Ancillary to Sale or Other Transfer of Business, Practice, or Property, As Affected by Territorial Extent of Restriction, 46 A.L.R.2d 119 (1956).

42 The enforcement of noncompete clauses and defining what is reasonable exceeds the scope of this Note. For the purposes of discussion we will presume the noncompete would be enforceable if no assignment occurred. For a discussion on the reasonableness of the length of a noncompete, see C. T. Drechsler, Annotation, Enforceability of Restrictive Covenant, Ancillary to Employment Contract, As Affected by Duration of Restriction, 41 A.L.R.2d 15 (1955).
Provisions of this type . . . are in most cases limited to a specified period of time, varying in duration from a few months to many years. However, there are also restraints which, either by an express provision to this effect or by the failure to specifically limit the duration of the restraint, are considered to last for an unlimited period of time; while in some cases the time limitation is made to depend on the occurrence of some future event.
It is obvious that the provision of the covenant as to the time of the restraint, being an element of major importance, has an important bearing on enforceability of the agreement.

See also C. T. Drechsler, Annotation, Enforceability of Covenant Against Competition, Ancillary to Sale or Other Transfer of Business, Practice, or Property, As Affected by Duration of Restriction, 45 A.L.R.2d 77 (1956).

43 The past decade has seen an “exponential increase in the volume of court cases between employers and former employees involving the ownership of information and knowledge. Indeed, disputes over ownership of human capital are becoming one of the most frequently litigated issues in the employment law field.” STONE, supra note 13, at 128; see sources cited supra notes 41-42.

44 See W. Med. Consultants, Inc. v. Johnson, 80 F.3d 1331, 1335 (9th Cir. 1996) (narrowly interpreting the language of a noncompetition clause).

45 See Atlanta Center, Ltd. v. Hilton Hotels Corp., 848 F.2d 146, 148 (11th Cir. 1988) (“[W]hen a court is presented with a restrictive covenant that is susceptible of more than one reasonable interpretation, the preferred interpretation is the one that least restricts competition, thereby posing the least affront to the public policy of the state of Georgia.”); Harvest Ins.
As the following section will show, this narrow construction results in some courts’ refusal to enforce covenants not to compete when a successor attempts to enforce the covenant, while other jurisdictions take the opposing view and allow assignment. These jurisdictions refuse to view covenants not to compete as either personal between the parties or as contracts for personal services.

A. Covenants Not to Compete are Facially Assignable, Passing As Incidents of Business During an Asset Sale

In *A. Fink & Sons*, an asset purchaser enforced a covenant not to compete entered into between the predecessor employer and an employee. The New Jersey court considered a noncompete agreement between the predecessor employer and current employee to be facially assignable. Seventy years later, in *J. H. Renarde, Inc. v. Sims*, the court upheld the earlier precedent set forth in *A. Fink & Sons*. In *Sims* the court began its analysis by stating that in an asset sale, unless specifically excluded, noncompete agreements will inure to the benefit of the purchaser. Furthermore, *Sims* noted that modern courts lack
hostility towards covenants not to compete and allow their enforcement under appropriate circumstances.\footnote{Sims, 711 A.2d at 414 (reasoning that when buying a business, "the purchaser and the employee expect, without new negotiations between them, that the purchaser will honor the employment contract and that the employees, who choose to remain, will honor the promises made to the former employer"); see also Sevier Ins. Agency, Inc. v. Willis Corroon Corp. of Birmingham, 711 So. 2d 995, 1000-01 (Ala. 1998) (holding that noncompetes and nonsolicitation agreements should be viewed together and that to deny their assignment would "ignore the reality that such agreements are often important assets that businesses intend to transfer during a purchase or merger"); see also Fink & Sons, 139 A. at 409-10 (explaining that there can be no independent existence of the noncompete since it was made "for the benefit of the business, and not the individual parties to the contract"); Hexacomb Corp. v. GTW Enters., Inc., 875 F. Supp. 457, 464-65 (N.D. Ill. 1993) (deciding that a successor can enforce a noncompete because it was part of the goodwill purchased); Safelite Glass Corp., 807 P.2d at 681 (citing the general rule that "valid covenants not to compete are assignable and enforceable by a subsequent purchaser of a business as an incident of the business, whether or not there is an express assignment by the seller"); Campbell v. Millennium Ventures, LLC, 55 P.3d 429, 436 (N.M. Ct. App. 2002) (construing the purchasing of goodwill to include noncompete clauses).}

Finally, the court considered the expectations of the parties, commenting that when purchasing a business, the subsequent owner and employees expect current employment contracts to be honored. The holding recognized the reality that such agreements are important assets which the purchaser intends to transfer.\footnote{Sims, 711 A.2d at 414 (reasoning that when buying a business, "the purchaser and the employee expect, without new negotiations between them, that the purchaser will honor the employment contract and that the employees, who choose to remain, will honor the promises made to the former employer"); see also Sevier Ins. Agency, Inc. v. Willis Corroon Corp. of Birmingham, 711 So. 2d 995, 1000-01 (Ala. 1998) (holding that noncompetes and nonsolicitation agreements should be viewed together and that to deny their assignment would "ignore the reality that such agreements are often important assets that businesses intend to transfer during a purchase or merger"); see also Fink & Sons, 139 A. at 409-10 (explaining that there can be no independent existence of the noncompete since it was made "for the benefit of the business, and not the individual parties to the contract"); Hexacomb Corp. v. GTW Enters., Inc., 875 F. Supp. 457, 464-65 (N.D. Ill. 1993) (deciding that a successor can enforce a noncompete because it was part of the goodwill purchased); Safelite Glass Corp., 807 P.2d at 679 (holding noncompete ancillary to sale of business assignable); Alexander & Alexander, Inc. v. Koelz, 722 S.W.2d 311 (Mo. Ct. App. 1986) (holding noncompetes to be enforceable because they protect the goodwill of a business; when this goodwill is sold the assignee can enforce the noncompete).}

Enforcement of the noncompetes also maintains the employer’s investment in human capital, thereby protecting the firm’s purchase price.\footnote{Sims, 711 A.2d at 414 (reasoning that when buying a business, "the purchaser and the employee expect, without new negotiations between them, that the purchaser will honor the employment contract and that the employees, who choose to remain, will honor the promises made to the former employer"); see also Sevier Ins. Agency, Inc. v. Willis Corroon Corp. of Birmingham, 711 So. 2d 995, 1000-01 (Ala. 1998) (holding that noncompetes and nonsolicitation agreements should be viewed together and that to deny their assignment would "ignore the reality that such agreements are often important assets that businesses intend to transfer during a purchase or merger"); see also Fink & Sons, 139 A. at 409-10 (explaining that there can be no independent existence of the noncompete since it was made "for the benefit of the business, and not the individual parties to the contract"); Hexacomb Corp. v. GTW Enters., Inc., 875 F. Supp. 457, 464-65 (N.D. Ill. 1993) (deciding that a successor can enforce a noncompete because it was part of the goodwill purchased); Safelite Glass Corp., 807 P.2d at 679 (holding noncompete ancillary to sale of business assignable); Alexander & Alexander, Inc. v. Koelz, 722 S.W.2d 311 (Mo. Ct. App. 1986) (holding noncompetes to be enforceable because they protect the goodwill of a business; when this goodwill is sold the assignee can enforce the noncompete).}

The jurisdictions that permit asset purchasers to enforce covenants not to compete use two models. Some courts adhere to the notion that covenants not to compete are assignable because they are not personal service contracts; they do not seek performance, only forbearance.\footnote{Sims, 711 A.2d at 414 (reasoning that when buying a business, "the purchaser and the employee expect, without new negotiations between them, that the purchaser will honor the employment contract and that the employees, who choose to remain, will honor the promises made to the former employer"); see also Sevier Ins. Agency, Inc. v. Willis Corroon Corp. of Birmingham, 711 So. 2d 995, 1000-01 (Ala. 1998) (holding that noncompetes and nonsolicitation agreements should be viewed together and that to deny their assignment would "ignore the reality that such agreements are often important assets that businesses intend to transfer during a purchase or merger"); see also Fink & Sons, 139 A. at 409-10 (explaining that there can be no independent existence of the noncompete since it was made "for the benefit of the business, and not the individual parties to the contract"); Hexacomb Corp. v. GTW Enters., Inc., 875 F. Supp. 457, 464-65 (N.D. Ill. 1993) (deciding that a successor can enforce a noncompete because it was part of the goodwill purchased); Safelite Glass Corp., 807 P.2d at 679 (holding noncompete ancillary to sale of business assignable); Alexander & Alexander, Inc. v. Koelz, 722 S.W.2d 311 (Mo. Ct. App. 1986) (holding noncompetes to be enforceable because they protect the goodwill of a business; when this goodwill is sold the assignee can enforce the noncompete).}
The second model grounds assignability in the view that the covenants not to compete are severable from the employment contract.\textsuperscript{57}

In support of the forbearance model, the court in \textit{Cropper v. Davis} drew a distinction between forcing an employee to continue to work for an employer and preventing the employee from working for the competition.\textsuperscript{58} Forcing an employee to work for an employer would be involuntary servitude, prevented by the Thirteenth Amendment, but here the owner of the covenant not to compete does not seek a continuation of the employment relationship.\textsuperscript{59} Instead, the employer attempting to enforce the agreement endeavors to restrict the employee from working elsewhere.\textsuperscript{60}

Pursuant to the second model, some jurisdictions view the covenant not to compete as independently assignable regardless of the assignability of the employment contract.\textsuperscript{61} Severing the bundle of duties and rights allows enforcement of the covenant because the issues involved in delegating performance under an employment contract are

\begin{quote}
57 The noncompete can be viewed as a separate, independent contract. A contract can be either an entire contract or a severable one according to the intentions of the parties. “[T]he fact that divisible parts are included within the same document does not preclude them from being considered and enforced as separate contracts.” Penske Truck Leasing Co. v. Huddleston, 795 S.W.2d 669, 671 (Tenn. 1990).

58 \textit{Cropper v. Davis}, 243 F. 310, 316 (8th Cir. 1917):

It should be borne in mind that a distinction must exist between compelling one to keep his contract of employment and forbidding him to work for his rival in the same line.

The first would require involuntary servitude in violation of the Thirteenth Amendment to the Constitution, while the second would not be subject to that criticism.

See also Managed Health Care Assocs. v. Kethan, 209 F.3d 923, 929-30 (6th Cir. 2000) (holding that “a noncompetition clause only requires that one of the parties abstain from certain activities. . . . [I]t does not require any affirmative action on the part of [the employee], and is thus assignable”).

59 See sources cited supra note 58; J.H. Renarde, Inc. v. Sims, 711 A.2d 410, 413 (N.J. Super. Ct. Ch. Div. 1998) (drawing a distinction between ordering the employee to continue working at his job, which would be involuntary servitude, and restricting jobs available to the former employee).

60 See sources cited supra notes 58-59.


Limitations on an employer’s liberty to assign the right to enforce personal service contracts, like restrictions on an employee’s liberty to delegate her duty to perform under an employment contract, involve different issues than assignment of covenants not to compete. For while the former two primarily involves [sic] the relationship between the employer and employee, the later [sic] concerns an employer’s investment in its employee and the possibility of that investment being pawned off to a rival competitor. Covenants not to compete facilitate and protect capital investment. It comes as no small surprise, then, that in conjunction with a sale of a business, a covenant not to compete with a business is assignable.

\textit{Id. at} 557 (internal quotations omitted).\end{quote}
different from that of the covenant. Enforcing a restrictive covenant represents only part of the employment agreement. A contract consisting of a bundle of rights and duties may allow assignment of certain aspects of the agreement and not others. Work can be separated from the other promises that trigger the termination of the employment relationship. In these jurisdictions, viewing the work relationship as personal does not void the assignment of a covenant not to compete. The covenant not to compete primarily addresses the employer’s human capital investment and his apprehension of its utilization by the competition, which is distinguishable from the work relationship.

Not all jurisdictions allow asset purchasers to enforce covenants not to compete. However, some courts that do not permit enforcement without employee consent will allow it when the employee manifests consent to the assignment. Courts have relied on the contract doctrines of assent and ratification to enforce covenants not to compete when an employee continues to work after the business has been sold.

62 See sources cited supra note 61.
63 See Equifax Servs. v. Hitz, 905 F.2d 1355, 1361 (10th Cir. 1990). In dicta, the court noted that:

A contract consists of a bundle of rights and duties, and whether rights are assignable or duties delegable depends on the particular rights and duties at issue. Although an employee’s duty to perform under an employment contract generally is not delegable, the right to enforce a covenant not to compete generally is assignable in connection with the sale of a business.

64 See sources cited supra note 61.

65 In some jurisdictions, an employee who continues to work for the asset purchaser may be assenting to the changed terms. “Where a performance is personal and not possible of delegation, the condition of personal performance is waived if the obligor assents to the substituted performance; and failure to object, with knowledge that the work is being performed by a substitute, may operate as assent.” 9-48 ARTHUR L. CORBIN, CORBIN ON CONTRACTS §865 (rev. ed. 2004). The doctrine of ratification is also employed. See BLACK’S LAW DICTIONARY 1289-90 (8th ed. 2004) (defining ratification as “[a] person’s binding adoption of an act already completed but either not done in a way that originally produced a legal obligation or done by a third party having at the time no authority to act as the person’s agent”); Peters v. Davidson, Inc., 359 N.E.2d 556, 562-63 (Ind. Ct. App. 1977) (noting that enforcement of a noncompete agreement, following a merger, is particularly appropriate “in those cases where, as here, the employee continues to accept the benefits of his agreement without objection”); Orkin Exterminating Co. v. Burnett, 146 N.W.2d 320, 325-27 (Iowa 1966). In Orkin, following an acquisition by a successor corporation, an employee continued to act under employment contract for nine months. The court relying on ratification, noting that

the relationship appears to have been satisfactory and was faithfully performed by each. Thus, unless plaintiff has forfeited or lost some rights, has breached the agreement in some material aspect, or has done something unfair or unjust to defendant in relation to the agreement, a court of equity would not be justified in refusing to enforce this restrictive covenant.

66 Id. at 325. The court later stated a general rule that “an executory contract for personal services is not assignable by either party unless the contract so provides or unless the other party consents thereto or ratifies the assignment or waives his right to object.” Id. at 327. See also Jack Tratenberg, Inc. v. Komoroff, 87 Pa. D. & C. 1 (C.P. Pa. 1951) (allowing assignment when
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B. Viewing Noncompetes as Unassignable

When the employee does not consent to enforcement of a covenant not to compete by an asset purchaser, many jurisdictions do not permit assignment of the agreement. They decline to enforce assignments of these contracts because of either common law or statute.66

Common employee expressly or implicitly consents through conduct); Green’s Diary, Inc. v. Chilcoat, 89 Pa. D. & C. 351 (C.P. Pa. 1953) (same).

66 States have taken different approaches to the assignment of noncompetes. Florida allows for assignment only when “expressly authorized.”

(f) The court shall not refuse enforcement of a restrictive covenant on the ground that the person seeking enforcement is a third-party beneficiary of such contract or is an assignee or successor to a party to such contract, provided:

1. In the case of a third-party beneficiary, the restrictive covenant expressly identified the person as a third-party beneficiary of the contract and expressly stated that the restrictive covenant was intended for the benefit of such person.

2. In the case of an assignee or successor, the restrictive covenant expressly authorized enforcement by a party’s assignee or successor.

FLA. STAT. ANN. § 542.335 (West 2002). The Florida rule requires disallows assignment without getting express permission to do so. Marx v. Clear Channel Broad., Inc., 887 So. 2d 405, 408 (Fla. Dist. Ct. App. 2004) (noting that “non-competition agreements can be enforced by assignees, but only if the agreement expressly so provides”). Other states take the opposite approach, allowing for assignment by defining employer to include successors in interest. See GA. CODE ANN. § 13-8-2.1 (1991):

(C) “Employer” means any corporation, partnership, proprietorship, or other organization, including any successor-in-interest to such an entity, that conducts a business or any person or entity that directly or indirectly owns an equity interest or ownership participation in such an entity that accounts for 50 percent or more of the voting or profits interest of such entity.

See also OR. REV. STAT. § 652.310 (1989):

1) “Employer” means any person who in this state, directly or through an agent, engages personal services of one or more employees and includes any successor to the business of any employer, or any lessee or purchaser of any employer’s business property for the continuance of the same business, so far as such employer has not paid employees in full.

Some states, such as California, avoid the assignability issue by refusing to initially recognize many restrictive covenants. California law disfavors noncompetes and only allows them in limited circumstances when “the former employee would be subject to judicial restraint under the law of unfair competition.” 2 KURT H. DECKER, COVENANTS NOT TO COMPETE 25-26 (2d ed. 1993); see also CAL. BUS. & PROF. CODE § 16600 (1997) (“Except as provided in this chapter, every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void.”); N.D. CENT. CODE § 9-08-06 (2005):

Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void, except:

1. One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part of either, so long as the buyer or any person deriving title to the goodwill from him carries on a like business therein.

2. Partners, upon or in anticipation of a dissolution of the partnership, may agree that all or any number of them will not carry on a similar business within the same city where the partnership business has been transacted, or within a specified part thereof.

OKLA. STAT. tit. 15, §§ 217-219A (1993) (similar); COLO. REV. STAT. § 8-2-113 (2004) (allowing noncompetes only in sale of business, partnership, and for “[e]xecutive and
law presents two main objections to an asset purchaser’s enforcement of the agreement. The first approach declines enforcement because the covenant is personal between the parties. Second, courts consider covenants not to compete to be personal service contracts. Courts frequently muddle the distinction between personal contracts and contracts for personal services. In recent years some jurisdictions, following Pennsylvania’s well articulated Hess v. Gebhard & Co. Inc. decision, shifted to view the assignment of noncompetes under a personal theory while others continue to consider the agreements contracts for personal services.

1. Personal Between the Parties

The courts that consider noncompetes to be personal between the parties and therefore nonassignable follow the justification found in Smith, Bell & Hauck, Inc. v. Cullins. These jurisdictions consider the management personnel and officers and employees who constitute professional staff to executive and management personnel”). What constitutes reasonable varies among jurisdictions. Most states allow noncompete agreements either through common law or statute. The covenants must be within a definitive geographic location and reasonable within their scope. To what extent the noncompete is reasonable in regard to location and scope is well-litigated and is a commonly encountered by lawyers practicing employment law. See Ticor Title Ins. Co. v. Cohen, 173 F.3d 63 (2d Cir. 1999) (holding the prevention of former employee from appropriating customers for six months to be reasonable because of his unique skills); Guardsmark, Inc. v. Borg-Warner Protective Servs., 14 I.E.R. Cas. (BNA) 1457 (Tenn. Ct. App. 1998) (holding a nationwide injunction to be overly broad and inappropriate).

During the purchase of assets, the noncompete is included in the goodwill purchased, even when not made explicit. Hexacom Corp. v. GTW Enters., 875 F. Supp. 457, 464-65 (N.D. Ill. 1993). An example of the confusion courts face can be found in Sisco v. Empiregas, Inc. of Belle Mina, 237 So. 2d 463 (Ala. 1970), which was overruled by Sevier Ins. Agency, Inc. v. Willis Corroon Corp. of Birmingham, 711 So. 2d 995 (Ala. 1998). Although Alabama has recently allowed successors to enforce noncompete clauses, Sisco is still pertinent because other jurisdictions face similar confusion. The Sisco court began its analysis with “the general proposition that personal service contracts are not assignable.” 237 So. 2d at 466 (emphasis added). The court then referred to the relationship between the employer and employee as one of “personal confidence between the parties.” Id. The circumstances demonstrated that “Sisco relied upon the uniqueness of his corporate employer and their relationship of mutual confidence.” Id. at 467. The Sisco court used the label of personal service contracts when it wanted to refer particularly to the personal aspect of the agreement. The ambiguities of language found in Sisco should be contrasted with Hess v. Gebhard & Co. Inc., 808 A.2d 912 (Pa. 2002). Here the court, noting the difference, said: “Some of these jurisdictions have based their decision on a finding that the employment contracts, and therefore the covenants, are personal to the parties may not be assigned. Others have concluded that employment contracts involve personal services and are not assignable.” Id. at 918-19.

808 A.2d 912 (Pa. 2002).

183 A.2d 528 (Vt. 1962). Smith held that a noncompete clause could not be enforced by a successor in interest when the covenant was silent on assignability. This decision is often quoted by its progeny because it thoroughly states the reason to disallow enforcement of a noncompete
personal aspects of the contract to permeate throughout the entire agreement, including the covenant not to compete, rejecting the justification that the covenants can be severed from the remaining clauses of the contract.71 When parties begin an employment relationship, they enter into it with certain expectations, including the character and personality of the employer.72 These expectations form the basis of the trust reposed in the employer that is subsequently relied upon when agreeing to a covenant not to compete.73 Therefore, the trust and confidence the employee places in the hands of the employer warrants, under this theory, denial of enforcement of the assigned agreement.74 The employee’s trust in the employer may not extend to the successor in interest, and the employee may not have been willing to enter into the same agreement if the successor had been the initial

by a successor:

From its inception, the relationship between [the employer] and its employee . . . was one of mutual confidence. The employee confided to the servant important customer relationships and business confidences. The employee entrusted to his employer the important privilege of discharging him at will and without cause. This eventuality would at once invoke the severe detriment of foreclosing him from employment elsewhere in that community in his chosen occupation. The restriction, in its own terms, was designed to protect a fiduciary relationship which emanated solely from the master and servant relationship. Knowing the character and personality of his master, the employee might be ready and willing to safeguard the trust which his employer had reposed in him by granting a restrictive covenant against leaving that employment. His confidence in his employer might be such that he could scarcely anticipate any rupture between them. As to that particular employer, if a break did occur, he might be willing to pledge that his fidelity would continue after the employment had ended, even at the cost of forsaking the vocation for which he was best suited. This does not mean that he was willing to suffer this restraint for the benefit of a stranger to the original undertaking.

We conclude that the personal characteristics of the employment contract permeate the entire transaction. Like the contract for hiring, upon which it was given, the employee’s restrictive covenant is confined to the employer with whom the undertaking was made. Since the [noncompete was personal] . . . it was incapable of effective assignment without the employee’s consent or ratification.75

Id. at 532; see also Hess, 808 A.2d 912 (Pa. 2002) (holding a noncompete not assignable in Pennsylvania because it is personal between the parties).

71 See sources cited supra note 70.

72 See Traffic Control Servs. v. United Rentals Northwest, Inc., 87 P.3d 1054, 1058 (2004): When an employee enters into a covenant not to compete with his employer, he may consider the character and personality of his employer to determine whether he is willing to be held to a contract that will restrain him from future competition with his employer, even after termination of employment. This does not mean, however, that the employee is willing to suffer the same restriction with a stranger to the original obligation.

73 See Hess, 808 A.2d at 919 (noting that “the employee placed considerable trust in the employer by agreeing to the non-compete clause, namely trusting that the employer would not fire him and then invoke the covenant not to compete”).

74 Id. at 922. The court remarked that the “employment contract, of which the covenant is a part, is personal to the performance of both the employer and the employee, the touchstone of which is the trust that each has in the other.” Id.
contracting party.\textsuperscript{75} Selling a business disrupts the personal nature of the noncompete agreement and therefore some courts decline to allow an asset purchaser to enforce the agreement.\textsuperscript{76}

This model can be analyzed within the framework of a bilateral contract. The employee promises his services in exchange for compensation \textit{and} the right to work for the employer.\textsuperscript{77} The right to work for the \textit{employer} is a condition precedent. This condition results from the “special trust and confidence” reposed in the employer and renders impossible an assignment as long as the contract is executory on the part of the party in which the trust and confidence has been reposed.\textsuperscript{78} The “special trust and confidence”\textsuperscript{79} constitutes part of the bargained-for exchange. Trust is given to the employer in exchange for his promise that he will treat the employee fairly and not unjustly discharge him.\textsuperscript{80} This remains executory because trust and confidence remain with the employer as long as the employment relationship persists.\textsuperscript{81}

2. Personal Service Contracts

Courts that restrict the assignment of noncompetition agreements on the basis of personal services do so because a contract for personal services cannot be delegated, and therefore the assignment violates public policy.\textsuperscript{82} The two personal theories of contract are

\textsuperscript{75}See id. (noting that even though “an individual may have confidence in the character and personality of one employer does not mean that the employee would be willing to suffer a restraint on his employment for the benefit of a stranger to the original undertaking”).

\textsuperscript{76}See Traffic Control Servs., 87 P.3d at 1058 (noting that “the sale of a business fundamentally alters the nature of an employment relationship”).

\textsuperscript{77}See sources cited supra note 70.

\textsuperscript{78}CORBIN, supra note 65, § 865.

\textsuperscript{79}Id.

\textsuperscript{80}Id.

\textsuperscript{81}A noncompete is distinct from a normal employment contract because it is personal on both sides. A condition precedent requires the employee to perform the function without assignment and a second condition precedent requires the employer not to assign the noncompete. \textit{Id.} There are two separate layers of conditions, the first layer binding the employee to personally perform and the second layer binding the employer to remain the employer. The noncompete is a second mutual exchange of promises. The employee promises not to compete with the employer when he leaves his employment in exchange for compensation. \textit{Id.} There is also a condition precedent that the employer will treat the employee fairly. Within this condition is a second condition that the employer will remain the same. “In a contract for a sales agency, the personal performance of the agent is practically always a condition precedent to the duty of the principal and the employer.” \textit{Id.} This statement conforms to the first set of conditions, but for the second the employer is now the promisor, his promise being not to assign the contract.

\textsuperscript{82}See \textsc{Restatement (Second) of Contracts} § 367 (1981).

1. A promise to render personal service will not be specifically enforced.

2. A promise to render personal service exclusively for one employer will not be enforced by an injunction against serving another if its probable result will be to
distinguishable; a personal contract cannot be assigned because it is formed on the basis of mutual trust and confidence between the two parties, whereas a contract for personal services must be performed by the contracting parties.\textsuperscript{83}

The assignment of a personal service contract forces an individual\textsuperscript{84} to work against his will—akin to slavery.\textsuperscript{85} Some courts consider covenants not to compete to be integrally intertwined with the employment contract.\textsuperscript{86} Employment contracts are by their very nature personal service contracts; an employee cannot delegate his or her job to another, and doing so removes the employee status.\textsuperscript{87} Therefore, if an

compel a performance involving personal relations the enforced continuance of which is undesirable or will be to leave the employee without other reasonable means of making a living.

See also Alldredge v. Twenty-Five Thirty-Two Broadway Corp., 509 S.W.2d 744, 749 (Mo. Ct. App. 1974) (stating the general rule that personal service contracts are unenforceable); Avenue Z Wet Wash Laundry Co. v. Yarmush, 221 N.Y.S. 506, 507 (Sup. Ct. 1927) (citing the “general rule is that no bilateral contract for personal services can be assigned by either party to it”).\textsuperscript{83} See RESTATEMENT (SECOND) OF CONTRACTS § 367 cmt. b (1981) (noting that a personal contract has a “sense of being non-delegable”); Avenue Z, 221 N.Y.S. at 507 (same).

84 See Avenue Z, 221 N.Y.S. at 507 (“[E]mployment contracts are for personal services and, while the services are not extraordinary or unique, the contract calls for the services of the individual [employee], and of no other.”); see also BALLENTINE’S LAW DICTIONARY 942 (3d ed. 1969) (defining a personal service contract as a “contract for the furnishing of services by the promisor only, that is, services to be performed by no person other than the promisor”).

85 See RESTATEMENT (SECOND) OF CONTRACTS § 367 cmt. a (1981) (viewing the ordering of specific performance on a personal service contract to be “imposing what might seem like involuntary servitude”).


87 CORBIN, supra note 65, § 865. The employee can “assign his right to salary or wages; but he cannot delegate performance of the service.” \textit{Id}. The person to whom the employee assigned his or her salary can collect only after performance of the employee. The same is true for the employer. The employer may assign “his right to the services and he can delegate performance of his duty to pay wages; but the employee’s duty to render the services remains conditional upon the original employer’s readiness and willingness to pay the wages or upon a tender of ample security by the assignee.” \textit{Id}. Allowing assignment by the employer does not allow the promised service to be changed in any material way by the assignment. \textit{Id}. If the performance due is to act as a valet for a particular person, the assignment cannot change the performance to act for another. \textit{Id}.

There are several ways to interpret why a personal service contract should not be assignable. If the performance is personal, substituting another person “would not discharge the contractor’s duty.” \textit{Id}. Because the performance of a particular person is required, the employee can not replace himself with someone else and still be in fulfillment of his existing contract.

The second possible interpretation given by Corbin suggests that it is harder to assign an employment contract. Under this interpretation if “personal performance by the contractor is a
employment contract includes a covenant not to compete and an employment contract is a contract for personal services, then according to this line of reasoning the covenant is non-assignable.

III. ENFORCING OR DECLINING TO ENFORCE A NONCOMPETE CAN PRODUCE AN INEQUITABLE RESULT

States have made varying policy decisions to either allow or restrict the assignment of noncompete agreements when the contract does not set forth the intent of the parties. Generally, the decisions are initially made by courts, and legislatures subsequently modify them when the decisions generate controversy.88 The application of these rules produces inequitable results for certain parties, which calls the wisdom of inflexible per se rules into question. As the disparity in size between the acquiring company and the employee’s original employer increases, the equity of enforcing noncompete agreements arguably decreases, but this inequity is not addressed by current law.

Two possible scenarios illustrate how disputes about the assignment of a noncompete agreement can arise. The first factual scenario occurs when one large company is acquired by another large company. The effect of company size on assignability of covenants not to compete can be appreciated when compared with the second scenario, where a small company is purchased by a larger entity.

The first factual scenario presents the strongest case for enforcement of noncompetes. An example of this scenario is the merger of Sears and Kmart.89 The objection that the noncompete is personal between the parties loses its strength when the size of the company being sold increases.90 In a large company, employees may
not experience a personal bond with the business. Even if such a bond exists between employees and their supervisors, it will most likely not extend to the president of the company. Additionally, the economic advantages of alienability increase as the company gets larger. A larger, publicly traded company will suffer a more transparent economic loss if noncompetes cannot be sold, since such sales are factored into the economic worth of the stock price.

The second factual scenario, a large company acquiring a small one, is a situation that presents the strongest justification to deny the assignment of noncompetes. A real world example can be found in the acquisition of Merchants Automotive Group’s rental car division, a local, family-run car rental agency, by Enterprise Rent-A-Car Company, a large multi-national corporation. As a company decreases in size, the likelihood of a closer personal relationship between the employer and employee becomes more believable, due in part to the increased

rule [of not assigning personal contracts] is out of touch with the reality of the times.” Larry A. DiMatteo, Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability, 27 Akron L. Rev. 407, 439 (1994). DiMatteo argues that the current label of personal should no longer be applied to contracts because “relational contracts have expanded in scope [and] have also in some areas become more fungible or standardized. Thus, many transactions considered strictly personal in the past have become more transactional in nature and more akin to a sale of goods.” Id.; see also SAMUEL ESTREICHER & MICHAEL C. HARPER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW 748 (2d ed. 2000) (“As the [twentieth] century progressed and the scale of production increased, . . . enterprises became larger and more impersonal and many workers became farther removed from ownership.”).

91 The “employment relations in very small firms tend to be significantly different from those in larger organisations; they are more personalised and individual in character.” PRINT the Government Speaks, PRINTING WORLD, May 29, 2000, at 13.

92 Noncompetes are valuable, and larger companies will suffer a greater economic loss if as a result of their size they have more noncompetes than a small company. Common law favors the ability to assign contracts as it does other forms of real property because it increases free market efficiencies. See Alice J. Baker, Legislative Prohibitions on the Enforcement of Post-Employment Covenants Not to Compete in the Broadcasting Industry, 23 Hastings Comm. & Ent. L.J. 647, 650 (2001).

Although the common law’s treatment of restraints on the alienation of human capital developed separately from its treatment of restraints on the alienation of real property, both types of restrictive covenants are in fact subsets of a broader category: restraints on the alienation of entitlements. Restraints on the alienation of entitlements are disfavored in the common law, whether those entitlements are interests in real property, goods, services, or human capital. Regardless of the type of entitlement, transferability is thought to be necessary to promote the efficient use of entitlements.

93 See supra text accompanying note 55.

94 In 2004 Enterprise Rent-A-Car operated more than 6,000 offices in the US, Canada, UK, Ireland, and Germany and purchased Merchants Automotive Group’s rental car division’s seventeen locations. There are many differences between the way these two companies are run, primarily stemming from the sheer difference in magnitude. See Enterprise Rent-A-Car, Who We Are, http://aboutus.enterprise.com/who_we_are/milestones.html (last visited Feb. 29, 2005); Merchants Rent-A-Car, Merchants Rent-A-Car, Inc Sells Its Rental Car Division to Enterprise, Jul. 9, 2004, available at http://www.singerfamilyenterprises.com/popup.cfm?cid=223.
contact between the parties. In a small business, agreements may be reached informally as opposed to at arms length as they would be negotiated in a large corporate setting. The trust reposed in the owner of a small business may not be the same as that which an employee would be willing to give to the manager of a larger company. In addition, the fear that the scope of the agreement might change becomes a factor. A larger company may operate more broadly, and preventing competition against this new larger entity may be more restrictive.

The current law does not allow for distinctions between the different factual situations surrounding an assignment. It instead imposes blanket rules ill-equipped to deal with the differing scenarios that are presented. Holmsian contracts jurisprudence may posit that such rules are equitable because they only apply when the drafter fails to include an assignability provision. But this Note argues that a more equitable balancing test, which is currently used to determine

95 In a small firm “owners, managers, and employees are more likely to have daily, face-to-face contact . . . .” Helen Haugh & Lorna McKee, The Cultural Paradigm of the Smaller Firm, 42 J. SMALL BUS. MGMT. 377, 380 (2004), available at http://www.imese.gr/courses/Scheinapplied.pdf.

96 Small firms “tend to be characterized by frequent informal communication between employees and customers.” Id. at 379.

97 “In small firms regular contact and communication with decision-takers who are in close proximity may form the basis for meaningful participation in decision-making and trust-based employee relations.” Alex Bryson, The Impact of Employee Involvement on Small Firms’ Financial Performance, 169 NAT’L INST. ECON. REV. 78 (1999).

98 See infra note 128.

99 See supra note 47 (detailing different ways states deal with the assignment of noncompetes); see also DiMatteo, supra note 90, at 438 (rejecting the idea that personal contracts should be per se nonassignable).

100 See GRANT GILMORE, THE DEATH OF CONTRACT 15 (1974). The Holmes-Williston theory of contracts was such that:

[T]he courts should operate as detached umpires or referees, doing no more than to see that the rules of the game were observed and refusing to intervene affirmatively to see that justice or anything of that sort was done. Courts do not, it was said, make contracts for the parties. The parties themselves must see that the last i is properly dotted, the last t properly crossed; the courts will not do it for them. And if A, without the protection of a binding contract, improvidently relies, to his detriment, on B’s promises and assurances, that may be unfortunate for A but is no fit matter for legal concern.

Applying the Holmes-Williston theory of contracts to noncompetes would dictate that courts should ignore any concern for inequities resulting from the agreement. The parties to the noncompete agreement had the opportunity to contract around the assignment question in advance; their failure to do so should not be rectified by the court. See id. While Holmes and Williston had great prominence in the early twentieth century, legal scholars such as Corbin and Cardozo spent their legal lives with an opposing view. Cardozo, with Corbin in agreement, used his influence on the New York Court of Appeals to develop “what might be called an expansive theory of contract. Courts should make contracts wherever possible rather than the other way around. Missing terms can be supplied. If an express promise is lacking, an implied promise can easily be found.” Id. at 62. It was Corbin’s opinion that the “Holmsian model was wrong—wrong as a matter of historical fact . . . and also wrong as a matter of social policy.” Id. at 58. A court taking the Cardozo-Corbin view would imply the necessary terms to preserve equity, either permitting or prohibiting assignment as necessary.
union recognition during mergers and acquisitions will produce less harsh results. When a noncompete agreement omits an assignment provision, the employee may suffer a disadvantage if a successor employer enforces a noncompete. Correspondingly, denying an assignment reduces the value an owner can garner for the sale of the business. Reconciling these divergent interests through balancing both the employer’s and employee’s interests can achieve a more equitable outcome.

IV. A BALANCING APPROACH TO ENFORCEMENT OF NONCOMPETE AGREEMENTS

Applying flexible guidelines as opposed to strict rules in determining the assignability of a covenant not to compete produces the most equitable solution to preserve the bargained-for agreement restricting competition.101 The nature of the successor in relation to the

101 Courts of equity are “less prone to enforce a restriction against competition in the case of a mere employment contract than in a case where such a restriction is part of a contract for the sale of a business.” Original Vincent & Joseph, Inc. v. Schiavone, 134 A.2d 843, 845 (Del. Ch. 1957); see also Ellis v. McDaniel, 596 P.2d 222, 224 (Nev. 1979) (noting that “the loss of a person’s livelihood is a very serious matter, [therefore] post employment anti-competitive covenants are scrutinized with greater care than are similar covenants incident to the sale of a business”). The previous owner, who signs a noncompetitive agreement in the sale of a business, knows that he will be restrained from competing. The restriction is immediately placed on the seller of the business. Therefore it is more reasonable to enforce this agreement against the seller of a business than an employee.

Different expectations and pecuniary positions exist for the former owner and former employee. See Safelite Glass Corp. v. Fuller, 807 P.2d 677, 681 (Kan. Ct. App. 1991) (“When determining the reasonableness of a covenant, a covenant not to compete contained in an employment contract is generally strictly construed against an employer because the employee is in a weaker bargaining position at the time of contract formation than is a party selling his or her business.”); Hess v. Gebhard, 808 A.2d 912, 918 (Pa. 2002) (noting the different treatment of noncompete resulting from sale of business because parties entering into the sale of a business generally have equal bargaining power). The former owner is paid handsomely for the agreement, with full knowledge that he is not allowed to compete as soon as the sale is completed. A former employee signs an agreement hoping never to be discharged, or with the assumption the discharge will occur at some point in the future. For some employees, their only compensation for not competing was the ability to work in the first place. The employee is at a disadvantage in the negotiating stage with the employer because of unequal bargaining and a lesser financial position. A narrow construction of the noncompete will allow a former employee the ability to earn a livelihood while still preserving some of what the employer sought.

When the noncompete is assigned to a successor in interest, differing policy considerations emerge for a prior owner and employee. In California, noncompetes are generally not enforceable. CAL. BUS. & PROF. CODE § 16600 (1997). However, there is an exception for the sale of a business. Id. § 16601. In the sale of goodwill or corporate shares, [a]ny person who sells the goodwill of a business, or any owner of a business entity selling or otherwise disposing of all of his or her ownership interest in the business entity, or any owner of a business entity that sells (a) all or substantially all of its operating assets together with the goodwill of the business entity, (b) all or substantially all of the operating assets of a division or a subsidiary of the business
predecessor is the most important factor to be considered. In labor law, an inquiry similar to the one proposed to evaluate noncompete assignability is conducted to determine if a successor must recognize a labor union. Although notable distinctions exist between union recognition and enforcement of restrictive covenants, there are sufficient similarities to apply a modified version of the successor test in the noncompete context.102

In *Fall River Dyeing & Finishing v. NLRB*, the Supreme Court determined that Fall River was a successor corporation and that it must recognize the previous labor union.103 In deciding to enforce a bargaining obligation on the successor, the Court relied on the fact that the new employer generally maintained the same business and hired a majority of the former employees.104 The *Fall River* Court, in determining the successorship question, noted the employer’s intent to take advantage of the predecessor’s workforce, utilizing the employees’ firm-specific skills.105

To determine if an asset purchaser succeeds the predecessor, and therefore must recognize a union, several factors are considered. These factors include continuation of similar product lines, departmental organization, job functions, and employee identity.106 This is a factual

entity together with the goodwill of that division or subsidiary, or (c) all of the ownership interest of any subsidiary, may agree with the buyer to refrain from carrying on a similar business within a specified geographic area in which the business so sold, or that of the business entity, division, or subsidiary has been carried on, so long as the buyer, or any person deriving title to the goodwill or ownership interest from the buyer, carries on a like business therein.

*Id.* (emphasis added).

102 The policy of the National Labor Relations Board is to ensure “industrial peace.” Brooks v. NLRB, 348 U.S. 96, 103 (1954). Although there are different policy considerations when considering noncompetes, such as preserving the bargained for exchange and recognizing the personal nature of the contract, such distinctions would not preclude borrowing a test from labor law. In both situations, the issue is if the purchasing company is a successor and should assume certain assets and liabilities from the predecessor. Union recognition is considered a liability, as opposed to a noncompete, which is considered an asset, but the essential question is if this new company should have the assets or liabilities of the predecessor. A successor to a labor agreement is saddled with liabilities from the predecessor’s unfair labor practices unless the successor contracts around it. *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168 (1973). In labor law, if an asset purchaser is not considered a successor, the liabilities from the predecessor’s unfair labor practices do not flow. The same justification can be applied to noncompete agreements; if the asset purchaser is not a successor, but instead has simply purchased assets, enforcing the noncompete agreement would be the same as applying *Golden State Bottling* liability to a company that had not purchased the workforce.


104 Making a “conscious decision to maintain generally the same business and to hire a majority of [one’s] employees from the predecessor” activates a bargaining order. *Id.* at 41.

105 The Court’s decision rested on the tenuous state of unions during a transition period and tried to strike a balance between forcing someone who only intends to purchase assets and someone who intends to take advantage of the previous workforce. *Id.*

approach based on the totality of circumstances, with no one factor being determinative.\footnote{Fall River, 482 U.S. at 43 (using a totality of circumstances analysis).} In determining if a “substantial continuity” exists between the two enterprises, the court places an emphasis on the employee’s perspective.\footnote{Id. (citations omitted): In conducting the [successor] analysis, the Board keeps in mind the question whether “those employees who have been retained will understandably view their job situations as essentially unaltered.” This emphasis on the employees’ perspective furthers the Act’s policy of industrial peace.} If the employees view their new positions after the employer transition to be similar to their prior jobs, then they would legitimately expect continued union representation or would reasonably believe the new employer can enforce the noncompete.\footnote{Id. at 43-44.}

When purchasing assets that include human resources, the same question arises in the context of noncompete agreements: Does the new employer intend to utilize the employees in the same manner as did the predecessor employer? If the asset purchaser acquires the noncompetes solely to prevent competitors from hiring its employees—without the intention of hiring the workers itself—allowing enforcement of the noncompete will benefit the successor by eliminating competition. The employees, out of work and with restricted job prospects, are substantially worse off after the acquisition. This dubious intention on the part of the successor company does not raise the same balancing-of-equities concerns as a similar situation in which the successor intends to retain the employees. In the latter situation, the employer still attempts to exercise the restrictive covenant because he fears equipping the competition with valuable skill sets that the employees acquired while working, but the employees still have their existing jobs.\footnote{See source cited supra note 109.} These clearly distinct scenarios demonstrate the shortcomings of a one-size-fits-all rule.

In constructing a default rule for the assignment of noncompetes, analyzing the employee bargain according to the steps used for union recognition would produce the most equitable result. When the business of the new employer differs,\footnote{This can occur when the company utilizes different supervisors or production processes.} a “substantial continuity” is not present.\footnote{In determining if the asset purchaser is a successor, consider whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.} If a “substantial continuity” exists between the predecessor and the asset purchaser, enforcing the noncompete becomes reasonable—from the employee’s perspective he is still performing the
same job and the ownership change will appear to be only semantic. In dicta, some courts have expressed a willingness to allow an assignment because factual determinations reveal that the fundamental character of the employee’s situation remains unchanged.

An employer-centered analysis focuses on the variation in size between the former and successor enterprises as part of the relevant inquiry. Although the Court in Fall River considered both the continuation of supervisors and similar performance requirements, the Court did not contemplate a change in the size of the enterprise. This may in large part be due to the differences between labor relations law and its application to covenants not to compete. Indeed, in a union setting, an employer utilizing only a fraction of the former employees can be considered a successor. However if the successor enforces noncompetes of employees it chooses not to retain, an inequitable result occurs, denying the employee the opportunity to work for either the successor or competitor firm, without first being given the opportunity to demonstrate his skill set to the successor and avoid layoff. An

113 See Rogers v. Runfola & Assoc., 565 N.E.2d 540 (Ohio 1991). In Rogers, the court allowed the assignment of a covenant not to compete when a sole proprietorship incorporated with the original owner, becoming the sole shareholder. The court went on to say that “because only the structure of the business changed and the fact that no additional burdens were placed on [the employee] as a result of the incorporation, we find that the employment contract and covenant not to compete contained therein were properly assigned.” Id. at 543 (emphasis added). The court also noted that the incorporation had “no effect on [the employee’s] duties or the daily operations.” Id.

114 See Reynolds & Reynolds Co. v. Tart, 955 F. Supp. 547, 556-57 (W.D.N.C. 1997). In dicta, the court considering the assignment of a noncompete clause noted that: [T]he character of the performance and the obligation, did not change when Reynolds took over their contracts—the Defendants, before and after the assignment, were to be at-will salesman of the same products to the same customers in the same area. The fact that Reynolds proposed to reduce compensation, change benefits and increase obligations would not change the fundamental character or the employee’s situation, for these are all modifications that [the previous employer] could have made and in several respects did make under the at-will contract. Id. (emphasis added) (internal quotations omitted); see also Safelite Glass Corp. v. Fuller, 807 P.2d 677, 683 (Kan. Ct. App. 1991) (citing that fact that the employee “continued in substantially the same job after the transfer” as support for assignability).

115 The court did not consider a seven-month hiatus between when the predecessor shut down and when it was purchased and re-opened to be determinative of the successor question. Fall River, 482 U.S. at 45. In applying this test to noncompetes, anything more than an insubstantial closing can have different consequences. The former employee may begin alternative employment. If the successor is then allowed to enforce a noncompete, the employee may have to leave a job which he assumed he had the right to perform because the former company was dissolved.

116 In NLRB v. Burns Int’l Security Servs., 406 U.S. 272, 279 (1979), the Court held that whether “a majority of employees after the change of ownership or management were employed by the preceding employer” does not affect certification. This ruling allows an asset purchaser to be considered a successor when only employing a fraction of the initial employees as long as they are a majority of its current employees.

117 See source cited supra note 116.

118 Although the employee that agreed to a noncompete may be an at-will employee, a
application of labor relations policy seems relevant to prevent disparate treatment among the affected employees. If the asset purchaser continues operations in such a manner that from the employee’s viewpoint the operations continue in a similar fashion, allowing an assignment of the noncompete will not fundamentally alter what the employee had agreed to.\textsuperscript{119} If a change is implemented by the asset purchaser, enforcement of a noncompete may exceed what the employee anticipated when he entered into the agreement. Determining if an asset purchaser is a successor does not conclude the assignment inquiry. The consideration given for the noncompete assists in determining its enforcement.

In addition to the \textit{Fall River} successor test, several other important factors exist: the nature of the consideration for the noncompete, any change in the scope of the agreement as a result of an assignment, and the manner in which the agreement was entered, either informally or at arms length.\textsuperscript{120}

The consideration\textsuperscript{121} required to enter into a noncompete agreement is found either in the initial offer of employment, or it may exist independently.\textsuperscript{122} Jurisdictions disagree if continued employment suffices as consideration after employment has commenced.\textsuperscript{123}

\textsuperscript{119} This is the same logic offered in \textit{Fall River}, 482 U.S. at 43, wherein the employees had “legitimate expectations in continued representation by their union” because of the consistency in their jobs. Affording an employer the same expectation conforms with this justification.

\textsuperscript{120} No single factor should be determinative and this list is not exhaustive.

\textsuperscript{121} Like any other contract, “the promise not to compete must be supported by adequate consideration on the part of the promisee.” Zellner v. Conrad, 589 N.Y.S.2d 903, 906 (N.Y. App. Div. 1992).

\textsuperscript{122} “Courts have consistently held that the taking of employment is sufficient consideration for a covenant not to compete.” Records Ctr., Inc. v. Comprehensive Mgmt., Inc., 525 A.2d 433, 435 (Pa. Super. Ct. 1987); see FSI Int’l, Inc. v. Shumway, No. 02-402, 2002 U.S. Dist. LEXIS 3388, at *12 (D. Minn. 2002) (holding that covenants not to compete entered into with the initial offer of employment require no independent consideration).

\textsuperscript{123} Some jurisdictions require additional consideration for a noncompete if it is not ancillary to the start of employment. This is because the employer is in a superior bargaining position. Midwest Sports Mktg., Inc. v. Hillerich & Bradsby of Can., Ltd., 552 N.W.2d 254, 265 (Minn. Ct. App. 1996). Earlier, the court had labeled “[t]he practice of not telling prospective employees all of the conditions of employment until after the employees have accepted the job . . . [as taking] undue advantage of the inequality between the parties.” Nat’l Recruiters, Inc. v. Cashman, 323 N.W.2d 736, 741 (Minn. 1982). Additional consideration can be found in multiple ways, “such as a pay raise or other employment benefits or advantages for the employee.” Stevenson v. Parsons, 384 S.E.2d 291, 293 (N.C. Ct. App. 1989). A covenant not to compete will only be enforced if “executed contemporaneously with the exchange of consideration.” Records Ctr., 525 A.2d at 435; see Worth Chem. Corp. v. Freeman, 136 S.E.2d 118, 119 (N.C. 1964) (holding that a covenant not to compete signed sixteen days after start of employment requires
Examination of the nature of the consideration becomes a useful equity consideration as part of the balancing process. For instance, an employee given independent consideration receives a larger benefit in exchange for the possibility of foregoing future employment than the employee who does not receive additional funds. Additional consideration is a signal to the employee that the employer is serious about his intention to enforce the noncompete and that it is not just another form required to begin employment. Following such a signal, allowing a successor to enforce the agreement becomes more equitable than it otherwise would be because the employee anticipates enforcement.

The employer with superior bargaining power may insist on a noncompete as a condition of employment. If the consideration is independent of the start of employment, in the form of money (payable at the contract signing or when exercising the noncompete) or other independent consideration); W.N.O.W., Inc. v. Barry, 32 Pa. D. & C.2d 514 (C.P. Penn. 1963) (same result for covenant signed seven days after employment). But see Olsten Corp. v. Sommers, 534 F. Supp. 395 (D. Or. 1982) (employee bound by a covenant not to compete signed two weeks before starting work); Bouska v. Wright, 621 P.2d 69, 72 (Or. Ct. App. 1980) (holding that a covenant signed three days after starting work did not lack consideration).

Other jurisdictions find consideration in the offer of continued at-will employment. See Mattison v. Johnston, 730 P.2d 286, 289 (Ariz. Ct. App. 1986). Consideration is appropriately found under this situation because the employers offer is either to sign the restrictive covenant or to be discharged. Id. It does not matter if the consideration results from forbearance, discharging the employee, or from an initial hiring. Id.; see Zellner, 589 N.Y.S.2d at 906 (holding that an existing at-will relationship will support a restrictive covenant). See generally Ferdinand S. Tinio, Annotation, Sufficiency of Consideration for Employee’s Covenant Not to Compete, Entered Into After Inception of Employment, 51 A.L.R.3d 825 (1973) (detailing split among jurisdictions, requiring and not requiring independent consideration for noncompetition agreements after employment has begun).

124 See Traffic Control Servs. v. United Rentals Northwest, Inc., 87 P.3d 1054, 1055 (Nev. 2004). Noting the importance of independent consideration for a noncompetition agreement, the court held that “an employer may only assign such covenants with the employee’s consent and only when the consent is supported by independent consideration.” Id. (emphasis added).

125 When a covenant not to compete is present in an employment relationship, it is reasonable to assume that the employee has consented to restrictions on his or her post-employment activities. Accordingly, there is a strong argument for courts to enforce the covenant, perhaps with some scrutiny to ensure that the agreement was the product of actual consent and that the terms were disclosed. A consent-based approach to noncompete and nondisclosure covenants might, for example, permit courts to ensure that a covenant was not buried in fine print in an employment handbook or otherwise hidden from view.

STONE, supra note 13, at 131-32. Receiving independent consideration for the restrictive covenant when the agreement is entered into can be used as evidence of the employee’s awareness and that the terms of the noncompetition agreement were not buried in the large stack of documents that accompanies the start of employment.

126 Modern, “mainstream labour law makes the bedrock assumption that employers ordinarily possess superior bargaining power to employees.” Klare, supra note 16, at 13. Courts that do not find consideration for a noncompete from continued employment decline to do so because of the inequality in bargaining power. A covenant not to compete must be “bargained for and supported by adequate consideration.” Sanborn Mfg. Co. v. Currie, 500 N.W.2d 161, 164 (Minn. Ct. App. 1993).
tangible assets, then there is evidence that the employer did not unjustly take advantage of his superior bargaining power.\footnote{127} Allowing the assignment under these circumstances is therefore more equitable.

The initial independent consideration may suffice to allow for a changed scope of a noncompete agreement. When an assignment occurs, the employee finds himself having the agreement enforced by a different business. Resulting from the change in the assignment, the noncompete may restrict the employee from competing with a larger business than originally contemplated.\footnote{128} For example, if the agreement places geographic boundaries from any location in which the employer has a store, and the successor employer has more (or differently situated) stores, then the employee will see a modification of the geographic terms of the noncompete.\footnote{129} The changed nature of the agreement will refer only to whom the employee is restricted from competing against and will not affect the duration of the agreement. Changing the scope of the agreement may exceed what the employee bargained for, and a new court may impose terms different than those previously agreed upon.\footnote{130} Assignment of a noncompete agreement

\footnote{127} A standardized form offered on a “take it or leave it basis” may possess the characteristics of a contract of adhesion. The lack of additional terms potentially advantageous to the drafter mitigate in favor of enforcement than if the “drafter inserted additional terms potentially advantageous to itself.” Broemmer v. Abortion Servs. of Phoenix, Ltd., 840 P.2d 1013, 1016 (Ariz. 1992).

Historically, courts were suspicious of noncompete covenants in the employment setting because they believed they were often the result of vastly unequal bargaining power and thus contracts of adhesion. While the existence of one-sided or oppressive terms in an employment contract are not usually grounds to vacate a contract, courts have historically scrutinized noncompete promises with a jaundiced eye. STONE, supra note 13, at 132.

\footnote{128} See Traffic Control Servs., 87 P.3d at 1059 (noting foreclosure from competing on any level with a much larger business entity is “specifically the risk that an employee must consider when agreeing to assignability of a noncompetition covenant”); Hess v. Gebhard & Co., 808 A.2d 912, 922 (Pa. 2002) (noting that assigning a noncompete may expand the scope of the agreement by preventing competition from a “much larger business entity”).

\footnote{129} Although the employee may see a modification of the terms of the noncompete, the agreement may be enforced in a manner that limits the geographic area to what is both necessary to protect the employer and equitable to the employee. See Ingram, supra note 15. The geographic area that is considered reasonable is “limited to the territory in which the employee was able, during his employment, to establish contact with his employer’s customers.” \textit{Id.} at 67-68. If the purported assignment created a prohibition from “doing business with any customer of the former employer, regardless of the employee’s relationship with that customer, [it] is overbroad and unenforceable.” \textit{Id.} at 68. However, courts will enforce a noncompete that applies to the employer’s entire business territory, even areas where the employee has not worked, where it is shown that the employee had access to business information, data, technical developments, and other restricted information, since his knowledge of the employer’s business could be effectively used to the employer’s detriment throughout the territory of the employer’s business. \textit{Id.} at 69.

\footnote{130} When a noncompete agreement is unenforceable because it is unreasonable courts can choose to only partially enforce the agreement. See Ferdinand S. Tinio, Annotation,
does not necessitate a change in the geographic restriction. When the resulting assignment does not modify the scope, enforcement will appear more equitable.

The final factor in considering the enforcement of an assigned noncompete agreement is the manner in which the agreement was entered into by the initial parties. When the initial contract was entered into, both sides had the opportunity to insist on a provision explicitly permitting or denying a future assignment. The court needs to determine such issues as whether the offer was given on a take-it-or-leave-it basis, or whether lawyers represented both parties to the agreement. An examination of issues such as these would allow the court to understand the circumstances under which the contract was entered. If assignment was discussed, and was not agreed to the court should hesitate before allowing an assignment. A situation could arise in which the employee insisted on the removal of an assignment provision, thereby showing a clear manifestation to the court that the employee opposed such an assignment. Through an examination of the manner in which the agreement was entered into the courts can make a more equitable decision regarding assignment.

CONCLUSION

Under the current state laws interpreting and enforcing noncompete clauses, there are various approaches that can be taken to determine if an asset purchaser can enforce a noncompete clause entered into between the predecessor business and the employee. These approaches result in per se enforceability or non-enforceability of the


Noncompetitive restrictions in employment contracts which include unreasonably broad areas have been modified in a variety of ways, in light of the particular attendant circumstances. Usually, these covenants are enforced only within the territory where the employee performed his duties, or the area where the employer was conducting his business, or they are confined at least to a “reasonable” area. In considering to what extent an unreasonably broad territorial restriction in a noncompetitive covenant in a contract of employment may be modified, the courts have also taken into account applicable statutes which provide for the permissible territorial scope of such restrictions. In some cases, covenants shown to include an unreasonably broad area have been modified by simply prohibiting the former employee from dealing with his former employer’s customers. And when proper under the applicable circumstances, covenants which do not specify any territorial limitations have been enforced within an area considered reasonable by the courts.

131 See Traffic Control Servs., 87 P.3d at 1057 (advising that noncompetition agreements must be negotiated at arms length).

132 See id. at 1058 (“[T]he drafter of the covenant[] was in the best position to negotiate for an assignment clause. However, for whatever reason, it chose not to do so.”).
clause within the jurisdiction. However, relying on a set of rigid default rules can result in the unfair treatment of employees and successor employers.

There are several positive factors that should be noted with the current sets of default rules. For example, in any particular jurisdiction, the parties will know in advance the effect of their silence. Proponents of Holmesian contracts doctrine may not find default rules inequitable because the parties can avoid them through the terms of their agreement. However, in order to more fairly represent the needs of all relevant parties, the totality of factors should be weighed in determining whether or not to enforce the noncompete. The employee’s strong incentive to avoid enforcement of the covenant is appropriately balanced by the offsetting harm to the employer’s business. Additionally, courts should continue declining enforcement of noncompetes when they are unnecessary.

The proposed balancing system allows courts to preserve the benefit of the bargain. When employees enter into noncompete agreements they may do so without the presence of legal counsel, even when an attorney is available, due to the inequality in bargaining power. To the contrary, an employer in a greater position to insist on an assignment provision that failed to do so may be negatively affected in the sale of his business should a court determine that the covenants are nonassignable. Through comparing the change in the scope of the noncompete, the extent to which the asset purchaser is a successor, the nature of the consideration offered, and the manner in which the agreement was entered, the decision to enforce noncompetes can be more equitably reached.