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Comments

BLOCKED AIRWAVES: USING LEGISLATION TO MAKE NON-COMPETE CLAUSES UNENFORCEABLE IN THE BROADCAST INDUSTRY AND THE POTENTIAL EFFECTS OF PROPOSED LEGISLATION IN PENNSYLVANIA

I. INTRODUCTION

Imagine getting in your car in the morning and switching the radio to your favorite morning station to listen to the familiar voices of personalities you listened to for years.\(^1\) Inexplicably, you find that they are gone and that switching to other stations feels unsatisfying.\(^2\) You are left driving to work in silence, without the laughter to which you have become accustomed.\(^3\) Now imagine that the reason for your silent drive to work is a few sentences in a contract that prevent these on-air personalities from returning to the airwaves for a year.\(^4\) After a year, you have probably moved on to another station, perhaps the new station is not quite as enjoyable, but you have become used to it and do not wish to change.\(^5\)

\(^1\) Cf. Pathfinder Commc'ns Corp. v. Macy, 795 N.E.2d 1103, 1112 (Ind. Ct. App. 2003) (explaining evidence that radio stations have large audience during morning drive time than any other time of day). "The evidence presented at the hearing revealed that, in general, the morning drive time slot is the most important day period for a radio station in terms of generating the largest audience and revenue . . . .'" Id.


\(^3\) Cf. id. (explaining strong connection Preston and Steve personalities have with their audience). "Preston & Steve match up perfectly with the WMMR morning audience," said Program Director Bill Weston. 'They're pop culture junkies, know Philadelphia inside and out, and possess a true love for their audience and they're hilarious!' Id. ¶ 2.

\(^4\) Cf. Wilson v. Radio One, Inc., No. 05-1087, at 2 (E.D. Pa. Apr. 26, 2005) (order granting preliminary injunction) (explaining that combination of non-compete and anti-solicitation clauses in Wilson and Morrison's, also known as Preston and Steve, contracts would "preclude them from appearing on-air on WMMR until February 24, 2006, one year after Plaintiffs' employment with Defendant terminated").

\(^5\) Cf. id. at 3 ("Plaintiffs will suffer irreparable harm and loss if they are (a) unnecessarily and inappropriately deprived of their livelihood, (b) subjected to the loss of an unascertainable number of loyal rock format listeners, and (c) denied an opportunity to commence on-air appearances immediately.").
This scenario is what the court addressed in Wilson v. Radio One, Inc., where the court decided to grant a preliminary injunction in favor of two broadcasting personalities known as “Preston and Steve.” The injunction prevented their employer, Radio One, Inc., from enforcing a non-compete clause against them. The court’s decision reflects a concern that on-air personalities who try to return to their former audiences often face uncertain and difficult futures as a consequence of employment contract provisions known as non-compete clauses.

This Comment explores non-compete clauses generally, from common law to statutory modifications. Section III analyzes the application of non-compete law in the broadcasting world, discussing what courts in different states found reasonable and the situations in the broadcast industry that make applying non-competes particularly difficult. This section also discusses legislative efforts to handle non-competes, focusing specifically on those states with statutes that prohibit courts from enforcing non-competes in broadcasting.

Section III goes on to apply the proposed Pennsylvania law to Wilson, examining the proposed legislation’s sufficiency. It then applies the broadcasting non-compete laws of other jurisdictions to the facts of Wilson. Furthermore, Section III continues with an

6. See id. at 3-5 (refusing to enforce defendants' non-compete agreements).
7. See id. at 4 (providing court order and barring enforcement of restrictive non-compete covenant).
[B]roadcasters who sign non-compete agreements are generally unable to increase their salaries more than a minimal cost of living raise during contract negotiations, because employers know other stations in the market cannot pay broadcasters more without risking the loss of the broadcasters’ popularity while waiting out the duration of a non-compete agreement.
Id. (citing Telephone Interview with Steve Hertz, President, If Management, in New York, NY (Sept. 1, 2001)).
9. For a further discussion of non-compete clauses generally, see infra notes 16-54 and accompanying text.
10. For a further discussion of the application of non-compete clauses in the broadcast industry, see infra notes 55-124 and accompanying text.
11. For a further discussion of the legislation dealing with non-compete clauses, see infra notes 125-49 and accompanying text.
12. For a further discussion of the proposed Pennsylvania statute, see infra notes 150-65 and accompanying text.
13. For a further discussion of the application of Pennsylvania’s proposed law and non-compete legislation in other states to the Wilson case, see infra notes 163-81 and accompanying text.
II. BACKGROUND: NON-COMPETE CLAUSES

Non-compete clauses are applicable in virtually all areas of business. Consequently, jurisdictions have developed a body of statutory and case law to interpret and apply these provisions in various circumstances. Courts' basic analyses examine the clause in terms of its reasonableness of location, duration, and activities forbidden.

A. What are Non-Compete Agreements?

Non-compete clauses are agreements which employers include in employment contracts to ensure that for a period of time after the employee leaves the employer, s/he will not work for a competitor in certain positions. The general purpose of a non-compete clause is to "prevent unscrupulous employees from appropriating confidential trade information and customer relationships for their own benefit, so that employers can invest optimally in research, employee training, improvement of business methods, and client relationships without fearing that their investments will be lost . . . ."

14. For a further discussion of the positive and negative consequences of statutes preventing enforcement of non-competes, see infra notes 182-220 and accompanying text.

15. For a further discussion of whether laws preventing the enforcement of non-competes are needed and looking at Pennsylvania's proposed law, see infra notes 221-30 and accompanying text.

16. For a further discussion of the general body of case law that has developed on non-compete clauses, see infra notes 35-54 and accompanying text. For a discussion of statutory law, see infra notes 125-42 and accompanying text.

17. For a further discussion of factors courts examine for determining reasonableness of non-competes, see infra notes 35-54 and accompanying text.


Non-compete clauses are often used by employers, arguably to employees' detriment, in rapidly changing technological industries.\(^\text{20}\)

In broadcasting contracts, employers argue that non-compete clauses have a slightly different purpose.\(^\text{21}\) In this industry, employers sometimes claim that the training and skill they provided to the employee is in the form of advertising dollars spent promoting the employee's personality.\(^\text{22}\) In some cases, this argument has been successful.\(^\text{23}\)


\[\text{The recent rapid pace of technological change has made human capital more important, yet it has rendered the employee's knowledge base obsolete more quickly. Employers use covenants not to compete, restricting employees from switching to work for competitors, in order to retain knowledgeable personnel. Currently, the lack of predictability in interpreting noncompete agreements allows employers to draft overly-lengthy noncompetes, encourages enforcement litigation, and curtails employees from changing jobs because of the fear of litigation. Employees should not be prevented from working for competitors for longer than is necessary to protect the employer's legitimate interest.}\]

\[\text{Id.}\]

\(\text{21. See Brawer, supra note 8, at 724-25 (discussing employer's attempt to claim advertising efforts as "legitimate business interest" in enforcing non-competes). Courts often require employers to provide a legitimate business interest in order for a non-compete clause to be held reasonable. See id. at 697 ("Employers do not have a protectable interest in avoiding ordinary competition.").}\]

\(\text{22. See Midwest Television, Inc. v. Oloffson, 699 N.E.2d 230, 233 (Ill. App. Ct. 1998) (analyzing whether advertising is sufficient legitimate business interest); New River Media Group, Inc. v. Knighton, 429 S.E.2d 25, 26 (Va. 1993) (presenting three criteria and assessing whether promotional spending on personality satisfied legitimate business interest). The Virginia Supreme Court articulated the three criteria as:}\]

\[\text{In determining whether a noncompetition agreement is valid and enforceable, we apply the following criteria:}
\]

\[\begin{align*}
(1) & \text{ Is the restraint, from the standpoint of the employer, reasonable in the sense that it is no greater than is necessary to protect the employer in some legitimate business interest?} \\
(2) & \text{ From the standpoint of the employee, is the restraint reasonable in the sense that it is not unduly harsh and oppressive in curtailing his legitimate efforts to earn a livelihood?} \\
(3) & \text{ Is the restraint reasonable from the standpoint of a sound public policy?}
\end{align*}\]

\[\text{New River Media Group, 429 S.E.2d at 26.}\]

\(\text{23. See Midwest Television, 699 N.E.2d at 233 (declaring television station successfully demonstrated that "Oloffson offered a unique 'product'" that station developed via advertising dollars); New River Media Group, 429 S.E.2d at 26 (applying three criteria and finding employer's spending on promotion satisfied legitimate business interest).}\)
B. Complications in the Broadcasting Industry

Non-compete agreements are particularly unfair to employees in the broadcasting industry due to two unique circumstances. First, finding an on-air broadcasting position is extremely difficult.\(^2^4\) Second, an employee's personality may have become popular for reasons other than the employer's advertising efforts.\(^2^5\)

As a result of these concerns, some jurisdictions have created legislation that prevents courts from enforcing non-compete clauses in the broadcasting industry.\(^2^6\) Because of these laws, courts will more likely grant preliminary injunctions that prevent broadcasting employers from enforcing non-competes.\(^2^7\) This is the case in Pennsylvania, where a state senator has proposed a bill that would prevent broadcasting employers from including non-compete agreements in their employment contracts.\(^2^8\)

C. History of Non-Competes

Non-compete clauses have existed since at least the early fifteenth century.\(^2^9\) In 1415, in England, the first case dealing with a non-compete clause struck the clause down.\(^3^0\) Courts upheld non-compete clauses in the eighteenth century if the court found adequate consideration for the clause and that the covenant was reasonable.\(^3^1\) Later, the English courts required that the covenants

\(^2^4\) See Brawer, supra note 8, at 711 (describing rareness of obtaining broadcasting position).

\(^2^5\) See id. at 725-26 (detailing other factors, such as "personality" and community involvement, which help broadcasters gain popularity and relying on Richmond Bros., Inc. v. Westinghouse Broad. Co., 256 N.E.2d 304, 307 (Mass. 1970)).

\(^2^6\) For a discussion of legislation created to prohibit enforcement of non-competes, see infra notes 125-42 and accompanying text.

\(^2^7\) See Asher Hawkins, Broadcasters Look to Shrug Off Yoke of Non-Competes, Legal Intelligencer, Apr. 1, 2005, at 1 (suggesting effect of legislation on court decisions).

\(^2^8\) See id. at 8 (discussing Sen. Jane Clare Orie's proposed legislation). While not specifically mentioning the legislation, one Pennsylvania court granted a preliminary injunction in favor of employees after the legislation was proposed. See Wilson v. Radio One, Inc., No. 05-1087, at 2 (E.D. Pa. Apr. 26, 2005) (order granting preliminary injunction (preventing enforcement of non-compete agreement against two on-air personalities).


\(^3^0\) See Brawer, supra note 8, at 694 (citing Charles E. Carpenter, Validity of Contracts Not to Compete, 76 U. Pa. L. Rev. 244 (1928)) (discussing early case striking down non-compete against dyer).

\(^3^1\) See Hess, 808 A.2d at 917 (discussing reasonableness test established in eighteenth century); see also Brawer, supra note 8, at 695 (noting typical requirements, including consideration, for non-compete in eighteenth century English courts).
reasonably restrain location and duration.\textsuperscript{32} The English courts eventually allowed more far-reaching clauses to stand, without inquiring into the reasonableness of a particular clause's location and duration provisions.\textsuperscript{33} The United States courts would have probably rejected such strong restraints on trade.\textsuperscript{34}

D. General Requirements

As with other contracts, courts require consideration, offer, and acceptance in order to enforce non-compete agreements.\textsuperscript{35} Then, to determine whether to actually enforce the clause, courts balance the business's protectable legitimate interest against the clause's reasonableness.\textsuperscript{36} Reasonableness consists of three elements: the reasonableness of (1) the geographical area covered by the clause, (2) the length of time the clause will be in effect, and (3) the range of activities or employment positions described in the clause.\textsuperscript{37} Instead of imposing a "bright line rule," courts engage in a fact-specific examination of each case to determine whether the clause in question meets the reasonableness requirements in the jurisdiction.\textsuperscript{38} In conducting case specific analyses, the majority of

\begin{itemize}
  \item \textsuperscript{32} See Brawer, supra note 8, at 695 (establishing factors English courts used to analyze and evaluate reasonableness).
  \item \textsuperscript{33} See id. (explaining shift in English law).
  \item \textsuperscript{34} Cf. Hess, 808 A.2d at 918 (noting U.S. courts are less likely to enforce agreements stifling competition).
  
  In order for an agreement to be enforceable, the agreement must include all of the elements of a valid contract. Therefore, there must be an offer, acceptance, consideration, the agreement must be entered into for a lawful purpose and both parties must possess the requisite capacity to enter such an agreement.
  
  \textit{Id.}
  
  \item \textsuperscript{36} See, e.g., Hess, 808 A.2d at 920 (balancing reasonableness with employer interests); Richmond Bros., Inc. v. Westinghouse Broad. Co., 256 N.E.2d 305, 307 (Mass. 1970) (applying balancing test to broadcasting non-compete); Brawer, supra note 8, at 697 ("[T]he employer seeking to enforce such a covenant must identify a protectable interest."); Hodges and Taylor III, supra note 20, at 2 ("Employees cannot be prevented from working for competitors for longer than necessary to protect the employer's legitimate interest.").
  
  \item \textsuperscript{37} See Baker, supra note 19, at 648 (listing elements courts considered reasonable in modern non-compete enforcement litigation).
  
  \item \textsuperscript{38} See Brawer, supra note 8, at 696 (summarizing case-by-case nature of non-compete review in courts).
\end{itemize}
jurisdictions apply the rules established in the Restatement of Contracts.\(^{39}\)

Courts vary by jurisdiction as to the extent of how geographically far-reaching a clause may be before declaring it invalid.\(^{40}\) For example, one court upheld a boundless non-compete covenant due to the extent of the business’s contacts.\(^{41}\) Courts also generally uphold non-compete covenants covering an employer’s market area.\(^{42}\)

Courts also review the reasonableness of the length of time the clause remains in effect.\(^{43}\) Reasonableness also depends upon the jurisdiction and sometimes the field of employment.\(^{44}\)

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39. See Baker, supra note 18, at 651 ("[O]n the enforcement of covenants not to compete, most jurisdictions in the United States follow the rule set forth in the Restatement of Contracts . . . ."); see also Restatement (Second) of Contracts: Ancillary Restraints on Competition § 188 (1981) (asserting reasonableness test for non-compete agreements). The Restatement states:

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

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

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

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

. . . .

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

Restatement (Second) of Contracts § 188.

40. See, e.g., Brawer, supra note 8, at 696 (citing Brian M. Malsberger, Covenant Not to Compete: A State-by-State Survey, 2000 Cumulative Supplement, 560, 611 (2d ed. 2001)) (noting courts have upheld clauses covering hundreds of miles have been upheld).

41. See, e.g., Superior Consulting Co. v. Walling, 851 F. Supp. 839, 847 (E.D. Mich. 1994) (upholding clause with no geographic limitation because business’s contacts were sufficiently international in scope).

42. See Baker, supra note 19, at 652 (describing typical acceptable geographic limit on non-competes).

43. See Hess v. Gebhard, 808 A.2d 912, 918 (Pa. 2002) (noting duration and location as main factors U.S. courts examine for reasonableness); see also Baker, supra note 19, at 652-53 (citations omitted) (providing duration typically reviewed for reasonableness in non-compete enforcement cases and listing cases enforcing two year covenants).

44. See, e.g., Baker, supra note 19, at 653 (citing Earth Web, Inc. v. Schlack, 71 F. Supp. 2d 299, 316 (S.D.N.Y. 1999) (discussing difference in technology fields where imposition of non-compete for one year might seriously impact marketable skills); Hodges and Taylor III, supra note 20, at 1-3 (discussing unfairness of enforcing unnecessarily long non-competes in technology industry). For a further discussion of the differences between jurisdictions, see infra notes 126-42 and accompanying text.
states, courts typically enforce non-compete covenants that last for one or two years.\textsuperscript{45}

In evaluating the reasonableness of the range of activities a non-compete clause prohibits, courts balance the employer's interests with the community's interest in competition and availability of skill sets.\textsuperscript{46} Additionally, courts often consider the employee's interest in earning a livelihood.\textsuperscript{47} For unreasonable clauses, courts disagree on the most effective remedy for the injured party.\textsuperscript{48} The majority view modifies an imperfect covenant, making it enforceable under slightly different terms.\textsuperscript{49} There is some support, however, for striking the entire clause if it is partially unenforceable.\textsuperscript{50}

On the other hand, when the non-compete clause is found reasonable, employers sometimes request equitable relief or specific performance, which often comes in the form of a preliminary injunction.\textsuperscript{51} Granting such a drastic remedy is sometimes difficult or

\textsuperscript{45} See \textit{Baker}, \textit{supra} note 19, at 652-53 (noting range of non-compete duration most courts are typically willing to accept); \textit{see, e.g., Nike, Inc. v. McCarthy}, 379 F.3d 576, 578 (9th Cir. 2004) (upholding one year non-compete for executive); \textit{Benchmark Med. Holdings v. Barnes}, 328 F. Supp. 2d 1236, 1268 (M.D. Ala. 2004) (upholding parts of two year, seventy-five mile non-compete clause for physical therapist).

\textsuperscript{46} See, \textit{e.g., Nike}, 379 F.3d at 584 (applying balancing test of employer interest against public interest); \textit{Beckman v. Cox Broad. Corp.}, 296 S.E.2d 566, 568 (Ga. 1982) (considering public's interest in competition).

\textsuperscript{47} \textit{See, e.g., Benchmark Med. Holdings}, 328 F. Supp. 2d at 1257 (discussing Alabama's four-factor test including imposition of undue hardship on employee and employer's interest); \textit{Beckman}, 296 S.E.2d at 568 (noting trial court's evaluation of economic impact on employee); \textit{Cullman Broad. Co. v. Bosley}, 373 So. 2d 830, 836 ( Ala. 1979) (balancing employer interest against employee hardship).

\textsuperscript{48} \textit{See \textit{Baker}, supra note 19, at 654-55} (citations omitted) (noting disagreement of courts listing contradicting court decisions).

\textsuperscript{49} \textit{See id.} (discussing minority and majority rule).

\textsuperscript{50} \textit{See, e.g., Pathfinder Commc'ns Corp. v. Macy}, 795 N.E.2d 1108, 1114 (Ind. Ct. App. 2003) (discussing "blue pencil" method, which strikes out unreasonable provisions); \textit{Gould, supra note 18, at 1} (discussing different approaches states take in dealing with unreasonable non-compete provisions).

\textsuperscript{51} \textit{See \textit{Baker}, supra note 19, at 655} (describing employer's preference for specific performance). Baker noted:

From the employer's perspective, specific performance of the covenant not to compete has two advantages: (1) it gives the employer greater leverage over a breaching employee because ordinary contract damages will frequently be smaller than the gain the employee will realize if she breaches; and (2) specific performance avoids the valuation problem that would otherwise face an employer seeking damages for breach of a covenant not to compete.

unfair, especially if there is a remedy at law.\textsuperscript{52} If a court decides to award breach of contract damages instead of granting equitable relief, valuation becomes an issue.\textsuperscript{53} Determining monetary damages in this situation is difficult because of the uncertainty of the value that an employee gained, or an employer lost, as a result of the breach.\textsuperscript{54}

III. ANALYSIS: NON-COMPETES IN THE BROADCAST INDUSTRY

In the broadcast industry, most employers require the majority of their employees to sign non-competes.\textsuperscript{55} Established journalists, however, such as Geraldo Rivera, are often free to move between competing broadcasters without legal complications.\textsuperscript{56} Most people who aspire to become broadcasters must start in a small local market in which they will most likely have to sign a non-compete.\textsuperscript{57} Heavy competition and low turnover vex the industry, making it highly unlikely that most contenders will obtain the prestigious on-air positions they seek.\textsuperscript{58} In smaller markets, on-air news reporters make less than $25,000 a year.\textsuperscript{59}

Broadcasters’ worth includes their name-recognition in the market.\textsuperscript{60} But if they want to leave their current position, they have to wait until their non-compete expires before they can obtain a similar position, at which time this name-recognition will likely have

\begin{itemize}
\item \textsuperscript{52} Cf. \textit{id.} (relying on \textsc{Restatement (Second) of Contracts} § 367(2) (1981)) (explaining injunctions will not be enforced if employee would be left without reasonable means of making income).
\item \textsuperscript{53} See \textit{id.} at 655-56 (mentioning difficulty in determining damages).
\item \textsuperscript{54} See \textit{id.} (noting factors complicating determination of damages).
\item \textsuperscript{55} See Deborah Potter, \textit{Contractual Servitude: Some States Outlaw Dreaded Non-Compete Clauses}, \textsc{Am. Journalism Rev.}, April 2002, available at \url{http://www.news-lab.org/articles/noncompetes.htm} (noting prevalent use of non-competes in broadcasting contracts).
\item \textsuperscript{56} See Brawer, \textit{supra} note 8, at 693-94 (discussing employers’ differing treatment of “big name” broadcasters and local broadcaster in requiring non-competes).
\item \textsuperscript{57} See \textit{id.} at 709 (describing typical path of broadcasting careers).
\item \textsuperscript{58} See \textit{id.} (explaining difficulty of obtaining job in broadcasting).
\item \textsuperscript{59} See Radio-Television News Dir. Ass’n & Found.: 2000 Radio and Television Salary Survey, (2000), \url{http://www.rtnda.org/research/salaries00.html} (providing “Television News Salaries” chart showing median salary for television news reporter as $24,000, and “Radio News Salaries” chart showing median salary for radio news reporter as $20,000).
\item \textsuperscript{60} See, e.g., Beckman v. Cox Broad. Corp., 296 S.E.2d 566, 567 (Ga. 1982) (discussing how “WSB-TV spent in excess of one million dollars promoting Beckman’s name, voice and image” in order to increase Beckman’s value to WSB-TV’s Action News Team).
\end{itemize}
lost its value. Employers argue that they paid for this "product" (the personality's popularity) through their own advertising efforts and are, therefore, entitled to any profit they gained from it. Employers sometimes lose because they cannot provide an adequate legitimate business interest. In some cases, courts do not consider the "advertising costs" to be adequate interests.

When employers prevail on an argument that they lose the benefit of their investment through advertising in a "personality," broadcasting employees lose what may be the single most important trait that they have acquired through their employment: namely, fame. Without the benefit of popularity, the broadcaster often has difficulty finding a job. Further, some employers require non-compete agreements regardless of whether the employee is on- or off-air. Such action causes these employees to remain unemployed.

61. See Brawer, supra note 8, at 710 (describing issues broadcasters face when deciding to leave position).

62. See Baker, supra note 19, at 657-59 (explaining broadcasting employers' typical arguments for non-compete clauses); see also Gould, supra note 18, at 2 (discussing employer's interest in non-competes). Gould states: "Covenants not to compete have been used in the media industry for years because employers invest substantial resources to recruit, train, market, and remunerate on-air talent. Media employers expend considerable time, money, and effort to create recognizable stars that drive performance and ratings. On-air talent often acquire a high level of recognition and popularity as a result of their employment and the related efforts by their employers to nurture and promote these talents. As a result, these employees are capable of siphoning audience if they are able to work for a direct competitor immediately following the employment term."

Gould, supra note 18, at 2.


64. See, e.g., Finding of Fact and Conclusions of Law, Wilson v. Radio One, Inc., No. 05-1087, at 11 (E.D. Pa. filed May 3, 2005) (on file with author) [hereinafter Wilson Findings] (finding employer, Radio One, did not have legitimate business interest to enforce non-compete provision). Any interest in goodwill between the plaintiffs and Y-100 listeners had been abandoned by the employer's decision to "change music formats to a format that targets a different population of listeners." Id. "Defendant's only motivation for enforcing the Non-Compete Covenants is to prevent Plaintiffs from appearing on WMMR, allowing Defendant ostensibly to gain an economic advantage in advertising revenue. This economic advantage does not constitute a legitimate business interest requiring enforcement of the Non-Compete Covenants." Id.

65. See Brawer, supra note 8, at 710 (explaining negative effect of non-compete enforcement on broadcasting careers).

66. See id. (noting difficulty broadcasting employees face after non-compete enforcement).
for the duration of a non-compete even though the employer has not expended advertising dollars to promote them.67

A. Wilson v. Radio One, Inc.

In Wilson v. Radio One, Inc., Philadelphia radio personalities Preston Wilson and Steve Morrison (referred to on-air as "Preston and Steve") tried to void their non-compete clauses.68 Their former employer, Radio One, owned the WPLY ("Y-100") station where Wilson and Morrison conducted a morning show.69 On February 24, 2005, Y-100 converted from a rock station to an "urban" station called "The Beat."70 As of that date, Radio One, Inc. no longer operated a rock station in the Philadelphia area.71 The plaintiffs petitioned for, and successfully obtained, a preliminary injunction against the broadcasting company preventing it from enforcing the duo’s non-compete clauses.72 Thus, Wilson and Morrison could pursue positions with another radio station called WMMR.73 Due to the preliminary injunction, WMMR did not have to wait for the non-compete clauses in Wilson and Morrison’s contracts to expire. Wilson and Morrison could commence employment with WMMR as soon as the station was prepared to put them on the air.74

67. See Potter, supra note 55 (discussing use of non-competes in broadcast industry beyond on-air personality contracts). Potter states:

[P]roducers today are almost as likely to be covered by a non-compete agreement as on-air reporters. Bob Papper of Ball State University who tracks broadcast news contracts says about half of all reporters and producers are under non-competes. Even photographers and assignment editors-mostly anonymous and never promoted on billboards-are having to sign contracts that would force them to wait six months or longer before taking a job with a competitor. According to Papper’s 2000-2001 survey, the percentage of TV news people covered by non-competes jumped almost 17 percent in just one year, to 43 percent.

Id. ¶ 5.


69. See id. at 1-2 (explaining relationship between Radio One, Inc. and Y-100).

70. See id. (discussing replacement station).

71. See id. at 2 (finding defendant ceased to operate rock station in Philadelphia due to changed format).

72. See id. at 4 (granting plaintiffs’ motion for preliminary injunction to strike non-compete agreements in employment agreements).

73. See FMQB article, supra note 2 (announcing Wilson and Morrison’s agreement to join WMMR).

74. Cf. Hawkins, supra note 27, at 1 (explaining when Wilson and Morrison would begin hosting morning show on WMMR).
In response, Wilson and Morrison’s former employer moved for an injunction to prevent Wilson and Morrison from going on-air, impliedly arguing that the former morning show hosts would detract from the station’s advertisers and audience.\textsuperscript{75} The employer also argued that it had invested in Wilson and Morrison’s show in order to generate goodwill with listeners, the benefit of which would be lost if Wilson and Morrison were able to appear on another morning show.\textsuperscript{76} The employees, on the other hand, argued that the station had entirely changed its format and no longer existed.\textsuperscript{77} They argued further that it was unfair to hold Wilson and Morrison to their contracts because the employer altered the contracts of other Y-100 employees to allow them to work for a station with a different musical format than “The Beat.”\textsuperscript{78}

The court found Wilson and Morrison’s arguments more persuasive.\textsuperscript{79} Determining that the employer lacked a legitimate business interest to enforce the covenants, the court granted the preliminary injunctions in favor of Wilson and Morrison.\textsuperscript{80} The court further found that the defendant’s only motivation for enforcing the non-competes was to “gain an economic advantage in advertising revenue.”\textsuperscript{81} According to the court this did not constitute a legitimate business interest.\textsuperscript{82}

The court determined that Wilson and Morrison would “suffer irreparable harm” and would be deprived of their livelihood if injunctive relief was denied.\textsuperscript{83} The court was also concerned that Wilson and Morrison would lose their “loyal rock format listeners” and believed that this contributed to the necessity of granting injunctive relief.\textsuperscript{84} Consequently, Wilson and Morrison were permitted to start their morning show on WMMR in August of 2005.\textsuperscript{85} The out-
come in Wilson represents a victory for broadcasting employees because courts generally do not grant such preliminary injunctions. The majority of similar cases settle.

B. Judicial Enforcement of Non-Competes

Courts evaluate the reasonableness of a clause on a case by case basis, looking at such facts as an employer's legitimate business interest, location, duration, and range of activities. Based on the courts' analyses of case and statutory law, where applicable, the clause is found to be enforceable, partially enforceable, or void.

1. Employers' Legitimate Protectable Interest

In some cases, broadcasting employers have difficulty formulating legitimate business interests or injury in order to satisfy this as-

Mainstream Rocker WMMR. After sitting out a non-compete clause, the duo will debut on WMMR in August 2005.); see also Wilson, No. 05-1087, at 4 (enjoining defendant from interfering with plaintiffs' employment "as on-air personalities for WMMR or in any other manner with another Rock radio station").

86. See Asher Hawkins, Local DJs Win Preliminary Order, LEGAL INTELLIGENCER, Apr. 27, 2005, at 1 [hereinafter Hawkins, Local] ("Barry Skidelsky, a former broadcaster and New York solo practitioner who frequently represents on-air personalities during contract negotiations, noted that preliminary injunctions are typically difficult to obtain in any type of litigation.").

87. See id. ("'Few disputes involving non-compete get to court, and most rarely go through trial - like many litigations, they frequently settle.'" (quoting Barry Skidelsky, former WMMR broadcaster)).

88. See, e.g., Cullman Broad. Co. v. Bosley, 373 So. 2d 830, 833 (Ala. 1979) ("[T]he validity of a covenant not to compete is dependent on the particular facts of each case.").


90. See, e.g., Wake Broads., Inc. v. Crawford, 114 S.E.2d 26, 28 (Ga. 1960) (finding extent of location requirement unreasonable).


92. See id. (determining reasonableness of activities prohibited).

93. See id. at 233-36 (concluding clause reasonable and issuing injunction in favor of employer).


95. See Cullman Broad. Co. v. Bosley, 373 So. 2d 830, 833 (Ala. 1979) (noting Alabama law holds non-competes generally void "except that an agent, servant or employee may agree with his employer not to engage in or carry on a similar business and not solicit old customers of the employer").
pect of the court’s review. For example, in *West Group Broadcasting, Ltd. v. Bell*, the court held that the employer lacked evidence that the employee’s violation of her non-compete agreement interfered with its legitimate business interests of customer retention and advertising revenue. The arguments failed because when she worked at the new radio station, the radio personality created a new persona by changing her name. The court found that her new radio program for a rival station was sufficiently different that it did not directly compete with her former employer.

Wilson also discusses an employer’s failure to establish a legitimate business purpose for enforcing non-compete provisions in their employment contracts. In that case, the employer seemed to argue that switching Wilson and Morrison’s morning show to WMMR might cause Radio One, Inc.’s “The Beat” to lose audience members. This argument failed because of the stations’ different

96. See, e.g., West Group Broad., Ltd. v. Bell, 942 S.W.2d 934, 938-39 (Mo. Ct. App. 1997) (finding employer failed to show legitimate protectable interest in relation to employee recognition on rival station); KWEL, Inc. v. Prassel, 527 S.W.2d 821, 823 (Tex. App. 1975) (analyzing employer testimony and concluding employer lacked evidence that employee’s violation of non-compete clause caused loss of advertising audience).

97. See *West Group Broad.*, 942 S.W.2d at 938-39 (finding no evidence that former employee interfered with customer contacts or advertising revenue by obtaining position at rival station).

98. See *id.* at 938 (discussing employee’s creation of new persona for new radio position and lack of evidence employee used name recognition provided to her by previous employer’s advertising expenditures).

99. See *id.* (rejecting employer’s argument that employee interfered with any legitimate business interest by working on-air at competing station). The court stated:

    Although West created Hurricane Hannah as Bell’s radio personality and used its resources to promote Hurricane Hannah as part of KXDG’s image, there is no evidence that at KSYN Bell ever used or attempted to capitalize on that personality or name recognition. The only things that Bell took with her and used when she went from KXDG to KSYN were her aptitude, skill, mental ability, and the voice with which she was born. At KSYN, Bell assumed a new name, Robin Kane. She worked a different time slot, 5:30 a.m. to 10:00 a.m.; and was merely a co-host with a male announcer. At KSYN, she read the news and bantered with the cohost. The music on KSYN, which was announced by Robin Kane’s co-host, was contemporary music, not the country format of KXDG.

*Id.*

100. See Wilson Findings, No. 05-1087, at 11 (E.D. Pa. filed May 3, 2005) (on file with author) (arguing defendant’s potential loss of advertising revenue was not legitimate business interest).

101. *Contra id.* at n.9 (rejecting employer’s argument and rationale from conclusions of law).
2. Location

In restricting location, most broadcasting non-compete agreements prohibit an employee from working anywhere within the market area of a particular station. Most enforceable clauses punish employees for working for a competitor within the same region where the original employer's broadcasts are available. In one case, the court evaluated a non-compete clause which prevented the employee from working in the vicinity of any office established by the employer, regardless of when the contract clause existed. The court found that this location requirement was unreasonable because it would be nearly impossible for the employee to know whether or not she was breaching the agreement. Accordingly, the court found the contract to be unreasonable.


103. See Wilson Findings, No. 05-1087, at 11-13 (announcing decision of court not to enforce non-compete based on lack of legitimate business interest resulting from change in format).


105. For a discussion of the typical broadcasting non-compete clause location provision, see supra note 104 and accompanying text.

106. See Wake Broad., Inc. v. Crawford, 114 S.E.2d 26, 28 (Ga. 1960) (holding unreasonable "catch-all" non-compete clause prohibiting employee from working in radio or television within fifty mile radius of any city in which broadcasting corporation operated or began to operate during term of employment contract).

107. See id. at 28 (finding lack of notice of prohibited locations in contract made clause unreasonable to comply with).

108. See id. at 28-29 (determining clause unenforceable).
3. **Duration**

Most courts enforce non-competes that impose durations between six months and two years. In some cases, however, even a one year restriction can wreak havoc on a broadcaster’s career. In *Midwest Television, Inc. v. Oloffson*, for instance, the court enforced a one year non-compete clause against a disc-jockey. Oloffson wanted to host a show with a “different musical format” on a competitor’s station. The court found that Oloffson’s popularity might cause the original employer to lose advertising if he had a show on a competitor’s station. Oloffson, however, feels that the year off destroyed his career.

4. **Range of Prohibited Activities**

The range of prohibited activities covered in broadcasting non-compete clauses are sometimes evaluated based on balancing factors to determine reasonableness. Such provisions can include prohibiting an employee from appearing on a rival station’s program with a similar format. A court might uphold a clause, how-

109. See, e.g., *Cullman Broad. Co.*, 373 So. 2d at 831-32, 836 (upholding employer’s one year non-compete clause protecting “substantial right in its business”); *Beckman*, 296 S.E.2d at 567, 569 (holding valid 180 day non-compete clause); *Murray*, 284 S.E.2d at 10-11 (upholding two year non-compete clause as reasonable); *Midwest Television, Inc.*, 699 N.E.2d at 235 (upholding one year non-compete clause as reasonable in relation to acquiring new customers); *Clooney*, 500 N.E.2d at 259 (upholding one year non-compete clause); *New River Media Group*, 429 S.E.2d at 27 (enforcing twelve month non-compete clause).

110. *See Brawer*, *supra* note 8, at 718 (“Oloffson worked for one year on-air at the new station after the non-compete restriction expired, and then the station went under. He regained employment but not his past popularity. Today he is unemployed in the Peoria market.” (citing Interview with Gary Oloffson, Former Radio Disc Jockey, in Peoria, Ill. (Dec. 24, 2001))).

111. *See Midwest Television*, 699 N.E.2d at 237 (upholding prior court’s issuance of injunction validating non-compete clause).

112. *See id.* at 232 (noting that two shows had different formats).

113. *See id.* at 235 (“Midwest’s concern that its listeners and advertisers would follow him to a station within an overlapping broadcast zone is not unreasonable. In fact, Midwest’s station manager testified that both listeners and advertisers followed Oloffson when he moved between its AM and FM stations.”).

114. *See Brawer*, *supra* note 8, at 718 (noting difficulty Oloffson faced when trying to reestablish his broadcasting career).


116. *See id.* at 569 (enforcing covenant preventing employee personality from appearing on-air with local competitor for 180 days).
ever, which prevents a former employee from occupying a variety of different positions for a competitor. 117

In Murray v. Lowndes County Broadcasting Co., for instance, a radio announcer signed a non-compete agreement that prohibited him from working in several positions. 118 The court held that because the employee could work as a radio engineer and occupy other positions, the restriction was reasonable in preventing him from taking any of the positions listed in his contract throughout the duration set forth in the non-compete agreement. 119 Murray eventually obtained a position as a disc-jockey in Georgia. 120

When covenants in this area become more restrictive, radio and television station consolidations in the broadcasting industry become more problematic. 121 Mergers between some major competitors may cause some states to create legislation to protect broadcasting employees from non-competes. 122 States might consider such changes because the fewer station owners there are, the more

118. See id. at 10 (detailing positions former broadcaster could not occupy but indicating other positions still available to him). The court noted that:
The contract contained the following language: “Employee agrees that if his employment shall be terminated for any reason he will not engage in the business of announcer, disc jockey, advertisement selling, station manager or director for any other radio station in Lowndes County, Georgia, for a period of two (2) years from the date of termination.”

Id.
119. See id. at 10-11 (finding clause was reasonable).
120. See Brawer, supra note 8, at 717 (citing Interview with Gary Wisenbaker, George Murray’s former attorney, in Savannah, Ga. (Dec. 27, 2001)) (describing Murray’s career subsequent to enforcement of non-compete clause).
122. See Hawkins, Local, supra note 86, at 1 (“[W]ith new legislation emerging in various states to prohibit or restrict broadcast non-competes, in today’s consolidated environment, we are likely to see more cases brought.”) (quoting Barry Skidelsky, former broadcaster) (discussing possibility of employees obtaining preliminary injunctions preventing enforcement of non-competes); see id. S. 2401, 108th Cong. § 1084(c)(1)(C) (2004) (noting mergers have occurred between following: Viacom with CBS and UPN (2000), GE/NBC with Telemundo Communications, Inc. and Vivendi Universal Entertainment (2004), News Corp./Fox with DirecTV (2003), and Time Warner, Inc. with America Online (2000)).
likely an employee is to obtain a job working for a direct competitor. In such a business climate, enforcing non-compete clauses against employees in broadcasting might be considered less fair than in other industries.

C. Legislation and Non-Competes

Employees will more likely prevail in non-compete cases as efforts continue to create legislation that prevents courts from enforcing these agreements within the broadcast industry. States are becoming increasingly concerned about the unique position of employees in this industry. These employees have less bargaining power due to the scarcity in employment opportunities.

1. Existing State Legislation

California has a statute with a provision preventing enforcement of non-competes in employment contracts generally. There are exceptions to this provision, though, which allow courts to enforce some non-competes if they do not prevent the promisor from "plying its trade or business." Further, California courts may enforce contracts created outside of the state which include non-competes, despite the California provision. Several other states have provisions similar to California's, which prevent the application of non-competes in all industries.

123. See Hawkins, supra note 27, at 1 (discussing difficulty in obtaining employment due to recent mergers in broadcasting industry).
124. See id. (noting plight of broadcasting employees in light of mergers).
125. See id. (postulating that growing support for legislation will yield more success for broadcasting employees).
126. See Brawer, supra note 8, at 694 (discussing state trend of creating legislation protecting broadcasting employees from enforcement of non-competes).
127. See Potter, supra note 55 (stating that broadcasting employers have unusual amount of bargaining power over employees).
128. See CAL. BUS. & PROF. CODE § 16600 (West 2005) ([E]xcept as otherwise provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.). But see Advanced Bionics Corp. v. Medtronic, Inc., 59 P.3d 231, 237-38 (Ca. 2002) (holding out-of-state contract's non-compete clauses can be enforced in California).
129. Brawer, supra note 8, at 699-700 (citing Malsberger, supra note 40, and Gen. Commercial Packaging, Inc. v. TPS Package Eng’g, Inc., 114 F.3d 888, 891 (9th Cir. 1996)) (discussing potential to exploit loop-hole in California law).
130. See Advanced Bionics Corp., 59 P.3d at 237-38 (indicating out-of-state non-compete clauses are potentially enforceable in California).
131. See Hawkins, supra note 27, at 9 (“Alabama, California, Colorado, Montana, North Dakota and Oklahoma all have statutes on the books that effectively prohibit the use of non-competes in any industry . . . .”); see, e.g., ALA. CODE § 8-1-1 (2005) (detailing Alabama statute); COLO. REV. STAT. § 8-2-113 (2005) (detailing
Some states chose to address the broadcasting industry specifically in their non-compete statutes.\textsuperscript{132} Maine and Massachusetts were among the first states to go this route.\textsuperscript{133} Several other states have since passed laws preventing the application of non-compete clauses in the broadcasting industry.\textsuperscript{134}

The union representing broadcasters made considerable efforts to prevent the enforcement of non-compete clauses in broadcasting.\textsuperscript{135} The legislatures of several other states have proposed bills to further this objective.\textsuperscript{136} Oregon attempted to pass a bill in 2003 that would prevent the application of non-competes in the

\begin{footnotesize}
\begin{enumerate}
    \item[132.] See Brawer, supra note 8, at 702-07 (discussing different states’ legislation preventing use of non-competes in broadcasting).
    \item[133.] See Me. Rev. Stat. Ann. tit. 26, § 599 (2005) (forbidding enforcement of non-compete clauses in broadcast industry); Mass. Gen. Laws ch. 149, § 186 (2005) (indicating Massachusetts law forbids non-competes in broadcasting). Maine enacted a statute in 1999, specifically forbidding the application of non-compete clauses in most instances. See Me. Rev. Stat. Ann. tit. 26, § 599. The Maine statute only applies, however, if the employee was terminated without fault on his or her part. See id.; see also Brawer, supra note 8, at 703 (“This statute is the most comprehensive statute of those since enacted to protect employees in the broadcast industry from non-compete agreements regardless of termination procedures.”).
    \item[135.] See AFTRA-SAG: Maryland Non-Compete Bill Laid to Rest for Now, http://www.aftrasagdcbalt.com/index.php?section=broadcast&sub=noncompetedmd2005 (last visited Mar. 17, 2006) [hereinafter AFTRA-SAG] (discussing AFTRA’s commitment to fighting non-competes). The article states: AFTRA continues to believe that the use and enforcement of non-compete clauses in the broadcast industry is fundamentally unfair and that employees ought to have the basic right to earn a living and build a career. We are unwavering in our commitment to pass legislation that will ban the use of non-competes completely, as has been achieved in the District of Columbia.
    \item[136.] Id. ¶ 4.
    \item[137.] See Brawer, supra note 8, at 704-06 (noting Iowa, Missouri, New Jersey, North Carolina, Washington, and West Virginia’s legislatures proposed legislation on non-competes in broadcasting with varying results). The bills proposed in Iowa, Missouri, Washington, and West Virginia did not pass. See id. at 704-05.
\end{enumerate}
\end{footnotesize}
broadcasting industry.\textsuperscript{137} While this attempt also failed, American Federation of Television and Radio Artists ("AFTRA") members intend to again raise the campaign to pass such legislation in Oregon.\textsuperscript{138} Maryland attempted to pass legislation to prevent the enforcement of non-compete earlier this year, but the attempt failed as well.\textsuperscript{139}

Other states codified a reasonableness standard.\textsuperscript{140} While the wording varies, these jurisdictions typically require that the location, duration, and range of activities prohibited by a particular clause be reasonable.\textsuperscript{141} States continue, however, to enforce non-competes.\textsuperscript{142}

2. \textit{Pending Legislation}

Some states have proposed legislation which would prevent non-compete from applying in the broadcasting industry.\textsuperscript{143} Penn-

\textsuperscript{137} See H.B. 2390, 72nd Gen. Assem., Reg. Sess. (Or. 2003), \textit{available at} http://www.leg.state.or.us/ (click "Search" hyperlink; check "2003 Legislative Measures" and enter "H.B. 2390"; follow "H.B. 2390.1 ha" hyperlink) (providing proposed Oregon bill).


\textsuperscript{139} See AFTRA-SAG, \textit{supra} note 135 ("AFTRA's 2005 legislative campaign in the Maryland General Assembly to prohibit non-compete clauses in the radio and television contracts of broadcast employees, unfortunately came to a close this month without a victory. . . . [T]he politics of a few overtook the will of the majority.").


\textsuperscript{141} See MICH. COMP. LAWS § 445.774a (providing Michigan's version of reasonableness standard); TEX. BUS. & COM. CODE ANN. § 15.50(a) (giving Texas' reasonableness standard); WIS. STAT. § 103.465 (illustrating Wisconsin's reasonableness standard).

\textsuperscript{142} See MICH. COMP. LAWS § 445.774a (providing Michigan's non-compete law, enforcing non-compete to extent they are reasonable); S.D. CODIFIED LAWS § 53-9-8 (2005) (voiding non-compete except as provided in §§ 53-9-9 to 53-9-12); TENN. CODE ANN. § 47-25-101 (2005) (providing Tennessee's non-compete provision); TEX. BUS. & COM. CODE ANN. § 15.50 (providing Texas' non-compete law); WIS. STAT. § 103.465 (providing Wisconsin's non-compete provision).

sylvania State Senator Jane Clare Orie (R-Pittsburgh) introduced legislation that prohibits employers from requiring the inclusion of non-compete clauses in broadcasting employment contracts.\textsuperscript{144} Currently, Pennsylvania relies on common law by applying a reasonableness standard to evaluate the enforceability of non-compete clauses.\textsuperscript{145}

Violations under the proposed Act would expose employers to potential civil damages and misdemeanor criminal charges.\textsuperscript{146} AFTRA, a union that represents broadcasters and other entertainers, supports this potential law.\textsuperscript{147} Such laws have now become more necessary due to increased corporate consolidation of radio and television stations.\textsuperscript{148} These business developments make it even more difficult for employees to obtain new positions without breaching non-compete clauses.\textsuperscript{149}


\textsuperscript{146} See Hawkins, supra note 27, at 8 (describing sentences provided in proposed bill).


\textsuperscript{149} See Hawkins, supra note 27 (noting unfairness of non-competes in light of corporate consolidation in media industry).
D. Applying Law Preventing Enforcement of Non-Competes to *Wilson*

To better understand how laws preventing the use of non-competes in the broadcasting industry work, this Section applies these laws to the *Wilson* facts, as if they had happened in various jurisdictions. The laws are examined to determine which are most effective at preventing the enforcement of non-competes in the broadcast industry. This illustrates how each law's operation provides guidance to jurisdictions considering the adoption of such laws in the future.

1. *Applying the Broadcast Industry Free Market Act to Wilson*

The plaintiffs in *Wilson* had a non-compete clause in their employment contract with Radio One, Inc. The clause provided that the employees could not appear on air or assist in programming for another radio station. The agreement prohibited certain activities within a fifty-mile radius of Philadelphia and remained in effect for six months.

If enacted, Pennsylvania’s proposed Broadcast Industry Free Market Act will prevent the enforceability of this clause. The emp-

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151. For a further discussion of the application of broadcasting non-compete laws to the facts in *Wilson*, see infra notes 152-81 and accompanying text.

152. See *Wilson Findings*, No. 05-1087, at 2-3 (E.D. Pa. filed May 3, 2005) (on file with author) (reproducing paragraph thirteen of employment agreement signed by Wilson and Morrison). Their non-compete clause contained the following language:

Employee shall not, at any time during employment or during the six (6) month period after the date Employee is no longer employed by Employer for any reason, engage, directly or indirectly, or through any partnerships, corporations or any other legally recognizable entity or associates in any business, enterprise or employment which is directly competitive with Employer. “Competitive” shall mean that the Employee shall not appear on a radio station as an announcer or personality . . . or assume responsibility for programming a radio station located within a fifty (50) mile radius of Employer’s principle place of business in Philadelphia, Pennsylvania.

*Id.* (ellipsis in original).

153. See *id.* (providing prohibited activities).

154. See *id.* (announcing location and duration restrictions applicable to employees).

ployment agreement would violate the proposed bill because it contains a clause prohibiting the employees from obtaining employment in a geographic area.\textsuperscript{156} Further, the clause violates the proposed law because it prevents them from working in the region for six months.\textsuperscript{157} Finally, the non-compete clause violates the law because it prohibits them from working in a particular industry.\textsuperscript{158} Therefore, the non-compete clauses in Wilson and Morrison’s employment contracts directly contravene the proposed law.\textsuperscript{159}

It is unclear whether the proposed law would apply even if it was in effect at the time Wilson and Morrison terminated their contracts.\textsuperscript{160} There is uncertainty because the law contains no provision specifying whether it would apply retroactively or only prospectively.\textsuperscript{161} Pennsylvania courts would likely be unable to apply the proposed law to contracts that are already in existence.\textsuperscript{162}

\begin{enumerate}
\item in a geographic area;
\item for a specific period of time; or
\item for any particular employer or in any particular industry;
\end{enumerate}

after termination of employment with the broadcasting industry employer.

\textit{Id.} § 5(a).

\textsuperscript{156} See Wilson Findings, No. 05-1087, at 3 (“Employee shall not appear on a radio station or as an announcer or personality . . . or assume responsibility for programming a radio station within a fifty (50) mile radius of Employer’s principal place of business in Philadelphia, Pennsylvania.”) (ellipsis in original) (quoting Wilson and Morrison’s employment contract).

\textsuperscript{157} See \textit{id.} at 2 (reproducing phrase in employment contract prohibiting competing with employer for “the six (6) month period after the date Employee is no longer employed by Employer”).

\textsuperscript{158} See \textit{id.} at 3 (providing language from non-compete limiting future employment such that “the Employee shall not appear on a radio station as an announcer or personality . . . or assume responsibility for programming a radio station”).


\textsuperscript{160} See \textit{id.} (lacking provision indicating when law goes into effect). “This act shall take effect in 60 days.” \textit{Id.} (providing Section 5).

\textsuperscript{161} See \textit{id.} (lacking provision specifying whether law applies retroactively).

For this reason, significant edits may be necessary before the proposed law would be useful to current broadcasting employees who hope to avoid enforcement of non-compete clauses.¹⁶³

2. Applying Other Jurisdictions’ Laws to Wilson

The Massachusetts provision is clearer than the proposed Pennsylvania law because it specifically prohibits the enforcement of non-compete agreements.¹⁶⁴ The Massachusetts law contains similar prohibitions to the proposed Pennsylvania law.¹⁶⁵ The Massachusetts statute’s enactment made this language obsolete, but similar to Pennsylvania courts, Massachusetts courts apply the statute only prospectively.¹⁶⁶ Therefore, if Wilson and Morrison had signed a similar contract in Massachusetts, Radio One, Inc. might still be able to enforce the non-compete agreement depending on when the contract was entered into.¹⁶⁷


Any contract or agreement which creates or establishes the terms of employment for an employee or individual in the broadcasting industry, including, television stations, television networks, radio stations, radio networks, or any entities affiliated with the foregoing, and which restricts the right of such employee or individual to obtain employment in a specified geographic area for a specified period of time after termination of employment of the employee by the employer or by termination of the employment relationship by mutual agreement of the employer and the employee or by termination of the employment relationship by the expiration of the contract or agreement, shall be void and unenforceable with respect to such provision. Whoever violates the provisions of this section shall be liable for reasonable attorneys’ fees and costs associated with litigation of an affected employee or individual.

Id. (emphasis added).

¹⁶⁶. See id. (voiding language comprising non-compete clause). According to the law’s Historical and Statutory Notes, “[t]his Act shall apply to contracts entered into on or after its effective date.” See id. (citations omitted).

Maine takes a different approach to non-compete clauses.\textsuperscript{168} Maine’s statute creates a presumption of unreasonableness for language creating a non-compete.\textsuperscript{169} Therefore, if Radio One, Inc. sought to enforce the clauses against Wilson and Morrison in Maine, the court would presume the clauses are unreasonable.\textsuperscript{170}

The language in the proposed Pennsylvania statute is similar to Arizona’s broadcasting non-compete law.\textsuperscript{171} The Arizona law states: “[A]s a condition of employment, it is unlawful for a broadcast employer to require a current or prospective employee to agree to a noncompete clause.”\textsuperscript{172} The Arizona law specifies that it applies to both current and prospective employees,\textsuperscript{173} so it arguably applies to contracts already in force. If the facts in Wilson took place in Arizona, it would have been unlawful for Radio One, Inc. to require Wilson and Morrison to agree on the inclusion of a non-compete in their contracts.\textsuperscript{174}

Pennsylvania’s proposed law also closely mirrors Illinois’s broadcasting non-compete law.\textsuperscript{175} This law prohibits employers from requiring the inclusion of language in broadcasting employment contracts that would restrict an employee’s job opportun-


\textsuperscript{169} See id. (detailing provision Maine adopted to limit enforcement of non-competes). The Maine law provides:

\begin{quote}
PRESUMED UNREASONABLE. A broadcasting industry contract provision that requires an employee or prospective employee to refrain from obtaining employment in a specified geographic area for a specified period of time following expiration of the contract or upon termination of employment without fault of the employee is presumed to be unreasonable.
\end{quote}

\textit{Id.} § 599(2).


\textsuperscript{173} See id. (“As a condition of employment, it is unlawful for a broadcast employer to require a current or prospective employee to agree to a noncompete clause.”).

\textsuperscript{174} Compare Wilson Findings, No. 05-1087, at 2-3 (reproducing non-compete clauses from Wilson’s and Morrison’s employment contracts), \textit{with} Ariz. Rev. Stat. § 23-494(A) (“As a condition of employment, it is unlawful for a broadcast employer to require a current or prospective employee to agree to a noncompete clause.”).

\textsuperscript{175} See 820 Ill. Comp. Stat. 17/10 (2005) (prohibiting certain provisions in employment contracts).
ties.\textsuperscript{176} The problem with the Illinois statute is that it does not indicate whether it should be applied retroactively or whether the state will continue to enforce clauses in already existing contracts.\textsuperscript{177} If the facts in \textit{Wilson} occurred in Illinois and the statute applied, Radio One, Inc. would have been prohibited from requiring Wilson and Morrison to agree to the non-compete clauses in their contracts.\textsuperscript{178}

Washington D.C.'s law takes an approach similar to the approach taken in Massachusetts.\textsuperscript{179} The D.C. law makes non-compete clauses unenforceable at the time the contract expires or the employee terminates employment.\textsuperscript{180} If \textit{Wilson} occurred in Washington, D.C., it seems the employer could not enforce the clause upon Wilson and Morrison's termination of employment.\textsuperscript{181}

E. Pros and Cons of Preventing Non-Competes

There are arguments for and against the use of legislation to prevent courts from enforcing non-competes.\textsuperscript{182} These provisions

\textsuperscript{176} See id. ("Post-employment covenants not to compete are prohibited. (a) No broadcasting industry employer may require in an employment contract that an employee or prospective employee refrain from obtaining employment in a specific geographic area for a specific period of time after termination of employment with that broadcasting industry employer.").

\textsuperscript{177} See id. (lacking a provision applying the law retroactively); Brennan, supra note 162, at 359 (explaining Louisiana statute's lack of treatment of issue and discussing decision in Louisiana court not to retroactively apply law in non-compete context).

\textsuperscript{178} See generally 820 ILL. COMP. STAT. 17/10 (2005) (prohibiting employer from requiring employee to sign non-compete agreement).

\textsuperscript{179} Compare D.C. CODE ANN. § 32-532 (2005) (providing District of Columbia's broadcast industry non-compete law, which declares non compete clauses "unenforceable"), with MASS. GEN. LAWS ch. 149, § 186 (2005) (providing Massachusetts law, which also declares broadcasting non compete clauses "unenforceable").

\textsuperscript{180} See D.C. CODE ANN. § 32-532 ("A broadcasting industry employment contract provision that requires an employee or prospective employee to refrain from obtaining similar employment with another broadcasting industry employer following expiration of the contract or upon termination of employment shall be unenforceable.").

\textsuperscript{181} Compare Wilson Findings, No. 05-1087, at 2-3 (summarizing non-compete clauses from Wilson's and Morrison's employment contracts), with D.C. CODE ANN. § 32-532 ("A broadcasting industry employment contract provision that requires an employee or prospective employee to refrain from obtaining similar employment with another broadcasting industry employer following expiration of the contract or upon termination of employment shall be unenforceable.").

\textsuperscript{182} For a further discussion of the pros and cons of adopting legislation which would prevent the enforcement of non-compete clauses in broadcasting, see infra notes 183-220 and accompanying text.
are useful when negotiating contracts. Further, broadcasters are represented by a strong union that should have the power to protect their interests despite the use of non-competes. The recent push to adopt such legislation indicates concern about the use of non-competes in broadcasting employment contracts.

1. **Freedom to Contract**

The freedom to contract is sometimes discussed in determining the reasonableness of non-competes in broadcasting contracts. Employers have a strong argument that they should be free to negotiate the terms of employment with potential employees without interference from the state. Legislation, however, would prevent employers from paying for costly litigation in this area by prohibiting non-competes entirely. Further, employers would remain free to negotiate other terms of the contract such as salary and promotion.

2. **Unions- Do They Provide Enough Protection?**

Employers may argue that employees in the broadcast industry are well represented by unions. Unions, such as AFTRA, are vigilant supporters of legislation to prevent non-competes in broadcasting. "The union serves as a check on employee myopia and the employee's tendency to disregard low-probability events as well." Unions may even want to allow non-competes to remain in broadcasting contracts in order to create incentives for the employers to

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183. For a further discussion of the use of non-competes in negotiation, see infra notes 186-89 and accompanying text.
184. For a discussion on AFTRA's influence in negotiations, see infra notes 190-96 and accompanying text.
185. For a further discussion of the laws states have adopted to prevent the enforcement of non-competes, see supra notes 125-42 and accompanying text.
187. See Baker, supra note 19, at 683-84 (explaining why unions should negotiate to remove non-competes from broadcasting contracts rather than resorting to legislative remedies).
188. See id. at 683 ("A blanket prohibition on covenants not to compete would provide a clear, predictable rule and save litigation costs.")
189. See id. at 678-79 (discussing trade-offs between non-competes, wages, and advertising promotion in broadcasting employment contracts).
190. See id. at 678 (discussing argument that unions provide bargaining power for broadcasting employees).
191. See generally AFTRA-SAG, supra note 135 (discussing AFTRA's efforts to pass broadcasting non-compete laws).
192. Baker, supra note 19, at 678.
invest in promoting these personalities and continue to create jobs for broadcasting personalities.\footnote{193}{See id. (emphasizing unions' responsibility to object to clauses). Baker states:}

This argument lacks merit because AFTRA vehemently protests the inclusion of these clauses in broadcasting contracts.\footnote{194}{Cf. AFTRA-SAG, supra note 135, ¶ 3 (discussing AFTRA's belief that non-compete clauses are "fundamentally unfair").} Further, these clauses allow employers to exert even more control over the careers of their broadcasting employees.\footnote{195}{See Potter, supra note 55 (reporting on unusual amount of power broadcasting employers have over employees).} While employers can facilitate an employee's rise to fame, they can also take it away by preventing that employee from taking advantage of that fame for one year or more.\footnote{196}{See Baker, supra note 19, at 678-79 ("There is a trade-off between increased promotional investment, and the employee's obligation to share the fruits of that investment with the station that made that investment.").}

3. **Employers Lose Incentives to Promote Personalities**

Employers commonly argue that they are responsible for the employee's name-recognition.\footnote{197}{See Midwest Television, Inc. v. Oloffson, 699 N.E.2d 230, 233 (Ill. App. Ct. 1998) (detailing argument that advertising expenditure resulting in employee's fame is legitimate business interest).} They claim that the employee's fame results directly from the expenditures the employer has made to promote the personalities.\footnote{198}{See Brawer, supra note 8, at 725 (explaining broadcasting employer's argument that protecting investment in promoting personalities is legitimate business interest).} The argument continues that if stations can no longer benefit from promoting particular personalities, they will lose their incentive to promote these personalities.\footnote{199}{See Gould, supra note 18 (describing employers' justifications for enforcing non-competes).}

It is hard to know, however, whether advertising dollars alone are responsible for the popularity of certain broadcasters.\footnote{200}{See Brawer, supra note 8, at 725-26 (discussing other reasons for broadcasters' popularity).} Community involvement, abilities, or personalities that people admire, among other things, might increase a broadcaster's popularity regardless of the attention personalities are given in advertising.
schemes.\textsuperscript{201} Indeed, Wilson and Morrison appear to possess such qualities.\textsuperscript{202} Precedent in some courts, though, has shown support for the station's interests in several cases arguing this theory.\textsuperscript{203}

4. Protection of Employees

Employees may possibly sign a contract including a non-compete clause based on the assumption that they will never be required to break their contract.\textsuperscript{204} Employees may also sign such contracts without being informed of the conditions of their employment.\textsuperscript{205} This argument lacks force in the broadcasting industry because a number of cases dealing with the enforcement of non-compete clauses in the contracts of radio and television personalities have increased awareness of the issue.\textsuperscript{206} Further, because of the activity of AFTRA in this area, it would be difficult for any member employee to argue they were unaware of the existence of such clauses.\textsuperscript{207}

Radio and television station advocates may argue that unions provide broadcasters with all of the bargaining power they require

\textsuperscript{201} See Richmond Bros., Inc. v. Westinghouse Broad. Co., 256 N.E.2d 304, 307 (Mass. 1970) (illustrating other reasons for broadcaster's fame). The court stated:

Even though a broadcasting company may have expended large sums to promote a performer's popularity with the listening public, it would indeed be difficult to determine that such expenditures and promotion have resulted in the performer's popularity. The performer's popularity may well be attributed to his own personality and ability.

Id.

\textsuperscript{202} See FMQB article, supra note 2 ("Preston & Steve are such a winning combination - an entertaining and experienced show admired by listeners and advertisers alike for their exceptional talents, unique promotions, and wonderful community involvement. We're thrilled to have them join the WMMR team."

(quoted John Fullman, Greater Media Vice-President & Market Manager)).

\textsuperscript{203} See, e.g., T.K. Comms., Inc. v. Herman, 505 So. 2d 484, 486 (Fla. Dist. Ct. App. 1987) ("The breach consists of intangibles that cannot be replaced by money damages; for instance, the use of the disc jockeys' valuable names and reputations and the capitalization on the disc jockeys' popularity."); Beckman v. Cox Broad. Corp., 296 S.E.2d 566, 567 (Ga. 1982) (stating "during the term of Beckman's employment with Cox, WSB-TV spent in excess of a million dollars promoting Beckman's name, voice and image as an individual television personality and as part of WSB-TV's Action News Team..." (footnote omitted)).

\textsuperscript{204} See Baker, supra note 19, at 677 (discussing employees' inability to plan for potentially bad futures).

\textsuperscript{205} See Brawer, supra note 8, at 712-13 (discussing employers' failure to adequately explain terms of contract to broadcast employees).

\textsuperscript{206} See Baker, supra note 19, at 680 (noting high possibility of employee awareness of ramifications of non-competes in broadcasting industry due to enforcement of non-competes in "a number of high profile cases").

\textsuperscript{207} See Lurie, supra note 138, at 6-7 (discussing AFTRA's campaign to stamp out non-competes in broadcasting through legislation).
to be on equal footing. 208 When one looks closely at this highly competitive industry, however, it becomes apparent that obtaining a job in broadcasting “feels like winning the lottery without the financial windfall.” 209 The perceived (or actual) inequality in bargaining power can impact employment decisions.

When obtaining employment in one’s chosen field is highly unlikely, a person is more inclined to sign a contract even if it is unfair to them. 210 Even when there is a union, the fear of not getting the same opportunity again provides incentive to the employee to sign the contract, which gives the employer more power in hiring decisions. 211 This gives employers an unfair amount of leverage over the employee’s career. 212 Employers argue that employees in other industries deal with non-compete clauses, but employees in other industries potentially have more flexibility in changing their jobs in a way that does not cause them to break their non-compete agreements. 213

208. See, e.g., Baker, supra note 19, at 678 (arguing that union presence makes bargaining power equal between broadcasting employers and employees).

209. See Brawer, supra note 8, at 711 (opining that finding employment on-air in broadcasting is difficult task).

210. See Potter, supra note 55 (“‘Employers wield overwhelming power,’ says Dominique Bravo, legislative and legal affairs director for AFTRA, the union that represents broadcast talent. In a tight job market and in a consolidated industry like broadcasting, she says, ‘You sign or you don’t get the job.’”); DPE, NewsLine, Department for Professional Employees: Protecting Media Workers, (Jan. 2004), http://www.dpeafclio.org/news/newsline/newsline_2004_01.htm [hereinafter DPE] (“Such restrictions have a devastating effect upon the careers of these workers by, in effect, preventing them from earning a living or improving their economic standing within their chosen profession.”). The Department of Professional Employees represents unions. See Department for Professional Employees About DPE - Who We Are, http://www.dpeafclio.org/about.htm (last visited Mar. 19, 2006) (“The Department for Professional Employees, AFL-CIO (DPE) currently represents 22 unions comprising over four million white collar workers.”).

211. See Potter, supra note 55 (detailing situations of certain broadcasting employees). Potter explains:

Because of non-competes, some high-profile anchors have been forced to sit at home instead of practicing their craft. Tracy Rowlett, who worked at WFAA in Dallas for 25 years, was off the air for nine months before joining cross-town rival KTVT; Barbara Ciara waited a year after leaving WVEC to return to the anchor desk at WTKR, also in Norfolk. Ultimately, though, they got what they wanted: same job, same town, different station.

Id.

212. See DPE, supra note 210 (“For both aspiring and veteran broadcasters and journalists, these caveats are often the non-negotiable price of being hired in a take-it-or-leave-it environment that allows media employers to amass unreasonable economic leverage over these professionals.”).

213. See Potter, supra note 55 (detailing arguments advanced for each side). Such arguments specifically include:
Further, employees in smaller markets who have families and community ties have far less bargaining power than those who intend to use the smaller community networks as a jumping off point. 214 While a non-compete clause may not be harmful for a broadcast personality in Allentown, Pennsylvania, who intends to someday move to a California market, the same clause will have a serious effect on an Allentown family man who has lived in the city for most of his life and whose children attend school there. 215 Such a person is likely to become locked into a position with no hope of ever leaving the station with whom he signed the non-compete because his other options are to uproot his family or to leave them behind and take an out-of-town job. 216 The employee might avoid this if he is fired, but, in that case, finding a new job without moving may be impossible until his non-compete expires. At that point, his name recognition will have weakened or disappeared. 217

Perhaps an industry does not collapse without non-competes. 218 The success of California’s technological industry indicates that the absence of enforceable non-competes did not hurt

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Employers who favor non-competes say it’s discriminatory for states to make them illegal only for broadcast contracts, pointing out that doctors, sales people, and even employees at nail salons sometimes sign similar agreements. But AFTRA argues that sales people can always switch to another industry, keep working and stay in the same town. Broadcast journalists either have to wait, move or get out of the business. Unless, of course, they’re in management.

Id.

214. See Brawer, supra note 8, at 711-13 (demonstrating unequal bargaining power between employer and employee).

215. Cf. id. (explaining difficulties settled employees face); Baker, supra note 19, at 659-60 (exploring different situations of two employee types); Potter, supra note 55 (detailing how Fox News reporter Jon Du Pre “never would have moved if he hadn’t been forced to because of a noncompete clause in his contract at KPNX in Phoenix”). “It’s tough having to start over every few years,” he told the Arizona Republic. “I promised I would not do this to my kids, but it turns out I am because of the nature of this business.” Potter, supra note 55 (quoting Jon Du Pre).

216. See Potter, supra note 55 (noting that unlike other professionals, broadcasters cannot easily obtain similar positions in their field without leaving town or violating a non-compete).

217. See Brawer, supra note 8, at 716-18 (discussing outcome in certain employee situations).

218. See Baker, supra note 19, at 674 (discussing support for contention that California’s prevention of enforcement of non-competes caused some of Silicon Valley’s success).
the industry.219 Instead, the free flow of ideas allows for more rapid innovations in the field.220

IV. CONCLUSION

There is support for the contention that non-compete clauses are unfairly enforced in the broadcast industry.221 States may use legislation to deter the use of non-competes in the broadcast industry.222 Still, lack of interest or support for such legislation is problematic.223

It is prohibitively expensive for broadcasters to take these cases to court, as they often lose.224 Wilson and Morrison’s situation shows some possibility that such cases may prevail on the merits as support for legislation in this area increases.225 Communities should not be prevented from having the best possible entertainment unless broadcasting employers can show a legitimate and strong business interest in stifling competition.226 The reasons currently employed by broadcasting employers, such as advertising dollars spent and the uniqueness of the product they claim to have created in an on-air personality, seem weak in the face of the damage that these clauses can do to broadcasters’ careers.227

Pennsylvania should consider making the Broadcast Industry Free Market Act law, as this would prevent non-competes from applying in the broadcast industry by enforcing civil and criminal pen-

220. See id. (emphasizing how “knowledge spillover” allowed industry to thrive); Baker, supra note 19, at 674 (“[W]hen highly skilled employees move between firms taking ideas and innovations with them, the rapid diffusion of information more than compensates for the investment disincentives that arise when noncompetes are not enforceable.” (quoting Gilson, supra note 219)).
221. See Potter, supra note 55 (discussing plight of broadcasters in face of non-compete clauses).
222. For a discussion of states currently using legislation to prevent the enforcement of non-competes, see supra notes 128-34 and accompanying text.
223. Contra Hawkins, supra note 27, at 8 (listing examples of jurisdictions enacting legislation).
224. See Brawer, supra note 8, at 714-15 (explaining difficulty broadcasters experience in affording court battles).
225. See Hawkins, supra note 27 (mentioning effect of proposed legislation on awareness of problems in broadcasting).
227. See Brawer, supra note 8, at 716-18 (describing problems faced by broadcasting employees).
alties on employers who include them in contracts. If this measure seems too drastic, Pennsylvania might also consider drafting a statute that would make employers prove a stronger business interest than potential, but unsubstantiated, losses in advertising dollars or audiences. If non-compete clauses remain in place, broadcasting employees could be forced to come up with clever ways to avoid their effects.

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229. See Hawkins, Local, supra note 86 (discussing plaintiffs' experts' arguments in Wilson that "The Beat" and WMMR do not "target the same audiences" and that advertisers would not leave Y-100 because of Wilson and Morrison); see also Wilson v. Radio One, Inc., No. 05-1087, at 3 (E.D. Pa. Apr. 26, 2005) (order granting preliminary injunction) (finding that employer has no legitimate business interest because of changed format of station).

230. See Paul Heine, WMMR Trumpets Arrival of Former Y100 Morning Show, BILLBOARD RADIO MONITOR, Feb. 28, 2005, http://www.airplaymonitor.com/radiomonitor/news/format/rock/article_display.jsp?vnu-contentid=1000818753 ("By 10 a.m., it was a veritable media circus on 'MMR, with a pair of 11-year-old girls serving as translators for Preston & Steve, whose non-compete agreement with Radio One prohibits their voices (but not their names) to air on 'MMR for a six-month period.").