

COVENANTS NOT TO COMPETE IN NEVADA: A PROPOSAL

*Elham Roohani**

INTRODUCTION

As global society rapidly moves from an economy based on physical labor to an economy comprised of a knowledge-based workforce, businesses have been forced to adapt to protect their intangible assets.¹ Recently, companies have realized their value lies more in the “creative services provided by the human capital of their employees” and less with “physical assets that can be owned, sold, or leveraged.”² However, while businesses have created highly sophisticated employment agreements to protect their human capital, the law governing those employment agreements has been slower to develop.³ Although most states have laws in this area, those laws have not been updated to reflect modern business trends and protect a company’s intangible assets.⁴ Moreover, a minority of states, including Nevada, have little or no controlling law on business owned intellectual property and its effect on employment.⁵

This Note offers a balanced standard for Nevada’s restrictive covenant laws in the employment context.⁶ First, Part I defines “covenants not to compete” and explains how they have developed. Second, Part II examines other

* J.D. Candidate, May 2010, William S. Boyd School of Law. Special thanks to Professor Elaine Shoben, for her patient guidance, and Nima Khomassi, for his constant support.

¹ Norman D. Bishara, *Covenants Not to Compete in a Knowledge Economy: Balancing Innovation from Employee Mobility Against Legal Protection for Human Capital Investment*, 27 BERKELEY J. EMP. & LAB. L. 287, 295 (2006).

² *Id.* at 296.

³ *Id.* at 295.

⁴ See generally ARIZ. REV. STAT. ANN. § 44-1402 (2003); CAL. BUS. & PROF. CODE § 16600 (West 2008); COLO. REV. STAT. ANN. § 8-2-113 (West 2003); DEL. CODE ANN. tit. 6, § 2707 (2006); IND. CODE ANN. § 24-1-2-1 (West 2006); IOWA CODE ANN. § 553.4 (West 1997); LA. REV. STAT. ANN. § 23:921 (Supp. 2009); MICH. COMP. LAWS ANN. § 445.774a (West 2002); MINN. STAT. ANN. § 325D.51 (West 2004); MONT. CODE ANN. § 28-2-703 (2007); NEV. REV. STAT. § 613.200 (2007); N.D. CENT. CODE § 9-08-06 (2008); S.D. CODIFIED LAWS § 53-9-11 (2004).

⁵ Thomas M. Hogan, Note, *Uncertainty in the Employment Context: Which Types of Restrictive Covenants are Enforceable?*, 80 ST. JOHN’S L. REV. 429, 438 (2006) (discussing some limited statutes that “leave a lot of discretion to the courts”).

⁶ A covenant is a “formal agreement or promise.” BLACK’S LAW DICTIONARY 419 (9th ed. 2009). Therefore, a restrictive covenant is a promise or agreement that restricts the actions of one of the parties to the agreement. See *id.* at 393. A noncompetition covenant, which is a type of restrictive covenant, is a “promise . . . not to engage in the same type of business for a stated time in the same market as the buyer, partner, or employer.” *Id.* at 420. Non-competition covenants are also interchangeably called “noncompetition agreement; non-compete covenant; covenant not to compete; restrictive covenant; promise not to compete; contract not to compete.” *Id.*

states' treatment of restrictive covenants in the employment context. Third, part III proposes a solution for Nevada that balances tensions between employers and employees in light of Nevada's unique workforce and economic makeup. By discussing Nevada's specific considerations, this Note aims to guide Nevada's legislators when discussing and adopting new laws respecting covenants not to compete.

I. COVENANTS NOT TO COMPETE

A. *What are Covenants Not To Compete?*

Covenants not to compete are "contractual provisions where the parties agree not to compete with each other for a certain time period in a particular geographic location."⁷ "By their very nature," covenants not to compete limit competition by "imped[ing] the full participation of a competitor in a business."⁸ Specifically, these covenants effectively curb former employees from seeking and obtaining future employment.⁹ Despite harsh limitations, covenants not to compete serve a valuable commercial purpose by allowing employers to invest time and money into their employees.¹⁰ For example, employers are able to train employees, develop relationships with clients, and share confidential information, without fear that the employee will "run off" with their investment only to benefit a competitor.¹¹ Through these covenants, businesses can develop their human capital without apprehension that competitors will inadvertently benefit from investments in their employee.

Noncompetition covenants are "enforceable only to the extent that" they are reasonable.¹² Courts determine the reasonability of these covenants by weighing three factors: duration, breadth, and geographic scope.¹³ First, the duration of covenants not to compete can be "no greater than necessary to provide reasonable protection to the employer."¹⁴ Thus, courts will not uphold ambiguous provisions or indefinite extension periods because the unlimited duration provides the employer with unreasonable protection.¹⁵

Second, the restriction can be broad enough to "afford a fair protection to the interests of" the employer, but "not so large as to interfere with the interests

⁷ 2 MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 8.1 (3d ed. 2004).

⁸ Edward T. Ellis, *Protection of Intangible Business Assets: Trade Secrets in the Age of Federal Computer Legislation*, in ALI-ABA, CURRENT DEVELOPMENTS IN EMPLOYMENT LAW 949 (Am. Law Inst. 2008).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 677 (2008) (stating that "noncompete agreements are enforceable only to the extent that they are reasonably necessary to protect narrowly defined and well recognized employer interests").

¹³ Harlan M. Blake, *Employee Agreements Not To Compete*, 73 HARV. L. REV. 625, 626, 640 (1960) ("The court's function was to determine 'what is a reasonable restraint with reference to the particular case.'" (quoting *Tallis v. Tallis*, 118 Eng. Rep. 482 (Q.B. 1853))).

¹⁴ *Noncompetition Covenants*, 20 No. 5 Bus. Torts. Rep. 148, 149 (Mar. 2008) [hereinafter *Covenants I*].

¹⁵ *See id.*

of the public.”¹⁶ Covenants not to compete protect a variety of interests. Non-compete agreements “are designed to prohibit an employee from competing with his employer after the termination of the employment agreement.”¹⁷ Therefore, businesses use covenants not to compete to protect trade secrets, confidential information, good will, an employee’s unique and extraordinary skills they possessed before beginning their employment, and against competitors profiting from any specialized training and skills the employer provided to the employee.¹⁸

Finally, geographic restrictions contained in the noncompetition covenant may only extend to areas in which the employee established contacts during the course of employment.¹⁹ Notably, in a unique case,²⁰ the court upheld a covenant not to compete within a specific radius of every existing franchise.²¹ In *Boulanger v. Dunkin’ Donuts*,²² Boulanger, the plaintiff, bought a Dunkin’ Donuts franchise, and signed the accompanying noncompetition agreement.²³ After disagreements with Dunkin’ Donuts about expanding the establishment, Boulanger closed his Dunkin’ Donuts store.²⁴ Thereafter, he contacted Honey Dew Donuts, Dunkin’ Donuts’ direct competitor, to buy a franchise.²⁵ Dunkin’ Donuts refused to waive the noncompetition covenant and Boulanger sued to invalidate the covenant not to compete.²⁶ The court held that the covenant was reasonable and enjoined Boulanger from competing within a five-mile radius of every existing Dunkin’ Donuts store.²⁷

While most corporations choose to incorporate in states with favorable incorporation laws, some ex-employees will intentionally incorporate a competing business in a state that has unfavorable incorporation laws but that disfavors non-competition agreements in an attempt to circumvent a validly executed non-compete covenant.²⁸ For example, in *Ferrofluidics Corporation v. Advanced Vacuum*,²⁹ the First Circuit rejected an ex-employee’s attempt to apply California law by incorporating a competing business in California, when the parties executed the contract in Massachusetts.³⁰ The employee attempted

¹⁶ Blake, *supra* note 13, at 639.

¹⁷ Pivateau, *supra* note 12, at 676.

¹⁸ *Noncompetition Covenants*, 20 No. 1 Bus. Torts Rep. 20, 21 (Nov. 2007) [hereinafter *Covenants 2*].

¹⁹ Blake, *supra* note 13, at 680; *Covenants 1*, *supra* note 14, at 149.

²⁰ *Boulanger v. Dunkin’ Donuts Inc.*, 815 N.E.2d 572 (Mass. 2004).

²¹ J. Michael Dady, *Evaluating the Termination Decision—Common Law and Statutory Considerations*, in *Practicing Law Institute, 44th Annual Advanced Antitrust Seminar: Distribution & Marketing 753* (Practicing Law Inst. 2005) (the court upheld the agreement terms and enjoined Boulanger from competing within a specific radius of every existing Dunkin’ Donuts).

²² *Boulanger*, 815 N.E.2d at 572.

²³ *Id.* at 575-76.

²⁴ *Id.* at 576 n.5.

²⁵ *Id.* at 576.

²⁶ *Id.*

²⁷ *Id.* at 581.

²⁸ *Ferrofluidics Corp. v. Advanced Vacuum Components, Inc.*, 968 F.2d 1463, 1465-66 (1st Cir. 1992).

²⁹ *Id.*

³⁰ *Id.* at 1467.

to choose California as controlling law because California law disfavors covenants not to compete.³¹ To that end, the Court did not allow the employee to choose California's favorable state law in order to prevail on his claim.³² Furthermore, the Court reaffirmed that covenants not to compete are limited to apply only to the extent necessary to protect legitimate employer interests.³³

Lastly, covenants that contain otherwise reasonable terms may be void if they contradict public policy.³⁴ Restrictive covenants may violate public policy in several ways.³⁵ First, the covenant might have a substantial effect on third parties.³⁶ For example, in *Graham v. Cirocco*,³⁷ the Kansas Court of Appeals would not enforce a covenant that restricted the availability of specialized medical care because the covenant violated public policy.³⁸ In *Graham*, two physicians entered into a partnership contract that contained a covenant not to compete for two years within a specific geographical radius.³⁹ After one partner left, he opened a competing practice right next door to the original business.⁴⁰ The court reasoned that the need for specialized medical professionals significantly outweighs any harm to the parties.⁴¹

Businesses frequently use covenants not to compete to protect trade secrets.⁴² The motivation behind protecting trade secrets is simple: prevent unfair competition and invasion of privacy while promoting innovation, progress, and efficiency.⁴³ Protecting an employer's interest in trade secrets is reasonable when it involves the employer's own "detailed confidential processes which [are] kept secret from [its] customers and competitors."⁴⁴ In protecting trade secrets, courts consider several factors:

- (1) the extent to which people outside the business know the information
- (2) the extent to which employees and others involved in the business know the information
- (3) the extent of measures the employer took to prevent dissemination of the information
- (4) the information's value to the employer and its competitors

³¹ *Id.* at 1466, 1468.

³² *Id.* at 1467-68.

³³ *Id.* at 1471; ROTHSTEIN ET AL., *supra* note 7, at § 8.5.

³⁴ *See Covenants 1*, *supra* note 14, at 149.

³⁵ ROTHSTEIN ET AL., *supra* note 7, at 362.

³⁶ *Id.*

³⁷ *Graham v. Cirocco*, 69 P.3d 194 (Kan. Ct. App. 2003).

³⁸ *Id.* at 200.

³⁹ *Id.* at 196. Although geographic limitations that protect legitimate employer interests are reasonable, any reach beyond those areas is deemed unreasonable. *Id.* at 198-199. However, here, geographic reasonability was not the main concern. *Id.* at 197-99.

⁴⁰ *Id.* at 197.

⁴¹ *Id.* at 200. As the purpose of the covenant was to limit competition in a certain geographic area, the court effectively held the entire non-competition covenant invalid by allowing the competing doctor to continue to practice next door. Ultimately, the court based its decision on public policy.

⁴² *See* Jeremy P. Cattani et al., *Employment Contracts*, in 1 MASSACHUSETTS CONTINUING LEGAL EDUCATION, MASSACHUSETTS EMPLOYMENT LAW § 2.1.4(b) (2008).

⁴³ Ellis, *supra* note 8, at 963.

⁴⁴ Cattani et al., *supra* note 42, § 2.1.4(b) (quoting *Novelty Bias Binding Co. v. Shevrin*, 342 Mass. 714, 715 (1961)).

- (5) the amount of money or effort the employer expended to developing the information; and
- (6) the ease or difficulty with which others could acquire or duplicate the information.⁴⁵

The employer seeking enforcement of a covenant bears the burden of proving that the information is confidential.⁴⁶ To determine whether the information is confidential, courts consider factors such as whether the information is “compiled and cultivated internally,” or whether it entails “expansion plans, merchandising strategies, product mixes, and retail devices.”⁴⁷ Here, the reasoning seems to be that if the information was developed *by* the company *for* the company, then that information is more likely to be confidential. Regardless, courts may issue a narrowly tailored injunction to protect the employer’s confidential information.⁴⁸

B. Historical Development

A historical overview of covenants not to compete is essential to understanding the potential benefits of developing a balanced structure for Nevada law affecting covenants not to compete. Although the pendulum of protection has swung back and forth between employers and employees for hundreds of years, Nevada is currently positioned to address modern trends and temper any volatility in this area of the law.

In the employment context, covenants not to compete began to emerge about five hundred years ago.⁴⁹ Since then, the court’s treatment of covenants has gone through four distinct stages as its priorities shifted back and forth between protecting employers and employees. First, courts held that covenants not to compete were an undue restraint on trade that offended public policy.⁵⁰ This early development began during the English guild system.⁵¹ During this period, masters used covenants to bind their apprentices from competing against the master’s business in the same geographical area for unreasonably long periods.⁵² Due to the decreased mobility of workers based on the feudal communities, these covenants acted as an absolute restraint on trade.⁵³ The courts disfavored these covenants until *Mitchel v. Reynolds*,⁵⁴ decided in 1711.⁵⁵ In *Mitchel*, a court enforced a non-competition agreement because the terms were reasonable where a baker promised not to compete in return for

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Use of restrictive covenants began in England as early as the fifteenth century. T. Leigh Anenson, *The Role of Equity in Employment Noncompetition Cases*, 42 AM. BUS. L.J. 1, 1 (2005). Covenants not to compete are also used to protect goodwill through business purchases. Richard Ullman, *Tax Treatment of Covenants Not To Compete: A Problem of Purchase Price Allocation*, 67 YALE L.J. 1261, 1265 (1958).

⁵⁰ ROTHSTEIN ET AL., *supra* note 7, at 358.

⁵¹ Anenson, *supra* note 49, at 5.

⁵² *Id.*

⁵³ *Id.* at 6.

⁵⁴ *Mitchel v. Reynolds*, (1711) 24 Eng. Rep. 347 (Q.B.).

⁵⁵ *Id.*; *see also* Hogan, *supra* note 5, at 433-34.

lease payments.⁵⁶ *Mitchel* laid the foundation for courts to later adopt a more tempered approach by enforcing restrictive covenants that were fair and reasonable.⁵⁷

During the Industrial Revolution, courts responded to increased worker mobility by adopting a reasonableness standard for enforcing non-competition covenants.⁵⁸ During this time, the courts examined reasonableness in terms of time, scope, and employer's interests.⁵⁹ Although courts continued to disfavor restrictive covenants and "judicial hostility to post-employment restrictions remained," the laws continued to be notably pro-employer.⁶⁰ During the Great Depression, the pendulum swung back in favor of employee rights as the courts sought to foster economic growth.⁶¹ Consequently, courts placed increasingly heavy burdens on employers and demanded more rigorous proof of their protected interests and reasonableness of the restraint.⁶²

With the information age, courts then shifted back to a reasonable analysis with current trends favoring employer protection.⁶³ Increased mobility and the heightened need for employee training and skills drove this judicial reversion.⁶⁴ Courts retreated to a reasonableness analysis to determine whether employers had a legitimate protectable interest in (1) retaining a customer base and (2) protecting confidential trade secrets and information.⁶⁵

C. Tensions between Employers and Employees

The inherent nature and purpose of covenants not to compete creates a palpable tension between employers and employees. In some cases, the non-competition agreement "creates an unnecessary and unfair advantage for one party."⁶⁶ For example, an employer may gain an unfair advantage by using "economic coercion to force all employees to promise that they will not work for competitors if they ever leave the company."⁶⁷ This creates a restraint on former employees and unequal "bargaining power" favoring the employer.⁶⁸ Consequently, discharged employees often fear restrictive covenants will hinder their ability to obtain new employment.⁶⁹

Courts have noted that covenants generally are not assignable because loyalty to one's long-time employer does not naturally pass to a new employer.⁷⁰

⁵⁶ *Mitchel*, 24 Eng. Rep. at 348.

⁵⁷ Anenson, *supra* note 49, at 2 n.4; Blake, *supra* note 13, at 629-31 (citing *Mitchel*, 24 Eng. Rep. at 348); Hogan, *supra* note 5, at 433-34.

⁵⁸ Anenson, *supra* note 49, at 5.

⁵⁹ *Id.* at 8.

⁶⁰ *Id.* at 2.

⁶¹ *Id.* at 11.

⁶² Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 110-111 (Spring 2008).

⁶³ Anenson, *supra* note 49, at 2, 12.

⁶⁴ *Id.* at 16.

⁶⁵ *Id.* at 13-14.

⁶⁶ ROTHSTEIN ET AL., *supra* note 7, § 8.1.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* § 8.3.

⁷⁰ *Id.* § 8.1.

Thus, courts have given covenants not to compete little to no effect in company sales, unless the employee signs a new agreement with the new owner.⁷¹ Meanwhile, employers fear that employee training, relationships employees develop with clients, confidential company information, and company investment into human capital will disappear when an employee leaves the company.⁷²

Public policy arguments mirror the concerns of employers and employees.⁷³ Employers argue that society benefits from enforcing post-employment restrictive covenants.⁷⁴ Specifically, they contend that enforcement protects private ownership interests, facilitates investment in research, and encourages investment in and development of human resources.⁷⁵ On the other hand, employees argue that the public pays a high price for covenant enforcement including limited competition, impediments in the free flow of information, and lack of workers' economic mobility.⁷⁶ Plaintiff Kai-Fu Lee raised these arguments, among others, in *Google v. Microsoft*.⁷⁷ In that case, Lee, a Microsoft employee, left the company to work for Google, a direct competitor.⁷⁸ Accordingly, Microsoft sued Lee in the State of Washington for breach of covenant not to compete and sought a temporary restraining order against Google and Lee.⁷⁹ The court granted the injunction with limited scope,⁸⁰ allowing both sides to claim victory.⁸¹ The outcome seemed to balance employer and employee rights but in reality, it was merely a public relations strategy to avoid negative publicity.

II. OVERVIEW OF JURISDICTIONAL TREATMENT: OTHER STATES' TREATMENT OF COVENANTS NOT TO COMPETE

When developing a standard, Nevada could benefit from looking to other states' solutions and learning from their treatment of employment covenants. Notably, treatment of covenants not to compete is purely a state issue.⁸² Most states have statutes on the subject and many of those statutes have evolved to account for changing trends.⁸³ Nonetheless, many state legislatures have

⁷¹ *Id.*

⁷² Ellis, *supra* note 8, at 949.

⁷³ See, e.g., Blake, *supra* note 13, at 652 (discussing the public policy argument in favor of protecting the employer's investment in employee-training programs).

⁷⁴ *Id.*

⁷⁵ Anenson, *supra* note 49, at 3 n.10; Blake, *supra* note 13, at 652; Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. Rev. 575, 627-29 (1999).

⁷⁶ Anenson, *supra* note 49, at 3.

⁷⁷ *Google, Inc. v. Microsoft Corp.*, 415 F. Supp. 2d 1018 (N.D. Cal. 2005); see Garrison & Wendt, *supra* note 62, at 107-11 (discussing *Google*).

⁷⁸ *Google, Inc.*, 415 F. Supp. 2d at 1019.

⁷⁹ *Id.* at 1019-20.

⁸⁰ *Id.*; Garrison & Wendt, *supra* note 62, at 110.

⁸¹ Garrison & Wendt, *supra* note 62, at 110.

⁸² ROTHSTEIN ET AL., *supra* note 7, § 8.6.

⁸³ *Id.*; see generally ARIZ. REV. STAT. §44-1402 (2003); CAL. BUS. & PROF. CODE § 16600 (West 2008); COLO. REV. STAT. ANN. § 8-2-113 (West 2003); DEL. CODE ANN. tit. 6, § 2707 (2006); IND. CODE ANN. § 24-1-2-1 (West 2006); IOWA CODE ANN. § 553.4 (West 1997); LA.

actively endeavored to enact laws that limit covenants in the employment context.⁸⁴

State statutes regarding covenants not to compete generally fall into one of three categories: (1) statutes generally prohibiting any restraint of trade, (2) statutes specifically addressing covenants not to compete in employment contracts, or (3) statutes addressing covenants not to compete but only with respect to specific professions.⁸⁵ Some states, such as Colorado, have statutes that fall into two categories with statutes that address noncompetition covenants in employment contracts generally and the same covenants with respect to certain professions specifically.⁸⁶

States that fall into the general prohibition category are Arizona,⁸⁷ California,⁸⁸ Iowa,⁸⁹ Indiana,⁹⁰ Minnesota,⁹¹ and North Dakota.⁹² These statutes favor a strong protection of employee rights.⁹³ For example, California takes a liberal approach to the general restriction on trade.⁹⁴ California's statute disallows and voids "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind."⁹⁵ Notably, California businesses have not suffered significantly because of this statute as evidenced by

REV. STAT. ANN. § 23:921 (Supp. 2009); MICH. COMP. LAWS ANN. § 445.774a (West 2002); MINN. STAT. ANN. § 325D.51 (West 2004); MONT. CODE ANN. § 28-2-703 (2007); NEV. REV. STAT. § 613.200 (2007); N.D. CENT. CODE § 9-08-06 (2008); S.D. CODIFIED LAWS § 53-9-11 (2004).

⁸⁴ ROTHSTEIN ET AL., *supra* note 7, § 8.1.

⁸⁵ *Id.* § 8.6.

⁸⁶ COLO. REV. STAT. ANN. § 8-2-113 (West 2003) (subject to enumerated exceptions, section (2) provides a general prohibition on covenants not to compete and section (3) addresses covenants not to compete involving a physician's right to practice medicine).

⁸⁷ ARIZ. REV. STAT. ANN. § 44-1402 (2003) (providing only the general prohibition that "[a] contract, combination or conspiracy between two or more people in restraint of, or to monopolize, trade or commerce, any part of which is within this state is unlawful").

⁸⁸ CAL. BUS. & PROF. CODE § 16600 (West 2008) (providing only the general prohibition that "every contract by which anyone is restricted from engaging in a lawful profession, trade or business of any kind is to that extent void").

⁸⁹ IOWA CODE ANN. § 553.4 (West 1997) (providing only the general prohibition that "[a] contract, combination, or conspiracy between two or more people shall not restrain or monopolize trade or commerce in a relevant market").

⁹⁰ IND. CODE ANN. § 24-1-2-1 (West 2006) (codifying a general prohibition stating that "[e]very scheme, contract, or combination in restraint of trade or commerce, or to create or carry out restrictions in trade or commerce, or to deny or refuse to any person participation, on equal terms with others . . . is illegal"). "The Indiana statutory prohibition against restraint of trade does not apply to covenants not to compete in employment contracts. The common law in that jurisdiction nonetheless holds that restraints on competition between an employer and former employee are not favored and are enforced only where the restraint is reasonable." ROTHSTEIN ET AL., *supra* note 7, § 8.6.

⁹¹ MINN. STAT. ANN. § 325D.51 (West 2004) (providing only the general prohibition that "[a] contract, combination, or conspiracy between two or more persons in unreasonable restraint of trade or commerce is unlawful").

⁹² N.D. CENT. CODE § 9-08-06 (2008) (providing, subject to enumerated exceptions, only the general prohibition that "[e]very contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void").

⁹³ See *supra* notes 87-92 and accompanying text.

⁹⁴ Hogan, *supra* note 5, at 435.

⁹⁵ CAL. BUS. & PROF. CODE § 16600 (West 2008).

the success of many Silicon Valley technology-based enterprises.⁹⁶ In Ronald Gilson's article, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, he suggests that California's unwillingness to enforce these covenants actually caused the Silicon Valley business boom by allowing mobility of employees and information.⁹⁷ In particular, Gilson argues that increased employee mobility enabled knowledge and information to move faster because employers wanted to reap the rewards of their investment in human capital before the knowledge became irrelevant and stale.⁹⁸

The second category of state statutes specifically addresses covenants not to compete in employment contracts. States in this category are Colorado,⁹⁹ Georgia,¹⁰⁰ Michigan,¹⁰¹ Montana,¹⁰² and South Dakota.¹⁰³ For example, Colorado disfavors covenants not to compete but recognizes and addresses a few exceptions to the general prohibition: protection of trade secrets, investment in employee training, and proprietary information held by executive managerial positions.¹⁰⁴

The third category of state statutes only restricts covenants not to compete that affect specific professions. These states are Delaware,¹⁰⁵ Colorado,¹⁰⁶ and Louisiana.¹⁰⁷ The most common protected profession is medical practice.¹⁰⁸

⁹⁶ Gilson, *supra* note 75, at 575.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ COLO. REV. STAT. ANN. § 8-2-113 (West 2003) (specifically addressing covenants not to compete which "restrict[] the right of any person to receive compensation for performance of skilled or unskilled labor"); ROTHSTEIN ET AL., *supra* note 7, at 381. In Colorado, non-competition agreements are generally void with three exceptions: in relation to trade secrets, specialized training, and contracts restricting executives and managerial personnel and staff.

¹⁰⁰ Jackson & Coker, Inc. v. Hart, 405 S.E.2d 253, 255 (Ga. 1991); ROTHSTEIN ET AL., *supra* note 7, at 382. In *Jackson*, the Georgia Supreme Court held that a statute requiring the courts to enforce noncompetition agreements were unconstitutional and unenforceable because the agreements were a restraint on trade and inconsistent with the state Constitution.

¹⁰¹ MICH. COMP. LAWS ANN. § 445.774a (West 2002) (specifically allowing an "agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment of line of business").

¹⁰² MONT. CODE ANN. § 28-2-703 (2007) (specifically voiding "[a]ny contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind").

¹⁰³ S.D. CODIFIED LAWS § 53-9-11 (2004). Although South Dakota "voids any contract restraining exercise of a lawful profession, trade, or business," the state "exempts noncompetition agreements not exceeding two years after termination of employment." *Id.* § 53-9-8, § 53-9-11.

¹⁰⁴ COLO. REV. STAT. ANN. § 8-2-113(2)(b)-(d) (West 2003).

¹⁰⁵ DEL. CODE ANN. tit. 6, § 2707 (2006). Delaware does not recognize restrictive covenants with respect to physicians.

¹⁰⁶ COLO. REV. STAT. ANN. § 8-2-113(3) (West 2003). Colorado does not recognize restrictive covenants generally and specifically with respect to physicians.

¹⁰⁷ LA. REV. STAT. ANN. § 23:921(I) (Supp. 2009) (disallowing covenants "entered into by an automobile salesman and his employer restraining him from selling automobiles"); *id.* § 23:921(C) (restricting agreements with former employees to two years). The Louisiana Legislature specifically addresses employees involved in computer programming in a separate subsection. *Id.* § 23:921(G).

¹⁰⁸ See DEL. CODE ANN. tit. 6, § 270; COLO. REV. STAT. ANN. § 8-2-113(3).

The major factor motivating statutes protecting certain professions is public policy.¹⁰⁹ Simply, the public interest in retaining the services of a doctor or specialist greatly outweighs the interest in protecting contract terms.¹¹⁰

III. NEVADA'S ACTION

For the past thirty years, the Nevada State Legislature has recognized Nevada's lack of an intermediary appellate court is problematic.¹¹¹ Therefore, Senate Bill 234 provided a remedy by seeking to "increase the number of authored opinions for those cases that establish" Nevada common law.¹¹² However, until such time, attorneys have the daunting task of convincing judges of their positions and pressing for the Nevada Supreme Court to publish favorable cases.¹¹³ This process is neither quick nor simple.¹¹⁴

However, this lack of controlling law, and the corresponding lack of *stare decisis*, is positive in one regard. Although Nevada law reflects a general tendency to disfavor covenants not to compete,¹¹⁵ case law in this area has yet to develop the concept completely.¹¹⁶ To date, the Nevada Supreme Court has developed a reasonableness standard, evidenced judicial disfavor of covenants that restrain trade, instituted business fines for enforcement of unreasonable covenants, and completely disavowed assignments of non-competition agreements absent adequate consideration and agreement to be bound.¹¹⁷ As case law has not developed the concept completely, there is large latitude in shaping the law.

Nevada demonstrates its disapproval of restrictive employment covenants by a strict penalty of no more than \$5,000 for anyone who "willfully does anything intended to prevent any person who for any cause left or was discharged from his or its employ from obtaining employment elsewhere in this

¹⁰⁹ Grossman v. Columbine Med. Group, Inc., 12 P.3d 269, 273 (Colo. App. 1999).

¹¹⁰ *Id.*

¹¹¹ SUPREME COURT OF NEV., REPORT TO THE 74TH REGULAR SESSION OF THE NEVADA STATE LEGISLATURE, 2007, REGARDING THE CREATION OF THE NEVADA COURT OF APPEALS, available at <http://www.leg.state.nv.us/74th/Exhibits/Senate/JUD/SJUD855C.pdf> [hereinafter REPORT TO LEGISLATURE]; S. 234, 2005 Leg., 74th Sess. (Nev. 2005) (effective Oct. 1, 2005).

¹¹² REPORT TO LEGISLATURE, *supra* note 111, at 10.

¹¹³ See generally *id.*

¹¹⁴ See *id.*

¹¹⁵ NEV. REV. STAT. § 613.200 (2007).

¹¹⁶ See *HD Supply Facilities Maint., Ltd. v. Bymoen*, 210 P.3d 183 (Nev. 2009); *Traffic Control Servs., Inc. v. United Rentals Nw., Inc.*, 87 P.3d 1054 (Nev. 2004); *Jones v. Deeter*, 913 P.2d 1272 (Nev. 1996); *Hansen v. Edwards*, 426 P.2d 792 (Nev. 1967).

¹¹⁷ See generally NEV. REV. STAT. § 613.200 (2007) (imposing statutory fines); see also *HD Supply Facilities Maint.*, 210 P.3d at 188 (holding that nonassignability rule for covenants not to compete in asset sale does not apply to statutory merger); *Traffic Control Servs., Inc.*, 87 P.3d at 1060 (holding that covenants not to compete are not assignable absent employee's express consent and adequate consideration); *Jones*, 913 P.2d at 1275 (expressing judicial disfavor of restrictive covenants and holding that a restrictive covenant will only be upheld "if reasonably necessary to protect the business and goodwill of the employer"); *Hansen*, 426 P.2d at 793 (holding that covenants not to compete are restraints on trade and will not be enforced unless reasonable).

State.”¹¹⁸ Although some statutory authority exists, there are only a few Nevada cases on point: *Hansen v. Edwards*,¹¹⁹ *Ellis v. McDaniel*,¹²⁰ *Jones v. Deeter*,¹²¹ *Camco, Inc. v. Baker*,¹²² *Traffic Control Services, Inc. v. United Rentals Northwest, Inc.*,¹²³ and *HD Supply Facilities Maintenance, Ltd. v. Bymoen*.¹²⁴ Each case addresses an aspect of covenants not to compete that is well-developed in other jurisdictions: the reasonableness standard, public policy concerns, consideration for at-will employment, assignability of restrictive covenants, and the status of non-competition covenants after company mergers.¹²⁵

In 1967, the Nevada Supreme Court adopted the reasonableness standard to govern covenants not to compete.¹²⁶ The Court in *Hansen*, applied the reasonableness standard to geographical reach, duration, and scope, where a podiatrist’s post-employment covenant restricted practice by the former employee within a 100 mile radius of the city, but did not include time limitation.¹²⁷ After the former employee opened an office near the original office and lured away 180 of the former employer’s patients, the Court limited the injunction to prevent the former employee from competing within the city limits for one year.¹²⁸ In that case, the Court held that Nevada Revised Statutes section 613.200¹²⁹ did not apply to persons who seek self-employment.¹³⁰ Interestingly, the Court did conduct a public policy analysis, but it tethered its analysis to the “interest in protecting the freedom of persons to contract, and in enforcing contractual rights and obligations.”¹³¹ This demonstrates the court’s reluctance to change the terms of the agreement. The lack of a time limitation would normally invalidate the covenant for being unreasonable, but here, the court intentionally protected the right to contract and did not reform the contract.

Twelve years later the court reiterated the reasonableness standard under similar circumstance and allowed the effect of restrictive covenants in the medical profession.¹³² In *Ellis*, Ellis, an orthopedic surgeon, signed an employment

¹¹⁸ NEV. REV. STAT. § 613.200(1) (2007).

¹¹⁹ *Hansen*, 426 P.2d at 792.

¹²⁰ *Ellis v. McDaniel*, 596 P.2d 222 (Nev. 1979).

¹²¹ *Jones*, 913 P.2d at 1272.

¹²² *Camco, Inc. v. Baker*, 936 P.2d 829 (Nev. 1997).

¹²³ *Traffic Control Servs., Inc. v. United Rentals Nw., Inc.*, 87 P.3d 1054 (Nev. 2004).

¹²⁴ *HD Supply Facilities Maint., Ltd. v. Bymoen*, 210 P.3d 183 (Nev. 2009).

¹²⁵ *HD Supply Facilities Maint.*, 210 P.3d at 188 (declining to apply the rule of non-assignability of covenants to corporate mergers); *Traffic Control Servs.*, 87 P.3d at 1057 (discussing assignability of restrictive covenants); *Camco*, 936 P.2d at 831-32 (discussing restrictive covenants in the context of at-will employment); *Jones*, 913 P.2d at 1275 (addressing public policy concerns); *Ellis*, 596 P.2d at 224 (reaffirming the reasonableness standard); *Hansen v. Edwards*, 426 P.2d 792, 793 (Nev. 1967) (adopting the reasonableness standard).

¹²⁶ *Hansen*, 426 P.2d at 793.

¹²⁷ *Id.* at 793-794.

¹²⁸ *Id.* at 794.

¹²⁹ NEV. REV. STAT. ANN. § 613.200 (2007) (titled Prevention of employment of person who has been discharged or who terminates employment unlawful; criminal and administrative penalties; exception).

¹³⁰ *Hansen*, 426 P.2d at 794.

¹³¹ *Id.* at 793.

¹³² *Ellis v. McDaniel*, 596 P.2d 222, 224 (Nev. 1979).

contract with Elko Clinic, which included a covenant not to compete.¹³³ In relevant part, the covenant prohibited post-employment competition restricting Ellis from practicing “medicine within a distance of five miles from the city limits . . . for a period of two years from the termination date of his employment.”¹³⁴ After four months, Ellis announced his intention to leave the Elko Clinic at the end of his contract term and establish his own practice within the city limits.¹³⁵ Thus, Elko Clinic filed a motion for preliminary injunction.¹³⁶ After the district court granted the injunction, Ellis appealed.¹³⁷ Through this set of facts, the Nevada Supreme Court held that “[t]he medical profession is not exempt from a restrictive covenant provided the covenant meets the tests of reasonableness.”¹³⁸ The court further noted that although the covenant was reasonable in its limits and Ellis could be restrained from opening a “general” medical practice, “the public interest in retaining the services of the specialist is greater than the interest in protecting the integrity of the contract”¹³⁹ Thus, the Court modified the terms of the injunction to allow Ellis to perform his specialty, but not to compete according to the terms of the agreement.¹⁴⁰

The Nevada Supreme Court held that protecting legitimate business interests is an appropriate motive for a covenant not to compete.¹⁴¹ The Court has further clarified the law by holding that restrictive covenants are not inherently against public policy.¹⁴² In *Jones*, the Court declined to endorse the proposition that Nevada’s policy is “that restrictive covenants on employment are per se invalid.”¹⁴³ In *Jones*, the plaintiff alleged misappropriation of trade secrets based on defendant having access to customer lists and possibly divulging proprietary information about the light retrofitting trade.¹⁴⁴ However, the court held that the five-year duration was greater than necessary to protect Deeter’s legitimate business interests, and it placed undue burdens on Jones.¹⁴⁵ The court concluded that the legislative history made it “clear that the Nevada Legislature never intended NRS 613.200 to render post-employment restrictive covenants void as against public policy.”¹⁴⁶ Unlike *Hansen*, where the court analyzed the reasonableness of duration and scope in relation to a party’s freedom to contract, *Jones* addressed the contract’s restrictions on duration and scope in relation to a party’s legitimate business interests.¹⁴⁷

¹³³ *Id.* at 223.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 224.

¹³⁹ *Id.* at 225.

¹⁴⁰ *Id.*

¹⁴¹ *See Jones v. Deeter*, 913 P.2d 1272, 1275 (Nev. 1996) (holding that “[a] restrictive covenant on employment will be upheld only if it is reasonably necessary to protect the business and goodwill of the employer”).

¹⁴² *Id.* at 1274.

¹⁴³ *Id.* at 1274.

¹⁴⁴ *Id.* at 1273.

¹⁴⁵ *Id.* at 1275.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1274-75.

As employment in Nevada is presumably at-will, continued employment can be sufficient consideration for a covenant not to compete that is created after an employee begins employment.¹⁴⁸ In *Camco*, the court addressed covenants not to compete in the context of at-will employment when Camco appealed the lower court's decision to deny a preliminary injunction enjoining Baker from competing post-employment.¹⁴⁹ The district court denied the motion for want of sufficient consideration.¹⁵⁰ On appeal, the Nevada Supreme Court first addressed whether continued employment in an at-will state constituted sufficient consideration to support a covenant not to compete, and then decided whether the terms of the covenant were reasonable.¹⁵¹ The *Camco* court held that "[c]ontinued employment in an at-will state is sufficient consideration for a post-hiring [non-competition] covenant."¹⁵² The court reasoned that the promise of initial hiring is equivalent to the promise of continued employment, constituting sufficient consideration.¹⁵³ Notwithstanding, the court still denied the motion because the terms of the covenant were not reasonable; the geographic restrictions extended further than necessary to protect the employer's interests.¹⁵⁴

In *Traffic Control Services*, the Nevada Supreme Court held that rights under a covenant not to compete are not assignable in a corporate sale; thus, a new corporate owner needs to obtain the employee's consent and pay separate consideration.¹⁵⁵ In that case, Burkhardt, a specialist in selling and renting trench shoring equipment, worked for NES Trench Shoring ("NES").¹⁵⁶ After being assured NES did not have plans to sell the business, Burkhardt signed a contract that included a covenant not to compete with NES in exchange for valid consideration.¹⁵⁷ NES subsequently sold its corporate assets to United Rentals Northwest ("United").¹⁵⁸ Prior to completing the sale, United requested that NES's employees sign new non-competition agreements, which they would support with adequate consideration.¹⁵⁹ Although Burkhardt and others refused to sign the new agreement, he continued to work for United for a period before United terminated his employment.¹⁶⁰ Thereafter, Burkhardt began work for United's direct competitor.¹⁶¹ The court ultimately held that the original covenant not to compete signed with NES was not assignable to United absent a separate agreement with consideration.¹⁶²

¹⁴⁸ *Camco, Inc. v. Baker*, 936 P.2d 829, 832 (Nev. 1997).

¹⁴⁹ *Id.* at 831.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 832.

¹⁵² *Id.* (alteration in original) (quoting *Sw. Gas Corp. v. Ahmad*, 668 P.2d 261, 261 (Nev. 1983)).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 833.

¹⁵⁵ *Traffic Control Servs., Inc. v. United Rentals Nw., Inc.*, 87 P.3d 1054, 1057 (Nev. 2004).

¹⁵⁶ *Id.* at 1055.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 1056.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 1060.

The most recent Nevada Supreme Court decision regarding covenants not to compete is *HD Supply Maintenance*¹⁶³ in which the court held that covenants not to compete are enforceable by a successor corporation that acquires non-competition agreements as part of a merger.¹⁶⁴ HD Supply Facilities Maintenance, Ltd. (HDS) was the new company created by two separate mergers between Century Maintenance Supply, Inc. (Century), Hughes Supply, Inc. and a subsidiary of Home Depot.¹⁶⁵ When originally employed by Century, Bymoen entered into non-solicitation, confidentiality, and non-competition covenants.¹⁶⁶ The contract did not contain an assignment clause.¹⁶⁷ After the final merger, Bymoen left the newly-formed HDS and immediately began to work for a direct competitor.¹⁶⁸ HDS sued Bymoen alleging breach of contract and misappropriation of trade secrets, among other claims.¹⁶⁹

After limiting *Traffic Control* to its facts, the Court distinguished between contractual asset-purchase agreements and statutory mergers.¹⁷⁰ The Nevada Supreme Court explicated that while a contractual asset-purchase agreement creates a new entity and thus a new employer, a statutory merger merely unites two corporations into one single entity.¹⁷¹ The court opined that the holding in *Traffic Control* did not apply in the context of a corporate merger¹⁷² and it declined to accept Bymoen's argument advocating adoption of Vermont Supreme Court's reasoning.¹⁷³

IV. THE NEED FOR A NEW STANDARD: A PROPOSAL

Nevada is in the perfect position to make forward-looking laws, protect its business and workforce, and help remedy the state's economic concerns. The evolution of employment in the United States has taken a new turn. Scientific progress has put a man on the moon, a computer in two-thirds of American homes, and cell phones at the ears of a majority of teenagers.¹⁷⁴ Since achiev-

¹⁶³ *HD Supply Facilities Maint., Ltd. v. Bymoen*, 210 P.3d 183 (Nev. 2009). In *HD Supply Facilities*, the court answered three questions certified by the federal district court. *Id.* at 184.

¹⁶⁴ *Id.* at 188.

¹⁶⁵ *Id.* at 184.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 186.

¹⁷¹ *Id.* at 186-87.

¹⁷² *Id.* at 187-88.

¹⁷³ *Id.* at 188, n.4 (“[T]he Vermont Supreme Court concluded that an acquiring corporation in a stock purchase transaction could not enforce a former employee’s noncompetition covenant under Vermont’s now-superseded merger statute, which provided that upon an asset sale, merger, or consolidation of different corporate entities, the acquiring corporation ‘shall possess all the rights, privileges and benefits of the original corporation *properly exercisable* under the laws of [Vermont].’” (second alteration in original) (quoting *Smith, Bell & Hauck, Inc. v. Cullins*, 183 A.2d 528 (Vt. 1962))). Additionally, the court did not address the implications of the holding based “on the type of covenant—whether one of noncompetition, nonsolicitation, or confidentiality.” *Id.* at 188.

¹⁷⁴ Barnaby J. Feder, *Information On-Ramp Crosses a Digital Divide*, N.Y. TIMES, July 8, 2003, at C1; John Noble Wilford, *A Powdery Surface Is Closely Explored*, N.Y. TIMES, July

ing statehood over one hundred years ago, Nevada's economy relied strongly on silver production.¹⁷⁵ More recently, development of the gaming and tourism industries has sustained the state's tax base and allowed Nevada to support the sudden influx of new residents.¹⁷⁶

The current economic crisis has not spared Nevada. With the highest foreclosure rates in the nation,¹⁷⁷ Nevada is not immune to the economic challenges the current recession presents. Education, healthcare, and state welfare programs already have suffered losses and the current plight has not escaped the attention of state legislators.¹⁷⁸ With Nevada's recent unemployment levels reaching values last seen in the 1980s,¹⁷⁹ the state cannot sit with its fingers crossed waiting for the relief proposed by the \$700 billion economic bailout.¹⁸⁰ Nevada is in a position to insulate itself, at least in the area of employment.¹⁸¹ Luckily, Nevada has hindsight in its favor because lawmakers have the benefit of viewing the past successes and failures of other states in determining new law in the employment arena. Any new legislation could reflect modern trends in employment law, address knowledge-based fields, while protecting businesses, employees, and Nevada's economic stability.

Essentially, Nevada has hit a brick wall. The housing and employment bubble has reached its current maximum capacity.¹⁸² Likewise, investors have all but given up on Nevada as the new "it" location.¹⁸³ Additionally, considering the current budget crisis and serious cuts in education funding, "[b]usinesses are choosing not to relocate [to Nevada] because [Nevada is] not

21, 1969, at A1; CTIA, Teenagers: A Generation Unplugged, <http://www.ctia.org/advocacy/research/index.cfm/AID/11483> (last visited Feb. 28, 2010).

¹⁷⁵ THE COLUMBIA ENCYCLOPEDIA (6th ed. 2008), available at <http://www.encyclopedia.com/topic/Nevada.aspx>.

¹⁷⁶ STATE GAMING CONTROL BD. & NEV. GAMING COMM'N, GAMING REGULATION IN NEVADA 10 (2006), available at http://gaming.nv.gov/documents/pdf/gaming_regulation_nevada.pdf [hereinafter GAMING REGULATION IN NEVADA] Nevada's economy is largely fueled by gambling taxes, and gaming is the "primary economic industry in the State of Nevada."

¹⁷⁷ Steve Green, *Nevada's Foreclosure Rate Tops Nation Once Again*, LAS VEGAS SUN, Feb. 12, 2009, <http://www.lasvegassun.com/news/2009/feb/12/foreclosures>; Mark Huffman, *May Foreclosure Filing Rate Highest Ever*, CONSUMERAFFAIRS.COM, June 15, 2008, http://www.consumeraffairs.com/news04/2008/06/foreclosures_may.html.

¹⁷⁸ Associated Press, *2009 Nevada Legislature Opens amid Budget Debate*, SAN DIEGO UNION-TRIB., Feb. 2, 2009, <http://www.signonsandiego.com/news/2009/feb/02/nv-nevada-legislature-020209/>.

¹⁷⁹ Sean Whaley, *Nevada's Jobless Rate Reaches 7.3 Percent, Highest Since '85*, LAS VEGAS REV.- J., Oct. 21, 2008, at 1A, available at <http://www.lvrj.com/news/31560884.html>.

¹⁸⁰ *Id.*; Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765.

¹⁸¹ Unlike other states that have a significant body of law that prevents easy adaptation, Nevada's lack of law works to its advantage. Specifically, it allows Nevada to create a statutory solution that would attract more businesses, which will in turn create more jobs.

¹⁸² Housing Predictor, Nevada, <http://www.housingpredictor.com/nevada.html> (last visited Feb. 28, 2010).

¹⁸³ See *Hot Spots Cold Spots*, http://money.cnn.com/popups/2006/fortune/invguide_real_estate/4.html (last visited Feb. 28, 2010).

investing enough in . . . education.”¹⁸⁴ Nevada cannot take drastic measures, because such a huge gamble could result in a catastrophic situation. Instead, adopting small changes to its legal structure could benefit the state without running the risks that accompany more drastic measures.

Nevada needs to invest in its future by drawing new businesses into the state to increase capital investments. Likewise, the state needs to protect its most valuable human resources, by legally insulating them from any retaliation or intimidation tactics by businesses. This proposal only addresses one possible course of action. However, this is the best course of action once Nevada considers the successes and failures of other states. As they have time and again, Nevada legislators should strive to balance the needs of every constituent in the state.

Nevada lawmakers have the opportunity to shape balanced laws that will continue to attract business to the state while also protecting the workforce. Although Delaware has traditionally been the state of choice for business incorporation, Nevada’s corporate tax structure is particularly appealing to new businesses.¹⁸⁵ Perhaps the most appealing feature is that Nevada businesses do not pay any corporate tax on profits or franchise ownership.¹⁸⁶ Additionally, Nevada law provides greater protection to officers of limited liability companies by making their asset valuation decisions final.¹⁸⁷ Therefore, Nevada has the strong potential to attract new businesses while simultaneously protecting workers.

The Nevada Supreme Court’s most recent decision regarding covenants not to compete illustrates that the need for new law or judicial interpretation has not diminished. As the court aptly noted, the analysis does not cease upon a finding of covenant validity, but rather must extend to statutory applicability.¹⁸⁸ Unlike other states that may struggle with the weight of judicial precedent and conflicting statutes affecting the issue, Nevada does not have these barriers.¹⁸⁹ Nevada is uniquely positioned to create new laws that do not conflict with existing laws. Thus, Nevada legislators can easily create laws that reflect the new and modern trend of technologically-based business. When developing new law in this area, Nevada legislators should anticipate decisions made by the judiciary, who will ultimately have the responsibility to interpret those laws.

¹⁸⁴ *Why Nevada Education Matters for Job Creation*, KTNV.COM, April 13, 2009, <http://www.ktnv.com/Global/story.asp?S=10176665>; see also *Legislatures Balances Budget with Big Cuts, Line of Credit*, KVBC.COM, Dec. 9, 2008, <http://www.kvbc.com/Global/story.asp?S=9480464> (stating that the Nevada Legislature approved \$5 million budget cut for the Millennium Scholarship Fund for 2008 and that absent further action, funds will run out by 2015).

¹⁸⁵ Nevada Corporation, <http://www.quickmba.com/law/corporation/nevada/> (last visited Feb. 28, 2010). Recent changes have put Nevada in a more advantageous situation.

¹⁸⁶ Nevada Secretary of State, *Why Incorporate in Nevada?*, <http://nvsos.gov/index.aspx?page=152> (last visited Feb. 28, 2010).

¹⁸⁷ *Id.*

¹⁸⁸ *HD Supply Facilities Maint. Ltd. v. Bymoan*, 210 P.3d 183, 187-88 (Nev. 2009).

¹⁸⁹ The limited case law in this area enables the court to “to stand by and adhere to decisions and not disturb what is settled.” *In re Osborne*, 76 F.3d 306, 309 (9th Cir. 1996).

Most importantly, legislators must consider balancing the interests of both employers and employees, and the intricate dynamics of Nevada's economy.¹⁹⁰ Some of these unique characteristics include a strong union presence representing and negotiating a majority of employment contracts, the relatively small number of technology-based businesses as compared to a large labor force, Nevada's ability, or inability to sustain a large business influx, and the concentration of urban-based jobs in small pockets scattered throughout the state.¹⁹¹

To balance interests while still drawing businesses into the state, Nevada should adopt a standard similar to Colorado's.¹⁹² Following this model, Nevada would simultaneously protect employers and limit restraint of trade by drawing distinctions between restraint of trade and trade secrets, specialized training, and executives.¹⁹³ Adopting a Colorado-type standard is advantageous to Nevada for three reasons. First, the new standard would leave all existing Nevada precedent intact.¹⁹⁴ Second, Colorado's controlling statute successfully balances the interests of employers and employees by protecting business investments and employee mobility.¹⁹⁵ Lastly, looking at major industries, Colorado's economic makeup is more similar to Nevada's than the economy of California or other states with a pro-employee approach.¹⁹⁶

Language similar to the Colorado statute would expand and elaborate on existing law, thereby creating a more predictable framework for everyone involved. Adopting a statute similar to Colorado's would not require overturning any existing precedent and the statute would not conflict with any existing laws.¹⁹⁷ Similar to Nevada's existing statute, Colorado generally voids any contract that restrains trade.¹⁹⁸ Likewise, Colorado's statute encompasses rather than contradicts the concepts that exist in Nevada law: a reasonableness standard, disfavor of covenants that restrain trade, fines for businesses enforce-

¹⁹⁰ COLUMBIA ENCYCLOPEDIA, *supra* note 175.

¹⁹¹ *Id.*; Nevada Union Facts, <http://www.unionfacts.com/states/state.cfm?state=NV> (last visited Feb. 28, 2010).

¹⁹² See COLO. REV. STAT. ANN. § 8-2-113 (West 2003) (titled "Unlawful to intimidate worker—agreement not to compete").

¹⁹³ *Id.* at § 8-2-113(2)(a)-(d).

¹⁹⁴ Compare *id.*, with *Traffic Control Servs. Inc. v. United Rentals Nw., Inc.*, 87 P.3d 1054, 1060 (Nev. 2004) ("Covenants not to compete are personal in nature and therefore are not assignable absent the employee's express consent."), and *Jones v. Deeter*, 913 P.2d 1272, 1275 (Nev. 1996) ("A restrictive covenant on employment will be upheld only if it is reasonably necessary to protect the business and goodwill of the employer."), and *Hansen v. Edwards*, 426 P.2d 792, 793 (Nev. 1967) ("The medical profession is not exempt from a restrictive covenant provided the covenant meets the tests of reasonableness.").

¹⁹⁵ COLO. REV. STAT. ANN. § 8-2-113(2) (West 2003) (voiding covenants not to compete except for those involving the sale of business, trade secrets, training expenses, and high-level employees).

¹⁹⁶ Colorado's major industries include agriculture, scientific technologies, financial services, information technology, and manufacturing. Colorado Office of Economic Development and International Trade, Major Industries and Employers, <http://www.colorado.gov/cs/Satellite/OEDIT/OEDIT/1167928218432> (last visited Feb. 28, 2010).

¹⁹⁷ See *supra* note 194 and accompanying text. Compare COLO. REV. STAT. ANN. § 8-2-113, with NEV. REV. STAT. § 613.200 (2007).

¹⁹⁸ COLO. REV. STAT. ANN. § 8-2-113(2).

ing such covenants, and disallowing assignment of non-competition agreements absent adequate consideration and agreement to be bound.¹⁹⁹

Legislative clarification would allow businesses to feel comfortable relocating businesses to Nevada, because it would create a predictable outcome easing the fears of employees agreeing to non-competition agreements. Accordingly, the statute would aid the judiciary in its decision-making processes because the legislative intent would be clear from the statute's plain language rather than legislative history. The adjudication process becomes less daunting for employers and employees and courts will be less hesitant to make decisions that could restrain trade.

A. *Blue-Pencil Doctrine*

On the same note, concerns of courts "blue-penciling" agreements would dissipate. Blue "is believed to be the color pencil used by editors in the past," hence the term "blue-penciling."²⁰⁰ Many times when a state's law is unclear, the judiciary employs the blue-pencil doctrine.²⁰¹ Blue-penciling refers to the "judicial standard for deciding whether to invalidate the whole contract or only the offending words."²⁰² Generally, there are "three schools of thought" when it comes to state use of the blue-pencil doctrine: "all or nothing," "blue pencil," or "partial enforcement."²⁰³ The "all or nothing" voids the offending covenant in its entirety, whereas "blue-penciling" strikes the offending clause and enforces all other reasonable contract terms.²⁰⁴ The last "school" of "partial enforcement" allows the judiciary to re-write contract terms.²⁰⁵ Therefore, strict blue-penciling allows the judiciary to strike contract clauses "by running a blue pencil through them, as opposed to changing, adding, or rearranging words."²⁰⁶

Courts are at liberty and obligated to blue-pencil contractual provisions that contradict public policy.²⁰⁷ That flexibility allows courts to either strike only the unreasonable clauses, or actually modify the agreement to encompass which the the parties "should have" agreed.²⁰⁸ This authority raises concerns about the freedom to contract, and overreaching of judicial authority.²⁰⁹ Furthermore, states that allow blue-penciling give employers no incentive to avoid

¹⁹⁹ See *supra* note 125 and accompanying text.

²⁰⁰ Kenneth R. Swift, *Void Agreements, Knocked-Out Terms, and Blue Pencils: Judicial and Legislative Handling of Unreasonable Terms in Noncompete Agreements*, 24 HOFSTRA LAB. & EMP. L.J. 223, 247 n.136 (2007).

²⁰¹ Pivateau, *supra* note 12, at 673.

²⁰² *Id.* at 681 (quoting BLACK'S LAW DICTIONARY 183 (8th ed. 2004)).

²⁰³ *Id.* at 682.

²⁰⁴ *Id.* Arizona is an "all or nothing" state and disallows any form of blue-penciling. See *e.g.* Valley Med. Specialists v. Farber, 982 P.2d 1277, 1286 (Ariz. 1999) ("Where the severability of the agreement is not evident from the contract itself, the court cannot create a new agreement for the parties to uphold the contract.") (quoting Olliver/Pilcher Ins. v. Daniels, 715 P.2d 1218, 1221 (Ariz. 1986)).

²⁰⁵ Pivateau, *supra* note 12, at 682.

²⁰⁶ *Id.* at 681 (quoting BLACK'S LAW DICTIONARY 183 (8th ed. 2004)).

²⁰⁷ *Id.* at 706.

²⁰⁸ *Id.* at 673.

²⁰⁹ *Id.* at 686 n.73.

overreaching and restrict employees who do not litigate the reasonableness of the provisions.²¹⁰ By limiting judicial blue-penciling, states significantly discourage employer overreaching and create stability for employees.²¹¹

By adopting Colorado's clear language, Nevada would avoid the trap of judicial blue-penciling. Furthermore, the Legislature could include a subsection disallowing judicial interference and voiding either the offending contractual provisions or the entire agreement.

B. Trade Secrets

Adopting a statute based on Colorado's statute would balance legitimate business interests while simultaneously protecting workers in both knowledge and labor-based fields. Unlike many other states' statutes, Colorado's statute carefully carves out exceptions to address public policy concerns.²¹² The Colorado statute protects employee interests overall; however, it allows minor exceptions to protect employers' business investments.²¹³ These exceptions are not unreasonable or overreaching in either direction because they protect the interests of the employer with only minimal burden on the employee. First, the statute allows "any contract for the protection of trade secrets."²¹⁴ Two key characteristics of creative skills-based or knowledge-based businesses are trade secrets and the business' desire to protect its intangible assets.²¹⁵ Colorado's statute addresses these key concerns of businesses. By protecting business investments in intellectual property, the statute creates an incentive for businesses to incorporate there.²¹⁶ However, this is not to suggest that the covenant need not be narrowly tailored and reasonable.²¹⁷ For example, in *Management Recruiters of Boulder, Inc. v. Miller*,²¹⁸ Management Recruiters sued Miller for a violation of a covenant not to compete.²¹⁹ The Colorado Court of Appeals held that the one-year restriction was narrowly tailored, reasonable, and

²¹⁰ *Id.* at 689.

²¹¹ *Deutsche Post Global Mail, Ltd. v. Conrad*, 292 F. Supp. 2d 748, 754 n.3 (D. Md. 2003) ("In my view to permit blue penciling encourages an employer to impose an overly broad restrictive covenant, knowing that if the covenant is challenged by an employee the only consequence suffered by the employer will be to have a court write a narrower restriction for it. This appears to me to be extremely unfair and contrary to sound public policy.").

²¹² COLO. REV. STAT. ANN. § 8-2-113(2) (West 2003).

²¹³ *Id.*

²¹⁴ *Id.* § 8-2-113(2)(b).

²¹⁵ Bishara, *supra* note 1, at 295.

²¹⁶ Note: A noncompetition contract clause is independent of any patent assignment clause generally included in contracts. Common law rule requires employees hired to make an invention to assign his employer any patent obtained. *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 187-88 (1933). However, when the employee is not specifically hired to invent products, but comes across an invention in the normal course of his employment, then the employee is the patent holder, but must allow the employer to use the patent without having to pay royalties. *Id.* Nevada law is pro-employer in this regard, giving intellectual property rights to the employer when an "employee during the course and scope of the employment that relates directly to work performed during the course and scope of the employment" creates "any patentable invention or trade secret." NEV. REV. STAT. § 600.500 (2007).

²¹⁷ *Mgmt. Recruiters of Boulder, Inc. v. Miller*, 762 P.2d 763, 765-66 (Colo. App. 1988).

²¹⁸ *Mgmt. Recruiters of Boulder, Inc. v. Miller*, 762 P.2d 763.

²¹⁹ *Id.* at 764.

enforceable.²²⁰ The covenant “prohibited Miller from contacting any ‘candidate’ with whom he had actual contact during his final year in Recruiters’ employ” thus “prevent[ing] the misappropriation of trade secrets by Miller.”²²¹

It is important to note the contrast between California and Colorado respecting covenants not to compete. Despite adopting laws favoring employees, California’s intellectual property market has flourished with companies like Apple, Google, and Sun Microsystems choosing to locate their headquarters there.²²² Colorado’s main business exports, beef and mineral ore, are more akin to Nevada’s main export, minerals, both of which are agricultural.²²³ Although it is not completely unreasonable to hope that Nevada will attract more businesses like California;²²⁴ however, Nevada is more likely to continue to develop like Colorado with mainly rural/urban hybrid cities and small pockets of ultra-urbanization.²²⁵

Further, commentators have recognized the monkey wrench that the internet throws into the equation by effectively eliminating all geographic boundaries and allowing for a global customer base.²²⁶ Consequently, geographic restrictions are ineffective and courts will invariably hold any covenants with expansive geographic limitations unreasonable.²²⁷ Therefore, narrow exceptions force businesses to draft covenants reasonably and narrowly, thus limiting their force.²²⁸ Specifically, this exception ensures employer protection while the general reasonableness standard protects employees as well.²²⁹

²²⁰ *Id.* at 766.

²²¹ *Id.*

²²² California’s “business climate has nurtured Google, Apple, Hewlett-Packard, Facebook, Twitter, Disney, Cisco, Intel, eBay, YouTube, MySpace, the Gap and countless other companies.” Michael Grunwald, *The End of California? Dream On!*, TIME, Nov. 2, 2009, at 28.

²²³ Nevada’s economy largely is fueled by gambling taxes, and gaming is the “primary economic industry in Nevada.” GAMING REGULATION IN NEVADA, *supra* note 176, at 10; COLUMBIA ENCYCLOPEDIA, *supra* note 175 (Nevada is the United States leading producer of gold, silver, and mercury). Colorado’s main exports are beef and mineral ore. U.S. Census Bureau, State Exports for Colorado, <http://www.census.gov/foreign-trade/statistics/state/data/co.html> (last visited Feb. 28, 2010).

²²⁴ California businesses are not relocating “to Nevada or anywhere else; . . . fewer than one-tenth of 1% of [California’s] jobs leave the state each year.” Grunwald, *supra* note 222, at 28.

²²⁵ Due to Nevada’s desert climate and the lack of available water, widespread urban growth is unlikely. See CHRISTINA ROESSLER, PROGRESSIVE LEADERSHIP ALLIANCE OF NEV., WHERE DOES IT START? WHERE WILL IT END? 2-3 (2006), available at <http://www.westernresourceadvocates.org/media/pdf/NV-water-pipeline-report.pdf>.

²²⁶ Barbara Pellow, *The E-Commerce Success Model . . . Supply Chain Management: Great Lakes Companies Embraces Change*, DIGITAL OUTPUT, Apr. 2003, available at <http://www.digitaloutput.net/content/contentct.asp?p=348>.

²²⁷ Joan T.A. Gabel & Nancy R. Mansfield, *The Information Revolution and Its Impact on the Employment Relationship: An Analysis of the Cyberspace Workplace*, 40 AM. BUS. L.J. 301, 323 (Dec. 2002).

²²⁸ *Id.*

²²⁹ *Id.*

C. Education and Training

The second relevant subsection of the Colorado statute allows employers to invest in employee education and training to promote their business without fear of losing their investment when employees leave to work for a competitor.²³⁰ In pertinent part, the subsection provides “for recovery of the expense of educating and training an employee who has served an employer for a period of less than two years.”²³¹ The two-year window is critical, especially for existing Nevada businesses in Clark and Washoe Counties. Although most unskilled service positions, such as housekeeping or kitchen helpers, do not require additional training,²³² other hospitality positions may require additional education in hotel management, managerial systems, internet technology, or gaming development.²³³

The two-year limitation encourages rapid development in these areas by allowing employers to recoup educational expenses that will remain current in two years. Nonetheless, this durational restriction is probably more beneficial in computer related businesses where the rapid growth of knowledge makes new technologies obsolete within days or months of conception rather than years.²³⁴ Colorado’s statute reflects the need to protect business investment in employee training by requiring that the contract contain a provision proscribing reimbursement for training expenses.²³⁵ Protecting knowledge-based businesses would enable Nevada to make a significant contribution to the nation’s economic recovery.

Furthermore, Colorado’s stance on covenants not to compete in the “at-will context” of employment comports better with earlier Nevada decisions than the *Camco* holding. Recently the *Lucht’s Concrete Pumping, Inc. v. Horner*²³⁶ court held that Colorado does not recognize continued at-will employment to be sufficient consideration for a covenant not to compete.²³⁷ In that case, Horner executed a post-employment non-competition agreement but was not given a “pay increase, promotion, or additional benefits in considera-

²³⁰ COLO. REV. STAT. ANN. § 8-2-113(2)(c) (West 2003).

²³¹ *Id.*

²³² Although service positions may entail extended training, continuing professional education is more prevalent in heavily academic fields.

²³³ Division of Educational Outreach, Business and Professional Development, http://edoutreach.unlv.edu/catalog/business_professional_programs.html (last visited Feb. 28, 2010). For example, the University of Nevada, Las Vegas offers Continuing Education Units in business essentials, and internet design and technology, among others. *Id.*

²³⁴ Jim Pinto, *Product Development Speed in the Internet Age*, CONTROLS INTELLIGENCE & PLANT SYSTEMS REPORT, June 2000, available at <http://www.jimpinto.com/writings/development.html> (“In the last century, new products took 3 years to develop. In the Internet age Time is critical and clearly a competitive weapon. With accelerating technology, some products are obsolete within months.”).

²³⁵ See *Dresser Indus., Inc. v. Sandvick*, 732 F.2d 783, 788 (10th Cir. 1984) (holding inapplicable the statute allowing contractual provision for recovery of training expenses where employee serves employer for less than two years where the employment agreement did not contain a provision requiring reimbursement of training expenses).

²³⁶ *Lucht’s Concrete Pumping, Inc. v. Horner*, No. 08CA0936, 2009 WL 1621306 (Colo. App. June 11, 2009).

²³⁷ *Id.* at *1.

tion of his new commitment.”²³⁸ Relying heavily on basic contract principles and the definition of consideration, the court rejected the defendant’s argument that continued employment constituted sufficient consideration.²³⁹ This reasoning is similar to the reasoning of the Nevada Supreme Court in *Hansen*, protecting the right to contract.²⁴⁰

The Colorado’s statute also protects employer interests by providing an exception for “executive and management personnel and officers and employees who constitute professional staff to executive and management personnel.”²⁴¹ This is especially relevant in light of current bank mergers and acquisitions, where the employees and secrets of two different employers become employees and secrets of the same company.²⁴² These protectable secrets may include proprietary knowledge of customer lists²⁴³ and other information that executives develop in the course of their employment, such as customer relations.²⁴⁴

Interestingly, this subsection fits perfectly with the reasoning of the Nevada Supreme Court in *Hansen* that non-competition restrictions do not apply to people who intend to be self-employed.²⁴⁵ Those professionals who advance to executive positions are able to be and are in some ways self-employed because of their independence through connections and experience. In Nevada, professionals have the opportunity to obtain future employment in diverse fields and thus the statute is not necessary to provide protection to employers.²⁴⁶

D. Specific Professions

The final relevant subsection of the statute voids covenants not to compete between and among physicians.²⁴⁷ The public policy concerns here are clear and are particularly apparent in light of the Kansas case, *Graham v. Cirrocco*, discussed above.²⁴⁸ However, the Kansas court was quick to note that although the agreement was facially reasonable, its effect was unreasonable in light of

²³⁸ *Id.* at *2.

²³⁹ *Id.*

²⁴⁰ In *Hansen*, the court’s final analysis pivoted around the “interest in protecting the freedom of persons to contract, and in enforcing contractual rights and obligations.” *Hansen v. Edwards*, 426 P.2d 792, 793 (Nev. 1967).

²⁴¹ COLO. REV. STAT. ANN. § 8-2-113(2)(d) (West 2003).

²⁴² See Eric Dash & Andrew Ross Sorkin, *Government Seizes WaMu and Sells Some Assets*, N.Y. TIMES, Sept. 25, 2008, at A1, available at http://www.nytimes.com/2008/09/26/business/26wamu.html?_r=1&pagewanted=all.

²⁴³ See Transcript of Motion Hearing, *Mutual of Omaha Bank v. Huntington*, 597 F. Supp. 2d 1213, *passim* (D. Nev. 2009) (No. 2:08-CV-1274-PMP-LRL).

²⁴⁴ NEV. REV. STAT. § 613.200(4)(b) (2007).

²⁴⁵ *Hansen v. Edwards*, 426 P.2d 792, 794 (Nev. 1967).

²⁴⁶ The *Hansen* court specifically states that the Nevada statute “concerns only persons who seek employment with someone else, not those who intend self-employment.” *Id.* If those who reach upper echelons of management and control in corporations are intending to be self-employed, then it is reasonably implied the Nevada statute will not apply or protect employers.

²⁴⁷ COLO. REV. STAT. ANN. § 8-2-113(3) (West 2003).

²⁴⁸ *Graham v. Cirrocco*, 69 P.3d 194, 200 (Kan. Ct. App. 2003).

public policy.²⁴⁹ It is apparent that the restriction in *Graham* was unreasonable because prohibiting practice within twenty-five miles of any hospital or practice for two-years created a virtual monopoly on the doctor's specialty.²⁵⁰ Moreover, in *Ellis* the court made clear that voiding covenants that limit competition in medical specialties serves the public interest.²⁵¹ This provision is especially significant to Nevada because of the shortage of doctors, nurses, and other medical professionals.²⁵² Additionally, in light of the recent events within the medical community, any monopolization of any specialty would be detrimental to the public health.²⁵³ Protecting physicians would encourage more doctors to relocate to Nevada by reducing the risk of possible bad partnerships and litigation based on non-competition agreements.

Additionally, this subsection could be modified to include attorneys. Other states classify lawyers as protected professionals because they recognize the public benefit in allowing clients to choose freely their legal representation.²⁵⁴ One logical argument supporting this policy is that loyalty does not naturally pass to the firm but rather to the individual attorney involved and restricting the client's choice to one firm is beyond the reach of the state's power.

E. Nevada, California, and Colorado

Although Nevada traditionally looks to its neighbor, California, when adopting new laws,²⁵⁵ Nevada's economic and social composition is more akin to Colorado than California. As mentioned above, Nevada's silver mining is more akin to Colorado's agricultural exports than California's Silicon Valley. Remarkably, Silicon Valley produces the majority of California's primary export—computers and electronics—despite being a small pocket of industry situated in Northern California.²⁵⁶ Thus, although California's pro-employee

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 199, 200.

²⁵¹ *Ellis v. McDaniel*, 596 P.2d 222, 225 (Nev. 1979).

²⁵² Lawrence Mower, *Doctor Shortage: Help Sought South of Border*, LAS VEGAS REV.-J., Jan. 22, 2007, http://www.reviewjournal.com/lvrj_home/2007/Jan-22-Mon-2007/news/12071369.html.

²⁵³ Annette Wells, *Public Health Crisis: Insurers Drop Clinics, Doctors*, LAS VEGAS REV.-J., May 28, 2008, <http://www.lvrj.com/news/17079896.html>. One such medical crisis is the recent Hepatitis C outbreak springing from Endoscopy Center of Nevada's reuse of contaminated syringes, which put many patients at risk for disease.

²⁵⁴ See Cattani et al., *supra* note 42, § 2.1.4(d).

²⁵⁵ STATE BAR OF NEVADA, 1 NEVADA CIVIL PRACTICE MANUAL § 1.03 (2006) ("California law has been a prominent source of Nevada law since the inception of statehood."); see, e.g., *Clark v. Lubritz*, 944 P.2d 861, 865 n.6 (Nev. 1997) ("Nevada's statute on punitive damages is a verbatim copy of the California punitive damages statute. . . . [W]e have adhered to the rule of statutory interpretation that when a statute is derived from a sister state, it is presumably adopted with the construction given it by the highest court of the sister state." (alteration in original) (quoting *Craig v. Circus-Circus Enters.*, 786 P.2d 22, 23 (Nev. 1990))).

²⁵⁶ CalChamber, *Trade Statistics*, <http://www.calchamber.com/BusinessResources/InternationalResources/AllAboutInternationalTrade/Pages/TradeStatistics.aspx> (last visited Feb. 28, 2010) ("California is the number one exporter in the nation of computers, electronic products, and sales of food and kindred products. Computers and electronic products are California's top export, accounting for 42 percent of all the state's exports.").

laws protect employees in all fields, intellectual fields are being most greatly affected.²⁵⁷

Although Colorado law is a sound resource for Nevada legislators, any new legislation must consider Nevada's unique economy. When adopting forward-looking laws, Nevada legislators' foremost concern should be striking a balance that considers and addresses the interests of both employers and employees. In a state built on the shoulders of its workforce, it would be irresponsible to create laws that do not protect the state's workforce which is arguably the state's most valuable asset. However, protecting employees does not require the state to value employees over employers. Accordingly, the legislature can recognize the symbiotic relationship between employers and employees with new legislation. As neither consideration trumps the other, legislators should weigh each group's interests and factor and incorporate them into any law.

Although covenants not to compete are a restraint on trade, not all are unreasonable or unnecessary.²⁵⁸ A balanced agreement begins with drafting a covenant where both sides have equal bargaining power, responsibilities, and rights.²⁵⁹ Thus, employers should not be able to economically strong-arm employees into these agreements, and employees should not be allowed to benefit at the expense of a company's investment in their development. Although California has extremely pro-employee laws, the state's reasoning reflects the state's characteristics and is beneficial for its residents. Commentators looking at California reason that any restraint on trade that limits freedom of competition and an employee's right to move between jobs retards the free-flow of information.²⁶⁰ The free-flow of ideas and knowledge allows technology and society to develop at a rapid pace.²⁶¹ However, despite California's success, this free-flow does not need to come at complete expense of business owners. In a capitalist society, all sides can mutually benefit.²⁶² Legal protections must reflect a society's values. Therefore, Nevada should allow businesses to protect "its investment in human resources, customer relationships, and confidential business information" to ensure its "continued economic viability."²⁶³ Legislators should extend this legal protection to allow full mobility of employees. Accordingly, businesses should not be able to trap employees into continued employment by holding a non-competition agreement over their heads; employees should be allowed to seek better work when conditions are less than ideal. Likewise, businesses should be able to recoup their economic investments in employee training while that training is still relevant. A solution that

²⁵⁷ Bishara, *supra* note 1, at 307-08.

²⁵⁸ See, e.g., *Camco, Inc. v. Baker*, 936 P.2d 829, 832-833 (Nev. 1997).

²⁵⁹ See Pivateau, *supra* note 12, at 675 (noting that employers must carefully consider the terms and conditions of employee contracts, so as to correctly value and draft the agreement).

²⁶⁰ Bishara, *supra* note 1, at 307-08.

²⁶¹ See *id.* (arguing that the success of Silicon Valley, California and its "high velocity" labor market are a result of the state's ban on non-competes).

²⁶² See generally Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, reprinted in SCOTT B. RAE & KENMAN L. WONG, BEYOND INTEGRITY 131 (2d ed. 2004).

²⁶³ Gabel & Mansfield, *supra* note 227, at 321.

values organic development and respect, engages both employers and employees. Consequently, employees would take ownership of their labor and produce better work, while employers' investment in human capital would generate development at exponential rates. Adopting these principles will dissolve, or at least alleviate to a non-crippling degree, the culture of fear surrounding non-competition agreements.

Regulation of restrictive covenants also serves the public interest. By providing reasonable protection to employers and employees, the public interest gains access to higher levels of specialization and expertise. Capitalism is founded on competition which keeps businesses "focused on providing the best quality product or service," "leads to the development of new products and innovative technologies," and ultimately "provide[s] selection" and lower cost goods to the consumer.²⁶⁴ Therefore, the very nature of competition will encourage consumers to seek out the best physician, lawyer, contractor, or other creative mind, and thus those professionals will have to produce increasingly better service to enjoy business success.²⁶⁵ Regulation of covenants not to compete helps prevent monopolies and drives innovation forward. Although it is imprudent to expect utopian results, Nevada would be irresponsible if it failed to push for positive change in novel ways.

A new statute must retain the underlying foundation of a contractual agreement, including the presence of consideration. Additionally, covenants should avoid boilerplate clauses and narrowly tailor each covenant to the particular employee based on his credentials, expertise, position, and needs. Although this increases the initial burden on employers, it would reduce the amount of litigation and frustration in the event of termination. Consequently, employees will not fear leaving their jobs, employers will not fear judicial blue-penciling of otherwise reasonable contract terms, and future employers will seek additional expertise without unfairly benefiting from other company's investment.²⁶⁶

Unlike most states, Nevada's statutory solution must address the abundance of unions.²⁶⁷ Although many employment contracts are boilerplate and pre-negotiated with union officials, this statute will still prove to be beneficial for intermediate managerial positions.²⁶⁸

Most of the time, employers will not deem it beneficial to litigate losing a labor-based service to a competitor. Rather, these "collateral losses" are typical in the hotel and casino industries.²⁶⁹ Notably, this change would significantly affect only the two most urban of Nevada's thirteen counties, Washoe and

²⁶⁴ Dakota State University, Center for TechnoEntrepreneurism, <http://www.ct.dsu.edu/laic.htm> (last visited Feb. 28, 2010).

²⁶⁵ *Id.*

²⁶⁶ Pivateau, *supra* note 12, at 705-06.

²⁶⁷ See UnionFacts.com, *supra* note 191.

²⁶⁸ *Id.*; Musicians Union of Las Vegas, Local No. 369 v. Del E. Webb Corp. 736 F.2d 1388, 1391 (9th Cir. 1984), *reh'g denied, amended, and superseded* 117 L.R.R.M. (BNA) 2409 (9th Cir. 1984) ("Consequently, union members necessarily forfeit the power individually to negotiate the terms and conditions of their employment.").

²⁶⁹ Press Release, Hotel-Online.com, *EI-AH&MA / KPMG Study Finds Hotel Industry Turnover Rates Continue to Climb* (April 1998), available at http://www.hotel-online.com/News/PressReleases1998_2nd/EITurnoverRatesClimb_May98.html.

Clark.²⁷⁰ Nonetheless, the majority of Nevada's land continues to be rural and consists of low-populations or clusters of people.²⁷¹ Rural counties contribute more land than population to the state.²⁷² However, if the proposed statute has the anticipated effect, then rural areas should realize population growth and increased economic significance as a result of increased business.

CONCLUSION

Employment situations become especially troublesome when restrictive covenants prevent employees seeking career advancement from searching out new employment, or employers from hiring qualified applicants. Essentially, covenants not to compete create a stalemate. Employers fear discharging employees, employees fear leaving, and future employers fear potential lawsuits. However, Nevada can avoid or at least significantly alleviate this predicament by adopting new laws governing covenants not to compete. Most states prohibit assigning employment contracts, including any restrictive covenants contained within them.²⁷³ It is imperative for Nevada to develop law in this area because Nevada's continued economic growth depends on protecting its workforce while simultaneously encouraging new businesses to incorporate in Nevada. Thus, Nevada should look to both California and Colorado when crafting a statute uniquely tailored to its economy.

California's underlying policy and demonstrated success should inform Nevada's decision making process. Despite extremely pro-employee laws, California has experienced success in emerging markets such as computers and electronics.²⁷⁴ It subscribes to the reasoning advanced by some academics that laws protecting employee mobility force employers to move quickly to reap the benefits of their investment into human capital²⁷⁵ and result in more rapid development of innovation.²⁷⁶ Regardless of the theory's validity, California has done well for itself.²⁷⁷ Although Nevada's laws mirror California's, its economy bears a closer resemblance to Colorado economy than it does to California. Hence, Colorado's statutes incorporate effective strategies for a similar economy. First, both Nevada and Colorado are at-will states.²⁷⁸ Second, both states rely largely on tourism and agriculture to generate tax revenue. Finally,

²⁷⁰ U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004-2005 at 20, 27 (124th ed. 2004) (showing that over 70% of Nevada's population resides in Las Vegas, Clark County); Nevada Dept. of Employment Training & Rehabilitation, *Current Nevada Economic Indicators 4*, available at <http://www.nevadaworkforce.com/article.asp?PAGEID=&SUBID=&ARTICLEID=2749&SEGMENTID=0>. Additionally, Clark and Washoe Counties are the two largest generators of gaming revenue in Nevada.

²⁷¹ Merriam-Webster, *Nevada*, <http://www.merriam-webster.com/cgi-bin/nytmaps.pl?nevada> (last visited Feb. 28, 2010). Only 0.6% of Nevada's total area is "urban and built-up areas." *Id.*

²⁷² *Id.* at 28 (91.5% of Nevada's population is concentrated in urban areas).

²⁷³ ROTHSTEIN ET AL., *supra* note 7, at 360.

²⁷⁴ CalChamber, *supra* note 256 and accompanying text.

²⁷⁵ Gilson, *supra* note 75, *passim*.

²⁷⁶ *Id.* at 575.

²⁷⁷ CalChamber, *supra* note 256 and accompanying text.

²⁷⁸ *Vaske v. DuCharme, McMillen & Assoc., Inc.*, 757 F. Supp. 1158, 1161 (D. Colo. 1990); *Camco, Inc. v. Baker*, 936 P.2d 829, 832 (Nev. 1997).

and perhaps most importantly, both already have laws that disfavor but allow post-employment restrictive covenants.²⁷⁹ Thus, Nevada can adopt Colorado law without disrupting any legal precedent.²⁸⁰

If Nevada adopts the Colorado statute it would protect both businesses and employees. In particular, adopting Colorado's statute would address trade secret protection, employee training and education, and particular professions. Moreover, protecting trade secrets provides incentive for businesses to incorporate in Nevada. However, to balance interests, any covenant must be narrowly tailored and reasonable.²⁸¹ Investment in education and training affects Nevada particularly. Adopting the Colorado statute would allow employers to invest in employee education and training without fear of losing their investment.²⁸² It is important for the Nevada statute to draw upon Colorado's case law and require explicit contract provisions proscribing reimbursement of training expenses.²⁸³ Essentially, a contract would clearly state the conditions under which an employee would be obligated to reimburse an employer for training received during employment. Lastly, the newly amended statute should specifically identify the professions where restrictive covenants are void for public policy. For example, the statute should reflect the public policy decision that the law should not create a virtual monopoly on a doctor's specialty.²⁸⁴ This minor exception still follows Nevada's current case law but would encourage more doctors to come to Nevada. Additionally, the statute should also provide an exception for attorneys because the law should allow clients to freely choose their legal representation.²⁸⁵ Therefore, restricting the clients' choice is beyond the reach of state's power and breaches the American Bar Association's model code.²⁸⁶

Now is the time for Nevada to act and insulate itself, in the area of employment. With the benefit of hindsight, Nevada law can adopt a law that reflects modern trends in employment law, protects knowledge-based fields, businesses, employees, and bolsters Nevada's economic stability. Through the adoption of these new laws, Nevada will attract more business to the state and protect its workforce. The proposed balanced standard presents a tenable solution respecting Nevada's workforce and economy.

²⁷⁹ COLO. REV. STAT. ANN. § 8-2-113 (West 2003); NEV. REV. STAT. § 613.200 (2007).

²⁸⁰ See NEV. REV. STAT. § 613.200; see *supra* note 194 and accompanying text.

²⁸¹ *Mgmt. Recruiters of Boulder, Inc. v. Miller*, 762 P.2d 763, 766 (Colo. App. Ct. 1988) (upholding a narrowly construed and reasonable non-compete agreement).

²⁸² COLO. REV. STAT. ANN. § 8-2-113(2)(c).

²⁸³ *Dresser Indus., Inc. v. Sandvick*, 732 F.2d 783, 788 (10th Cir. 1984). In *Dresser*, the court held that the statute was inapplicable because the "employment agreements contained no provision requiring reimbursement of training expenses." *Id.* This is instructive to require Nevada employment contracts to contain a reimbursement provision.

²⁸⁴ *Graham v. Cirocco*, 69 P.3d 194, 199 (Kan. Ct. App. 2003).

²⁸⁵ Cattani et al., *supra* note 42, § 2.1.4(d).

²⁸⁶ See *id.* The Massachusetts Model Rule 5.6 mirrors the corresponding ABA Model Rule except in reference to private parties.

APPENDIX

Current Nevada Statute

§ 613.200 Prevention of employment of person who has been discharged or who terminates employment unlawful; criminal and administrative penalties; exception.

1. Except as otherwise provided in this section, any person, association, company or corporation within this State, or any agent or officer on behalf of the person, association, company or corporation, who willfully does anything intended to prevent any person who for any cause left or was discharged from his or its employ from obtaining employment elsewhere in this State is guilty of a gross misdemeanor and shall be punished by a fine of not more than \$5,000.
2. In addition to any other remedy or penalty, the Labor Commissioner may impose against each culpable party an administrative penalty of not more than \$5,000 for each such violation.
3. If a fine or an administrative penalty is imposed pursuant to this section, the costs of the proceeding, including investigative costs and attorney's fees, may be recovered by the Labor Commissioner.
4. The provisions of this section do not prohibit a person, association, company, corporation, agent or officer from negotiating, executing and enforcing an agreement with an employee of the person, association, company or corporation which, upon termination of the employment, prohibits the employee from:
 - a. Pursuing a similar vocation in competition with or becoming employed by a competitor of the person, association, company or corporation; or
 - b. Disclosing any trade secrets, business methods, lists of customers, secret formulas or processes or confidential information learned or obtained during the course of his employment with the person, association, company or corporation, if the agreement is supported by valuable consideration and is otherwise reasonable in its scope and duration.

Proposed Nevada Statute

§ 613.200 Prevention of employment of person who has been discharged or who terminates employment unlawful; criminal and administrative penalties; exception.

1. Except as otherwise provided in this section, any person, association, company or corporation within this State, or any agent or officer on behalf of the person, association, company or corporation, who willfully does anything intended to prevent any person who for any cause left or was discharged from his or its employ from obtaining employment elsewhere in this State is guilty of a gross misdemeanor and shall be punished by a fine of not more than \$5,000.
2. In addition to any other remedy or penalty, the Labor Commissioner may impose against each culpable party an administrative penalty of not more than \$5,000 for each such violation.
3. If a fine or an administrative penalty is imposed pursuant to this section, the costs of the proceeding, including investigative costs and attorney's fees, may be recovered by the Labor Commissioner.
4. ~~The provisions of this section do not prohibit a person, association, company, corporation, agent or officer from negotiating, executing and enforcing an agreement with an employee of the person, association, company or corporation which, upon termination of the employment, prohibits the employee from:~~
 - a. ~~Pursuing a similar vocation in competition with or becoming employed by a competitor of the person, association, company or corporation; or~~

- ~~b. Disclosing any trade secrets, business methods, lists of customers, secret formulas or processes or confidential information learned or obtained during the course of his employment with the person, association, company or corporation, if the agreement is supported by valuable consideration and is otherwise reasonable in its scope and duration.~~
- 4. Any covenant not to compete which restricts the right of any person to receive compensation for performance of skilled or unskilled labor for any employer shall be void, but this subsection shall not apply to:**
- a. Any contract for the purchase and sale of a business or the assets of a business;**
 - b. Any contract for the protection of trade secrets;**
 - c. Any contractual provision providing for recovery of the expense of educating and training an employee who has served an employer for a period of less than two years;**
 - d. Executive and management personnel and officers and employees who constitute professional staff to executive and management personnel.**
- 5. Any covenant not to compete provision of an employment, partnership, or corporate agreement between physicians which restricts the right of a physician to practice medicine, upon termination of such agreement, shall be void; except that all other provisions of such an agreement enforceable at law, including provisions which require the payment of damages in an amount that is reasonably related to the injury suffered by reason of termination of the agreement, shall be enforceable. Provisions which require the payment of damages upon termination of the agreement may include, but not be limited to, damages related to competition.**
- 6. In a civil action brought against the employer, the court may not create a new agreement for the parties to uphold the contract where the severability of the agreement is not evident from the contract itself.**