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Substantive Track – Session 3

Non-Competes & Non-Solicitation Agreements

Presenters:
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About the Presenters...

Peter Richter is a Member of Stroud, Willink & Howard, LLC, where his practice focuses on employment matters and business litigation. He has represented clients in state and federal court and before the EEOC and the Wisconsin Department of Workforce Development, and has authored numerous publications and articles regarding business and employment law. Peter earned his J.D., cum laude, from the University of Wisconsin Law School in 1998.

Will Kramer is a partner in the Litigation Practice Group at Pines Bach LLP. His primary practice focuses on representation of labor unions and whistleblowers, as well as employee-side employment matters. He practices in state and federal court, as well as before administrative agencies including the U.S. Department of Labor Office of Administrative Law Judges (OALJ), the Equal Employment Opportunity Commission (EEOC), and the Wisconsin Equal Rights Division (ERD). Will draws upon his unique background as an investigator, risk management consultant, and whistleblower to develop and implement comprehensive and innovative legal strategies for his clients.

Non-Competes and Non-Solicitation Agreements in Wisconsin

Peter Richter, Stroud, Willink & Howard, LLC — Will Kramer, Pines Bach LLP

I. General Principles

A properly drafted non-compete is enforceable in Wisconsin. An overbroad one is not, and the court will not fix it. Wis. Stat. § 103.465. The statute was enacted in 1957 to overrule *Fullerton Lumber Co. v. Torborg*, 270 Wis. 133, 70 N.W.2d 585 (1955), in which the court had enforced an unreasonable ten-year covenant for three years. The legislature's objection was that partial enforcement "tends to encourage employers possessing bargaining power superior to that of the employees to insist upon unreasonable and excessive restrictions, secure in the knowledge that the promise will be upheld in part, if not in full." *Streiff v. American Family Mut. Ins. Co.*, 118 Wis. 2d 602, 608-09, 348 N.W.2d 505 (1984).

Restrictive covenants are prima facie suspect; must withstand close scrutiny to pass legal muster; will not be construed beyond what the language absolutely requires; and are construed in favor of the employee. *Streiff*, 118 Wis. 2d at 611; *Farm Credit Servs. of N. Cent. Wis., ACA v. Wysocki*, 2001 WI 51, ¶¶9-10, 243 Wis. 2d 305, 627 N.W.2d 444; *Star Direct, Inc. v. Dal Pra*, 2009 WI 76, ¶19, 319 Wis. 2d 274, 767 N.W.2d 898. The canons operate within ordinary contract interpretation; a court will not "read a clause unreasonably in order to find the clause unreasonable and unenforceable against the employee." *Star Direct*, ¶62.

A covenant containing an unreasonable restraint is void in its entirety, reasonable parts included. § 103.465. Separate covenants supporting separate interests may be divisible, so that one falls and the others stand; indivisibility "will usually be seen by an intertwining, or inextricable link, between the various provisions via a textual reference such that one provision cannot be read or interpreted without reference to the other." *Star Direct*, ¶¶76, 78 (customer and confidentiality clauses enforced; "substantially similar business" clause void). And a clause directing the court to modify a restraint "only to the extent deemed necessary" to make it enforceable is contrary to the statute and has no effect, though its presence does not by itself void the covenants beside it. *Diamond Assets LLC v. Godina*, 2022 WI App 47, ¶¶65-74.

II. Non-compete Agreements under Wisconsin Law

The covenant must be limited to a specified time and territory, be "reasonably necessary for the protection of the employer," and not impose "an unreasonable restraint." The

employer bears the burden on every element, and failing one voids the covenant. *Star Direct*, ¶¶19-21. The five requirements—a protectable interest, a reasonable time, a reasonable territory, not harsh or oppressive to the employee, not contrary to public policy—come from *Lakeside Oil Co. v. Slutsky*, 8 Wis. 2d 157, 162-67, 98 N.W.2d 415 (1959). *Star Direct*, ¶20. "An employer is not entitled to be protected against legitimate and ordinary competition of the type that a stranger could give." *Lakeside Oil*, 8 Wis. 2d at 163.

Two years is not per se unreasonable, *Fields Found., Ltd. v. Christensen*, 103 Wis. 2d 465, 479, 309 N.W.2d 125 (Ct. App. 1981), but it is not a safe harbor. The period must be specified. A clause extending the restriction "by any period(s) of violations" made the duration "not a fixed and definite time period but a time period contingent upon outcomes the employee could not predict," and the clause was void. *H&R Block E. Enters., Inc. v. Swenson*, 2008 WI App 3, 307 Wis. 2d 390, 745 N.W.2d 421.

A geographic restriction is reasonable if it matches the territory in which the employee actually represented the employer. *Lakeside Oil*, 8 Wis. 2d at 165. The activity restrained must match the work the employee did. The insurance salesperson may not be barred from working as a janitor for a competitor, *Mut. Serv. Cas. Ins. Co. v. Brass*, 2001 WI App 92, ¶15, because "division of labor and specialization now make it of the utmost importance that a restraint define carefully the activities in which the employee is not to engage." *Rollins Burdick Hunter of Wis., Inc. v. Hamilton*, 101 Wis. 2d 460, 465, 304 N.W.2d 752 (1981). "Similar" but non-competitive businesses are outside any protectable interest. *Star Direct*, ¶¶53, 56.

III. Non-Solicitation Agreements

A restriction defined by customers rather than by a map satisfies the statute's "specified territory" requirement, and the statute then applies in full. *Rollins Burdick Hunter*, 101 Wis. 2d at 462-63; *General Med. Corp. v. Kobs*, 179 Wis. 2d 422, 507 N.W.2d 381 (Ct. App. 1993); *Wysocki*, 2001 WI 51.

A covenant reaching any customer the employee had serviced at any time in a fifteen-year career was overbroad. *Equity Enters., Inc. v. Milosch*, 2001 WI App 186, ¶15 & n.4, 247 Wis. 2d 172, 633 N.W.2d 662. A covenant reaching "past customers" defined as those who bought from the employer within the year before termination was reasonable, and lack of recent contact did not defeat the employer's interest where the employee had special knowledge of customer needs, pricing, and margins. *Star Direct*, ¶¶9, 41, 43-46.

Customers the employee actually served in a defined recent period survive. "Potential customers" generally do not, *J.T. Packard & Assocs., Inc. v. Smith*, 429 F. Supp. 2d 1052, 1056 (E.D. Wis. 2005), though *Diamond Assets* rejected a per se rule and reversed dismissal of a narrowly qualified potential-customer clause, ¶¶40-47. Anyone "dealt

with" reaches a person the employee "may have done so little as merely spoken to on the telephone." *Sysco Food Servs. of E. Wis., LLC v. Ziccarelli*, 445 F. Supp. 2d 1039, 1049 (E.D. Wis. 2006); but see *Diamond Assets*, ¶¶46-47.

A promise not to "solicit, induce, or encourage any employee(s) to terminate their employment with Manitowoc or to accept employment with any competitor, supplier, or customer of Manitowoc" is a restraint governed by § 103.465 and was unenforceable. *The Manitowoc Co. v. Lanning*, 2018 WI 6, ¶¶33-37, 379 Wis. 2d 189, 906 N.W.2d 130. "The law does not protect against the raiding of a competitor's employees"; the protectable interest is ordinarily limited to top-level employees, employees with special knowledge, or employees with skills that are difficult to replace. *Id.* ¶49.

Beyond the employment agreement (*Steffes v. Fond du Lac Regional Clinic, S.C.* (Ct. App. 2026))

A forfeiture-for-competition clause in a benefit plan is tested under the statute. *Holsen v. Marshall & Ilsley Bank*, 52 Wis. 2d 281, 190 N.W.2d 189 (1971); *Estate of Schroeder v. Gateway Transp. Co.*, 53 Wis. 2d 59, 191 N.W.2d 860 (1971). The statute does not reach a sale of a business, *Reiman Assocs., Inc. v. R/A Advertising, Inc.*, 102 Wis. 2d 305, 306 N.W.2d 292 (Ct. App. 1981), or a stock-purchase agreement the employee was free to decline, *Selmer Co. v. Rinn*, 2010 WI App 106, 328 Wis. 2d 263, 789 N.W.2d 621.

In *Steffes v. Fond du Lac Regional Clinic, S.C.*, 2026 WI App 35, 421 Wis. 2d 492, 37 N.W.3d 574, the court of appeals reversed a judgment enforcing a physician's retirement-plan covenant, holding the covenant within the plain language of § 103.465 under *Holsen* and declining to extend *Selmer* to a retirement plan. Because the clinic did not dispute that the covenant fails if the statute applies, the court did not reach reasonableness.

IV. Enforcement Issues and Practical Considerations

The statute did not change contract formation. *NBZ, Inc. v. Pilarski*, 185 Wis. 2d 827, 837, 520 N.W.2d 93 (1994). A handbook policy is generally insufficient absent assent and consideration, though a handbook the employee has accepted can be a contract. *Ferraro v. Koelsch*, 124 Wis. 2d 154, 368 N.W.2d 666 (1985). Continued employment is consideration where signing is required as a condition of staying, *Runzheimer Int'l, Ltd. v. Friedlen*, 2015 WI 45, and not otherwise (*NBZ*); an employee fired soon after signing has fraudulent inducement and good faith to work with (*Runzheimer*). An at-will employee fired for refusing to sign has no wrongful-discharge claim. *Tatge v. Chambers & Owen, Inc.*, 219 Wis. 2d 99, 115-16, 579 N.W.2d 217 (1998). Wisconsin courts apply Wisconsin law despite a contrary choice-of-law clause. *Kobs*, 179 Wis. 2d at 428-29; *Beilfuss v. Huffy Corp.*, 274 Wis. 2d 500, 504, 685 N.W.2d 373 (Ct. App. 2004).

An unreasonable liquidated-damages provision is unenforceable as a penalty, *Wassenaar v. Panos*, 111 Wis. 2d 518, 331 N.W.2d 357 (1983), but does not by itself void the covenant. *Fields Found.*, 103 Wis. 2d 465.

Physicians and the public interest

The public-interest requirement weighs "the interest of the public in having access to the employee's particular services during the time and in the area restricted", *Lakeside Oil*, 8 Wis. 2d at 166-67. That a surgeon will practice only as a surgeon does not make an over-inclusive restriction necessary. *Geocaris v. Surgical Consultants, Ltd.*, 100 Wis. 2d 387, 389, 302 N.W.2d 76 (Ct. App. 1981).

The federal picture

The FTC's non-compete rule was set aside in *Ryan, LLC v. FTC*, 746 F. Supp. 3d 369 (N.D. Tex. 2024); the Commission dismissed its appeals on September 5, 2025, and removed the rule from the CFR by a final rule published February 12, 2026. The NLRB General Counsel memoranda treating non-competes and stay-or-pay provisions as Section 7 violations (GC 23-08; GC 25-01) were rescinded February 14, 2025 (GC 25-05).

Hypothetical covenants not to compete under Wis. Stat. § 103.465

Will Kramer (Pines Bach LLP) and Peter Richter (Stroud, Willink & Howard, LLC)

For each clause, predict: PASS or FAIL. Assume a Wisconsin employer and an at-will employee, and that the covenant was supported by consideration.

1. "During employment and two years following, Employee shall not solicit, induce or encourage anyone to terminate their employment with Employer or accept employment with any competitor, supplier or customer of Employer."

2. "During their employment with the Company and for one (1) year thereafter, Employee will not provide services that are the same or substantially similar to those which they performed during their employment with the Company to any business in Wisconsin or indirectly own any interest in any business which competes with the Company in the United States; provided, however, that the foregoing will not prohibit Employee from holding a passive equity ownership interest of less than 2% in a publicly traded business."

3. "For two years following employment, Employee shall not work in Washburn County for any business that sells competitive products or similar items."

4. "For two years following employment, Employee shall not work for any business located within a fifty (50) mile radius which is substantially similar to Employer's business."

5. "For two years following employment, Employee shall not perform for a competitor the same or substantially similar duties as were performed for Employer during Employee's employment with it."

6. "During and for six (6) months following the termination of Employee's employment with the Company, Employee shall not sell products which compete with those offered by the Company at any location within five (5) miles of the Company's Wausau showroom. The duration of this restriction shall be extended by any period of breach of the restriction by Employee."

7. "For two years following employment, Physician shall not engage in the specialty in which they engaged during the year prior to the termination of their employment anywhere within 25 miles of the hospital in which they performed the majority of their duties during that last year of employment."

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Presentation Outline

1. General principles of non-compete agreements
2. Non-compete agreements under Wisconsin law
3. Non-solicitation agreements
4. Enforcement and practical concerns

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General Principles of Non-compete Agreements

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General Principles

- Properly drafted non-compete agreements and restrictive covenants are enforceable in Wisconsin
- Overly restrictive agreements may be completely nullified by courts
- The court does not rewrite the agreement to save it

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How Courts Evaluate Non-compete Agreements

- Non-compete agreements are prima facie suspect
- They must withstand close scrutiny to pass legal muster
- They will not be construed to extend beyond what the language of the contract absolutely requires
- Ambiguous agreements are construed in favor of the employee

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No “blue pencil”

- The court will not rewrite or modify a defective agreement
- A covenant with an unreasonable restraint is void in its entirety, even as to the parts that would have been reasonable
- But separate covenants supporting separate interests may be divisible: one can fall while the others stand (*Star Direct, Inc. v. Dal Pra* (2009))
- A clause asking the court to modify a restraint “only to the extent deemed necessary” has no effect (*Diamond Assets LLC v. Godina* (Ct. App. 2022))

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Non-compete Agreements under Wisconsin Law

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Wisconsin Statute § 103.465

A covenant by an assistant, servant or agent not to compete with his or her employer or principal during the term of the employment or agency, or after the termination of that employment or agency, within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Any covenant, described in this section, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.

Wis. Stat. § 103.465

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Key Wording in Statute

- A non-compete must:
  - be limited to a specified time and a specified territory
  - be "reasonably necessary for the protection of the employer"
  - not impose "an unreasonable restraint"
- The employer has the burden on every element; failing one voids the covenant
- "An employer is not entitled to be protected against legitimate and ordinary competition of the type that a stranger could give" (*Lakeside Oil Co. v. Slutsky* (1959))

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Application of Statute – Time

- What is a reasonable duration?
  - Two years has been upheld; it is not a safe harbor, and a shorter timeframe may be required
- The time must be specified
  - A restriction that is extended by any period of violation is not a fixed period, and the clause is void (*H&R Block Eastern Enterprises, Inc. v. Swenson* (Ct. App. 2008))

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Application of Statute – Territory and Activity

- Highly dependent on the facts and circumstances of each case
- Normally reasonable if it corresponds to the territory in which the employee represented the employer, or the area where the bulk of the customers are found
- The activity restrained must match the employee's actual work
  - A clause barring the salesperson from working as a janitor for a competitor fails (*Mutual Service Casualty Insurance Co. v. Brass* (Ct. App. 2001)); a restraint must "define carefully the activities in which the employee is not to engage" (*Rollins Burdick Hunter of Wisconsin, Inc. v. Hamilton* (1981))
  - "Similar" but non-competitive businesses or products are outside any protectable interest (*Star Direct, Inc. v. Dal Pra* (2009))

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Application of Statute – Reasonably Necessary to Protect Employer

- If the agreement is reasonably limited in duration and location, courts ask whether it is "reasonably necessary for the protection of the employer"
- Factors
  - Preservation of goodwill with customers
  - Whether the employee was terminated for good cause (a practical consideration; no reported Wisconsin decision treats it as a factor)
  - Employee's access to confidential information that has competitive significance

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Goodwill, Termination, Confidential Information

- Goodwill: necessary where customers relied on the individual employee more than the employer's reputation; recurrent purchases and frequent contact with the particular employee
- Termination: no reported Wisconsin decision treats the reason for termination as a factor, but an employer that terminated without cause should expect the question
- Confidential information: access to proprietary information the release of which could harm the employer supports enforcement

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Non-Solicitation Agreements

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Non-Solicitation as Territory

- Some “territory” restrictions are linked to a particular list or set of customers (non-solicitation agreements)
- A customer list satisfies the “specified territory” requirement; no map is required (*Rollins Burdick Hunter of Wisconsin, Inc. v. Hamilton* (1981))
- The statute then applies in full, with the same burden on the employer
- Restrictions reaching people the employee did not have relatively recent contact with may be overbroad

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Non-Solicitation Example: *Milosch*, and what came after

- *Equity Enterprises, Inc. v. Milosch* (Ct. App. 2001): a restriction on doing business with any customer the employee had serviced at any time in a 15-year career was overbroad and unenforceable
- *Star Direct, Inc. v. Dal Pra* (2009): a restriction limited to customers served in the last year of employment was enforced
  - Lack of recent contact does not end the inquiry where the employee had special knowledge of customer needs, pricing, and margins

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Customer Non-Solicits: What Survives, What Does Not

- Survives: customers the employee actually served in a defined recent period
- Fails, or fights
  - No look-back (*Equity Enterprises, Inc. v. Milosch* (Ct. App. 2001))
  - "Potential customers" (*J.T. Packard & Associates, Inc. v. Smith* (E.D. Wis. 2005)), though *Diamond Assets LLC v. Godina* (Ct. App. 2022) rejected a per se rule
  - Anyone "dealt with" (*Sysco Food Services of Eastern Wisconsin, LLC v. Ziccarelli* (E.D. Wis. 2006))
  - Customers the employee never touched

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Solicitation of Current Employees

- Employers who try to prevent former employees from soliciting current employees must also comply with the statutory requirements
- *The Manitowoc Company, Inc. v. Lanning* (2018): a promise not to "solicit, induce, or encourage any employee(s) to terminate their employment with Manitowoc or to accept employment with any competitor, supplier, or customer of Manitowoc" was not sufficiently limited or reasonably necessary

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Examples of Overbroad Scope of Manitowoc Agreement

- "Any employee"
  - Entry-level and highly skilled employees alike
  - People Lanning worked with closely and people he had minimal contact with or had not worked with in years
- "Any competitor, supplier or customer"
  - Encouraging a former colleague to work as a barista at Starbucks, a Manitowoc customer
  - Persuading a former colleague to retire to spend time with family

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Employee Non-Solicits after *Lanning*

- "The law does not protect against the raiding of a competitor's employees" (*The Manitowoc Company, Inc. v. Lanning* (2018))
- The protectable interest is ordinarily limited to top-level employees, employees with special knowledge, or employees with skills that are difficult to replace
- No territorial limit of any kind was noted
- No-hire agreements between employers are covered too (*Heyde Companies, Inc. v. Dove Healthcare, LLC* (2002))

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Beyond the Employment Agreement: *Steffes v. Fond du Lac Regional Clinic, S.C.* (Ct. App. 2026)

- Physician's retirement plan: forfeit the entire account, vested and unvested, for practicing in any of nine counties within two years of leaving
- Circuit court: the statute does not reach a retirement plan
- Reversed: a forfeiture-for-competition clause in the plan is a covenant within § 103.465, applying *Holsen v. Marshall & Ilsley Bank* (1971) and declining to extend *Selmer Co. v. Rinn* (Ct. App. 2010) beyond the stock-purchase context
- The clinic conceded the covenant fails if the statute applies, so reasonableness was not decided. Employer-side reading: deferred compensation, equity, and bonus clawbacks conditioned on not competing are now at least arguably tested the same way

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Enforcement Issues and Practical Considerations

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What is the Employer Trying to Protect?

- Employee will open, or work for, a competing business "down the street": focus on a specific geographic area
- Employee will actively solicit key clients: focus on the clients the employee serves
- Employee has access to and may disclose confidential information: confidentiality agreement
- Bottom line: all restrictive covenants should be tailored to the interest the employer is seeking to protect

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Written Contract Signed by the Employee?

- A handbook policy or employee manual that precludes future competition is generally insufficient absent the employee's assent and consideration
- Non-compete and confidentiality agreements are subject to the general rules of contract: offer, acceptance, and consideration
- Continued at-will employment is consideration for a mid-employment covenant (*Runzheimer International, Ltd. v. Friedlen* (2015))
  - An employee fired soon after signing has fraudulent inducement and good faith to work with
- An at-will employee fired for refusing to sign has no wrongful-discharge claim (*Tatge v. Chambers & Owen, Inc.* (1998))

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Which Employees Should Sign?

- Vital salespeople
- Managers and supervisory personnel
- Employees with access to proprietary confidential information
- Key point: the agreement should be tailored to the particular employee. Using the same form for every employee will likely result in an ineffective or unenforceable agreement

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What Remedies do Employers Have?

- Temporary or permanent injunctive relief
- Actual damages
- Attorneys' fees and court costs, where the agreement or a statute provides for them
- Liquidated damages; an unreasonable liquidated-damages provision is unenforceable as a penalty but does not by itself void the covenant (*Fields Foundation, Ltd. v. Christensen* (Ct. App. 1981))
- Trade-secret claims under § 134.90 and the Defend Trade Secrets Act do not depend on the covenant

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Physicians and the Public Interest

- Courts weigh the public's interest in access to the employee's services in the restricted time and area (*Lakeside Oil Co. v. Slutsky* (1959))
- That a surgeon will only ever work as a surgeon does not make an over-inclusive restriction necessary (*Geocaris v. Surgical Consultants, Ltd.* (Ct. App. 1981))

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The Federal Picture

- The FTC rule was vacated (*Ryan, LLC v. Federal Trade Commission* (N.D. Tex. 2024)); the Commission dropped its appeals in September 2025 and removed the rule in February 2026
- The NLRB General Counsel memos on non-competes and stay-or-pay were rescinded February 14, 2025

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Questions?

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