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NON-COMPETES, CONSIDERATION, AND COMMON SENSE: A TEMPORARILY REVOCABLE ARRANGEMENT TO PRESERVE “AFTERTHOUGHT” AGREEMENTS IN AT-WILL EMPLOYMENT

Joshua Sallmen *

I. INTRODUCTION

At-will employment provides a contractual avenue for employers to dismiss an employee for any reason (i.e., without having to establish “just cause”) and without warning.¹ While courts and scholars have generally accepted this arrangement as valid and necessary,² at-will employment provides a host of issues for courts to field.³ Without using the term of art in its opinion, the Supreme Court endorsed at-will employment arrangements over a century ago in *Adair v. United States* by protecting private contract rights against government regulation,⁴ a decision stemming from the

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¹ JAY SHEPHERD, *FIRING AT WILL: A MANAGER’S GUIDE* 3–4 (2011).

² See generally Richard Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

³ Courts have identified exceptions and extraordinary circumstances that limit the efficacy of at-will arrangements. The most notable of these are the public-policy exception and the implied-contract exception. See, e.g., *Peterman v. Int’l Bhd. of Teamsters*, 344 P.2d 25, 27 (Cal. Ct. App. 1959) (holding that an employee cannot be fired for refusing to perjure himself, protecting California’s interest in truthful testimony and discouraging criminal behavior); *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 894 (Mich. 1980) (recognizing that an implied contract can exist in at-will employment in a case-by-case analysis). Some states have declined to apply an implied-contract exception in at-will employment. See, e.g., *Muller v. Stromberg Carlson Corp.*, 427 So. 2d 266, 268 (Fla. Dist. Ct. App. 1983).

⁴ *Adair v. United States*, 208 U.S. 161, 174–75 (1908).

Lochner line of cases.⁵ Justices have dissented against at-will arrangements for public policy reasons throughout the last century, however, citing an inequality of bargaining power between employer and employee.⁶ An inherent lack of arm's length negotiation between the two is fundamental to this Note and its proposition.

The issue at hand is whether adequate consideration exists when an at-will employee signs a noncompetition agreement *after* he or she has already been working for an employer. It is well-established in virtually all states that consideration is sufficient when an employer requires an employee to sign a noncompetition agreement upon hiring him or her.⁷ Likewise, a change in employment status, such as a raise or promotion, provides sufficient consideration to enable an employer to require an employee to sign one.⁸ This Note grapples with whether a promise of continued employment, however brief, constitutes adequate consideration to require an at-will employee to sign a noncompetition agreement. These “afterthought” agreements⁹ have been a point of contention in each state with varied results across the country.

This Note will propose an afterthought agreement that would enable parties to retain their true “at-will” relationship while also enabling employers to compel their employees to enter into afterthought noncompetition agreements. It will do so by proposing an agreement with language which allows the employer to terminate the relationship, but if it does so within an agreed-upon timeframe, then the agreement is void.

⁵ The *Lochner* line of cases refers to an era of the Supreme Court where it “played a judicially activist but politically conservative role” in striking down government regulation, beginning around 1897 and ending in 1941 and named for its seminal case, *Lochner v. New York*, 198 U.S. 45 (1905). JEAN-CHRISTOPHE AGNEW, A COMPANION TO A POST-1945 AMERICA 386 (2005).

⁶ *E.g.*, *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (Holmes, J., dissenting).

⁷ See Ferdinand S. Tinio, Annotation, *Sufficiency of Consideration for Employee’s Covenant Not to Compete, Entered into After Inception of Employment*, 51 A.L.R.3d 825 § 2(a) (2017).

⁸ See, *e.g.*, *M.S. Jacobs and Assocs., Inc. v. Duffley*, 303 A.2d 921, 923 (Pa. 1979) (holding that a promotion is sufficient consideration in exchange for an at-will employee signing a noncompetition agreement); *Modern Laundry & Dry Cleaning Co. v. Farrer*, 536 A.2d 409, 411 (Pa. Super. 1988) (holding that a change from part-time to full-time employment is sufficient to constitute adequate consideration).

⁹ The term “afterthought agreement” was coined in one of the earliest scholarly publications on point, referencing any agreement entered into after an employee has commenced his employment. Jordan Leibman & Richard Nathan, *The Enforceability of Post-Employment Noncompetition Agreements Formed After At-Will Employment Has Commenced: The “Afterthought” Agreement*, 60 S. CAL. L. REV. 1465 (1987).

II. STATE COURT HOLDINGS

States fall into general groups where a state either approves of continued employment as sufficient consideration to support a noncompetition agreement¹⁰ or requires that something additional to continued employment is needed to constitute consideration.¹¹ States fitting into either group may have slightly modified versions of either rule. For instance, New York and several other states hold that continued employment provides adequate consideration to support a noncompetition agreement signed by an at-will employee, if employment continues for a substantial period.¹² Montana requires that a definite period of continued employment be promised at the outset or else continued employment is not sufficient consideration.¹³

Currently, there are thirty states that have held that continued employment constitutes sufficient consideration to support a noncompetition agreement signed by an existing at-will employee.¹⁴ Twelve of the remaining twenty states require that additional consideration is needed to hold a noncompetition agreement in these cases valid, and the remaining eight are undecided or the rule does not apply under the state's law.¹⁵

A. *The Pennsylvania Rule*

In November 2015, the Pennsylvania Supreme Court weighed in on whether a noncompetition agreement is valid when continued employment is the only alleged

¹⁰ This Note uses Wisconsin as a clear example of this majority position. *See infra* Section II.B.

¹¹ This Note uses Pennsylvania as a clear and recent example of the minority of states requiring additional consideration. *See infra* Section II.A.

¹² *See* Poller v. BioScrip, Inc., 974 F. Supp. 2d 204, 223 (S.D.N.Y. 2013). *See also* Ins. Assocs. Corp. v. Hansen, 723 P.2d 190, 191–92 (Idaho Ct. App. 1986) (holding that, in Idaho, employment for a certain amount of time may be required for consideration to be adequate); Puritan-Bennett Corp. v. Richter, 657 P.2d 589, 592 (Kan. Ct. App. 1983) (holding that employment must be continued for a “significant time” for consideration to be adequate).

¹³ *See* Access Organics, Inc. v. Hernandez, 175 P.3d 899, 904 (Mont. 2008).

¹⁴ Stacy A. Alexejun, Andrea J. Fowler & Brandon M. Krajewski, *Continued Employment: Lawful Consideration in Non-Competes?*, A.B.A. (Aug. 20, 2015), <http://apps.americanbar.org/litigation/committees/businessstorts/articles/summer2015-0815-employment-as-lawful-consideration-for-noncompete-agreements.html>.

¹⁵ *Id.* In California, most noncompetition agreements are unenforceable per statute and thus the issue regarding afterthought agreements is not applicable. *See* CAL. BUS. & PROF. CODE § 16600 (Deering 2017).

consideration provided to an at-will employee for entering the agreement.¹⁶ The high court in Pennsylvania was faced with a balancing act between language of intent to be bound and the “Commonwealth’s long history of disfavoring restrictive covenants.”¹⁷ Ultimately, the court decided that continued employment does not constitute ample consideration to validate a noncompetition agreement signed by an at-will employee, even in the face of statutory guidance.¹⁸

In *Socko*, Mid-Atlantic Systems of CPA, Inc. (“Appellant”) argued that the Uniform Written Obligations Act (“UWOA”) insulated the agreement from scrutiny for lack of consideration.¹⁹ Under the UWOA, if a contract contains an express statement that shows that the signer “intends to be legally bound,” then it may not be challenged for lack of consideration.²⁰ Appellant argued that the UWOA made whether the agreement was valid an open-and-shut case and that the Pennsylvania judiciary could not rewrite the UWOA “under the guise of interpretation.”²¹

Conversely, David Socko (“Appellee”) argued that the court follow the Commonwealth’s longstanding tradition of disfavoring restrictive covenants and find the agreement invalid for lack of consideration.²² Appellee pleaded with the court that, for public policy reasons, any restrictive covenant that lacks consideration cannot be shielded by statute.²³ Since nearly all contracts in Pennsylvania contain the boilerplate language of intent to be bound, Appellant’s assertion that the UWOA prevents any challenge to the agreement for lack of consideration would have the effect of “eliminat[ing] the consideration requirement for restrictive covenants” in the Commonwealth.²⁴

The lower court found in favor of Appellee, analogizing the UWOA with contract under seal cases.²⁵ Under typical circumstances, a contract under seal serves

¹⁶ *Socko v. Mid-Atlantic Sys. of CPA, Inc.*, 126 A.3d 1266 (Pa. 2015).

¹⁷ *Id.* at 1268.

¹⁸ *Id.*

¹⁹ *Id.* at 1269; 33 PA. CONS. STAT. §§ 6–8 (2016).

²⁰ *Socko*, 126 A.3d at 1269; 33 PA. CONS. STAT. § 6 (2016).

²¹ *Socko*, 126 A.3d at 1271.

²² *Id.* at 1268.

²³ *Id.* at 1271.

²⁴ *Id.* at 1272.

²⁵ *Socko v. Mid-Atlantic Sys. of CPA, Inc.*, 99 A.3d 928, 935 (Pa. Super. Ct. 2014).

as a valid substitute for valid consideration.²⁶ However, under Pennsylvania case law and in line with the policy against restrictive covenants, a contract under seal does not serve as a substitute for valid consideration, holding that “[l]anguage in an employment contract that the parties intend to be legally bound does not constitute valuable consideration in [the] context” of restrictive covenants.²⁷ Since the UWOA serves the identical purpose of substituting in language of intent to be bound in lieu of consideration, it follows that a similar exception for restrictive covenants should exist.²⁸ For this reason, the Superior Court found the noncompetition agreement invalid for lack of consideration.²⁹

The Pennsylvania Supreme Court was in agreement with the Superior Court’s assessment and ruled to affirm its decision.³⁰ The court started its analysis by going through the history of the at-will employment doctrine in Pennsylvania and the Commonwealth’s policy of disfavoring restrictive covenants.³¹ After the history lesson, the court fairly immediately dismissed the notion that continued employment is valuable consideration to enforce a noncompetition agreement or clause, stating that the employee must “receive[] ‘new’ and valuable consideration—that is, some corresponding benefit or a favorable change in employment status.”³² According to the court and Pennsylvania’s case law, “[s]ufficient new and valuable consideration” includes, but is not limited to, “a promotion, a change from part-time to full-time employment, or even a change to a compensation package of bonuses, insurance benefits, and severance benefits.”³³ After dismissing continued employment as sufficient consideration and deeming that the UWOA does not enable intent to be bound language to be a substitute for consideration, the majority opinion affirmed the Superior Court’s decision.³⁴

Thus, the state of the law in the Commonwealth of Pennsylvania is such that neither continued employment nor a statutory shield can constitute adequate

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 935–36.

³⁰ *Socko v. Mid-Atlantic Sys. of CPA, Inc.*, 126 A.3d 1266, 1268 (Pa. 2015).

³¹ *See id.* at 1273–75.

³² *Id.* at 1275 (citing *Pulse Techs., Inc. v. Notaro*, 67 A.3d 778, 781–82 (Pa. 2012)).

³³ *Id.* (footnotes omitted).

³⁴ *See id.* at 1275–78.

consideration to validate a noncompetition agreement signed as an afterthought. As a result, Pennsylvania joins a minority of states holding the same.

B. Wisconsin: A Recent but Classic Example of the Majority Position

In April 2015, the Wisconsin Supreme Court ruled to uphold a noncompetition agreement where the only alleged consideration for the agreement was continued employment at the company, making it the 30th state to approve of continued employment as valuable consideration to some degree.³⁵

Runzheimer International, Ltd. (“Runzheimer” or “Appellant”), employed David Friedlen (“Friedlen” or “Appellee”) at-will for more than 15 years before Runzheimer required all its employees to sign noncompetition agreements.³⁶ The agreement provided, in relevant part, that for a period of 24 months following the end of Friedlen’s employment with Runzheimer, “for whatever reason,” Friedlen would not use or disclose Runzheimer’s confidential information, would not directly or indirectly sell to protected customers, and would not directly or indirectly provide services to Runzheimer’s competitors.³⁷

After two and a half years of continued employment at Runzheimer, Friedlen’s employment was terminated.³⁸ Following his termination, Friedlen reached out to and began working for Corporate Reimbursement Services, Inc. (“CRS”), a competitor of Runzheimer.³⁹ Runzheimer filed suit against both Friedlen and CRS, alleging that Friedlen breached the noncompetition agreement and that CRS tortiously interfered with the noncompetition agreement.⁴⁰ At the trial court level, the court granted the defendants’ motion for summary judgment on the breach of contract claim, holding that the noncompetition agreement was not supported by consideration as a promise of continued employment is illusory.⁴¹ Rather than decide

³⁵ Runzheimer Int’l, Ltd. v. Friedlen, 862 N.W.2d 879, 882 (Wis. 2015). See also Alexejun et al., *supra* note 14.

³⁶ Runzheimer, 862 N.W.2d at 882–83.

³⁷ *Id.* at 883.

³⁸ *Id.*

³⁹ *Id.* at 884.

⁴⁰ *Id.*

⁴¹ *Id.*

Runzheimer's appeal, the Wisconsin Court of Appeals certified the question at hand to the Wisconsin Supreme Court.⁴²

The Wisconsin Supreme Court acknowledged that a majority of jurisdictions hold that "forbearance of the right to terminate an at-will employee is lawful consideration."⁴³ These jurisdictions typically reason that an employee obtains "the expectation of continued employment, which is not worthless or illusory."⁴⁴ Additionally, the American Law Institute embraces the same position.⁴⁵

After examining the state of the law countrywide, the court then moved to the case law on point in Wisconsin. In the court's opinion, the relevant rule in Wisconsin is that "[f]orbearance in exercising a legal right is valid consideration . . ."⁴⁶ As a result, the court noted that if the right to terminate an at-will employee is a "legal right," then foregoing that right would constitute valid consideration and the noncompetition agreement would be valid.⁴⁷ Since Wisconsin had long accepted an employer's right to terminate an at-will employee for any reason or no reason, the court held that the right to terminate an at-will employee constitutes a "legal right" and that the consideration in *Runzheimer* was valid.⁴⁸

Thus, with *Runzheimer*, Wisconsin joined the majority of states that hold that a forbearance of the right to terminate an at-will employee (in other words, a promise of continued employment) constitutes valid consideration to hold an employee to a restrictive covenant that he or she signed.⁴⁹ The court in *Runzheimer* took care to quash concerns that other states such as Idaho have raised about the length of

⁴² *Id.*

⁴³ *Id.* at 888–89.

⁴⁴ *Id.* at 888.

⁴⁵ *Id.* at 888–89 (citing RESTATEMENT (THIRD) OF EMP'T LAW § 8.06 cmt. e (AM. LAW INST., Proposed Final Draft 2014)).

⁴⁶ *Runzheimer*, 862 N.W.2d at 889 (citing Lovett v. Mt. Senario Coll., Inc., 454 N.W.2d 356, 358 (Wis. Ct. App. 1990)) (internal quotation marks omitted).

⁴⁷ *Id.*

⁴⁸ *Id.* at 889–90.

⁴⁹ While *Runzheimer* serves as a recent and thorough case study of the majority opinion, 29 other states have held similarly. *See, e.g.*, Corson v. Universal Door Sys., Inc., 596 So. 2d 565 (Ala. 1991); Mattison v. Johnston, 730 P.2d 286 (Ariz. Ct. App. 1986); Lucht's Concrete Pumping, Inc. v. Horner, 255 P.3d 1058 (Colo. 2011); QIS, Inc. v. Indus. Quality Control, Inc., 686 N.W.2d 788 (Mich. 2004); Lake Land Emp't Grp., LLC v. Columber, 804 N.E.2d 27 (Ohio 2004).

continued employment.⁵⁰ The court held that the consideration of not terminating Runzheimer was the promise not to “fire Friedlen *at that time and for that reason*”—a promise that Runzheimer performed at the moment it forewent firing him at the time of the signing of the agreement.⁵¹ Thus, the amount of time that Friedlen continues working at Runzheimer does not go towards the existence of the consideration but rather the *adequacy* of consideration, which is not a question for courts to decide.⁵² It is well established in contract law that so long as consideration exists in a bargain, then the fairness or adequacy of the consideration is immaterial.⁵³

C. *Montana and Kansas: Opposite Conclusions with Middle Ground*

While most states have taken a (somewhat) simple “yes” or “no” approach on whether these afterthought agreements are enforceable, a few have decided that this is an area of the law that requires nuance.⁵⁴ Two such states are Montana and Kansas.⁵⁵

1. Montana: No Consideration Without Promised Continued Employment

As a general rule, the Supreme Court of Montana held that consideration for an afterthought agreement is not sufficient through continued employment alone unless a definite period of the same was promised at the time of the consummation of the agreement.⁵⁶

In *Hernandez*, a sole proprietor hired Andy Hernandez (“Hernandez”) in April 2015 to sell organic produce for her company, Access Organics, Inc. (“Access Organics”).⁵⁷ Four months later, Access Organics had Hernandez sign both a

⁵⁰ See discussion *infra* Section II.C.

⁵¹ *Runzheimer*, 862 N.W.2d at 890.

⁵² *Id.* at 890–91.

⁵³ See *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891).

⁵⁴ States that take an “it depends” approach generally include a review of how long the employee is employed after the agreement is entered. See *Alexejun et al.*, *supra* note 14.

⁵⁵ See *Access Organics, Inc. v. Hernandez*, 175 P.3d 899 (Mont. 2008); *Puritan-Bennett Corp. v. Richter*, 657 P.2d 589 (Kan. Ct. App. 1983).

⁵⁶ *Hernandez*, 175 P.3d at 904.

⁵⁷ *Id.* at 901.

noncompetition and a non-disclosure agreement.⁵⁸ Shortly thereafter, Access Organics had some financial problems and laid off Hernandez and others.⁵⁹ Hernandez then went into business with another former Access Organics employee, providing essentially the same services and in the same geographic area.⁶⁰ Access Organics brought suit alleging that Hernandez and his partner's business venture violated the noncompetition agreement, and the Montana District Court granted injunctive relief and further held that Hernandez's actions violated the agreement.⁶¹ Hernandez then appealed the issue of whether the noncompetition agreement was valid, arguing that there was no valid consideration for his entering into it.⁶²

The Supreme Court of Montana was concise and clear with its ruling.⁶³ It first laid out Montana's policy disfavoring restrictive covenants and its resulting strict scrutiny of the same.⁶⁴ Then, it acknowledged that afterthought agreements are not automatically invalid: for starters, they can be made valid via consideration independent from continued employment, such as offering a promotion or raise.⁶⁵ The court continued by disagreeing with states such as Washington that say continued employment is never ample consideration for an afterthought agreement.⁶⁶ Ultimately, the court held that an afterthought agreement can be valid if the employer promises continued employment for a definite period for the employee, providing consideration in the form of job security.⁶⁷

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 901–02.

⁶² *Id.* at 902.

⁶³ *See id.*

⁶⁴ *Id.* at 902–03 (citing *Dumont v. Tucker*, 822 P.2d 96, 98 (Mont. 1991)).

⁶⁵ *Id.* at 903.

⁶⁶ *Id.* at 904 (citing and disagreeing with *Labriola v. Pollard Grp., Inc.*, 100 P.3d 791, 794 (Wash. 2004)).

⁶⁷ *Id.*

2. A Look Back at the Length of Employment in Kansas: Was that Long Enough?

Kansas takes a different approach than Montana while still putting weight upon the length of the continued employment post-afterthought agreement.⁶⁸

In *Richter*, Defendant Robert Richter (“Richter”) accepted a job with Puritan-Bennett Corporation (“Puritan-Bennett”) on November 2, 1973, subsequently uprooting his life and family to move to Kansas City by his start date on December 17, 1973.⁶⁹ On his start date, he filled out paperwork including a “Hiring Agreement” which was never discussed prior to that date.⁷⁰ The Hiring Agreement contained several restrictive covenants, including a covenant not to compete.⁷¹ Richter worked at Puritan-Bennett as an engineer until 1981, and soon after, he informed Puritan-Bennett that he had accepted a position at Scott Aviation, their biggest competitor.⁷² Puritan-Bennett sought injunctive relief to enforce the restrictive covenants, and the Kansas District Court held that Richter was precluded from disclosing trade secrets but was not barred from working at Scott Aviation.⁷³

The Kansas Court of Appeals first looked at whether the agreement was entered as a term of Richter’s hiring.⁷⁴ It determined that, while he signed it on his first day and it was entitled “Hiring Agreement,” he had not heard of it until six weeks after receiving his job offer, which he relied on to uproot his entire life, and therefore, the agreement was entered separately from his hiring.⁷⁵ Then, it considered the issue of whether continued employment is sufficient to provide consideration for an afterthought agreement.⁷⁶ The court engaged in discussion about Richter’s subsequent employment with the company, including the fact that it was lengthy, his obtaining promotions and learning company trade secrets.⁷⁷ Despite the fact that

⁶⁸ *Puritan-Bennett Corp. v. Richter*, 657 P.2d 589, 592 (Kan. Ct. App. 1983).

⁶⁹ *Id.* at 590.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 590–91.

⁷³ *Id.* at 591.

⁷⁴ *Id.* at 591–92.

⁷⁵ *Id.*

⁷⁶ *Id.* at 592.

⁷⁷ *Id.*

none of those benefits mentioned were explicitly conferred upon Richter at the time of signing the Hiring Agreement, the court deemed that they were valuable benefits given by Puritan-Bennett to Richter and held that the noncompetition covenant was enforceable as a result.⁷⁸ While the court in *Richter* did not state that continued employment for a long period or other benefits are required for a noncompetition agreement to be deemed valid, its due consideration to those facts provides that they should be considered in subsequent proceedings.⁷⁹

III. DISSECTING THE HOLDINGS

The core issue at the heart of each of these cases is whether continued employment at that moment (or, in other words, an employer foregoing its right to fire its employee right then and there) should count as consideration in exchange for the employee signing the afterthought agreement. The problem, then, is that both parties can form compelling arguments for whether it is indeed valid consideration, and the courts are then left with a difficult decision, as evidenced by varied results across states.⁸⁰ At least one court has accused other courts of simply deciding cases on its notion of fairness on the day⁸¹ and some scholars propose a standard involving fairness be employed.⁸²

⁷⁸ *Id.*

⁷⁹ *See id.* at 592.

⁸⁰ *See, e.g.,* Runzheimer Int'l, Ltd. v. Friedlen, 862 N.W.2d 879 (Wis. 2014) (providing a standard example of the majority position that continued employment is consideration in a recent case); Camco, Inc. v. Baker, 936 P.2d 829, 831–32 (Nev. 1997) (per curiam) (offering an older example of the same); *but cf.* Socko v. Mid-Atlantic Sys. of CPA, Inc., 126 A.3d 1266 (Pa. 2015) (holding that consideration was not valid in a recent and analogous case); Labriola v. Pollard Grp., Inc., 100 P.3d 791, 794 (Wash. 2004); *see also generally* RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW INST. 1981) (defining consideration, discussing its background, and providing examples).

⁸¹ *McGough v. Nalco Co.*, 496 F. Supp. 2d 729, 747–49 (N.D. W. Va. 2007) (holding in line with the majority opinion and with Alabama common law but utilizing a fairness analysis in lieu of traditional consideration arguments to get there). The court in *McGough* opined that other courts utilize a similar fairness analysis under the guise of making a decision based on whether there is ample consideration. *Id.* at 747. For a discussion on this same phenomenon, including summarizing the court in *McGough's* thoughts on it, see Michael J. Garrison & John T. Wendt, *Employee Non-competes and Consideration: A Proposed Good Faith Standard for the "Afterthought" Agreement*, 64 KAN. L. REV. 409, 445–46 (2015).

⁸² Richard A. Lord, *The At-Will Relationship in the 21st Century: A Consideration of Consideration*, 58 BAYLOR L. REV. 707, 717 (2006) (arguing that Texas' example is the one to follow when making a decision in at-will employment disputes, but since "it's doubtful that other courts will" do so, courts should then abandon the consideration doctrine and employ a fairness standard). A fairness standard would "focus on whether the interests of the parties, based on their relationship, and the interests of fairness, based on the circumstances surrounding the parties' relationship, justify the enforcement of

It follows, then, that litigants will often offer broad policy arguments and emotional appeals to support their claims. Proponents of continued employment as a basis for consideration in afterthought agreements will argue that finding them invalid on their face amounts to an evisceration of the at-will employment doctrine.⁸³ Opponents will argue that finding these agreements valid based on continued employment alone is an affront to the doctrinal requirement and definition of consideration in a contract and a general public policy against restrictive covenants.⁸⁴ How can one reconcile these sharply opposing views? Courts in states such as Montana and Kansas have attempted to do so in examining whether employment was promised and/or delivered upon for an adequate amount of time.⁸⁵ That proposition comes with its own host of issues.⁸⁶ Frankly, none of the jurisprudence on point is without its issues.

A. *Pennsylvania and the Minority Approach—“Defending the Little Guy”*

The minority approach to consideration, as exemplified by *Socko* and the Pennsylvania Supreme Court, has perhaps the strongest public policy argument. For starters, Pennsylvania and a strong majority of states have policies disfavoring restrictive covenants.⁸⁷ Additionally, even states such as Kansas that have found

promises made by either the employer or the employee.” *Id.* Much like the court in *McGough*, 496 F. Supp. 2d at 747, the author points out that, since there is no clear answer through the consideration doctrine, courts are employing this method behind the scenes and “should be open about it.” Lord, *supra*, at 717.

⁸³ If an employer not firing its employee at that moment does not constitute a forbearance of a legal right—and thus consideration for the afterthought agreement—then how can the employment arrangement be construed as “at-will?” See *supra* notes 44–49 and accompanying text (discussing this arrangement in *Runzheimer*).

⁸⁴ For a discussion of the public policy implications with respect to restrictive covenants in general, see Leibman & Nathan, *supra* note 9, at 1481–82 nn.40–41 and accompanying text.

⁸⁵ See discussion of *Hernandez* (Montana) and *Richter* (Kansas) *supra* Section II.C.

⁸⁶ See discussion of a temporal requirement on afterthought agreements *infra* Section III.C.

⁸⁷ See *Socko v. Mid-Atlantic Sys. of CPA*, 99 A.3d 928, 931 (Pa. Super. Ct. 2014), *aff’d*, 126 A.3d 1266 (Pa. 2015) (discussing Pennsylvania’s stance against restrictive covenants not come compete, “because they ‘have been historically viewed as a trade restraint that prevent[] a former employee from earning a living’” (citing *Hess v. Gebhard & Co.*, 808 A.2d 912, 917 (Pa. 2002))); *Access Organics, Inc. v. Hernandez*, 175 P.3d 899, 904 (Mont. 2008) (citing *Dumont v. Tucker*, 822 P.2d 96, 98 (Mont.1991)) (discussing that the court must use a strict scrutiny of noncompetition agreements in light of a strong policy disfavoring restrictive covenants). For a discussion of the public policy implications with respect

continued employment can count as consideration have considered factors such as whether the employee uprooted his or her life when accepting the job.⁸⁸ As a general public policy, it is probably best to not allow an employee to make huge changes to his life, only to surprise him with an agreement that had not been discussed previously without conferring any benefit upon him. For an employee in this circumstance or in a variety of other situations, there is an inequality of bargaining power, and employees feel forced to sign agreements under significant economic pressure or under a set of circumstances he or she perceives to be agreeable only to be changed abruptly soon after.⁸⁹

A common-sense argument helps former employees and courts alike when finding in favor of the minority position. For an employee with the sort of importance and knowledge that compels her employer to force her to sign a noncompetition agreement, offering some (relatively) small token to improve the employee's status is not onerous or overly expensive and nearly eliminates litigation risk.⁹⁰ In *Hernandez*, the court lists not only salary increases and promotions, but conferring knowledge of trade secrets or other confidential information upon the employee as potential valid consideration for an afterthought agreement.⁹¹

Detractors of the minority position point out the obvious—that an employer in an at-will arrangement has the right to terminate at any time, and if it has this right, then foregoing that right at that moment constitutes due consideration for requiring an employee to sign the agreement.⁹² Professors Leibman and Nathan point out that traditional contract law defenses such as duress, unconscionability, and fraud are available to defendants in a suit for breach of a noncompetition agreement.⁹³ The

to restrictive covenants in general, see Leibman & Nathan, *supra* note 9, at 1481–82 nn.40–41 and accompanying text.

⁸⁸ See *Puritan-Bennett Corp. v. Richter*, 657 P.2d 589, 590 (Kan. Ct. App. 1983). In *Richter*, the court mentioned on multiple occasions that Richter made major changes to his life to accept his new job, only to be surprised by a noncompetition agreement on his first day. *Id.* The Kansas Court of Appeals clearly found this to be relevant, seemingly only upholding the agreement's validity because Richter has worked for several years thereafter. *Id.* at 590–92.

⁸⁹ Leibman & Nathan, *supra* note 9, at 1491.

⁹⁰ See *supra* note 8 and accompanying text (discussing how a promotion, raise, or other conferred benefit has long been considered sufficient consideration for an afterthought agreement).

⁹¹ 175 P.3d at 903.

⁹² See *infra* note 95 and accompanying text.

⁹³ Leibman & Nathan, *supra* note 9, at 1539–51.

argument against the minority position runs deeper than just noncompetition agreements, however; while courts' focus has been on afterthought agreements that deal with competition, *any* agreement signed after employment commences has these same issues and implications, including nondisclosure agreements ("NDAs"). Requiring a business to offer a raise or promotion to every employee to whom it needs to disclose confidential information is a burdensome requirement.

B. *The Majority of States' Deference to At-Will Arrangement*

Perhaps the two best defenses to the majority's position are (1) that continued employment in any fashion constitutes consideration and (2) that at-will employment and agreements surrounding it should not be viewed under a contract law light.

Nearly all, if not all, states holding in favor of afterthought agreements' validity make the argument that foregoing a legal right such as the right to terminate employment constitutes valid consideration for a contract.⁹⁴ This is often refuted by argument that a promise not to terminate at-will employment is illusory, as the question remains of "whether the promise not to discharge [the employee] today is a promise to perform anything at all, when the power to discharge him tomorrow is retained by [the employer]."⁹⁵ Several authorities on point agree with this assessment.⁹⁶

⁹⁴ See, e.g., *Runzheimer Int'l, Ltd. v. Friedlen*, 862 N.W.2d 879, 892 (Wis. 2014); *Camco, Inc. v. Baker*, 936 P.2d 829, 830–32 (Nev. 1997); *Lake Land Emp't Grp., LLC v. Columber*, 804 N.E.2d 27, 32 (Ohio 2004); see also *Hamer v. Sidway*, 27 N.E. 256, 257 (N.Y. 1891) (providing the seminal example of consideration in the form of forbearance of a legal right); see generally RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW INST. 1981) (providing background, a discussion, and examples on what consideration is and what constitutes consideration).

⁹⁵ Leibman & Nathan, *supra* note 9, at 1472–73.

⁹⁶ E.g., *Miami Coca-Cola Bottling Co. v. Orange Crush Co.*, 296 F. 693, 694 (5th Cir. 1924) (stating that a "promise for a promise" is not so if one of the parties can renege on that promise at-will); *Wilmar, Inc. v. Liles*, 185 S.E.2d 278, 282–83 (N.C. Ct. App. 1971) (holding that continued at-will employment is illusory, and therefore could not serve as consideration for employee's covenant not to compete); see RESTATEMENT (SECOND) OF CONTRACTS § 77 cmt. a, illus. 2 (AM. LAW INST. 1981); SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 7:7 (4th ed. 1992 & Supp. 2006); see also Garrison & Wendt, *supra* note 81, at 425 (stating that "consideration cannot be constituted out of something that is given and taken in the same breath—of an employment which need not last longer than the ink is dry upon the signature of the employee" (internal quotation marks omitted)) (citing *Kadis v. Britt*, 29 S.E.2d 543, 548 (N.C. 1944)).

At least one scholar has argued that at-will employment is a quasi-contract area and should not be viewed under a strict reading of common law of contracts.⁹⁷ This would enable courts to abandon the consideration requirement and make broader policy arguments based on fairness or the interests of the parties, much like the court's proposal in *McGough*.⁹⁸

*C. Requiring Continued Employment for a Time is Neither
Definite nor At-Will*

States such as Montana and Kansas that propose a standard that falls somewhere in between the Wisconsin and Pennsylvania standards provide value to the discussion. To appease an employer, these agreements are held valid by continued employment alone; to appease the employee, that continued employment will need to be for either an agreed upon period at the outset⁹⁹ or for a sufficient amount of time when looked at retrospectively.¹⁰⁰

The key problem with this approach is that it defeats the purpose of an at-will employment arrangement. If employment is required to continue to make an agreement valid, and an employer no longer has the absolute right to terminate the employment at any time, the employment arrangement is no longer at-will.¹⁰¹ Another major issue is that nearly every state that employs this method approaches it differently.¹⁰² Even those states that agree that a definite length of continued employment need not be contemplated at the outset do not agree on the amount of time that would be sufficient, using ambiguous terms such as “certain additional

⁹⁷ See Diane M. Cornell, *Employee Benefits and the Employment-at-Will Rule*, 8 L. & INEQ. 355, 358–59 (1990) (stating that employment contracts have historically been treated in a different realm than traditional contract law, a quasi-contract-type area).

⁹⁸ See *McGough v. Nalco*, 496 F. Supp. 2d 729, 747–49 (N.D. W. Va. 2007).

⁹⁹ *E.g.*, *Access Organics, Inc. v. Hernandez*, 175 P.3d 899, 904 (Mont. 2008).

¹⁰⁰ *E.g.*, *Puritan-Bennett Corp. v. Richter*, 657 P.2d 589, 592 (Kan. Ct. App. 1983).

¹⁰¹ For a definition of at-will employment, see SHEPHERD, *supra* note 1, at 4. Courts such as those in Montana and Kansas propose a rule that arguably provides a good compromise for employer and employee alike, but it flies in the face of the at-will employment doctrine.

¹⁰² Compare *Hernandez*, 175 P.3d at 904 (requiring a definite period of continued employment to be contemplated at the time of entering the afterthought agreement to provide consideration in the form of job security), with *Richter*, 657 P.2d at 592 (providing a retrospective look at employment to see if it continued for a “significant time”), and *Prairie Rheumatology Assocs., S.C. v. Francis*, 24 N.E.3d 58, 62 (Ill. App. Ct. 2014) (holding that employment may need to continue for at least two years).

time,”¹⁰³ a “significant time,”¹⁰⁴ and an “appreciable length of time.”¹⁰⁵ This varied language from one state to the next on the same topic would be a nightmare for an interstate corporation to sift through when creating and executing afterthought agreements. Further, courts use a lot of “may” and “should” language that just begs for litigation on this matter.¹⁰⁶

IV. THE PROPOSED SOLUTION

Holdings and proposals to standardize the afterthought agreement process have run the whole gamut. Courts have held allowing even a moment of continued employment to act as valid consideration,¹⁰⁷ not allowing it to act as consideration under any circumstance,¹⁰⁸ and allowing it to validate the agreement only when the employment continues for an adequate or agreed-upon amount of time.¹⁰⁹

Scholars have proposed a variety of solutions that would further nuance the situation. Michael Garrison and John Wendt propose a “good faith standard” for determining whether an afterthought agreement should be enforceable.¹¹⁰ Garrison and Wendt’s proposal would help to balance the competing concerns of both the majority and minority positions. It would not curb the litigation on point, however, creating yet another issue for courts to consider. Rachel Arnow-Richman proposes a “procedural good faith” rule that addresses coercion concerns by requiring ample notice to the employee of a proposed change in employment.¹¹¹ In addition to concerns of litigation on what constitutes ample “reasonable notice,”¹¹² the proposal

¹⁰³ *Ins. Assocs. Corp. v. Hansen*, 723 P.2d 190, 191 (Idaho Ct. App. 1986).

¹⁰⁴ *Richter*, 657 P.2d at 592.

¹⁰⁵ *Cent. Adjustment Bureau, Inc. v. Ingram Assocs., Inc.*, 622 S.W. 2d 681, 685 (Ky. Ct. App. 1981).

¹⁰⁶ The use of uncertain language on whether continued employment for a time is required and on how long that time should be is irresponsible as it invites every one of these afterthought agreements to be litigated when employment is continued for a moderate amount of time.

¹⁰⁷ See discussion *supra* Section III.B.

¹⁰⁸ See discussion *supra* Section III.A.

¹⁰⁹ See discussion *supra* Section III.C.

¹¹⁰ See Garrison & Wendt, *supra* note 81, at 414.

¹¹¹ Rachel Arnow-Richman, *Modifying At-Will Employment Contracts*, 57 B.C. L. REV. 427 (2016).

¹¹² Arnow-Richman’s proposal does not specify what may qualify as “reasonable notice”—understandably so, as every employment situation is different—but, much like Garrison and Wendt’s proposal, this uncertainty would invite litigation that would bog down courts. *Id.* at 477–78.

requires an employer to contemplate the need for an afterthought agreement likely further in advance than an employer typically would.

This Note proposes a simple yet not previously contemplated solution on the matter, an agreement in the spirit of a unilateral contract that I will refer to as a “revocable afterthought agreement.”

A. Fake Corporation and its Jane Doe Dilemma

This type of arrangement is best introduced through a streamlined hypothetical. Fake Corporation hires employee Jane Doe in January 2017 to be a traveling salesperson. Jane performs exceptionally well and Fake Corporation promotes her in March 2017 to sales supervisor. Fake Corporation realizes soon afterwards that Jane’s new role will provide her the ability and power to start her own business or join a competitor, taking clients with her in the process.

In response, in May 2017, Fake Corporation asks her to sign a noncompetition agreement to limit this vulnerability as best as possible. Since they conferred a promotion and raise upon her recently, Fake Corporation is not willing to offer Jane any additional benefit in exchange for her signing this agreement. Fake Corporation’s legal team advises it that the law in its state is very unclear on this sort of agreement: There is a chance that simply allowing Jane to continue working in her capacity would be sufficient consideration for the agreement, but there is as equal a chance that it would be found invalid. Fake Corporation is left with a dilemma on how to proceed.

Fake Corporation’s legal team then draws up language in the agreement that allows it to terminate Jane’s employment at any point after the signing of the agreement, with a caveat. If Fake Corporation fires Jane within one year of the signing of the noncompetition agreement, the agreement is considered revoked and void, barring that the termination was for a reason contemplated in the contract (i.e., for “good cause”). These reasons could include facts such as Jane committing a crime or her substantially harming the reputation of the corporation. If Fake Corporation fires Jane after the agreed-upon one year, then the noncompetition agreement is valid. And, if Jane quits at any time for any reason but for a list of agreed-upon reasons (i.e., for “good cause”), then the agreement is valid. Reasons to justify Jane quitting could be a variety of things—anything from an undue reduction in salary or undue addition of workload (without a corresponding salary increase) to Fake Corporation committing an illegal or malfeasant act that prompts Jane to leave the company.

And, voila—Fake Corporation and Jane have entered a revocable afterthought agreement that would, or at least should, survive scrutiny in nearly any state.

B. Employer, Employee, and the Courts: Everybody Wins

While nothing in life comes free, the revocable afterthought agreement considers the needs and wants of the employer and employee and the public policy concerns at play, arriving at a compromise that offers something for everyone involved. The employer provides a period of “guaranteed employment”¹¹³ and the employee tenders a promise not to compete so long as the employer honors that period of employment.

The revocable agreement would operate in the form of a unilateral contract.¹¹⁴ The employee makes an irrevocable offer to the employer that she will not compete for an agreed-upon timeframe after her employment with the employer ceases. This irrevocable offer is accepted when the employer foregoes its right to terminate her employment for the agreed-upon timeframe. At the expiration of that timeframe, the revocable afterthought agreement is formed, and the employee is bound by her part of the agreement. If the employer terminates the employee prior to the agreed-upon date, then it rejects the offer, there is no afterthought agreement, and the employee is unencumbered when seeking new employment. If she is fired for good cause, this would operate to finalize the afterthought agreement. If the employee quits for any reason other than for good cause, the agreement is finalized.

This arrangement may not be perfect, but it provides a compromise much like that in *Hernandez* without eliminating the at-will nature of the agreement.¹¹⁵ The employer gets its noncompetition agreement without sacrificing too much,¹¹⁶ retaining its rights under the at-will employment doctrine, and the employee gets either job security or the ability to find a new job immediately—depending on whether the employer retains the employee for the requisite amount of time.

¹¹³ This period could be negotiated between the parties while also being subject to general parameters of reasonableness, much like the common law on the term for noncompetition agreements themselves. *See, e.g.,* Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531, 545 (Wyo. 1993) (reducing the length of a noncompetition clause from three years to one year as three years was unduly long).

¹¹⁴ A unilateral contract is “[a] contract in which only one party makes a promise or undertakes a performance.” *Contract—Unilateral Contract*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹¹⁵ *See* Access Organics, Inc. v. Hernandez, 175 P.3d 899, 904 (Mont. 2008); *supra* notes 57–68 and accompanying text (discussing Montana’s arrangement for afterthought agreements).

¹¹⁶ Employers often keep employees on their payroll for more than a year or two after these arrangements regardless, so they do not have to concede a lot to give an employee some peace of mind. *See, e.g.,* Runzheimer Int’l, Ltd. v. Friedlen, 862 N.W.2d 879, 892 (Wis. 2014); Puritan-Bennett Corp. v. Richter, 657 P.2d 589, 592 (Kan. Ct. App. 1983).

Further, the biggest winner in this arrangement may be the courts. Courts should have less afterthought agreement litigation on their dockets. In an ideal world, a revocable afterthought agreement would eliminate the need for litigation entirely—either the agreement is followed or it is not. Naturally, lawsuits would ensue on the conscionability and reasonableness of the length of time set forth in the agreement, but suits should be limited and significantly less complex than the current litigation in this area.

V. CONCLUSION

In practice, the simplest, safest and least litigated route to solving afterthought agreements would be for an employer to confer some small benefit upon an employee to constitute widely-accepted consideration.¹¹⁷ For any number of reasons, however, an employer may not view this as feasible or reasonable. In that event, the foregoing proposal for a revocable afterthought agreement is the best compromise to allow all parties involved to meet their goals while still honoring the common law of contracts, the at-will employment doctrine, and traditional notions of fairness.

¹¹⁷ See *supra* note 8 and accompanying text (discussing how a promotion, raise or other conferred benefit has long been considered sufficient consideration for an afterthought agreement).

