RESTRICTIONS ON
POST EMPLOYMENT COMPETITION:
Contractual and Statutory Restraint

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INTRODUCTION

Legal rights within the employment relationship continue to change. Although Iowa formally adheres to the at-will employment doctrine, French v. Foods, Inc., 495 N.W.2d 768, 769 (Iowa 1993); Fogel v. Trustees of Iowa College, 446 N.W.2d 451, 455 (Iowa 1989), employment litigation challenging that principle mushrooms. Starting with the enactment of traditional labor (union) legislation, Congress, state legislatures and municipalities began to enact a large number of statutory exceptions to at-will employment. These exceptions constitute clearly articulated public policy limitations upon an employer’s ability to terminate the employment relationship.¹

The courts, also, have eroded the concept of at-will employment and, by definition, the notion of freedom to contract. The Iowa Supreme Court has authorized new causes of action for termination of the employment relationship based upon “pseudo” contract principles. See, e.g., French v. Foods, Inc., 495 N.W.2d 768, 770 (Iowa 1993); McBride v. City of Sioux City, 444 N.W.2d 85, 90 (Iowa 1989); Cannon v. National By-Products, Inc., 422 N.W.2d 638, 640 (Iowa 1988) (employment handbook claims). The court has also recognized claims for wrongful termination in violation of public policy. See, e.g., Jasper v. H. Nizam, Inc., 764 N.W.2d 751, 766-67 (Iowa 2009) (administrative regulations may serve as the basis of a clear public policy serving as the basis of the cause of action); Springer v. Weeks & Leo Co., 429 N.W.2d 558 (Iowa 1988).

Concurrent with the rise in government involvement in business has been a lessening of parties’ unfettered right to contract as they choose with respect to the employment relationship. The expansion of employee rights and growing restrictions on employers’ ability to terminate the employment relationship have led to increased employment and labor litigation. Because such litigation usually relates to a breakdown of personal relationships, also, court battles are often fought in highly charged and personal terms. Such cases are often similar to litigation regarding dissolution of marriage or other family relations matters.

The general observations clearly hold true with respect to litigation aimed at restricting a former employee’s activities competitive with the previous employer’s business. Questions addressing former employees’ right to compete were litigated even before the rapid advancement of technology and economic changes. The present context, however, is a radical departure from those concerns. The legal doctrine of at-will employment, which once flourished, is now undergoing a period of transition that substantially limits the freedom of employers to terminate employees and, in turn, the freedom of employees to achieve a livelihood in an increasingly competitive world.

of employee rights (and the increased technological complexity of the business world). Some time ago, rules were established by the courts. At least ostensibly, those rules still govern. However, changes in society’s view of the employment relationship and changes in the legal rules governing employment have affected judicial analysis of the legal issues. The result has been a large and growing body of case law and legal precedent. See, e.g., Covenants Not to Compete, a State-by-State Survey, ABA Section of Labor and Employment Law (1991 & 1996 Supp.); Empirical Study, a Statistical Analysis of Non-Competition Clauses in Employment Contracts, 15 J. Corp. L. 483, 485 (1990). That legal precedent, based upon application of legal principles to individual fact settings (and generally addressed by courts in equity), is exceedingly diverse, divergent and contradictory. Despite (or perhaps because of) the abundance of legal precedent, commentators have decried the “exceptional degree of unpredictability” with respect to the area. Non-Competition Clauses, supra, 15 J. Corp. L. at 486.2

Lawyers who have been involved in litigation seeking to impose competitive restrictions on individuals soon begin to understand and appreciate the overriding feature of such litigation—unpredictability. Case law must be the starting point. Nonetheless, analysis of specific factual circumstances solely by reference to reported case decisions is and can be, at best, only partially successful. Worse, relying only on case authority, likely, will be misleading and, ultimately, expensive. However, since case law is what is available for analysis, it is appropriate to address various articulated considerations of Iowa courts with respect to competition questions and practical contexts in which those traditionally articulated considerations arise. In large part because of the shortcomings of contract-based competitive restrictions litigation, other legal theories are becoming increasingly popular. Alternative litigation approaches also merit discussion.

COVENANTS NOT TO COMPETE

A. LEGITIMATE COMPETITION ABSENT CONTRACTUAL RESTRAINT

There is not much case law directly articulating what constitutes non-actionable post-employment competition generally, although the cases in which courts have held covenants not to

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2 The Iowa Supreme Court has noted that there “is a fair consensus on the rules governing restraints on competition in employment contracts, but difficulty frequently arises in applying the rules to individual cases.” Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376, 381 (Iowa 1983). Similarly, in Curtis 1000, Inc. v. Youngblade, 878 F.Supp. 1224, 1256 (N.D. Iowa 1995), Judge Bennett quoted a decision describing case law on non-competition agreements as a “‘sea—vast and vacillating, overlapping and bewildering. One can fish out of it any kind of strange support for anything . . . .’” (citation omitted). Unpredictability has led to at least one effort to attempt to assess as many as 35 separate variables affecting judicial outcomes in non-competition cases. Non-Competition Clauses, supra, 15 J. Corp. L. at 533, App. B.
compete unenforceable, discussed below, demonstrate situations in which courts have found competition to be non-actionable. As a general matter, tort law suggests the limits of appropriate competition.\(^3\) There is no generalized duty imposed upon an individual that would prohibit competition with former employers. \textit{Lemmon v. Hendrickson}, 559 N.W.2d 278, 280-81 (Iowa 1997) (quoting Restatement (Second) of Agency § 396 at 223 (1958)). Other factors being equal,\(^4\) conduct that does not constitute tortious interference with existing or prospective contractual relations is otherwise legitimate. See, e.g., \textit{Nesler v. Fisher & Co.}, 452 N.W.2d 191, 194-95 (1990); \textit{C.F. Sales, Inc. v. Amfert, Inc.}, 344 N.W.2d 543, 555 (Iowa 1983); \textit{Toney v. Casey’s General Stores, Inc.}, 460 N.W.2d 849 (Iowa 1990).

In general, Iowa looks to the Restatement (Second) of Torts to establish conduct that is prohibited. See \textit{Hunter v. Board of Trustees}, 481 N.W.2d 510, 518 (Iowa 1992); Restatement (Second) of Torts §767. The Restatement also assists in determining the scope of permissible competition.

One’s privilege to engage in business and to compete with others implies a privilege to induce third persons to do their business with him rather than with his competitors. In order not to hamper competition unduly, the rule . . . entitles one not only to seek to divert business from his competitors generally but also from a particular competitor. And he may seek to do so directly by express inducement as well as indirectly by attractive offers of his own goods or services.

Restatement (Second) of Torts §768, Comment (b).

Within the context of this statement favoring competition, contractual restrictions on an employee’s ability to compete after the employment relationship has terminated have, fairly understandably, been viewed with lack of full approval. Although the view of the courts may be changing, generally, contractual covenants not to compete have been looked upon by the Iowa courts with disfavor. “We start with a basic tenet that restraints on competition and trade are disfavored in the law. Exceptions are made under narrowly prescribed limitations.” \textit{Uptown Food Store, Inc. v. Ginsberg}, 255 Iowa 462, 467, 123 N.W.2d 59, 62-63 (1963); see also \textit{Revere Transducers, Inc. v. Deere & Co.}, 595 N.W.2d 751, 761 (Iowa 1999) (“noncompete agreements are viewed as restraints of trade which limit an employee’s freedom of movement among

\(^3\) Trade secrets litigation is addressed separately below.

\(^4\) This analysis does not in any way attempt to encompass anti-trust or trade restriction considerations.

B. REASONABLENESS AS THE STANDARD DETERMINING ENFORCEABILITY

Before 1971, Iowa followed the traditional approach, entirely striking down post-employment contractual restrictions that the court found to be overbroad in any respect. See, e.g., Smith v. Stowell, 256 Iowa 165, 125 N.W.2d 795 (1964). In Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368, 369 (Iowa 1971), the Iowa Supreme Court rejected the all-or-nothing approach and, to that extent, overruled earlier case law. Under Ehlers, the court adopted the:

rule that unless the facts and circumstances indicate bad faith on the part of the employer, we will enforce non-competitive covenants to the extent that they are reasonably necessary to protect his legitimate interests without imposing undue hardship on the employee when the public interest is not adversely affected.

188 N.W.2d at 370 (emphasis added). In other words, the court will tailor a covenant not to compete so that it can be enforced.6

1. Factors determining reasonableness.

Determining reasonableness is, necessarily, dependent upon the specific facts and circumstances of a given case. Adding to the complexity of analysis is the clearly stated position

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5 In Dental Prosthetic Services, Inc. v. Hurst, 463 N.W.2d 36, 39 (Iowa 1990), the court attempted to synthesize the two views of no-compete agreements, deciding that a covenant not to compete in the employment setting “being in restraint of trade and personal liberty, should not be construed to extend beyond its fair import.” The case itself illustrates that the test does not provide much guidance. Expert testimony was presented at trial whether defendant’s premises were 50 or 52 miles from plaintiff’s. 463 N.W.2d at 38. The court held that plaintiff failed to prove defendant’s location was within the 50 miles prohibited under the agreement. Id. Thereafter, the court construed the contractual prohibition against engaging in business “directly or indirectly within a radius of 50 miles” not to include “delivering” to, “calling”.

However, the Iowa Supreme Court has also noted that there is “no public policy or rule of law which condemns or holds in disfavor a fair and reasonable agreement [restricting competition], and such a contract is entitled to the same reasonable construction and the same effective enforcement that are accorded to business obligations in general.” Kunz v. Bock, 163 N.W.2d 442, 445 (1969) (quoting Sickle v. Lauman, 185 Iowa 37, 169 N.W. 670 (1918)). Moreover, Judge Reade commented in American Express Financial Advisors, Inc. v. Yantis, 358 F Supp 2d 818, 836 (N.D. Iowa 2005), that the “public interest calls for enforcement of a valid restrictive covenant clause in a contract.”

6 Even under the Ehlers rule, however, lawyers involved in no-compete litigation must be mindful that the proponent of the contractual restriction must ask the court for partial enforcement and modification of the agreement. Failure to do so may, in effect, result in reversion to the all-or-nothing approach. See Lamp v. American Prosthetics, Inc., 379 N.W.2d 909, 911 (Iowa 1986) (“while Ehlers allows for modification of such agreements, it does not require a court to do so sua sponte.”); see also, M & F Livestock v. Mohr, 2009 WL 1491896 (Iowa App.) (affirming trial court refusal to reform agreement that was unreasonably restrictive and contrary to public policy).
of the Iowa Supreme Court that the:

reasonableness of the restraint and the validity of the covenant seldom depend exclusively on a single fact. Rather, all the facts must be considered and weighed carefully, and each case must be determined in its entire circumstances. Only then can a reasonable balance be struck between the interests of the employer and the employee upon or “servicing” customers “at their place of business”, even if a customer’s place of business was within the 50 mile radius. Id. at 39.

Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376, 382 (Iowa 1983); Baker v. Starkey, 259
Iowa 480, 495, 144 N.W.2d 889, 897-98 (Iowa 1966).

In applying the reasonableness standard, the court will seek to:

maintain[ ] a proper balance between the interests of the employer and the employee. Although we must afford fair protection to the business interests of the employer, the restriction on the employee must be no greater than necessary to protect the employer. Moreover, the covenant must not be oppressive or create hardships on the employee out of proportion to the benefits the employer may be expected to gain.

Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376, 381 (Iowa 1983); see Mutual Loan Co. v. Pierce, 245 Iowa 1051, 1055, 65 N.W.2d 405, 407 (1954). The burden to establish reasonableness, quite appropriately, rests with the employer seeking to enforce the restriction. Iowa Glass, 338 N.W.2d at 381.

In determining the reasonableness of the covenant not to compete, the court “will apply a three-prong test: (1) Is the restriction reasonably necessary for the protection of the employer’s business; (2) Is it unreasonably restrictive of the employee’s rights; and (3) Is it prejudicial to the public interest?” Lamp v. American Prosthetics, Inc., 379 N.W.2d 909, 910 (Iowa 1986).

2. Employer’s interest.

Factors considered generally in trying to evaluate the employer’s interest include long term customer relationships, good will, and the employee’s access to confidential information or trade secrets, customer lists, unique training and skills. A. Valiulis, Covenants Not to Compete, Forms, Tactics and the Law 15-16 (1985); 54 Am.Jur.2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §512 (1971). As the Iowa Supreme Court stated in Iowa Glass, however, “proximity to customers is only one aspect. Other aspects, including the nature of the business itself, accessibility to information peculiar to the employer’s business and the nature of the occupation which is restrained, must be considered along with matters of basic fairness.” 338
The courts tend to uphold restrictive covenants when the employee is in a position of close customer relationship and has the opportunity to pirate customers from the employer at the termination of employment. See, e.g., Curtis 1000, Inc. v. Youngblade, 878 F. Supp. 1224, 1270, 1273-74 (N.D. Iowa 1995); Farm Bureau Services Co. v. Kohls, 203 N.W.2d 209 (Iowa 1972); Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368 (Iowa 1971); White Pigeon Agency, Inc. v. Madden, 2001 W.L. 855366 (Iowa App. 2001) (trial court reversed, injunction prohibiting customer contact ordered). However, an employer is not “entitled to an injunction without some showing that defendant, when he left plaintiff’s employment, pirated or had the chance to pirate part of plaintiff’s business; or it can reasonably be expected some of the patrons or customers he served while in plaintiff’s employment will follow him to the new employment.” Mutual Loan Co. v. Pierce, 65 N.W.2d 405, 408 (Iowa 1954). But see Professional Building Services of the Quad Cities, Inc. v. DeClerck, 2002 W.L. 1058888 (S.D. Iowa 2002) (entering permanent injunction prohibiting solicitation of plaintiff’s customers and communication or use of plaintiff’s confidential or proprietary business information despite the observation of the court that the “[r]ecord evidence reveals no basis upon which the court can conclude Defendant had confidential information, imparted confidential information, solicited Plaintiff’s customers, or was used as an enticement to Plaintiff’s customers.”).

Many of the cases in which covenants not to compete have been enforced fall into a category the Supreme Court has called “route cases,” in which covenants are enforced (if otherwise reasonable in time and geographic area) because “the employee has had a close contact with the employer’s customers and it is only fair on termination of his employment, there be an interval when a new employee will be able to get acquainted with the customers.” Mutual Loan Co. v. Pierce, 65 N.W.2d 405, 409 (Iowa 1954); see e.g., Farm Bureau Services Co. v. Kohls, 203 N.W.2d 209 (Iowa 1972) (restriction enforced where employee was given a designated area in which he routinely serviced his employer’s customers); Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368 (Iowa 1971) (restriction enforced where there was close client contact).7

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7 Also, Moore Business Forms, Inc. v. Wilson, 953 F.Supp. 1056 (N.D. Iowa 1996). In Moore, Judge Melloy granted preliminary injunction, enforcing a customer limitation (but only for key accounts) against a husband and wife team based upon a balance of harms analysis.
Similarly, in Orkin Exterminating Co. v. Burnett, 146 N.W.2d 320, 323 (Iowa 1967), the Supreme Court enforced a restrictive covenant prohibiting for three years competition within ten miles of any town the former employee had serviced because the employee was given an established route for which he regularly serviced company accounts. See also, Curtis 1000, Inc. v. Youngblade, 878 F.Supp. 1224 (N.D. Iowa 1995) (preliminary injunction granted to enforce two year, “assigned territory” covenant); Presto-X-Co. v. Ewing, 442 N.W.2d 85, 88 (Iowa 1989) (covenant enforced with respect to customers)8; Dental East, P.C. v. Westercamp, 423 N.W.2d 553, 555 (Iowa App. 1988) (damages recoverable against dentist who violated 2 year, 25 mile, patients only restriction). The Iowa Supreme Court has indicated that a restriction might reasonably cover the entire nation if it embodies the employer’s trade area. Tasco, Inc. v. Winkel, 281 N.W.2d 280 (Iowa 1979).

Where there is less contact with existing or established customers or clients, the court is reluctant to uphold restrictions. For example, in Iowa Glass Depot v. Jindrich, 338 N.W.2d 376 (Iowa 1983), the court declined to enforce a restriction, contrasting the customers in “route cases” with Glass Depot’s customers and clients. Although Mr. Jindrich had substantial contact with clients and customers, his employer’s “business ... did not lend itself to the type of close personal relationship with the customers that a normal route salesman ordinarily would develop.” 338 N.W.2d at 384. The court in Iowa Glass also found it significant that there was no pirating of customers, or specialized training offered to the employee beyond a Dale Carnegie course. 338 N.W.2d at 382-83. See, also, Mutual Loan Co. v. Pierce, 65 N.W.2d 405, 409-11 (Iowa 1954) (court relied upon the fact that former loan company employee had no meaningful and ongoing

8 Presto-X also addresses the frequently made argument that, because lost business can be quantified, plaintiff’s legal remedy is sufficient and an injunction should not issue. “And the injury to the company would be irreparable in the absence of an injunction because the customers Ewing pirated from the company would be permanently lost. The issuance of an injunction is the only way that Presto-X can be returned to the position it would have been in had Ewing not violated the restrictive covenant.” 442 N.W.2d at 89. Under Presto-X, the ability to count lost business is simply not sufficient to bar injunctive relief. See, also, Pro Edge, L.P. v. Gue, 374 F.Supp.2d 711, 749 (N.D. Iowa 2005)(Bennett)(intangible injuries such as loss of goodwill and damage to customer relationships may constitute irreparable harm); American Express Fin. Advisors, Inc. v. Yantis, 358 F.Supp.2d 818, 835 (N.D. Iowa 2005)(Reade)(same); Moore Business Forms, Inc. v. Wilson, 953 F.Supp. 1056, 1062 (N.D. Iowa, 1996)(Melloy)“(mere availability of a valid damages claim, however, does not preclude the issuance of a preliminary injunction because money damages may not fully compensate a [plaintiff’s] less tangible injuries.”).

Presto-X held that a general letter advising of availability to offer services is a prohibited solicitation. 442 N.W.2d at 88. See Wachovia Securities, L.L.C. v. Stanton, 571 F.Supp.2d 1014, 1038 (N.D. Iowa)(Bennett) (“we are able to offer all products and services . . . .”); but see Farm Bureau Mutual Ins. Co. v. Osby, 2005 WL 2990129 (Iowa App.)(general advertisement of business does not constitute prohibited solicitation).
contact with employer’s customers).

Although customer contact appears usually to remain the major consideration, sometimes training an employee received at employer expense will factor into the decision to issue an injunction. In Orkin, the court relied in part on the fact that the employee had received substantial technical training concerning pest control. 146 N.W.2d at 324. See also Lamp v. American Prosthetics, Inc., 379 N.W.2d 909 (Iowa 1986) (twelve years’ training as prosthetic fitter); Dain Bosworth, Inc. v. Brandhorst, 356 N.W.2d 590, 592 (Iowa Ct. App. 1984) (employee received $20,000 worth of training to be broker); Cogley Clinic v. Martini, 253 Iowa 541, 544, 112 N.W.2d 678, 679-80 (1962) (medical clinic incurred $10,000 cost to train new doctor; doctor’s acquaintance and familiarity with patients, referral doctors, hospital personnel and local procedures all arose through his association with clinic); Dain Bosworth, Inc. v. Brandhorst, 356 N.W. 2d 590, 593 (Iowa App. 1984). Training without more, however, will not be the basis upon which an injunction will issue unless it is specialized or unique, or would permit the employee “to unjustly enrich himself at the expense of the employer”.9 Iowa Glass, 338 N.W.2d at 382-83 (“An employee cannot be precluded from exercising the skill and general knowledge he has acquired or increased through experience or even instruction while in the employment.”).10

3. Employee’s interest that is restricted or impaired.

Injunction actions to enforce covenants not to compete are tried in equity. Orkin Exterminating Co. v. Burnett, 146 N.W.2d 320, 324 (Iowa 1966). Accordingly, the courts tend to

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9 As noted by one commentator:
[T]he mere training of an employee should not be sufficient reason to justify a restrictive covenant based upon business necessity. The experience and knowledge gained by the employee during a period of employment do not become the property of the employer.
The expense of training as a protectable employer interest is closely related to assertions that irreparable loss falls to the employer arising from the need to replace the employee who left. That position, also, faces difficulty in Iowa courts. In Nelson v. Agro Globe Engineering, Inc., 578 N.W.2d 659, 663 (Iowa 1998), an exclusive services case, the court commented upon the argument as it related to salespeople:
 “[E]xperience, competency, and a high degree of efficiency in exploiting and selling any brand of goods are qualifications which can hardly be so rare as to require the aid of equity to prevent irreparable loss by an employer who finds [it]self-compelled to substitute one sale[s]person for another.”
578 N.W.2d at 663 (quoting H.W. Gossard Co. v. Crosby, 132 Iowa 155, 176, 109 N.W. 483, 491 (1906)).
10 In Dan’s Overhead Doors & More, Inc. v. Wennesmark, 2007 WL 1486133 (Iowa App.), the court rejected the argument that an injunction was merited because years of on the job training were necessary for hourly employees to become skilled. Such employees, the court held, did not provide services that were “unique and extraordinary.”
take a careful look at the hardship that will be imposed on an employee if the covenant is enforced. Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376 (Iowa 1983); Baker v. Starkey, 259 Iowa 480, 495, 144 N.W.2d 889, 897 (Iowa 1966). For example, in Iowa Glass, the Supreme Court discussed extensively the hardship the employee would endure, considering issues such as his marital breakup, the fact that he wished to stay in Iowa City where his children were located and the fact that despite his sales and management skills, he had been unable to find full time employment in his community in another field. 338 N.W.2d at 383-84.

The court in Iowa Glass considered whether the employee would be effectively denied gainful employment in the given geographic area. Clearly, this is, in itself, a significant factor. In Lamp v. American Prosthetics, Inc., 379 N.W.2d 909 (Iowa 1986), the court found that enforcement of the restriction would effectively deny employment to the employee because the restriction precluded competition within 100 miles of any of the employer’s offices. 379 N.W.2d at 910.11 Similarly, in Professional Building Services v. DeClerck, 2002 WL 1058888 (S.D. Iowa 2002)(Gritzner), the court refused to enforce that aspect of a no-compete agreement prohibiting defendant from engaging in any competitive activity within 50 miles of where plaintiff did business because, to do so, would restrict “Defendant’s employment in the Quad Cities area . . . .” But see Uncle B’s Bakery, Inc. v. O’Rourke, 920 F.Supp. 1405, 1437-38 (N.D. Iowa 1996) and Uncle B’s Bakery, Inc. v. O’Rourke, 938 F.Supp. 1450, 1464-65 (N.D. Iowa 1996) (on modification) (preliminary injunction granted, later clarified and modified because of defendant’s extreme difficulty in finding work consistent with restrictions).

In considering the rights of the employee, the circumstances of the termination of employment will be considered. However, the fact that the employee has been discharged will not, itself, invalidate the no-compete agreement. “[U]nder some circumstances termination of the employment by [the employer] would not invalidate the covenant not to compete. . . . On the other hand, discharge by the employer is a factor opposing the grant of an injunction, to be placed in the scales in reaching the decision as to whether the employee should be enjoined.” Ma & Pa, Inc. v. Kelley, 342 N.W.2d 500, 502-03 (Iowa 1984) (employer “did not terminate the [at-will employment] contract without any cause”; injunction nevertheless refused and trial court

11 Note, however, the court in Lamp refused to enforce the restriction to the extent reasonable since the employer had not previously urged partial enforcement.

4. Public policy.

The courts will not enforce covenants not to compete that are found to be against public policy. For example, in both Van Hosen v. Bankers Trust Co., 200 N.W.2d 504 (Iowa 1972), and Pathology Consultants v. Gratton, 343 N.W.2d 428 (Iowa 1984), the Iowa Supreme Court declined to enforce the forfeiture provision of pension plan (or deferred compensation plan) benefits in substantial part because of public policy considerations. In Pathology Consultants, referring to Van Hosen, the court stated that it had “found as a matter of public policy that infinite forfeiture and termination of all pension rights acquired by an employee through his prior employment cannot be forfeited by the employee merely accepting employment with a competing institution since this would impose an unjust and uncivic penalty on the employee and disproportionately benefit his employer.” 343 N.W.2d at 436. Despite the well-established state public policy against forfeiture, however, federal public policy will trump. In Lindsey v. Cottingham & Butler Ins. Serv., Inc., 763 N.W.2d 568 (Iowa 2009), the Iowa Supreme Court affirmed a trial court determination that the federal Employee Retirement Income Security Act (“ERISA”) preempted state law that would have barred enforcement of a restrictive covenant’s forfeiture provisions. 763 N.W.2d at 573-74. See also Van Natta v. Sara Lee Corp., 439 F. Supp. 2d 911 (N.D. Iowa 2006) (Bennett) (dismissing

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12 An employer’s breach of its own agreement will typically bar enforcement of competitive restrictions. “In Iowa, a breaching party cannot demand performance from the non-breaching party.” Moore Business Forms, Inc. v. Wilson, 953 F. Supp. 1056, 1066 (N.D. Iowa, 1996)(Melloy)(citing Orkin v. Burnett, 146N.W.2d 320). However, in Presto-X-Co. v. Ewing, 442 N.W.2d 85, 86 (Iowa 1989), the employer breached its contract by failing to provide the specified two-week notice of termination. Nonetheless, injunction and damages for improper competition were found to be appropriate and necessary, although the damages were offset by those for the employer’s breach. 442 N.W.2d at 90. Justice Harris dissented on the ground that the employer itself breached the contract. 442 N.W.2d at 91.

Preliminary injunction was also entered in Uncle B’s Bakery, Inc. v. O’Rourke, 920 F. Supp. 1405, 1431 (N.D. Iowa 1996), despite the claim that the employer breached moving expense and vacation provisions of the employment agreement. The court noted that the claimed breach “bears no necessary connection” to the issues litigated in the case. Id. Also, the employee in Uncle B’s alleged that he was terminated for commencing declaratory judgment action to determine the enforceability of the no-compete. The court held that the termination did not appear to raise a public policy wrongful discharge claim (in context of public policy analysis).
plaintiffs’ state law claims of bad faith breach of contract and under Iowa’s insurance trade regulation statutory scheme which arose solely out of employer’s allegedly improper distribution of plan benefits where plan was subject to ERISA preemption).

There are circumstances in which the interests of the consumers are sufficient to serve as a public policy that would preclude enforcement of a restrictive covenant’s provisions. For example, the court in Pathology Consultants also invalidated one of the restrictions involved because the “public interest suffers” when a pathology laboratory can dictate to other practicing pathologists the amount of referral work that should be sent from the hospitals that employed them. 343 N.W.2d at 436. The court also cited a third public policy reason in support of its decision—"a monopoly on laboratory services is not in the best interests of the public.” Id.

There is one clear example of a public policy prohibition against no-compete agreements. Rule 32:5.6, Iowa Rules of Professional Conduct, specifically prohibits agreements among lawyers to restrict “the right of an attorney to practice law after the termination of [a professional] relationship.” See Anderson v. Aspelmeier Law Firm, 461 N.W.2d 598, 601 (Iowa 1990) (applying former, similar rule). Despite reported decisions restricting physicians, see Cogley Clinic v. Martini, 253 Iowa 541, 112 N.W.2d 678 (1962), similar considerations could be argued to apply, also, to the medical field. The American Medical Association’s Council on Ethical and Judicial Affairs has officially stated that it “discourages any agreement between physicians which restricts the right of a physician to practice medicine . . . . Such restrictive agreements are not in the public interest.” Current Opinions §9.02 (1989).

13 The former ethical rule was D.R. 2-108(A) and was followed in Donnelly v. Brown, Winnick, Graves, 599 N.W.2d 677 (Iowa, 1999).

14 The Anderson decision invalidated a contractual provision that would have imposed consequences for the practice of law in competition with an attorney’s former law firm. In Anderson, a departing lawyer’s partnership interest was to be contractually reduced in the event of competition, deemed under the contract to be “detrimental to the partnership”. Id. at 599. The result reached in Anderson could also have been supported by an alternative forfeiture analysis similar to that followed in Pathology Consultants or Van Hosen. However, the ethical rule at issue in Anderson could also have supported a different result because it contained an exception similar to the ERISA rule addressed by the court in Lindsey v. Cottingham & Butler Ins. Serv., Inc., 763 N.W.2d 568 (Iowa 2009). Iowa Code of Professional Responsibility D.R. 2-108(A) (attorney covenants not to compete invalid “except as a condition to payment of retirement benefits.”). The current ethical rule, Rule 32:5.6, Iowa Rules of Professional Conduct, has a similar and even somewhat broader exception.

15 In one case, Chandra v. Cardiovascular Associates, (Woodbury Dist. Ct. L.A. No. 98076C, May 4, 1990), the court enforced a covenant not to compete against a partner leaving a physician group, notwithstanding the ethical pronouncement of the professional group. Public concern over the Chandra decision resulted in passage of Senate File 210 in the 1991 Iowa General Assembly by wide margins in each house. That legislation specifically provided that
the level of law. However, the Iowa Court of Appeals recently used the “public interest in health care” as a basis to affirm the right of a physician to practice. In Board of Regents v. Warren, 2008 WL 5003750 (Iowa App.), the court denied injunctive relief, addressing the shortage of oncologists in Iowa and the fact that the federal government had determined that Cedar Rapids is underserved by physicians.

5. **Time and place restrictions.**

The courts will not enforce a restriction that is unlimited in time or place. In Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368 (Iowa 1971), the Supreme Court applied the principle that covenants not to compete are unreasonably restrictive unless they are tightly limited as to both time and area. Id. at 373-74; see also Pathology Consultants v. Gratton, 343 N.W.2d 428, 434 (Iowa 1984). In Pathology Consultants, rejecting the argument of the former employer, the court held that a contractual provision did not constitute a “limited” covenant not to compete, concluding “that failure to incorporate time and area restrictions indicates that an anti-competitive covenant was not intended.” 343 N.W.2d at 434.

Determining reasonable time and place restrictions is a factual question under the particular circumstances of a case. Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368 (Iowa 1971). With respect to restrictions as to time, it is difficult to discern in the cases what kind of record must be developed to support an argument that the time restriction is reasonable. In Ehlers, for example, the court held that a two year restriction was necessary. The reason given was that a “two year limitation would appear adequate to enable the employer to establish a satisfactory relationship with customers previously dealing with plaintiff.” 188 N.W.2d at 373. Generally, two years appears to be a period of limitation that will be enforced. See Dental East, P.C. v. Westercamp, 423 N.W.2d 553, 554 (Iowa App. 1988); Rasmussen Heating and Cooling, Inc. v. Idso, 463 N.W.2d 703, 704 (Iowa App. 1990) (no Iowa Supreme Court case enforcing an agreement of greater than five years; “typically” enforcement of restrictions of two or three years); Ales v. Anderson, Gabelmann, Lower & Whitlow, P.C., 728 N.W.2d 832 (Iowa 2007) (confirming


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no-compete agreements restricting physicians violate public policy. The legislation, however, was vetoed by the governor, also for public policy reasons. In his veto message, the governor specifically acknowledged the physician shortage in Iowa, especially in rural areas, and expressed the opinion that the legislation would discourage physician recruitment efforts as well as interfere with physicians’ “ability to freely contract.” Letter of June 5, 1991, Governor Branstad to Secretary of State.
arbitration award that enforced five year, fifty mile restriction arising from sale of business); Phone Connection, Inc. v. Harbst, 494 N.W.2d 445, 447 (Iowa App. 1992) (affirming a trial court decision modifying and enforcing a five year no-compete agreement for a period of two years). But see Uncle B’s Bakery, Inc. v. O’Rourke, 920 F.Supp. 1405, 1433 (N.D. Iowa 1996) (although five-year time period “is at the very limits of what Iowa courts have found enforceable”, for this case it is not “unreasonably restrictive, at least for the purposes of a preliminary injunction.”); Rocklin Mfg. Co. v. Tucker, 2001 W.L. 1658676 (Iowa App. 2001) (Trade Secrets Act case, affirming a ten year injunction limited to prohibition against use of specific trade publications and trade shows that plaintiff used to its “best advantage”).

With regard to geographic restrictions, the court looks to determine whether restriction is too broad—does it protect areas only where the employer is doing business? In Ehlers, for example, the court examined a restriction of 150 miles from Waterloo, Iowa, an area in which the employer claimed it was doing business. The court found that there were many population areas within that radius in which the employer had no local customers. 188 N.W.2d 373. Instead, the court limited the restriction to a customer list that had been introduced into evidence. Id.

In Casey’s General Stores, Inc. v. Campbell Oil, 441 N.W.2d 758 (Iowa 1989), the court narrowed a geographic limitation contained in a franchise agreement to three miles from any existing franchise store. The court held this was not unduly restrictive because the franchise would profit from such a rule since it applied to all of the company’s franchisees. Id. at 159-60. This case, however, must be contrasted to Lamp v. American Prosthetics, Inc., 379 N.W.2d 909, 910 (Iowa 1986), in which the court refused to enforce a provision that restricted competition within 100 miles of any company offices. The differing results can be explained in two ways. First, the geographic restriction was far broader. Second, the Lamp case involved a former employee.

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16 With respect to the period of limitation, there is Iowa authority that, if the case is tied up in lawsuit and the period of time designated has expired, the injunction issue becomes moot. See Tasco, Inc. v. Winkel, 281 N.W.2d 280, 282 (Iowa 1979); Nitte v. Kuda, 249 Iowa 853, 857, 89 N.W.2d 149, 151 (Iowa 1958). See also Stiegel v. HMA, Inc., 2009 WL 775562 (Iowa App.) (damage claims for breach of no-compete moot because of passage of time). However, in Presto-X-Co. v. Ewing, 442 N.W.2d 85, 90 (Iowa 1989), the court, notwithstanding the approaching expiration of the period of time covered by the covenant, used its “equitable powers”, reversed the trial court’s refusal to grant injunctive relief and imposed an injunction for a period of “one year from the date of this opinion.” Id. at 90. Similarly, in White Pigeon Agency, Inc. v. Madden, 2001 WL 855366 (Iowa App.), the court reversed the trial court’s refusal to enter an injunction and imposed the full three year contractual restriction on the former employee.

17 Generally, Iowa courts have yet to address those circumstances in which, because of technology or truly national or international niche markets, broad (or no) geographic restrictions might be appropriate or required. It is certainly foreseeable, however, that such cases will arise. See M & F Livestock v. Mohr, 2009 WL 1491898 (Iowa
Casey’s involved a franchisee.\textsuperscript{18} See also Farm Bureau Service Co. v. Kohls, 203 N.W.2d 209, 211 (Iowa 1972) (two county restriction limited to six townships); Phone Connection, Inc. v. Harbst, 494 N.W.2d 445, 447 (Iowa App. 1992) (affirming trial court enforcement of a no-compete agreement after limiting area from the states of Iowa and Minnesota to the particular “trade area”); Larsen v. Burroughs, 277 N.W. 463 (Iowa 1938) (enforcing covenant that encompassed the city of LeMars).\textsuperscript{19}

6. Necessary consideration to support contractual restriction.

Employees have sought to void or avoid restrictive covenant agreements entered into after the employment relationship has begun. However, the Iowa Supreme Court has held that merely continuing an at-will employment relationship is sufficient consideration for such an agreement. Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 381 (Iowa 1983). See also Farm Bureau Services Co. v. Kohls, 203 N.W.2d 209 (Iowa 1972); Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368 (Iowa 1971). As with termination from employment, however, under Iowa Glass, it is clear that this factor will be considered by the court. “[W]e find no compelling reason to overrule our prior

\textsuperscript{18} Courts apply less restrictive, though similar, analysis to cases involving the sale of a business or sale of a franchise interest. Baker v. Starkey, 144 N.W. 2d 889, 895 (Iowa 1966); Brecher v. Brown, 17 N.W.2d 377, 379 (Iowa 1945). As justification, the court in Baker stated that “in case of the sale of good will, the restriction adds to the value of what is sold, and the parties are presumably more nearly on a parity in ability to negotiate than in negotiation of agreements between employer and employee.” 144 N.W.2d at 895. Accordingly, restrictive covenants arising from the sale of a business are presumptively valid. NCMIC Finance Corp. v. Artino, 638 F.Supp.2d 1042, 1068 (S.D. Iowa)(Gritzner); Curtis 1000, Inc. v. Youngblade, 878 F.Supp 1224, 1258 (N.D. Iowa)(Bennett). But see Rasmussen Heating and Cooling, Inc. v. Idso, 463 N.W.2d 703, 704 (Iowa App. 1990) (referring generally to restrictive covenants, making no distinction that the case was a sale of business situation).

\textsuperscript{19} In other circumstances, the court may even enforce a no-compete agreement when it is not at all clear the defendant agreed. See Uncle B’s Bakery, Inc. v. O’Rourke, 920 F.Supp. 1405, 1433 (N.D. Iowa 1996) (preliminary injunction entered with no signed agreement in evidence; defendant testified he was aware of no agreement; court noted that a jury or finder of fact “could go either way on the question [of whether the defendant signed the agreement].”); Phone Connection, Inc. v. Harbst, 494 N.W.2d 445, 447-49 (Iowa App. 1992) (injunction affirmed despite fact defendant business partner never signed agreement; defendant did not object to no-compete at meeting of partners but repeatedly refused to sign; substantial evidence supported finding that, by his conduct, he assented to the agreement); Barilla America, Inc. v. Wright, 2002 WL 31165069 (S.D. Iowa)(Pratt) (defendant aware of requirement of no-compete agreement at commencement of employment but never executed agreement (nor did he refuse to do so); injunction enforced based on Iowa Trade Secrets Act); Diversified Fastening Systems, Inc. v. Rogge, 786 F.Supp. 1486, 1492 (N.D. Iowa 1991) (nationwide restriction imposed despite fact that time and space blanks were not filled in by the parties).
decisions. This is especially true since we determine the covenant is invalid for [other] reasons . . . .” 338 N.W.2d at 381. Presumably, where an employee has a contract with a specific term and executes a covenant not to compete after the commencement of that term, a court would likely find the covenant fails for lack of consideration. The Iowa Supreme Court, however, has not dealt with this issue.

**TRADE SECRETS LITIGATION**

Lawsuits based upon contractual agreements restricting competitive activities continue to arise. Increasingly, however, either in conjunction with contractual restriction or separate from it, the courts are asked to restrict competition by former employees based upon fiduciary duty\(^\text{20}\) or trade secrets theories. The increase in trade secrets litigation is likely due to a number of factors. First, as noted above, contractual restrictions are not always easily litigated. Second, many former employees are not contractually limited from competing. Third, much of what provides the basis for analysis in contractual no-compete cases involves the value of information and training provided to employees, not really the fact of competition. As businesses increasingly rely upon information and technology (and, possibly, fewer employees have direct customer contact), trade secrets claims become more attractive.\(^\text{21}\) Last, since the enactment in 1990 by the Iowa General Assembly of the Uniform Trade Secrets Act, Chapter 550, Iowa Code, some of the uncertainties regarding trade secrets litigation have been lessened.

Under the common law, relief was available for misappropriation or theft of trade secrets. See Kendall/Hunt Publ. Co. v. Rowe, 424 N.W.2d 235, 245-46 (Iowa 1988); Basic Chem., Inc. v.

\(^{20}\) In *Nelson v. Agro Globe Engineering, Inc.*, 578 N.W.2d 659 (Iowa 1998), the Supreme Court distinguished between contracts that require exclusive services and preclude competition during such period and those contracts that contain requirements for post-employment competitive restraint. In *Nelson*, the employee resigned before the exclusive services period expired. The Court held such exclusivity agreements are more enforceable than regular, post-employment no-compete provisions.

The *Nelson* analysis really addresses the issue of contractual reinforcement of the fiduciary duties that employees generally owe their employers. For that reason, employers in cases seeking to restrain former employees should consider adding a fiduciary duty claim. However, such a claim will not always be viable. In *Midwest Janitorial Supply Corp. v. Greenwood*, 629 N.W.2d 371 (Iowa 2001), the court held that an officer and director of plaintiff’s business—who engaged in limited advance arrangements for competition before he resigned his positions with plaintiff—did not breach the fiduciary duties owed as an officer and director of plaintiff corporation.

\(^{21}\) In *NCMIC Finance Corp. v Artino*, 638 F.Supp.2d 1042, 1055-66 (S.D. Iowa)(Gritzner), the court considered trade secrets-related claims asserted under the Computer Fraud and Abuse Act (“CFAA”), holding that the defendant had violated the Act by accessing plaintiff’s customer spreadsheet through plaintiff’s computer and without authorization. Counsel should carefully consider the potential applicability of the CFAA in cases involving electronically stored confidential business information.
Benson, 251 N.W.2d 220, 226 (Iowa 1977). In 205 Corp. v. Brandow, 517 N.W.2d 548 (Iowa 1994) (en banc), the Iowa Supreme Court considered the effect of the enactment of the Trade Secrets Act. Eschewing reliance upon case law regarding the common law right to protect trade secrets, the 205 Corp. court limited definition of a trade secret under the Iowa Trade Secrets Act to that specifically set forth in the statute, Iowa Code §550.2(4). 517 N.W.2d at 549. However, that statutory definition is broad; the Iowa Supreme Court later observed that “there is virtually no category of information that cannot, as long as the information is protected from disclosure to the public, constitute a trade secret.” U.S. West Communications, Inc. v. Office of Consumer Advocate, 498 N.W.2d 711, 714 (Iowa 1993). In Cemen Tech, Inc. v. Three D Industries, L.L.C., 753 N.W.2d at 71 (Iowa 2008), the court focused on the economic value element of a trade secret. There, the defendant argued that the design of plaintiff’s unpatented machine could have been lawfully obtained through reverse engineering and that, accordingly, the information gathered did not constitute trade secrets. However, the court observed that the ability to obtain information legally is not, itself, dispositive of the trade secrets issue. 753 N.W.2d at 9. Rather, the fact that the improper conduct of defendants

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22 There is frequently an issue as to whether trade secrets are involved. In Economy Roofing & Insulating Co. v. Zumaris, 538 N.W.2d 641, 648 (Iowa 1995), the court held that the determination whether information constitutes trade secrets under the law is a “mixed question of law and fact.” The legal question is whether information is of a type that might be a trade secret. The factual aspect is whether the information has economic value and has been treated as confidential. Id.

Customer lists often serve as the basis of trade secrets claims. With respect to the legal aspect of the equation, the Iowa Supreme Court has noted that a customer list, under certain conditions, can be a trade secret. Basic Chem., Inc. v. Benson, 251 N.W.2d 220, 230 (Iowa 1977). See NCMIC Finance Corp. v. Artino, 638 F.Supp.2d 1042, 1077-79 (S.D. Iowa)(Gritzner)(customer spreadsheet constitutes trade secret); American Family Mutual Ins. Co. v. Hollander, 2009 WL 535990 (N.D. Iowa)(Scoble, M.J.)(customer names and addresses are trade secrets); Lemmon v. Hendrickson, 559 N.W.2d 278, 280 (Iowa 1997). See also White Pigeon Agency v. Madden, 2001 W.L. 855366 (Iowa App.). However, the Iowa Supreme Court in Lemmon v. Hendrickson made clear that it is not prohibited to call upon customers of a former employer recalled from memory. 559 N.W.2d at 280-81 (quoting Restatement (Second) of Agency § 396).
gave them an impermissible head start over lawful conduct was sufficient for the court to determine that the information possessed the requisite “independent economic value” required under Iowa Code § 550.2(4) to be considered trade secrets. 753 N.W.2d at 10-11.23

The types of cases in which such injunctive relief will be employed under the Trade Secrets Act to prohibit a new employment relationship (where there are no contractual restrictions on subsequent employment) are, necessarily, limited. 24 Such rulings, however, are not unprecedented.25 In Norand Corp. v. Parkin, 785 F.Supp. 1353 (N.D. Iowa 1990), Judge Hansen granted a temporary restraining order, notwithstanding the court’s “concern that there is no non-competition agreement . . . and no non-disclosure agreement . . . .” 785 F.Supp. at 1355. Similarly, a decision of the United States District Court for the Southern District of Iowa reached the same result. Barilla America, Inc. v. Wright, 2002 WL 31165069, at * 9-10 (S.D. Iowa)(Pratt). In Barilla, there was no agreement restricting competition because the defendant had not signed one.

23 The Cemen Tech court also addressed the argument that contractual restrictions are a prerequisite to the existence of protectable trade secrets. The court reversed the trial court’s determination in that regard, holding that “[w]hether an employee is subject to a covenant not to compete is not determinative of whether the information gathered through employment constitutes a trade secret.” 753 N.W.2d at 7-8. The court did observe, however, that nondisclosure and confidentiality agreements are relevant to determine the existence of trade secrets. 753 N.W.2d at 8. On the other hand, contractual language will not create trade secrets that do not otherwise exist. Sun Media Systems, Inc. v. KDSM, LLC, 587 F.Supp.2d 1059, 1073-74 (S.D. Iowa 2008)(Pratt).

In Business Designs, Inc. v. Mid National Graphics, L.L.C., 2002 W.L. 987971 (Iowa App.), the court decided that methods of selecting of materials and production approaches had economic value. Notwithstanding that the employer did not require the signing of non-competition or confidentiality agreements or policies, and a specific concession by the court that the plaintiff “did not do much internally” to keep information from being disclosed, the court held that the information at issue constituted trade secrets because the efforts were “reasonable under the circumstances.” Judge Hecht dissented on the basis of the conflict between plaintiff’s failure to “do much internally” to maintain confidentiality and the court’s finding that the efforts were, nonetheless, “reasonable”. In Rockland Mfg. Co. v. Tucker, 2001 W.L. 1658676 (Iowa App. 2001), the court affirmed a ten year injunction, finding that “the identity of trade publications and trade shows that [plaintiff] can use to its best advantage” constituted trade secrets subject to court protection.

24 The concept is referred to in case law as the “inevitable disclosure” theory. Judge Bennett has discussed the case law in depth, making clear that, absent contractual employment restriction, injunctive relief should be rarely granted. Interbake Foods, L.L.C. v. Tomasiello, 461 F.Supp.2d 943, 970-74 (N.D. Iowa 2006). However, in Interbake Foods, Judge Bennett adopted the inevitable disclosure doctrine where a former employee would “inevitably” disclose his former employer’s (a manufacturer of ice cream sandwich wafers) trade secrets in the course of his new employment with an ice cream cone maker which sought to penetrate the wafer market. Id.

Deciding the case on the basis of inevitable (or threatened) disclosure of trade secrets, the court enjoined defendant from working for any competitor of the plaintiff. The Barilla decision involves what virtually anyone would describe as trade secrets, the owner of which went to significant trouble and expense to protect. Given the right circumstances—involving clear misappropriation of proprietary information and/or a situation in which the new employment is not possible without using the confidential information—Chapter 550 provides an alternative, non-contractual remedy that may potentially limited competitive activities.26

CONCLUSION

Litigation seeking to prevent former employees from working for competitors is unpredictable. Although there is a wealth of appellate court authority, for each reported decision there are many more trial court rulings. The number of factors that may determine the outcome of such litigation is surprisingly large and results from reported decisions are varied and inconsistent. In practical terms, the most important variable in litigation is probably the identity of the trial judge hearing any injunction case.

From the practice standpoint, drafting of restrictive covenants must be cautiously undertaken. The circumstances of the imposition of such restrictions, the individual employee’s employment history with the firm, the circumstances of that employee’s departure from the company and a number of other individual factors that will likely be added to the court’s equitable balance must be considered. Personalities, necessarily, play an important role and it is foolish for any lawyer practicing in this area to pretend that they do not.

Because of the unpredictability of the area, the desire of employer-clients to rely almost totally upon written agreements must be strongly cautioned against at every stage. A position in court that essentially boils down to “because it says so here” will very likely be unsuccessful.

Lawyers should carefully consider restrictions that do not absolutely prohibit competition but impose liquidated damages for certain competition. Such an approach avoids the vagaries

attendant to injunction proceedings. That kind of restriction was upheld in Dental East P.C. v. Westercamp, 423 N.W.2d 553, 555 (Iowa App. 1988). In certain businesses, especially professional services, such an approach is commonly employed. See Burton E. Tracy & Co. v. Frink, 520 N.W.2d 316, 317-18 (Iowa App. 1994). By the same token, where a monetary penalty becomes a forfeiture of vested benefits, the forfeiture likely will be struck down as against public policy. See Van Hosen v. Bankers Trust Co., 200 N.W.2d 504 (Iowa 1972); Pathology Consultants v. Gratton, 343 N.W.2d 428 (Iowa 1984). Where circumstances are especially aggravated, protection is available under the Iowa Trade Secrets Act.