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The Enforceability Gap of Covenants Not to Compete in Telecommuting Employment Relationships

Emily J. Kuot†

This Comment addresses the poor fit between existing doctrine on the enforceability of noncompete covenants and the recent emergence of telecommuting employment relationships in nationwide and worldwide markets. It argues that current judicial enforcement rules produce unfair and incoherent outcomes in the context of these global employment relationships. The Comment then proposes that legislatures rather than courts should make the policy judgment involved in crafting a new rule because legislatures have greater political accountability and superior access to empirical data.

Part I of this Comment explains both the purpose of and limits on covenants not to compete. It also shows the implications the communications explosion and the rise in telecommuting present for covenants not to compete. Part II presents the traditional enforcement rule for covenants not to compete—the 'rule of reason.' Part II.A shows that courts have sometimes ignored the rule of reason's requirement of a reasonable geographic limit when construing noncompete covenants that cover nationwide or worldwide markets. Part II.B presents the types of statutes that govern covenants not to compete and their variations on the rule of reason. Part III argues that the decisions in cases involving nationwide or worldwide markets fail to create a fair and coherent standard for telecommuting relationships in such markets because they rely on inadequate substitutes for the protection of the geographical limit. Part IV recommends legislative and judicial responses to this enforcement gap. Part IV.A argues that legislatures, and not courts, should make the policy decision involved in crafting a new rule for telecommuting relationships in nationwide or worldwide markets. Part IV.B then proposes an interim default rule for courts.

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I. THE USE OF COVENANTS NOT TO COMPETE

Covenants not to compete are restraints on trade which courts will sometimes enforce in the employment context. The recent and expected future growth of telecommuting employment relationships challenges the assumptions underlying existing doctrine on the enforcement of covenants not to compete.

A. The Purpose and Limitations of Covenants Not to Compete

In an employment relationship, a covenant not to compete is an employee's contractual promise to refrain from engaging in business similar to that of her employer or from working for a competitor of her employer. Employers ask employees to sign noncompete agreements to protect business interests such as trade secrets, customer lists, and investments like training in unique skills. Covenants not to compete are enforceable only if reasonable because they are contracts in restraint of trade, which the law generally disfavors.

In determining the reasonableness of covenants not to compete, most jurisdictions still apply some variant of the rule of reason, a three-part balancing test that examines: (1) whether the restriction is broader than necessary to protect a legitimate employer interest; (2) whether the restriction imposes undue hardship on the employee; and (3) whether the restriction is

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1 See notes 3-11 and accompanying text.
2 See notes 12-17 and accompanying text.
4 See Apollo Technologies Corp. v Centrosphere Industry Corp., 805 F Supp 1157, 1192-93 (D NJ 1992) (noting that protectable interests include trade secrets, customer lists, and special harm from the unique nature of the employee's services); Picker Int'l, Inc. v Parten, 935 F2d 257, 262 (11th Cir 1991) (noting that protectable interests include trade secrets, client relationships, and extensive training); ISC-Bunker Ramo Corp. v Altech, Inc., 765 F Supp 1310, 1336 (N D Ill 1990) (noting that protectable interests include the employer's investment in training, trade secrets, confidential information, and customer relationships). See also James H.A. Pooley, Restrictive Employee Covenants in California, 4 Computer & High Tech L J 251, 251 (1988) (noting employers' concern about competition from former employees for current staff members and customers).
6 See Restatement (Second) of Contracts § 188 comment a (1979).
7 Id § 188(1)(a).
8 Id § 188(1)(b).
injurious to public interests. A covenant must also be reasonable as to duration, geographical area, and type of activity in order to satisfy all three prongs. Courts generally enforce only those covenants which limit the prohibition on competition to places in which the employee actually performed services for the employer.

B. The Effect of the Communications Explosion and Telecommuting on Covenants Not to Compete

The Department of Commerce recently declared, "[y]ou could live in many places without foregoing opportunities for useful and fulfilling employment, by 'telecommuting' to your office through an electronic highway instead of by automobile, bus or train." The number of Americans who telecommute during part or all of their workweeks, currently somewhere between 2 million and 7.6 million, will rise to as high as 15 million by 2003, according to one estimate.

In addition to the explosion of communications technology, multifarious concerns about the environment, the family unit, personal autonomy, and overhead costs are fueling the movement toward telecommuting. Some employees who do not work at
home are participating in programs like the federal government's Flexible Workplace Project ("Flexiplace"), which provides multiagency office space in outlying areas from which employees can telecommute to their respective agencies.\(^{15}\) California and New York have even required some of their state agencies to develop telecommuting programs.\(^{16}\)

Simultaneous with the telecommuting trend is the expansion of American businesses of all sizes into nationwide and worldwide markets. Like the growth in telecommuting, this broadening of markets is attributable in part to improvements in the information infrastructure.\(^{17}\)

As both broader markets and telecommuting employment relationships continue to become more prevalent, courts applying legal rules that rely upon features unique to the traditional employment relationship in a local market will face fact patterns of

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\(^{15}\) Fehr, Wash Post at B1; Causey, Wash Post at B2 (cited in note 14).

\(^{16}\) Bredin, Newsday at 32. For example, the California statute defines "telecommuting" as "the partial or total substitution of computers or telecommunication technologies, or both, for the commute to work by employees residing in California," Cal Govt Code § 14200 (West 1992 & Supp 1996), and expresses California's recognition of the growing importance of telecommuting:

(a) The Legislature finds and declares the following:

(1) Telecommuting can be an important means to reduce air pollution and traffic congestion and to reduce the high costs of highway commuting.

(2) Telecommuting stimulates employee productivity while giving workers more flexibility and control over their lives.

(b) It is the intent of the Legislature to encourage state agencies to adopt policies that encourage telecommuting by state employees.

Cal Govt Code § 14200.1 (West 1992 & Supp 1996). After acknowledging the significance of telecommuting, the statute then contributes to its growth by requiring the following:

Every state agency shall review its work operations to determine where in its organization telecommuting can be of practical benefit to the agency. On or before July 1, 1995, each agency shall develop and implement a telecommuting plan as part of its telecommuting program in work areas where telecommuting is identified as being both practical and beneficial to the organization.


\(^{17}\) See 58 Fed Reg at 49025, 49026 (cited in note 12) (predicting that "[a]n advanced information infrastructure will enable U.S. firms to compete and win in the global economy" and that even "[s]mall manufacturers could get orders from all over the world electronically").
first impression. One challenge courts will face is the decreasing relevance of geographic location in contracts governing telecommuting relationships in nationwide and worldwide markets. The popular covenant not to compete is one type of contract that will present courts with this problem because courts have been using geographic location to balance employee and employer interests in enforcement decisions.

II. DETERMINING THE VALIDITY OF COVENANTS NOT TO COMPETE

The common law balances employee, employer, and public interests through the requirement of a reasonable geographic limit on the enforceability of noncompete covenants. Most statutes that regulate covenants not to compete incorporate the common-law test. Courts have modified the doctrine to accommodate national and international markets where a geographic limit has no meaning. They have done so by substituting activity-based and customer-based limits for the geographic limit. A handful of legislatures have also altered the common-law test by placing nondiscretionary limits on covenants not to compete.

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19 Closius & Schaffer, 57 S Cal L Rev at 532 (cited in note 5) (noting the rise of technically skilled employees and service-oriented businesses and the resultant popularity of noncompete covenants).

20 See Restatement (Second) of Contracts § 188 comment d (1979); America Software USA, Inc., 264 Ga at 481-82 (noting that determining the reasonableness of a covenant's geographic terms is relevant to the covenant's enforceability; Ackerman v Kimball Intl., Inc., 652 NE2d 507, 510 (Ind 1995) (noting that enforceability of covenants turns on reasonableness of covenants' time, space, and activity limits); Diversified Human Resources Group, Inc., 752 SW2d at 12 (holding covenant unenforceable in part because geographic limit was unreasonably restrictive of former employee's employment opportunities); Zep Manufacturing Co., 824 SW2d at 660-61 (holding covenant unenforceable in part because geographic limit was unreasonably broad); Donahue, 234 Ind at 406-07 (holding covenant unenforceable because broad territorial limits unreasonably restricted employee's employment opportunities); Crowe, 286 Ga at 240 (holding covenant unenforceable in part because broad territorial limits protected more than just employer's training investment in and good will from employee).

21 See notes 29-44 and accompanying text.

22 See notes 80-93 and accompanying text.
A. The Rule of Reason

The majority of American jurisdictions follow some variant of the “rule of reason” in determining the enforceability of noncompete covenants. This rule holds that:

A promise to refrain from competition that imposes a restraint that is ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade if (a) the restraint is greater than is needed to protect the promisee’s legitimate interest, or (b) the promisee’s need is outweighed by the hardship to the promisor and the likely injury to the public.23


24 Restatement (Second) of Contracts § 188(1) (1979).
The restraint is unreasonable if it is more extensive in duration, geographical area, or type of activity than necessary to protect the employer's interests.\textsuperscript{25} Legitimate employer interests include the protection of trade secrets, customer lists, and investments such as training in unique skills.\textsuperscript{26} Even if a covenant contains unreasonable provisions, some jurisdictions are willing to enforce the reasonable portions or modify the unreasonable ones.\textsuperscript{27} Other jurisdictions do not permit courts to enforce any portion of a covenant containing unreasonable provisions.\textsuperscript{28}

1. The traditional conception of a reasonable geographic limit.

The traditional definition of a reasonable geographic limit in a noncompete covenant is the area in which the former employee did business on behalf of the employer.\textsuperscript{29} The entire area of the employer's business is an unreasonably broad limit unless the employer can show a legitimate interest in such a broad protection.\textsuperscript{30} If the former employee is in a position to compete unfairly in the employer's entire market, courts will enforce a geographic limit broader than the area in which the employee did business for the employer.\textsuperscript{31}

\textsuperscript{25} Id § 188 comment d.
\textsuperscript{26} Apollo Technologies Corp., 805 F Supp at 1192-93; Picker Intl., Inc. v Parten, 935 F2d 257, 262 (11th Cir 1991); ISC-Bunker Ramo Corp. v Altech, Inc., 765 F Supp 1310, 1336 (N D Ill 1990).
\textsuperscript{27} See JAK Productions, Inc. v Wiza, 986 F2d 1080, 1087 (7th Cir 1993) (describing "blue pencil" doctrine, under which courts disregard unreasonable portions and enforce only reasonable portions of covenants not to compete); Holloway, 319 Md at 329-30 (describing rule of partial enforcement and upholding lower court's reduction of covenant's duration from five to three years).
\textsuperscript{28} See Wis Stat Ann § 103.465 (West 1988).
\textsuperscript{29} See America Software USA, Inc. v Moore, 264 Ga 480, 481-82, 448 SE2d 206 (1994); Ackerman, 652 NE2d at 510; Diversified Human Resources Group, Inc. v Levinson-Polakoff, 752 SW2d 8, 12 (Tex App 1988); Chuck Wagon Catering, Inc. v Raduege, 88 Wis 2d 740, 754, 277 NW2d 787 (1979); Zep Manufacturing Co., 824 SW2d at 660; Donahue v Permacel Tape Corp., 234 Ind 398, 406-07, 127 NE2d 235 (1955); Crowe v Manpower Temporary Serv., 256 Ga 239, 240, 347 SE2d 560 (1986).
\textsuperscript{30} See America Software USA, Inc., 264 Ga at 481-82; Ackerman, 652 NE2d at 510; Diversified Human Resources Group, Inc., 752 SW2d at 12; Chuck Wagon Catering, Inc., 88 Wis 2d at 754; Zep Manufacturing Co., 824 SW2d at 660; Donahue, 234 Ind at 406-07; Crowe, 256 Ga at 240.
\textsuperscript{31} See note 35 and accompanying text. See also Rollins Burdick Hunter of Wisconsin, Inc. v Hamilton, 101 Wis 2d 460, 466-68, 304 NW2d 752 (1981) (rejecting flat rule that would invalidate all covenants with broader scope than former employee's actual territory).
For example, in *Rollins Burdick Hunter of Wisconsin, Inc. v Hamilton*, the court noted, "[in the case of] route salesmen or other non-management employees, the scope of actual customer contact may serve as a guide to what scope of restriction is reasonable. [citations omitted] But the customer contact notion takes on a new dimension where the person involved is a high-level management employee who is apt to have access to confidential business information."33

Similarly, in *Auto Club Affiliates, Inc. v Donahey*, the court upheld a nationwide restriction even though the employee had worked primarily in one area of the country.35 The court's rationale was that the employee's use of the employer's highly specialized statistical information "anywhere in the country could seriously injure [the employer's] business."36

In contrast, some jurisdictions have found the broader area of where the employer did business to be a reasonable limit solely because the employer had a market in the broader area and not because the employee had a special competitive position.37 For example, the court in *Kramer v Robec, Inc.*38 reasoned, "[s]ince competition in the computer market is world-wide and since Robec distributes throughout the nation and overseas, the geographic extent of the covenant—the United States—is reasonable."39

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32 101 Wis 2d 460, 304 NW2d 752 (1981).
33 Id at 469 (citing to *Chuck Wagon Catering, Inc.*, 88 Wis 2d 740; *Lakeside Oil Co. v Slutsky*, 8 Wis 2d 157, 98 NW2d 415 (1959); *Wisconsin Ice & Coal Co. v Lueth*, 213 Wis 42, 250 NW 819 (1933); *Milwaukee Linen Supply Co. v Ring*, 210 Wis 467, 246 NW 567 (1933); *Eureka Laundry Co. v Long*, 146 Wis 205, 131 NW 412 (1911)).
34 281 S2d 239 (Fla App 1973).
35 Id at 242. See also *Hulsenbusch v Davidson Rubber Co.*, 344 F2d 730, 736 (8th Cir 1965) (holding that irreparable injury to employer's competitive advantage in national market made nationwide restriction reasonable).
36 *Auto Club Affiliates, Inc.*, 281 S2d at 242. See also *Hulsenbusch*, 344 F2d at 736.
37 See note 39 and accompanying text.
39 Id at 512. See also *Matlock v Data Processing Security, Inc.*, 618 SW2d 327, 329 (Tex 1981) (noting that "[t]he breadth of territorial restrictions in noncompetition covenants may vary with the nature and extent of the employer's business operations" and holding a nationwide noncompete covenant unenforceable because the employer did not have nationwide market); *Comprehensive Technologies Intl., Inc.*, 3 F3d at 739-40 (holding that nothing less than nationwide prohibition could protect interests of employer with national market); *Marshall v Gore*, 506 S2d 91, 91-92 (Fla App 1987) (holding that evidence of employer sales to Pennsylvania, Iowa, Wisconsin, Ohio, Vermont, Missouri, and Oregon as well as nationwide advertisements justified nationwide restraint); *Harwell Enterprises, Inc.*, 276 NC at 480-81 (holding that allegations of employer's nationwide business activities were sufficient to support reasonableness of nationwide limitation).
Some courts determine the reasonableness of a covenant's time and geographical limits in tandem, allowing one to be broader if the other is narrower. For example, in *Russo Associates, Inc. v Cachina*, the court noted that the two limits were to be considered in relation to each other. It held that the two-year covenant at issue was unenforceable as too long because the "expanse of the geographic area distinguishes this case from other cases in which courts have found a two year restriction to be valid." Similarly, measuring both duration and territory by the nature of the employer's market, the *Kramer* court held a nationwide geographic restraint reasonable but reduced its time period from three to two years "because of the quick pace of obsolescence and technological innovation."

2. *The reasonable geographic limit in national and international markets.*

The traditional models of what constitutes a "reasonable geographic area" do not fit telecommuting relationships in the context of a worldwide or nationwide geographical market because the relationships have no relevant geographical place. Both the broader rule examining the area of the employer's business and the narrower rule examining the area in which the employee actually performed services for the employer have no meaning in telecommuting relationships because the physical location, if any, of the employer's operations and the employee's services bear little relation to that of the employer's customers. Since telecommuting relationships in nationwide and worldwide markets have no "place," courts must treat them as having either no geographical location or a worldwide geographic location under existing doctrine. Under either treatment, the most analogous cases are those involving nationwide or worldwide markets, where geographic limits have little relevance in reasonableness determinations. An analysis of such broad-market cases follows.

Employers with nationwide or worldwide markets have protected themselves by circumventing the reasonable geographic requirement in noncompete agreements. Many courts, there-
fore, have modified their traditional conception of a reasonable geographic area to create a legal rule for noncompete covenants with nationwide, worldwide, or no geographic limits. Some courts have relaxed the territorial requirement, while others have adhered to it.

The latter have held that covenants not to compete which have no effective geographic limit are per se unreasonable. For example, the court in *Tamburo v Calvin* held that a covenant failing to specify territorial or temporal limits was “too vague to be enforced” as a matter of law. Interpreting the reasonable geographic area requirement under the Texas statute on covenants not to compete, the court in *Zep Manufacturing Co. v Harthcock* held that “[t]he noncompete covenant in this case contained no limitation as to geographical area. Thus, the noncompete covenant does not comply with [the statute].”

Many jurisdictions, however, take a looser approach to covenants lacking a geographic limit. Their reasonableness determinations take into account the interests and circumstances involved. A common consideration is the employer’s interest in its client base. One court noted that as the employer defines its protected customer base more narrowly, the need for an expressly geographic limitation decreases. A covenant lacking a territorial limit is often enforceable where its purpose is to pro-

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*Inc. v Underwood,* 36 Ohio App 3d 90, 94, 521 NE2d 498 (1987) (noting that noncompete covenant with employee was silent as to geographical scope).

46 See note 57 and accompanying text.

47 See notes 49-50, 53, and 57 and accompanying text.

48 See notes 49-50 and 53 and accompanying text.

49 1995 WL 121539 (N D Ill) (memo).

50 Id at *5.


53 Id at 661 (emphasis in original). See also *Sheline v Dun & Bradstreet Corp.,* 948 F2d 174, 176 (5th Cir 1991) (noting that lower court correctly held absence of territorial limit rendered covenant unenforceable); *MedX Inc.,* 780 F Supp at 403-04, 403-04 n 15 (reforming silent covenant to cover only part of state and noting that enforcement of reformed covenant would not unduly burden employee and that if covenant’s silence as to geographic scope constituted worldwide scope, covenant would be manifestly unreasonable).

54 See notes 57 and 62-63 and accompanying text.

55 See note 57 and accompanying text.

56 *America Software USA, Inc. v Moore,* 264 Ga 480, 481, 448 SE2d 206 (1994) (citing *W.R. Grace & Co. v Mouyal,* 262 Ga 464, 467, 422 SE2d 529 (1992)). See also *NCR Corp. v Rotondi,* 88 AD2d 537, 450 NYS2d 198, 199 (1982) (memo) (holding injunction of former employee’s solicitation of all present and potential customers of employer to be too broad in absence of geographic limit).
tect the employer's nationwide client base because "a limitation as to geographical location would serve no purpose." Interpreting the Wisconsin statute on covenants not to compete, the court in *Rollins Burdick Hunter* held that since "a limitation expressed in terms of a particular group of forbidden customers or clients is in the manner of a territorial limitation, the absence of a geographic territorial limitation is not necessarily fatal."

In addition to client base, activity restraints are sometimes a factor in the reasonableness of an absence of geographical limits. For example, in *Telxon Corp. v Hoffman*, the court held that a lack of geographical restrictions could be reasonable in conjunction with appropriate activity restrictions because "the territorial and activity scope questions often merge into a single inquiry." Even though the employer had a worldwide market, the court denied enforcement of the covenant because it contained no activity restrictions and thus would have barred the former employee from working for any employer in any capacity. Taking a narrower position, the court in *Ackerman v Kimball Intl., Inc.* noted that in the specific context of trade secrets, the lack of a geographic limit did not make covenants per se unreasonable and void.

Beyond the debate over per se unreasonableness, the courts disagree over whether a covenant's lack of a geographical limit should be construed as a worldwide limit or as a limit on some

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57 *Wolf & Co. v Waldron*, 51 Ill App 3d 239, 242, 366 NE2d 603 (1977). See also *PCx Corp. v Ross*, 168 Ill App 3d 1047, 1059, 522 NE2d 1333 (1988) (holding territorial limit unnecessary where purpose of covenant was not to prevent competition but to protect employer's customer relationships); *Wolf v Colonial Life*, 309 SC at 109 (holding that agreement not to solicit existing customers of employer with nationwide market was valid substitute for territorial limit); *Dynamic Air*, 502 NW2d at 799-800 (holding that covenant lacking territorial limit was not per se unreasonable because such limit is but one of several factors in determining reasonableness and that the territorial limit is often irrelevant in non-disclosure and non-solicitation covenants).

58 Wis Stat Ann § 103.465 (West 1988).

59 See note 33 and accompanying text.

60 *101 Wis 2d at 466. See also *Bell Fuel*, 375 Pa Super at 254-56 (holding that actual geographic scope of non-solicitation covenant containing no explicit geographic limit was the territory in which employers' customers were located).

61 See notes 62-63 and accompanying text.


63 *Id at 664."

64 *Id."

65 *Id at 665."

66 652 NE2d 507 (Ind 1995).

67 *Id at 510."
smaller geographic area.\textsuperscript{68} The \textit{Wolf & Co. v Waldron}\textsuperscript{69} court held that the lack of a geographic limit did not impose a nationwide covenant.\textsuperscript{70} Taking a different approach, the court in \textit{Hillis v Waukesha Title Co.}\textsuperscript{71} held that the particular circumstances of a covenant, such as the type of business and the location where competition occurs in the business, inform the meaning of a covenant lacking a geographical limit.\textsuperscript{72} In contrast, the court in \textit{Sigma Chemical Co. v Harris}\textsuperscript{73} held that a covenant's silence as to territory "effectively prohibits defendants from working for a competitor for two (2) years \textit{anywhere in the world}.\textsuperscript{74} On appeal, the Eighth Circuit expressly declined to decide whether silence rendered the whole covenant void and did not address the lower court's holding that the effective worldwide restriction was reasonable because the employer's market was worldwide.\textsuperscript{75}

Even when courts find that a covenant has worldwide scope, its reasonableness is another point of contention among jurisdictions. The North Carolina Supreme Court has implied that it would find a worldwide covenant reasonable if the employer had a worldwide market because "the new products and techniques constantly being developed, the nation-wide activities (even world-wide in some instances) of many business enterprises, and the resulting competition on a very broad front" are increasing the need for broad employer protections.\textsuperscript{76} Conversely, \textit{Verda Industries, Inc. v Lightning Deterrent Corp.}\textsuperscript{77} noted, "a noncompetition clause that precludes competition anywhere in

\begin{thebibliography}{99}
\bibitem{68} See notes 70-75 and accompanying text.
\bibitem{69} 51 Ill App 3d 239, 366 NE2d 603 (1977).
\bibitem{70} Id at 242. See also \textit{Verda Indus.}, 1995 WL 548610 at *4-5 (declining to infer worldwide scope from absence of territorial limit in a distributorship contract's noncompete covenant).
\bibitem{71} 576 F Supp 1103 (E D Wis 1983).
\bibitem{72} Id at 1106.
\bibitem{73} 605 F Supp 1253 (E D Mo 1985), aff'd in part and rev'd in part on other grounds, 794 F2d 371 (8th Cir 1986), aff'd after remand, 855 F2d 856 (8th Cir 1988).
\bibitem{74} Id at 1260. See also \textit{American Hot Rod Association, Inc. v Carrier}, 500 F2d 1269, 1278-79 (4th Cir 1974) (holding covenant's lack of territorial restriction to be a worldwide prohibition); \textit{Ferrofluidics Corp. v Advanced Vacuum Components}, 789 F Supp 1201, 1209-11 (D NH 1992) (holding covenant's lack of territorial limit to constitute nationwide prohibition where employer had nationwide market), aff'd, 968 F2d 1463 (1st Cir 1992).
\bibitem{75} 794 F2d at 374.
\bibitem{76} 576 F Supp 1103 (E D Wis 1983).
\bibitem{77} 1995 WL 548610 (N D Ill).
\end{thebibliography}
the world is unlikely to be deemed reasonable in geographic scope.\textsuperscript{78} The court also implied that if it could infer unlimited geographical scope from a covenant's failure to define its territorial limits, it would hold the covenant per se unreasonable.\textsuperscript{79}

B. Legislation on Covenants Not to Compete

A minority of states have legislation on the enforceability of restrictive covenants.\textsuperscript{80} The statutes that permit noncompete covenants generally prescribe some variant of the common-law test. For example, a Florida law allows noncompete agreements "within a reasonably limited time and area"\textsuperscript{81} and permits injunctive relief if the covenant is reasonable, consistent with the public welfare, and the employer demonstrates irreparable injury.\textsuperscript{82} Both Michigan and Texas expressly authorize judicial modification of unreasonable covenants.\textsuperscript{83} In contrast, Wisconsin expressly forbids the enforcement of any part of a noncompete covenant that contains an unreasonable provision.\textsuperscript{84}

On the other hand, some states allowing noncompete covenants have narrowed the common-law rule. For example, Colorado renders all such covenants void unless they are contracts for the purchase of a business, contracts for the protection of trade secrets, provisions for the recovery of training expenses, or contracts involving executive or management personnel and their professional staff.\textsuperscript{85} In the category of training expense recovery, the employee must have served the employer for less than two years.\textsuperscript{86} In South Dakota, noncompete covenants in the employment context are valid only "for any period not exceeding two

\textsuperscript{78} Id at *4.
\textsuperscript{79} Id at *4-5.
\textsuperscript{82} Id.
\textsuperscript{84} Wis Stat Ann § 103.465 (West 1988).
\textsuperscript{85} 1986 Colo Rev Stat § 8-2-113.
\textsuperscript{86} Id.
years. Similarly, Louisiana restricts the time period of noncompete covenants in employment relationships to two years after termination. Hawaii protects employees and former employees by awarding them reasonable attorneys' fees and costs if they prevail in any civil suit "which involves the interpretation or enforcement" of a noncompete covenant.

A few states prohibit noncompete covenants in employment contracts. California, Montana, and North Dakota void covenants that restrain anyone from engaging in a lawful profession, trade, or business. All three states also provide exceptions for sellers of the goodwill of a business and partners in anticipation of or upon dissolution of a partnership, but even those noncompete agreements must be within specified cities or counties.

Some states ban noncompete covenants only in specific professions. Delaware invalidates noncompete agreements between physicians which restrict physicians' rights to practice medicine but permits enforcement of any damages provisions. In Vermont, schools of cosmetology may not condition training on agreement to enter a covenant not to compete.

III. THE INADEQUACY OF THE CURRENT LEGAL TREATMENT OF COVENANTS NOT TO COMPETE FOR TELECOMMUTING RELATIONSHIPS

Both traditional and current doctrines on the enforceability of noncompete covenants fail to provide a satisfactory substitute for the reasonable geographic limit in telecommuting relationships. Courts urgently need to find a substitute because worldwide covenants appear reasonably necessary to protect employer interests in geographically expanding markets. The doctrinal accommodations in the rule of reason for the growth of national

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94 See Harwell Enterprises, Inc. v Heim, 276 NC 475, 480-81, 173 SE2d 316 (1970) (noting that nationwide covenants appear reasonable to protect nationwide activities of employers and implying that worldwide activities of employers would require worldwide protection).
and international markets do not create a fair or coherent standard for all telecommuting relationships.

These doctrinal accommodations for national and international businesses establish viable enforcement rules for telecommuting noncompete covenants designed to protect trade secrets or customer lists. However, where the employer seeks to protect only its investment in training, courts have not provided a substitute employee protection for reasonable geographic limits.

For instance, a telecommuting employee of a highly specialized, worldwide consulting firm might have equal amounts of contact with all the major clients in the industry because most of the clients large enough to demand such specialized service patronize most of the firms in the industry. Any customer-specific or activity-specific limit would have the effect of barring the employee from his or her consulting specialty and therefore would not be an adequate substitute for a reasonable geographic limit. A geographic limit would also unduly burden the employee because only a worldwide geographic limit would be sufficient to protect the employer's training investment. If the covenant is then unenforceable because all options under existing law would unduly burden the employee, the employer's interest goes unprotected.

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95 See Wolf & Co. v Waldron, 51 Ill App 3d 239, 242, 366 NE2d 603 (1977) (holding that territorial limit serves no purpose where employer interest is nationwide client base); PCx Corp. v Ross, 168 Ill App 3d 1047, 1059, 522 NE2d 1333 (1988) (holding territorial limit unnecessary where purpose of covenant was not to prevent competition but to protect employer's customer relationships), aff'd after remand, 209 Ill App 3d 530, 568 NE2d 311 (1991); Wolf v Colonial Life & Accident Ins. Co., 309 SC 109, 109, 420 SE2d 217 (SC App 1992) (holding that agreement not to solicit existing customers of employer with nationwide market was valid substitute for territorial limit); Dynamic Air, Inc. v Bloch, 502 NW2d 796, 799-800 (Minn App 1993) (holding that covenant lacking territorial limit was not per se unreasonable because such limit, while important, is only one of several factors in determining reasonableness).

96 See Firearms Training Systems, Inc. v Sharp, 213 Ga App 566, 568, 445 SE2d 538 (1994) (holding unenforceable a worldwide restriction on all activity of employee within industry because it substantially limited his right to earn a living).

97 Some of the expertise the employer transferred to the employee might be protectable under agency law, but the remainder of the employer's investment would go unprotected. See Restatement (Second) of Agency §§ 395-96 (1957). An agent has a fiduciary duty to his or her principal, even post-termination, not to use or disclose trade secrets, customer lists, or other confidential information. Id at § 395 comment b and § 396(b). The duty does not extend to special skills an employee acquires from employment. Id at § 395 comment b. This Comment will not address trade secret or agency law.
The employer's interest is not trivial, as evidenced by ISC-Bunker Ramo Corp. v Altech, Inc.,98 in which the defendant systematically hired the plaintiff's technicians who had completed the plaintiff's extensive training program.99 Thus, the defendant avoided providing the specialized training employees needed to enter the industry.100 The court granted a preliminary injunction against the defendant's hiring practices because the defendant induced the plaintiff's employees to breach their noncompete contracts, which protected the plaintiff's interest in its training investment.101

The decisions in analogous cases do not provide guidance for how courts should balance the employer's investment in training against the employee's need to pursue employment elsewhere in the telecommunications context. In Telxon Corp. v Hoffman,102 the employer competed in a worldwide market against five to six major competitors for customers. The customers often switched vendors for lower prices.103 The employee left to work for one of the major competitors despite a noncompete agreement of worldwide scope that lacked activity limits.104 The court refused to enforce the covenant because narrower geographic limits would have protected the employer and because the worldwide prohibition on unlimited activity was unduly harsh.105 The stated goal of the decision was "to encourage employers to write contracts more narrowly tailored to serve their own individual needs."106 However, if the employment relationship in Telxon was a telecommuting relationship, and if the employee served the employer's whole worldwide market rather than just the American segment, the employer would not have been able to tailor the contract along narrower geographical lines.

In addition, even though the court faulted the covenant because "the relevant clauses [did] not preclude employment only in those capacities which might threaten Telxon's legitimate interests,"107 any adequate activity limit from Telxon's point of view would have excluded the employee from the whole market. In

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99 Id at 1327.
100 Id.
101 Id at 1335-36, 1340.
102 720 F Supp 657 (N D Ill 1989).
103 Id at 658-59.
104 Id at 658, 664-65.
105 Id at 658, 664-66.
106 Telxon, 720 F Supp at 666.
107 Id at 664.
other words, the court's objection was that "the agreement would [have] prevent[ed] Hoffman from working as a competitor's janitor," but Hoffman most likely did not want to be a competitor's janitor. Narrowing the agreement to allow Hoffman to take nonthreatening positions still would have excluded him from the whole market, while narrowing the agreement to allow Hoffman to take some threatening positions would not have protected the employer.

In Auto Club Affiliates, Inc. v Donahey, the employer's highly specialized business of automobile-racing insurance had a limited number of customers in a nationwide market. The employee in this case also had access to unique business information that would have given him an unfair competitive advantage anywhere in the nation. The court held the nationwide noncompete covenant reasonable only because the employee was the first to suggest the covenant and therefore could not claim it was oppressive. This fact-specific solution is not likely to be applicable to even a majority of telecommuting relationships in such markets, where customer-specific limits would operate as a complete bar from the industry.

Equally unhelpful is Sigma Chemical Co. v Harris, in which the employee's former and current employers were top competitors in a worldwide market. The Eighth Circuit upheld the lower court's injunction prohibiting the employee from working for the particular competitor but declined to address the lower court's finding that the covenant's lack of geographical limits constituted a reasonable worldwide restriction. This decision produces an unsatisfactory rule for future covenants. If employers have to relitigate the enforcement of noncompete agreements with respect to every one of their competitors who is willing to employ their former employees, the result will be either an expensive exclusion of the employee from the industry or the effective nonenforcement of the covenant.

In some telecommuting relationships that involve nationwide or worldwide markets, defining a reasonable geographic area as

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108 Id at 664-65.
109 281 S2d 239 (Fla App 1973).
110 Id at 242.
111 Id.
112 Id at 244.
113 794 F2d 371 (8th Cir 1986), aff'd after remand, 855 F2d 856 (8th Cir 1988).
114 Id at 373.
115 Id at 374.
worldwide or unlimited appears to be necessary to protect employers from the unfair competition of former employees who had access to unique business information and training. Several factors, however, make worldwide or unlimited covenants an unsatisfactory solution under existing law. First, courts disagree on whether a worldwide covenant could be reasonable. Second, although courts are more likely to enforce an unlimited covenant, or one that is silent with respect to geographic limits, than an explicitly worldwide covenant, courts still disagree on whether and under what circumstances such covenants are reasonable. Most courts base their enforcement of silent, unlimited covenants on facts that do not apply to telecommuting relationships.

Third, the employee will almost always suffer undue hardship under worldwide or unlimited covenants. As the court in Russo Associates, Inc. v Cachina noted about one industry, but which is true of many highly specialized markets, "the computer field changes rapidly and [a] two year hiatus from working in the C[omputer] A[ssisted] D[esign] field would exclude Cachina from the developments in the field. If the covenant were enforced, Cachina would be extremely disadvantaged when he reentered the [market]." Worldwide or unlimited covenants would force employees out of their chosen professional specialty. Even employees who possess some transferable skills do not necessarily have the means to develop a new specialty. Finally, the public has an arguable interest in the continued

116 See note 94 and accompanying text.
117 See Harwell Enterprises, 276 NC at 480-81; Sigma Chemical Co. v Harris, 605 F Supp 1253, 1260 (E D Mo 1985), aff'd in part and rev'd in part on other grounds, 794 F2d 371 (8th Cir 1986), aff'd after remand, 855 F2d 856 (8th Cir 1988). Compare notes 77-79 and accompanying text.
118 See notes 54-67 and 119 and accompanying text.
119 See notes 121-23 and accompanying text.
120 1995 WL 43683 (Conn Super).
121 Id at *4.
122 See Firearms Training Systems, 213 Ga App at 568 (holding unenforceable a worldwide restriction on all activity of employee within industry because it substantially limited his right to earn a living).
availability and mobility of telecommuting employees' services.124

IV. PROPOSALS FOR REFORM

Legislatures should fill the telecommuting gap in both current and traditional doctrines on the enforceability of noncompete covenants. They should decide whether employer interests warrant worldwide covenants and, if so, how to account for employee and public interests. Furthermore, legislatures are better policymakers than courts because of their access to empirical data and their political accountability. However, until legislatures choose to act, courts should apply an interim rule that uses a time limit to balance employer, employee, and public interests.

A. The Need for Legislative Action

The question of whether worldwide or unlimited noncompete covenants in certain telecommuting relationships are reasonable is ultimately a policy-based, interest-balancing issue.125 Democratically elected legislatures have superior institutional competency to courts in making policy judgments. As one commentator observed, the judiciary has “limited ability to ascertain reliably and with adequate generality ‘legislative facts,’ [...] difficult[y] in balancing competing private interests, and [] problems in surmounting the limitations of the case or controversy in hand to articulate, clearly and with sufficient determinacy, generalized norms to guide future conduct.”126 In Chevron, USA, Inc. v Natural Resources Defense Council, Inc.,127 the Supreme Court noted the judiciary’s lack of both expertise and political accountability in balancing competing political interests.128 The Court also

124 See Restatement (Second) of Contracts § 188 comment c (1979).
128 Id at 865-66.
observed that "policy arguments are more properly addressed to legislators or administrators, not to judges."  

State legislatures should therefore provide courts with clear and specific enforceability rules on this question because of the need to balance employee, employer, and the public's interests. They should perform empirical studies to ascertain factors such as: (1) the extent to which telecommuting occurs in national and international markets that are too homogeneous for meaningful activity-based or customer-based restrictions on noncompete covenants; (2) the average rate of obsolescence of job skills in such markets; (3) the average training expenditure per new employee in such markets; and (4) the rate of decline in training expenses over the number of years worked for a single employer in such markets.

Some legislatures have already made this balancing judgment. For instance, some states have decided that the interests of employees and the public always outweigh those interests of employers that remain unprotected by trade secret and agency laws. These states prohibit covenants that restrain employees from engaging in a lawful profession, trade, or business.

Other states have allowed or disallowed noncompete covenants only in particular circumstances. The Colorado legislature made clear policy statements on the optimum balance of employer, employee, and public interests by specifying in nongeographic terms which employer interests are protectable through noncompete covenants. Colorado prohibits all noncompete covenants in the employment context except those that are pursuant to the sale of a business, for the protection of trade secrets, for the recovery of up to two years of new employee training expenses, or negotiated with executive/management personnel and their professional staff.

Similarly, Louisiana and South Dakota set specific time limits on noncompete covenants in the employment context.
Both states declare void any covenant lasting longer than two years after termination of the employment relationship.136

Delaware struck a different balance from Colorado, Louisiana, and South Dakota. Only those noncompete covenants which restrict a physician's right to practice medicine are void.137 Aside from these physician agreements, the common law remains in effect in Delaware.138 All noncompete covenants, including those in physicians' agreements, may carry enforceable provisions which require payment of "damages related to competition."139

Potential problems with the institutional competency of state legislatures might weaken the proposal that they, and not the courts, should decide the reasonableness of worldwide or unlimited noncompete covenants in certain telecommuting relationships. First, many of the existing statutes merely enact some variant of pre-existing, common-law formulations.140 Some states, however, have enacted alterations to the common law.141 Second, since telecommuting is a rapidly growing practice, the inflexible legislatures may need to rely upon courts to respond to unforeseen inequities. On the other hand, Colorado, Louisiana, and South Dakota demonstrate that legislatures are capable of stating broad principles of enforcement without becoming entangled in predicting every possible future fact pattern.142 In addition, legislatures are in a superior position to make policy judgments in this area because they have already begun to set telecommuting policies.143

136 Id. Interestingly, before 1989 Louisiana restricted the use of employment noncompete covenants to the recovery of substantial training or advertising expenses related to the employee. See Diesel Driving Academy, Inc. v Ferrer, 563 S2d 886, 903 (La App 1990), recalled in part and reinstated in part on rehe’g on other grounds, 1990 La App LEXIS 1902 (La App) (per curiam).
138 Id.
B. An Interim Rule for Courts

Until legislatures address the reasonableness of worldwide covenants in telecommuting relationships, courts should apply an interim rule. Specifically, in cases where a nationwide or worldwide telecommuting market is too homogeneous for meaningful activity or customer limits on noncompete agreements, courts should balance the competing interests with a specific time limit on the enforceability of covenants. Courts should set a specific time limit for each industry or market based on factors such as the average rate of obsolescence of job skills in the market and the average rate of decline in training expenses over the number of years worked for a single employer.

Current doctrine fails to provide a rule for balancing competing interests. If the employer needs to recover a material training investment, only a nationwide or worldwide covenant can protect its interest. The employee's interest in earning a livelihood, however, calls for retention of some employment opportunities. In addition, the public has an interest in the continued availability of the employee's services.

In the past, courts have balanced competing interests by setting specific time limits on the practice in question. For example, in the area of property, the common law produced two time-limit doctrines, the rule against perpetuities and the prescriptive creation of servitudes. The rule against perpetuities invalidates future interests in property which may not vest, if at all, within twenty-one years of some life in being at the creation of the interest. The judiciary created the rule against perpetuities in order to balance the donor's interest in controlling the future use of her/his property, the donee's interest in free and full use of the property, and society's interest in the free alienation of property.

The common law also developed the doctrine of prescription, which permitted the creation of servitudes through use for a

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144 See notes 145-53 and accompanying text.
145 See Restatement (Second) of Property (Donative Transfers) at div I, pt I, intro note (1981) (describing adoption by American courts of the common law's rule against perpetuities); Restatement (First) of Property at div III, pt II, ch 15, intro note (1936) (describing common-law origin of prescriptive easements); Restatement (Third) of Property (Servitudes) § 2.16 comments a, b, c (T D No 3 1993) (describing American acceptance and gradual rejection of prescription).
147 Id; Restatement (Second) of Property (Donative Transfers) at div I, pt I, intro note (1981).
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twenty-year period. Although American courts generally have substituted statute of limitations doctrines for prescription, they originally accepted the prescription doctrine from the English courts. Prescription resulted from judicial balancing of the owner's interest in exclusive use of her/his property, the user's reliance interest after long use, and society's interest in conforming titles to actual usage in order to protect expectations.

In the area of contracts, the common law produced the doctrine of incapacity due to minority, which renders all contracts made by persons under the age of twenty-one voidable by them regardless of their actual capacity. The doctrine resulted from judicial balancing of the adult party's interest in protection of its expectations through enforcement of the agreement, the minor's interest in protection from overreaching, and the public's interests in both the fairness and stability of transactions. Most states have lowered the age of minority to eighteen by statute.

The idea of balancing competing interests with a time-specific limit has also appeared in the current doctrine. The Kramer court upheld a nationwide noncompete covenant but reduced its duration from three to two years in light of the rate of obsolescence in the particular market. Legislation in Colorado, South Dakota, and Louisiana has also used a time limit of two years to balance employer, employee, and public interests.

Judicial disfavor of the "one-year provision" in the Statute of Frauds might argue against a time-specific rule for enforcing noncompete covenants. The one-year provision of the Statute of Frauds forbids enforcement of any contract not in writing which "cannot be fully performed within a year from the time the contract is made." The provision originated in the 1677 English Statute of Frauds and is in force by statute in most Ameri-

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148 Restatement (Third) of Property (Servitudes) § 2.16 comments a, b, c (T D No 3 1993).
149 Id.
150 Id.
151 E. Allan Farnsworth, 1 Contracts § 4.3 at 377 (Little, Brown & Co. 1990).
152 Id § 4.1 at 374.
153 Id § 4.3 at 377.
156 See notes 157-60 and accompanying text.
157 Restatement (Second) of Contracts § 110(1)(e) (1979).
158 Id § 130(1).
can jurisdictions rather than by adoption through common law. The courts construe the one-year provision narrowly because it fails to accomplish its purpose of limiting reliance on witnesses' memories. The narrowing construction itself, however, is yet another example of a judicial rule on when to apply a time-specific limit.

CONCLUSION

Employment relationships in the wake of the telecommuting explosion challenge the assumptions underlying existing models of the enforceability of noncompete covenants. Further complicating the problem is judicial disagreement over the definition and relevance of a reasonable geographic limit on restrictive covenants. The inquiry into whether nationwide and worldwide noncompete covenants are reasonable is fundamentally an interest-balancing question. Since legislatures are better equipped than courts to make such policy judgments, they should provide the courts with clear direction on the relative importance of the employer, employee, and public interests involved.

159 Farnsworth, 2 Contracts § 6.1 at 83 (cited in note 151).
160 Restatement (Second) of Contracts § 130 comment a (1979).