I. Introduction

With employee loyalty on the decline, competition for employees on the increase and employee job-hopping becoming more common, an increasing number of employers are scrambling to protect themselves from unfair competition by departing employees. The mechanisms being used include noncompetition agreements, nonsolicitation of customer agreements, anti-employee raiding agreements, and nondisclosure agreements.

This article will discuss the most common types of restrictive covenant agreements, provide practical suggestions regarding drafting and litigating restrictive covenants, and survey important recent Kansas cases involving noncompete agreements. In addition, this article will touch on other issues that frequently arise in the context of enforcing noncompete agreements, including the Kansas Uniform Trade Secret Act (KUTSA), assignment/successor employer issues, requirements for injunctive relief, liquidated damages, actual damages, defenses against enforcement of noncompete agreements, claims of tortious interference with contract, and federal and Kansas computer fraud statutes that can sometimes come into play in connection with the unauthorized theft of confidential information and trade secrets.

II. Types of Restrictive Agreements

The least restrictive and most commonly enforced restrictive covenant is a restriction on the disclosure of confidential information and trade secrets. The use of this type of agreement is particularly useful as a supplement to the statutory protections afforded by the KUTSA. The KUTSA defines a “trade secret” as follows:

“Trade Secret” means information, including a formula, pattern, compilation, program, device, method, technique, or process that:

(i) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”

FOOTNOTES


2. K.S.A. 60-3320 et seq.


Confidentiality or nondisclosure agreements are a useful supplement to the KUTSA because a contractually imposed duty of confidentiality is independent of the statutory duty imposed by the KUTSA. Thus, a nondisclosure agreement may allow the employer to protect confidential information that does not qualify for protection as a “trade secret” under the KUTSA, such as where the employer failed to use reasonable steps to maintain its secrecy. Moreover, if the employee agrees in writing that a particular document constitutes confidential information, e.g., a “customer list,” the employer is in an enhanced position to obtain injunctive relief or damages by being able to argue that the employee has already agreed that the customer list is confidential. However, if the description of the confidential information is too general and would virtually bar the former employee from the practice of his profession and would unduly infringe upon his right to earn a living, the restriction will usually not be enforced.

The second type of commonly used restrictive covenant is the nonsolicitation of customers agreement, whereby the former employee agrees not to solicit his former employer’s customers for a particular period of time, at least in a way that would be competitive with the services offered by the former employer.

The third type of restrictive covenant is a variation on the nonsolicitation agreement but runs not to the former employer’s customers but rather to the former employer’s employees. These are commonly known as anti-raiding or anti-employee raiding covenants. In Ori Inc. v. Lanewals, the U.S. District Court for the District of Kansas recognized that the covenant not to employ, solicit, or seek to employ a person employed by the former employer was valid under Kansas law. However, Judge John W. Lungstrum held that summary judgment was proper against the former employer because there was no evidence of damage in that no admissible evidence was presented that any of the former employer’s employees actually left employment at the suggestion of the former employee.

The last and most restrictive type of covenant is what is known as the covenant not to compete, which typically restricts the employee from competing with his prior employer for a particular length of time in a specified geographical region.

III. Requirements for Enforcing Restrictive Covenants

In Idbeis v. Wichita Surgical Specialists P.A., the Kansas Supreme Court affirmed the vitality of the governing principles previously annunciated by the Court in Weber v. Tillman, regarding the general rules on enforcement of noncompete covenants. Those general principles include the following:

1. A noncompetition covenant ancillary to an employment contract is valid and enforceable if the restraint is reasonable under the circumstances and not adverse to the public welfare. Only a legitimate business interest may be protected by a noncompetition covenant, and if the sole purpose of the covenant is to avoid ordinary competition, it is unreasonable and unenforceable. Noncompetition covenants included in employment contracts are strictly construed against the employer.

The Kansas Supreme Court in Idbeis also reaffirmed the four factors that are to be considered in analyzing whether a noncompetition clause is reasonable:

1. Does the covenant protect a legitimate business interest of the employer?
2. Does the covenant create an undue burden on the employee?
3. Is the covenant injurious to the public welfare?
4. Are the time and territorial limitations contained in the covenant reasonable based on the particular facts and circumstances of each case?

A. Restrictive covenants must protect a legitimate business interest of the employer

Trade secrets and customer contacts have long been recognized in Kansas as legitimate business interests worthy of protection by noncompete agreements. Similarly, seeing that contracts with clients continue and also protecting against loss of clients are well-recognized legitimate business interests subject to protection by a reasonably crafted noncompete agreement. Other recognized protectable interests of employers include special training of employees, referral sources, good will, and reputation. However, the Kansas Supreme Court has refused to expand the list of protectable interests to include the employer’s size or “critical mass” or the special contributions the employer might be able to make to its community because of its size.

Moreover, although the Court in Weber recognized that “referral sources” were among legitimate business interests that could be protected by a reasonably limited covenant,
there are limitations to the protection of referral sources. For example, in *Graham v. Circocco*, the Court found that a former employer of a colorectal surgeon had a legitimate interest in referral sources that could validly be protected by a two-year, 150-mile, nonsolicitation restriction that prohibited the former employee from soliciting business from the patients or referral sources of the former employer with whom the former employee had come in contact as an employee of the former employer.

However, the restrictive covenants went further by prohibiting the former employee from providing services at another hospital or medical office within the geographical region of the Greater Kansas City metropolitan area bounded by Lawrence on the west; Blue Springs, Mo., on the east; Leavenworth on the north; and a line 25 miles beyond Olathe on the south. The Court found that colorectal surgeons were engaged in a medical subspecialty where physicians were necessary as colorectal surgeons. For example, in *Gibbs & Houlik L.C. v. Ristow*, 31 Kan. App. 2d 563, 69 P.3d at 196 (2003). The Court distinguished *Weber* by pointing out that *Weber* involved a dermatologist, which the Court viewed as engaged in a medical subspecialty that was not as necessary as colorectal surgeons. Thus, although the opinion is not clear on this point, the noncompete provisions of the agreement might well have been enforced had the case not involved a medical subspecialty where physicians were both very necessary and in short supply.

In *Weber* the Court recognized that other jurisdictions had recognized “special training of employees” as a legitimate business interest protectable by a reasonably limited covenant. In *Allen Gibbs & Houldik L.C. v. Ristow*, the Court explored the extent to which special training would justify a restrictive covenant. In *Ristow*, a former employer sought to enforce a restrictive covenant that would have prevented a certified public accountant working in an employee benefits group from accepting a position with any client or center of influence of the employer or Koch Industries Inc. and its affiliated companies for a six-month period after termination of employment. In determining whether the training provided to Ristow was adequate to support the restrictive covenant, the Court noted that the training over a seven-year period was valued at $7,479. After noting that the training was non-exclusive, that Ristow’s skills were not unique, and that her duties were absorbed by existing staff once her employment was terminated, the Court found that this training was not adequate to support the restrictive covenant contained in the agreement.

The Court also noted that there was no special relationship between Ristow and any of the former employer’s clients and no allegations that she conveyed any trade secrets. Thus, under the circumstances, the Court found that the former employer had no protectable interest sufficient to support the restrictive covenant.

It appeared to be significant to the *Ristow* Court that the former employer did not establish that Ristow could have easily located employment “outside the confines of the contractual language.” Indeed, the Court noted that Ristow had been informed that “there were very few places Ristow could become employed.” The appeals court also emphasized that there was no explanation in the agreement for why Ristow was barred from accepting employment with “Koch Industries and its affiliated companies” and that the agreement did not define or describe the “affiliated companies” of Koch Industries.

23. 31 Kan. App. 2d 563, 69 P.3d 194 (2003). 24. That nonsolicitation proviso had an exception whereby the former employer agreed to notify patients served by the former employee that the former employee was leaving and afforded those patients who requested an opportunity to be serviced by the former employee. *Id.* 31 Kan. App. 2d at 565, 69 P.3d at 196.


32. *Id.* 32 Kan. App. 2d at 1052, 94 P.3d at 725. 33. *Id.* 32 Kan. App. 2d at 1057, 94 P.3d at 728. 34. *Id.* 32 Kan. App. 2d at 1057-58, 94 P.3d at 728. 35. *Id.* 32 Kan. App. 2d at 1058, 94 P.3d at 728. 36. *Id.* 32 Kan. App. 2d at 1058-59, 94 P.3d at 728-29. 37. *Id.* 32 Kan. App. 2d at 1056, 94 P.3d at 727. 38. *Id.* 32 Kan. App. 2d at 1058, 94 P.3d at 729. 39. *Id.*
Ristow illustrates some practical points in the drafting and enforcement of a restrictive covenant. First of all, the more difficult the covenant makes it for the employee to find work with a new employer, the less likely a court is to enforce the covenant. Second, if there is a legitimate business reason for precluding the employee from working for another entity, such as a customer, an employer should spell out the reasoning in the agreement. Finally, an employer should define vague terms such as “affiliated companies” given that an ambiguous agreement will be construed against the employer and could well result in the ambiguous term not being enforced.

It should also be noted that the Kansas Supreme Court has held that when assessing the reasonableness of restrictive covenants a distinction has sometimes been drawn between covenants incident to an employment contract and those that are ancillary to the sale or other transfer of a business, practice, or property. In H&R Block v. Lovelace, the Court noted that “courts of equity have been less prone to enforce restrictive covenants between employer and employee than where the restriction is part of a contract for sale of a business, or other transfer of a business, practice, and those that are ancillary to the sale or property.” In a franchise agreement warranted heightened scrutiny when assessing its reasonableness. In a franchise agreement warranted heightened scrutiny when assessing its reasonableness.

B. The covenant must be reasonably limited in time, geography and activities

The Court in Ristow found a noncompete agreement overbroad where it prohibited Ristow from accepting a position with “any client or center of influence of the employer, or Koch Industries Inc. and its affiliated companies.” The Ristow decision might be viewed as one where the court found the activities prohibited rather than the time or geography overbroad.

While Kansas courts have sustained a 10-year, five-mile noncompete restriction and a two-year, 30-mile noncompete restriction for physicians, the Court in Graham v. Cirocco, found overbroad and unenforceable a two-year, 25-mile noncompete provision for a colorectal surgeon. This illustrates the overriding point that noncompete cases are highly fact specific, and even within the same profession, courts may reach varying conclusions as to what constitutes a reasonable restriction based on the unique facts of a particular case.

C. Overbroad covenants will generally be modified

If a restrictive covenant is overbroad, Kansas courts will typically modify or “blue pencil” the covenant to narrow it to make the covenant enforceable. However, a court has discretion as to whether to use its equitable powers to modify the covenant. Moreover, a court has no authority to modify a restrictive covenant to create a contract where the parties did not mutually consent to the modification or failed to have a meeting of the minds. Thus, in Idbeis, the Kansas Supreme Court reversed the trial judge’s actions in modifying a non-

(continued on next page)
compete agreement by substituting a liquidated damages remedy for injunctive relief because there was no evidence that the parties had agreed to such a modification.\(^\text{59}\)

A careful drafter should take care to include time and geographical restrictions that a court can modify if they are found to be overbroad and also language expressing the parties’ desire for the court to modify a restrictive covenant found to be overbroad such that the covenant can be narrowed to the maximum restriction permitted by law.

\section*{D. Consideration}

Consideration is required for a binding noncompete agreement and can take various forms. For example, consideration can be supplied by making agreement to the noncompete a requirement for initial employment. Consideration can also be supplied by a promotion\(^\text{50}\) or increase in salary\(^\text{51}\) or by continued employment.\(^\text{52}\) When an employer decides to institute noncompete or nonsolicit agreements into its workforce for existing employees, it faces the sometimes difficult question of what to do with a valued existing employee who is unwilling to sign such an agreement. Rather than terminating the employee, an employer may be able to obtain the employee’s agreement to the noncompete by making a promotion, bonus, or raise contingent upon agreement to the noncompete.

\section*{IV. Other Legal Issues Arising in the Enforcement of Restrictive Covenants and Preventing Unfair Competition}

\subsection*{A. Assignment/successor employer}

In a business environment in which mergers and sales of businesses are now commonplace, an issue that arises with some regularity is whether restrictive covenants entered into between an employee and his original employer can be enforced by a new owner or successor.

In \textit{Safelite Glass Corp. v. Fuller}, the Kansas Court of Appeals resolved this issue, holding that “in the absence of express language, which limits assignability, covenants not to compete, which do not involve personal and confidential relations are assignable and may be enforced by a subsequent purchaser of a business as an incident of the business.”\(^\text{53}\) Moreover, pursuant to K.S.A. 17-6709, in the case of a merger, the surviving corporation automatically acquires the rights of the merged corporations to enforce employees’ noncompete agreements.\(^\text{54}\)

It should be noted, however, that although an employer is permitted to include an assignment provision in an employment agreement, Kansas courts will carefully scrutinize the assignment language when considering whether to permit a successor company to enforce a restrictive covenant contained in the same employment agreement. In \textit{IT Network Inc. v. Shell}, the U.S. District Court for the District of Kansas rejected a successor company’s attempt to enforce a restrictive covenant due to an assignment clause in the employment agreement that provided that the agreement would only inure to the benefit of a successor or assignee who obtained “all or substantially all” of the predecessor’s business. Because the successor company had only purchased a “segment” of the predecessor’s business, the court found that the successor had no authority to enforce the restrictive covenant.\(^\text{55}\)

\subsection*{B. Requirements for injunctive relief}

To obtain injunctive relief, an employer must establish four prerequisites: (1) substantial likelihood that the movant will eventually prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause to the opposing party; and (4) a showing that the injunction, if issued, would not be adverse to the public interest.\(^\text{56}\)

Irreparable harm may be shown to exist where money damages are inadequate to compensate the wrong or where there are difficulties in the calculation of losses.\(^\text{57}\) Loss of customers, loss of goodwill, and threats to a business’s viability have all been found to constitute irreparable harm.\(^\text{58}\) On the other hand, where breach of the noncompete agreement causes the loss of identifiable customers, who had generated a known dollar amount of business, a court can refuse injunctive relief if there is a full, complete, and adequate remedy at law through recovery of calculable money damages.\(^\text{59}\)

\subsection*{C. Liquidated damages in lieu of injunctive relief}

In \textit{Weber}, the Kansas Supreme Court recognized the enforceability of a restrictive covenant, which gave the employee the option of not practicing medicine in a particular geographical region for two years or paying his former employer six months’ salary and bonuses as liquidated damages.\(^\text{60}\) Later, in \textit{Varney Business Services v. Pottroff},\(^\text{61}\) the Court applied the same analysis used in determining whether noncompete agreements are enforceable in enforcing a provision in an employment agreement against former shareholders of a professional association of accountants, which provided that they could compete with their former employer upon payment of

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\item 49. 279 Kan. at 773-74, 112 P.3d at 93-94.
\item 55. 21 F. Supp. 2d 1280, 1281-82 (D. Kan. 1998).
\item 60. 259 Kan. at 459, 475-77, 913 P.2d at 87, 96-97.
\item 61. 275 Kan. 20, 59 P.3d 1003 (2002)
\end{itemize}
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a percentage of fees earned during five years subsequent to the termination of their employment. The Court construed the provision as neither a liquidated damages provision nor a penalty provision but rather an enforceable agreement as to the value of Varney & Associates’ clients. If the noncompete agreement contains a liquidated damage provision, it appears that under Kansas law, the remedy for breach of the parties’ contract is either an injunction to enforce the contract or a computation of monetary damages. There is no Kansas case law on the subject of whether a court could utilize its equitable power to reduce the amount of a payment that was too high to make it reasonable or whether an unreasonably high payment would make the provision unenforceable. Thus, the careful drafter will not insert a liquidated damages provision that is so onerous that it is likely to be stricken as an unenforceable penalty.

62. 275 Kan. at 24, 34-38, 59 P.3d at 1009, 1015-17. The agreement provided for payment of a declining percentage of fees earned with 35 percent of fees earned payable in the first year after termination of employment and 10 percent in the fourth and fifth years after the termination of employment.
63. 275 Kan. at 38-39, 59 P.3d at 1017.
64. Idheis, 279 Kan. at 772, 112 P.3d at 92.
65. Idheis, 279 Kan. at 773-75, 112 P.3d at 93-94.
66. E.g., Wichita Wire Inc. v. Lenox, 11 Kan. App. 2d 459, 464-65, 726 P.2d 287, 291-92 (1986), which concluded that the loss of identifiable customers, who had generated a known dollar amount of business, was a calculable injury; thus, there was insufficient evidence to establish irreparable harm that would justifying the entry of a temporary injunction. The court reasoned that where there is a full, complete, and adequate remedy at law through recovery of calculable money damages, the injury is not irreparable and equity will not apply the extraordinary remedy of injunction, citing 42 Am. Jur. 2d, Injunctions § 49.
67. Christenson v. Akin, 183 Kan. 207, 213, 326 P.2d 313, 318-19 (1958) (defendants were barred from affirmative injunctive relief because their claim for breach of a noncompete agreement was barred by the statute of limitations and laches, but they were still permitted to use their counterclaim as a matter of pure defense to reduce any judgment received by plaintiffs herein).
E. Attorney’s fees

Under Kansas law, parties to an employment agreement are permitted to specify the remedies available for a breach of the agreement. Accordingly, although no Kansas court has explicitly addressed the issue in restrictive covenant litigation, a Kansas court is likely to enforce an attorney’s fees provision, particularly given the general willingness of Kansas courts to enforce such provisions in other contractual contexts.

Under the KUTSA, attorney’s fees can be awarded to a plaintiff in instances where “willful and malicious misappropriation exists.” Conversely, attorney’s fees can be awarded to a party defending against a claim brought pursuant to the KUTSA in instances in which the claim was brought in bad faith by the plaintiff.

F. Tortious interference with contract

An employer who induces a person to breach his noncompete agreement faces potential liability for tortious interference with contractual relations. Kansas has long recognized that a party who induces or causes a breach of contract will be answerable for damages caused thereby if he acted without justification. The elements of tortious interference with contract are: (1) the contract, (2) the wrongdoer’s knowledge thereof, (3) his intentional procurement of its breach, (4) the absence of justification, (5) the resulting damages, and (6) legal (not actual) malice. Kansas also recognizes a cause of action for civil conspiracy to procure or induce a breach of contract that renders all conspirators liable to the party damaged by the breach. However, corporate officers and employees acting within the scope of their employment (and not as individuals) cannot be held liable for tortious interference with a contract, at least where the corporation has the lawful right to take the action in question.

G. Breach of the duty of loyalty/faithless servant doctrine

Relying largely on agency principles, several courts interpreting Kansas law have held that under Kansas law an employee owes his employer a duty of loyalty. In Fryetech Inc. v. Harris, the U.S. District Court for the District of Kansas noted that under Kansas law employees, as agents of their employer, “have a duty to act solely for the benefit of the employer in all matters within the scope of the ... employment, and to avoid conflicts between their duty to their employer and their own self-interest.” The court in Fryetech further noted that this duty of loyalty is not limited to corporate officers and directors, but rather that Kansas case law “speaks of the duties of agents without respect to their exact status.” The Kansas Supreme Court has also held that pursuant to the “faithless servant” doctrine an employee who is disloyal to his employer forfeits his right to compensation earned during the period of his unfaithfulness. An employee can be “faithless” in a number of ways, including engaging in gross misconduct or misconduct that substantially affects the employment contract, engaging in intentional fraud, stealing or embezzling money from the employer, or committing other criminal offenses against the employer, even if said offenses are not immediately injurious to the employer. An employee may also violate his fiduciary duty to his employer, thereby forfeiting his right to compensation owed, by engaging in acts of competition against his employer during the course of his employment. While an employee’s mere intent to form or join a business in competition with his employer is unlikely to trigger a violation of the employee’s duty of loyalty, an employee who engages in “substantial planning activ[ies]” or other “overt acts” in furtherance of a “conspiracy to establish a competing business” may be found to have violated his duty of loyalty.

H. Federal and Kansas computer crime statutes

In instances in which a former employee is believed to have misappropriated or accessed information or data stored on the former employer’s computer system, an employer may be able to take advantage of federal criminal statutes that provide civil remedies for certain computer misconduct. Under the federal Computer Fraud and Abuse Act (CFAA), any person or entity who suffers damage or loss by reason of conduct prohibited by the act is entitled to recover compensatory damages and injunctive relief. Actionable conduct under the CFAA includes:

- Accessing a “protected” computer (i.e., one that is used in interstate or foreign commerce or communication) without permission with the intent to defraud, furthering the fraud, and obtaining anything of value other than the mere incidental use of the computer;
- Obtaining information from a protected computer without permission if interstate or foreign communication is involved; and
- Obtaining through unauthorized access financial information from a variety of financial institutions.

70. K.S.A. 60-3323(iii).
71. K.S.A. 60-3323(i). See also Curtis, 905 F. Supp. at 902-903 (rejecting claim for attorneys fees where misappropriation claim was not made in bad faith).
77. Id.
79. Id. at 1215 (quoting 56 C.J.S., Master and Servant § 105).
81. Id.
Civil remedies are limited to misconduct that involves (1) loss to one or more persons aggregating at least $5,000 in value; (2) the modification or impairment of the medical examination, diagnosis, treatment, or care of at least one individual; (3) physical injury to any person; (4) a threat to public health or safety; or (5) damage affecting a government computer system used in furtherance of the administration of justice or national security.

Kansas has also criminalized certain conduct involving computers, although without providing corresponding civil remedies. Under K.S.A. 21-3755, each of the following is a felony “computer crime”:

- Intentionally and without authorization accessing and damaging, modifying, altering, destroying, copying, disclosing, or taking possession of a computer, computer system, or network;
- Using a computer, computer system, or network for the purpose of devising or executing a scheme with the intent to defraud or the purpose of obtaining anything of value by means of false or fraudulent pretense or representation; and
- Intentionally exceeding the limits of authorization and damaging, modifying, altering, destroying, copying, disclosing, taking, or possession of a computer, computer system, or network.

It is a misdemeanor to intentionally and without authorization disclose a password or any other “means of access” to a computer, or to access or attempt to access any computer program or property on a computer.

I. Economic Espionage Act of 1996

The Economic Espionage Act of 1996 (EEA) is a federal statute that criminalizes the theft or attempted theft of certain commercial trade secrets. The definition of a “trade secret” under the EEA is set forth at 18 U.S.C. § 1839(3) and is similar but not identical to the definition of a “trade secret” under the KUTSASY.6

The EEA was used in 2006 to prosecute Coca-Cola Co. employees who tried to sell Coke’s trade secrets to PepsiCo. The EEA has also been relied upon by the government in a case involving the disclosure of trade secrets of corporate giant Gillett Co., and in the high-profile prosecution of two foreign nationals who attempted to purchase trade secrets belonging to the Bristol-Myers Squibb Co.

Although it may be difficult to convince a U.S. attorney to prosecute a violation of the EEA unless there is significant provable damages, the potential criminal penalties if convicted under the EEA are severe. A conviction can result in up to 10 years in prison, $250,000 in fines for an individual, and up to $5 million in fines for an organization, criminal forfeiture, and restitution. In addition, an attorney representing a person who has potentially violated this statute, needs to be concerned about Fifth Amendment issues if he or she is deposed or testifies at a hearing or trial.

J. Inevitable disclosure doctrine

A few courts outside Kansas have recognized the inevitable disclosure doctrine, which is a theory of relief for claims of misappropriation of trade secrets when an employee’s new employment will inevitably lead him to rely on his former employer’s trade secrets. Under this doctrine, a plaintiff can obtain relief when (1) the employers in question are direct competitors providing the same or very similar products or services; (2) the employee’s new position is nearly identical to his old one, such that he could not reasonably be expected to fulfill his new job responsibilities without utilizing the trade secrets of his former employer; and (3) the trade secrets at issue are highly valuable to both employers. To date, no Kansas case has addressed the inevitable disclosure doctrine.

V. Defenses to the Enforcement of Noncompete Agreements

A. Prior material breach by the employer

Although there does not appear to be a case applying Kansas law on this point, it is likely that a court would find an employer’s material breach of a noncompete agreement to be a valid defense to enforcement of a noncompete agreement. In Alexander & Alexander v. Feldman, the U.S. District Court for the District of Kansas applied Missouri contract law and found that to recover on a contract, the plaintiff must first demonstrate its own performance and that a plaintiff could not recover for breach of a noncompete agreement if the plaintiff was the first to breach the contract. Moreover, the court went on to reject the argument that defendant had waived the breach by continuing to work for more than four years after the employer breached the agreement by unilaterally changing the compensation in violation of the agreement that provided that changes in compensation were only effective if agreed to by both parties in writing.

82. K.S.A. 2006 Supp. 21-3755(b).
83. K.S.A. 2006 Supp. 21-3755(c), (d).
89. USA v. HSU et al., Case No. 2-97-cr-00323, U.S. Dist. Ct., Eastern District of Pennsylvania.
90. 18 U.S.C. §§ 1832(a)(5) and (b), 1834, 1836(a), and the Mandatory Victims Restitution Act of 1966, 18 U.S.C. 3663A.
91. PepsiCo Inc. v. Redmond, 54 F.3d 1262, 1269 (7th Cir. 1995).
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Barring enforcement of a noncompete agreement where the employer has committed a prior material breach of the contract would be consistent with general contract law97 and PIK Civ. 3d 124.01-A (defining “plaintiff’s performance or willingness to perform in compliance with the contract” as an essential element to a breach of contract claim). Thus, an employee might have a valid defense to enforcement of a noncompete agreement if the employer materially breached the employment contract by refusing to pay wages at the contract rate or possibly by failing to pay wages required to be paid under federal wage and hour laws.

B. Waiver/estoppel/selective enforcement

An issue that arises frequently in restrictive covenant litigation is whether an employer can waive (or be estopped from enforcing) its rights under a restrictive covenant when the employer has failed to enforce similar covenants against other employees. To date, no Kansas court has directly considered this “selective enforcement” defense.98 Nevertheless, it seems likely that an employee seeking to avoid a restrictive covenant by raising a waiver or equitable estoppel type argument will carry a heavy burden. Under Kansas law, equitable estoppel applies only where the acts, representations, admissions, or silence of a party (where there is a duty to speak) induce the first party to believe certain facts exist.99 The party seeking to invoke equitable estoppel must also prove that he reasonably and rightfully relied on the belief that those facts existed and that he would now be prejudiced if the inducing party were allowed to deny the existence of those facts.100 All the elements of equitable estoppel must be sufficiently proven, and the principle will not be applied if the facts of the case are ambiguous or are subject to more than one construction.101

C. Unclean hands

In American Fidelity Assurance Corp. v. Leonard,102 the court rejected an unclean hands defense to enforcement of a noncompete agreement where the employee claimed that his former employer had unclean hands because the former employer allegedly terminated him in retaliation for opposing enforcement of employee’s noncompete); Harrison v. Palm Harbor MRI Inc., 703 So. 2d 1117, 1119 (Fla. 2nd DCA 1997) (holding that a salesperson may have an affirmative defense to enforcement of a noncompete if she can prove that she was sexually harassed); North Pacific Lumber Co. v. Oliver, 596 P.2d 931, 942 (Or. 1979) (“an employer may be guilty of misconduct amounting to unclean hands if the employer uses, or attempts to use, the employment relationship to involve the [employee] in unethical behavior, which injures a third party”).

98. Courts from other jurisdictions have addressed this issue. See, e.g., Moda Hair Designs Inc., 2006 Ohio App., Lexis 599 (failure to enforce one-year, six-mile noncompete against other hairdressers is a factor to led to refusal to enforce noncompete provision); Sagrider Corp. v. Eye Technology Inc., 648 F. Supp. 661, 698 (D. Minn. 1986) (stating that “it would be inequitable to permit [employer] to now rely on a noncompete agreement, which it has so blithely ignored in the past”).
100. Toshiba, 23 Kan. App. 2d at 135, 927 P.2d at 972 (citations omitted).
101. Id.
103. Id. at 1121.
104. See, e.g., Mantek Division of NCH Corp. v. Share Corp., 780 F.2d 702, 707 (7th Cir. 1986) (holding that former employee should be allowed to demonstrate that employer’s actions in directing former employee to engage in commercial bribery constituted unclean hands precluding age discrimination. The court ruled that the former employee had failed to show that the former employer’s alleged directive to fire older employees was both legally and factually discriminatory.109 However, some courts outside Kansas have been receptive to unclean hands defenses.110

D. The covenant is unreasonable or overbroad

A common defense to a noncompete agreement is that the noncompete provisions are unreasonable or overbroad. Establishing this defense is very fact specific with courts taking a careful look at the extent of the protection necessary to prevent unfair competition. For example, in Foltz v. Struenness,105 the Kansas Supreme Court upheld a 10-year noncompete agreement after reducing the 100-mile limitation to a five-mile radius from the city where a surgeon practiced medicine. However, in Graham v. Cirocco,106 the Court struck a two-year, 25-mile noncompete provision for a colorectal surgeon after expressing concern for the public welfare given the shortage of colorectal surgeons.107 Another example of a court striking a noncompete agreement as unreasonable is Allen, Gibbs & Houlik L.C. v. Ristow, where the Court refused to enforce a noncompete agreement that would have barred a certified public accountant working in an employee benefits group from accepting a position with any client or center of influence of the employer or Koch Industries Inc. and its affiliated companies for a six-month period after termination of employment.108

In H&R Block v. Lovelace,109 the Court refused to enforce or to judicially narrow a five-year restrictive noncompete signed by a franchisee that contained no territorial limitation. By contrast, the court in Sizenwise Rentals v. Mediq/PRN Life Support Service,110 enforced a one-year nonsolicit agreement covering customers in a territory consisting of 50 counties in nine states. There is no logical reason why a geographical restriction that is nationwide or even broader would not be enforceable in the proper case if an employer could prove a valid protectable interest in customers or trade secrets on a national or even international basis.111

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VI. Conclusion

In an increasingly competitive business environment, restrictive covenants present important and often thorny issues for both employers and employees. For employers it is important to exercise considerable care in drafting reasonable restrictive covenants in order to prevent unfair competition and the loss of customers, employees and trade secrets. Kansas courts have long shown a willingness to enforce reasonable, narrowly tailored restrictive covenants aimed at protecting legitimate business interests, but will not hesitate to narrow or refuse to enforce provisions that unduly overreach legitimate protectable interests.

For those who represent employees or entities hiring employees, it is important to be alert to the wide array of possible defenses to such agreements, including a number of defenses that have not yet been fully considered by courts interpreting Kansas law. Finally, when clients hire new employees, it is imperative to take appropriate measures to ensure that such employment does not violate valid noncompete, nonsolicit, or nondisclosure agreements or the new employer will have potential legal liability. ■

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John Vering is a partner in the employment and labor and business litigation practice groups at Armstrong Teasdale LLP, Kansas City, Mo. Vering received his B.A. in 1973 from Harvard University and his J.D. in 1976 from the University of Virginia Law School, where he was a member of the board of editors of the Virginia Law Review.

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Fall Provides
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C. Conclusion

Since both the A201-2007 family and the ConsensusDOCS were created with input from a number of often divergent viewpoints, it goes without saying that no group is going to be entirely happy with either set of documents. Given the acrimony sometimes caused by the current selection of oft-biased form agreements, this is perhaps a good thing. Regardless, it is worth taking the time now to become familiar with them, as they are sure to quickly become the new industry standard. ■

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