SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 73 | Issue 3 Article 11

2023

Shortened Limitation Periods in Employment Contracts: A "Reasonable" Suggestion

Andrew Thompson

Follow this and additional works at: https://scholarlycommons.law.case.edu/caselrev

Part of the Law Commons

Recommended Citation

Andrew Thompson, *Shortened Limitation Periods in Employment Contracts: A "Reasonable" Suggestion*, 73(3) Case W. Rsrv. L. Rev. 951 (2023)
Available at: https://scholarlycommons.law.case.edu/caselrev/vol73/iss3/11

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

— Note —

Shortened Limitation Periods in Employment Contracts: A "Reasonable" Suggestion

Contents

Introduction 951
I. The Judicial Approach to Contractual Limitation Periods..... 956
A. *Reasonableness*...956
1. General and Specific Reasonableness 956
2. Reasonableness as Balancing Interests 960
B. *Other Approaches*..964
II. Alternative Approaches to Enforcement of Provisions in Employment Contracts 966
A. *Covenants Not to Compete*...966
1. Justifying Judicial Scrutiny.. 967
2. Reasonableness.. 969
B. *Forum-Selection Clauses* 971
III. Reimagining Judicial Review of Limitation Periods in Employment Contracts 973
A. *Justifying Judicial Scrutiny and a Reasonableness Standard*..............973
B. *Reconceptualizing Reasonableness as a Fact-Bound Balancing Test* ...978
Conclusion.. 981

Introduction

Amanda Fayak began working at University Hospitals as a police officer in 2013.[1] The chief of police told her that he did not want to hire a woman police officer, but he thought that the department needed to do so.[2] Her fellow officers "immediately began an unrelenting campaign to force her out of the department."[3] One police officer repeatedly called her a "slut" and made derogatory comments about her clothing and

1. Appellant's Opening Br. at 1–3, Fayak v. Univ. Hosps., No. 109279, 2020-Ohio-5512, 2020 WL 7062683 (Ohio Ct. App. Dec. 3, 2020), *appeal denied*, 166 N.E.3d 1247 (2021). The facts in the following two paragraphs are given as alleged by Ms. Fayak, which is the lens through which the court was bound to view the disputed facts at the summary judgment stage. *Fayak*, 2020 WL 7062683, at *3. University Hospitals largely disputes her account. Appellees' Answering Br. at 6–11, *Fayak*, 2020 WL 7062683 (No. 109279).
2. Appellant's Opening Br., *supra* note 1, at 3.
3. *Id.*

personal relationships.[4] Another touched her leg inappropriately and made sexual advances by text message.[5] The department also treated Ms. Fayak differently than male officers in terms of training, job assignments, and discipline.[6] On several occasions, other police officers ignored her calls for backup in dangerous situations.[7] This pervasive harassment and discrimination drove Ms. Fayak to attempt suicide twice.[8] Ms. Fayak's working conditions also caused panic attacks that required hospitalization.[9] In response to these mental health issues, she took several leaves of absence.[10] When she sought to extend her leave of absence, University Hospitals fired her.[11] She filed an employment discrimination lawsuit shortly after her termination.[12]

At the time of Ms. Fayak's lawsuit, the statute of limitations for state-law employment discrimination claims was six years.[13] One can only imagine Ms. Fayak's surprise, then, when the trial court granted summary judgment for her employer on the grounds that her signed employment application contained a fine-print provision stating that "any claim or lawsuits relating to my service . . . must be filed no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit. I waive any statute of limitations to the contrary."[14] The decision in this case was simply "another example of Ohio courts' willingness to enforce contractually established shortened limitations periods for a wide variety of employment-related claims."[15]

---

4. *Id.* at 4–5.
5. *Id.* at 5.
6. *Id.* at 4–6.
7. *Id.* at 6–7.
8. *Id.* at 9.
9. *Id.* at 8.
10. *Id.* at 8–9.
11. *Id.* at 9.
12. *Id.*
13. *See* Ohio Rev. Code Ann. § 2305.07(B) (West Supp. 2023) (providing a six-year statute of limitations for "[a]n action upon a liability created by statute"); *see also* Ohio Rev. Code Ann. § 4112.02 (West Supp. 2023) (defining unlawful discriminatory practices in employment). In 2020, the Ohio legislature created a two-year statute of limitations for state-law employment discrimination claims, but the new limitation period is tolled while a claim is pending before the Ohio Civil Rights Commission. *See* Act of Dec. 22, 2020, 2020 Ohio Sub. H.B. 352, at 28–29 (2020) (codified at Ohio Rev. Code Ann. § 4112.052(C) (West Supp. 2023)).
14. Appellant's Opening Br., *supra* note 1, at 1–2, 9.
15. Jyllian Bradshaw & Franck G. Wobst, *Ohio Court Enforces Six-Month Limitations Period for Filing Employment Claims*, Great Lakes Emp. L. Letter (Porter Wright Morris & Arthur LLP), March 2021, at 10.

In the wake of this decision and others, employment lawyers have counseled their corporate clients to adopt contractual limitation periods.[16] After all, "[t]here is no downside, and the benefits could be significant."[17] Accordingly, the issue of contractually shortened limitation periods will likely only grow in importance in the coming years.[18] The validity of the clauses themselves is even more important considering that employees' collateral attacks, such as lack of consideration and unconscionability, have proved largely fruitless.[19]

16. *Id.*

17. *Id.*

18. The use of contractual limitation periods following judicial approval may mirror the growth of binding arbitration agreements in employment contracts. Binding arbitration agreements have exploded in prevalence; some 60 million workers are now subject to mandatory arbitration. *See* Alexander J.S. Colvin, Econ. Pol'y Inst., The Growing Use of Mandatory Arbitration 3–5 (2018), https://files.epi.org/pdf/144131.pdf [https://perma.cc/6QZ4-UMGW]. Research has empirically linked the increased usage of arbitration agreements to Supreme Court decisions upholding the provisions' enforceability. *Id.* at 3 (referencing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)).

19. Joel C. Tuoriniemi & Roger W. Reinsch, *Return to* Camelot*: A Statutory Model for a Judicial Examination of Employment Agreements with Shortened Period of Limitations*, 35 Ohio N.U. L. Rev. 751, 792–95 (2009) (noting that courts have rejected consideration arguments and that "traditional contract defenses," including "substantive unconscionability," "do not adequately protect employees"). For a recent case rejecting both unconscionability and consideration defenses to a contractual limitation period in an employment contract, see Fry v. FCA U.S., LLC., 2017-Ohio-7005, 143 N.E.3d 1108, 1113–17 (Ohio Ct. App. 2017). In addition to changes in decisional law, the enforcement of contractual limitation periods may be curtailed by statute. Professors Tuoriniemi & Reinsch propose a model statute requiring courts to enforce only reasonable limitation periods in employment contracts. Tuoriniemi & Reinsch, *supra*, at 796–98.

    Federal and state legislators and regulators have shown some interest in limiting the broad freedom of contract in employment contracts. The Federal Trade Commission recently proposed a new rule to ban most noncompete clauses in employment contracts nationwide. *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910). Even prior to the FTC's proposal, several state assemblies were considering legislation to prohibit or limit the enforcement of noncompete agreements for low-wage workers. *See* Chris Marr, *Red State Lawmakers Look at Noncompete Bans for Low-Wage Workers*, Bloomberg L. (Feb. 9, 2022, 5:30 AM), https://news.bloomberglaw.com/daily-labor-report/red-state-lawmakers-look-at-noncompete-bans-for-low-wage-workers [https://perma.cc/U5R4-XJR4]. The legal developments regarding noncompete clauses are of particular relevance for this Note, given the comparisons I draw between contractual limitation periods and noncompete agreements. Additionally, Congress recently enacted a law prohibiting the enforcement of binding arbitration

Courts do traditionally enforce contract provisions that limit the time period for bringing future claims to a period shorter than the applicable statute of limitations, so long as the limitation period is "reasonable."[20] Today, that tradition is no longer unanimous. Some jurisdictions simply prohibit shortened limitation periods outright for certain employment claims.[21] Others enforce nearly *all* limitation periods without applying a reasonableness test.[22]

Even the courts that retain a reasonableness standard do not apply it in the same way. Reasonableness is a familiar inquiry, but it is also an extremely flexible standard that lends itself to competing formulations.[23] One axis along which notions of reasonableness differ is the distinction between what I call "general" and "specific" reasonableness, which asks whether the reasonableness of a thing should

clauses applicable to sexual assault and harassment claims. *See* Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (2022). The House of Representatives passed a broader bill banning the enforcement of arbitration agreements in a variety of contexts, including employment contracts, though the bill ultimately was not enacted. *See* FAIR Act of 2022, H.R. 963, 117th Cong. (as passed by the House of Representatives on Mar. 17, 2022); Paige Smith, *U.S. House Passes Bill Banning Mandatory Arbitration Agreements*, BLOOMBERG L. (Mar. 11, 2022, 5:26 AM), https://news.bloomberglaw.com/daily-labor-report/u-s-house-passes-bill-banning-mandatory-arbitration-agreements [https://perma.cc/9AFL-HNEY]. Still, beyond affirmative legislative or regulatory action, I contend that judicial reexamination of the common-law reasonableness requirement provides the most likely solution for balancing employer and employee interests.

20. *See, e.g.*, Ord. of United Com. Travelers of Am. v. Wolfe, 331 U.S. 586, 608 (1947) ("[I]t is well established that . . . a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitations, provided that the shorter period itself shall be a reasonable period."); Riddlesbarger v. Hartford Ins. Co., 74 U.S. (7 Wall.) 386, 390 (1868) (enforcing a contractual limitation period after noting that "it is not an unreasonable term"); Ausplund v. Aetna Indem. Co., 81 P. 577, 581 (Or. 1905).

21. *See infra* notes 81–92.

22. *See infra* notes 96–99.

23. *See* Benjamin C. Zipursky, *Reasonableness in and out of Negligence Law*, 163 U. PA. L. REV. 2131, 2132–33 (2015) (noting that "[t]he law's use of the terms 'reasonable' and 'unreasonable' are legion and notorious," but the meaning of reasonable is, "if nothing else, vague"); *see also* Kevin P. Tobia, *How People Judge What Is Reasonable*, 70 ALA. L. REV. 293, 295–96 (2018) ("Reasonableness is a central legal concept and its history and uses have been well studied. Nevertheless, there persists significant debate about how reasonableness should be understood."). In fact, a court considering the enforceability of a limitation period provision in an employment contract has observed that "[r]easonableness is not subject to well-defined or commonly accepted tests or standards . . . ." Badgett v. Fed. Express Corp., 378 F. Supp. 2d 613, 623 (M.D.N.C. 2005).

depend on the facts of a particular case or instead be determined at a higher level of generality.[24] This tension has arisen in the context of employment contract limitation periods, with courts giving different degrees of consideration to the facts of specific cases.[25] Another general tension is to what extent reasonableness should reflect a balancing of interests or costs and benefits and whose interests, costs, and benefits should be considered.[26]

Fortunately, these issues are not new to the law. Two other contractual clauses within employment contracts—covenants not to compete and forum-selection clauses—provide points of comparison. Neither type of clause is automatically enforced or uniformly invalidated. Instead, courts apply exacting judicial review that respects the important public policies at stake. These examples provide a framework for justifying judicial scrutiny of contractual limitation periods and responding to freedom-to-contract objections. Furthermore, they exemplify a reasonableness standard that is fact based and balances competing interests. With the law concerning limitation periods already in flux, courts should promote consistency within employment law by adopting a fact-based, interest-balancing reasonableness standard for limitation provisions.

24. *See, e.g.*, Nahrstedt v. Lakeside Vill. Condo. Ass'n, 878 P.2d 1275, 1290 (Cal. 1994) ("[T]he reasonableness or unreasonableness of a condominium use restriction . . . is to be determined *not* by reference to facts that are specific to the objecting homeowner, but by reference to the common interest development as a whole."). This distinction bears some resemblance to the distinction between facial and as-applied constitutionality challenges. *See* Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 Wm. & Mary Bill Rts. J. 657, 657 (2010) ("A facial attack is typically described as one where 'no application of the statute would be constitutional.' In contrast, courts define an as-applied challenge as one 'under which the plaintiff argues that a statute, even though generally constitutional, operates unconstitutionally as to him or her because of the plaintiff's particular circumstances.'"). The difference, of course, is that a plaintiff may generally choose whether to mount a facial constitutional attack; even if a facial claim fails, a plaintiff "[o]f course" may "still be able to claim" that a law is unconstitutional "as applied to them." *See* City of Chicago v. Morales, 527 U.S. 41, 82 (1999) (Scalia, J., dissenting). But when a court adopts a general reasonableness standard, it in effect *forces* the plaintiff to make the stronger showing of facial unreasonableness and forecloses the option to demonstrate unreasonableness as applied to the plaintiff and his or her circumstances. *See infra* notes 48–54 and accompanying text.

25. *See infra* Part I.A.1.

26. *See* Tobia, *supra* note 23, at 303 & nn.34–35 (describing "welfare maximization" or "cost-benefit maximization" as one major theory of reasonableness that is generally associated with tort; referencing as one of these theories the formula developed by Judge Learned Hand (citing United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.))).

I. The Judicial Approach to Contractual Limitation Periods

A. Reasonableness

As noted, contractual limitation periods are generally enforceable if they are "reasonable."[27] Courts have further defined this reasonableness test, holding that a provision is normally reasonable unless it is "very close to an abrogation of the right of action"[28] or is such that the claim "cannot be legally ascertained in time to bring an action."[29] The rule of decision is the same for employment contracts.[30] Further analysis will reveal two important points. First, courts apply these factors with different levels of concern for the underlying facts and circumstances. Second, virtually no courts require employers to articulate the interests that justify a given limitation provision.

1. General and Specific Reasonableness

It has been suggested that the reasonableness of a limitation provision "usually depends upon the circumstances of the particular case."[31] Courts have even explicitly held that "[w]hat shall be regarded as a reasonable time in any particular case . . . will depend upon [the] circumstances."[32] But, as will be shown, some courts have drifted from

---

27. *See supra* note 20 and accompanying text.

28. Page Cnty. v. Fid. & Deposit Co. of Md., 216 N.W. 957, 958 (Iowa 1927).

29. Sheard v. U.S. Fid. & Guar. Co., 107 P. 1024, 1026 (Wash. 1910).

30. *See, e.g.*, Timko v. Oakwood Custom Coating, Inc., 625 N.W.2d 101, 104 (Mich. Ct. App. 2001) (applying these subcomponents of the reasonableness test to a limitation provision in an employment contract).

31. B.H. Glenn, Annotation, *Validity of Contractual Time Period, Shorter than Statute of Limitations, for Bringing Action*, 6 A.L.R.3d 1197 § 2(a) (1966); *see also* 51 Am. Jur. 2d *Limitation of Actions* § 81 (2022) ("What constitutes a reasonable period of time in which to require commencement of a legal action will vary according to . . . the circumstances in which a given agreement is reached . . . ."). *But see id.* ("However, there is also authority that a court does not need to look at the particular facts of a case to determine if a contractually shortened limitations period is reasonable; a court must only determine if the period of limitation, in itself, is unreasonable."). Other authorities recognize the reasonableness requirement but are silent as to whether reasonableness depends upon the circumstances of a particular case. *See* 7 Richard A. Lord, Williston on Contracts § 15:12 (4th ed. 2022) (citing Glenn, *supra*).

32. Ord. of United Com. Travelers of Am. v. Duncan, 221 F.2d 703, 708 (6th Cir. 1955) (quoting Fellowes v. Madison Ins. Co., 13 Ohio Dec. Reprint 79, 83 (Cin. Super. Ct. 1858)); *see also Timko*, 625 N.W.2d at 106 (noting first that a six-month limitation was not "inherently unreasonable," but then continuing to ask whether the employee "otherwise demonstrate[d] that the shortened period unfairly deprived him of the opportunity to file his instant claims").

this specific, fact-bound reasonableness inquiry and instead apply a more generalized reasonableness inquiry that does not consider the facts of a specific case.

In *Fayak v. University Hospitals*,[33] the facts of which are laid out in the Introduction, an intermediate appellate court in Ohio upheld a six-month limitation period for employment claims that was contained in an employment application.[34] The court initially framed its analysis by noting that a contractual provision may limit "the time for bringing an action on such contract to a period less than that prescribed in a general statute of limitations provided that the shorter period shall be a reasonable one."[35] The court then held that the limitation period was not "inherently unreasonable."[36] But instead of applying its own reasonableness analysis to the facts, the court simply cited four cases holding that a six-month limitation period is facially reasonable.[37] These cited cases in turn both shed light on precisely what "reasonable" meant to the *Fayak* court and provide a survey of the tension between general and specific reasonableness.

The *Fayak* court cited only one appellate court decision, *Thurman v. DaimlerChrysler Inc.*,[38] in support of its conclusion. In *Thurman*, the court applied Michigan law, which at that time held that "a six-month statute of limitations clause in an employment application was not inherently unreasonable."[39] But unlike the recursive analysis of *Fayak*, whereby precedent rendered a limitation period of a given length automatically reasonable, the *Thurman* court applied the reasonableness

33. No. 109279, 2020-Ohio-5512, 2020 WL 7062683 (Ohio Ct. App. Dec. 3, 2020).

34. *Fayak*, 2020 WL 7062683, at *4.

35. *Id.* at *4 (quoting Kraly v. Vannewkirk, 635 N.E.2d 323, 327 (Ohio 1994)). The court then noted that other Ohio appellate courts have enforced limitation periods in employment contracts. *Id.* (citing Fry v. FCA US LLC, 2017-Ohio-7005, 143 N.E.3d 1108, 1111 (Ohio Ct. App. 2017)). Interestingly, though, *Fry* did not apply a *Kraly*-style reasonableness analysis at all. *Fry*, 143 N.E.3d at 1116–17. Instead, *Fry* considered only whether the provision was unconscionable. *Id.*

36. *Fayak*, 2020 WL 7062683, at *4 (citing Maxwell v. Univ. Hosps. Health Sys., Inc., No. CV-15-840036, slip op. at 5–6 (Ohio Ct. Com. Pl. Apr. 28, 2017); Terry v. Cent. Transp., Inc., No. 1:09-CV-2432, 2011 WL 3296852, at *3–5 (N.D. Ohio July 29, 2011); Hoskins v. DaimlerChrysler Corp., No. 3:03-CV-338, 2005 WL 5588084, at *4 (S.D. Ohio Mar. 30, 2005); and Thurman v. DaimlerChrysler, Inc., 397 F.3d 352, 357 (6th Cir. 2004)).

37. *Id.*

38. 397 F.3d 352 (6th Cir. 2004).

39. *Id.* at 357 (citing Timko v. Oakwood Custom Coating, Inc., 625 N.W.2d 101, 106 (Mich. Ct. App. 2001)). Michigan law has since dramatically changed, and courts now enforce contractual limitation periods in almost all cases. *See infra* notes 95–98 and accompanying text.

factors to the specifics of the case.[40] The *Thurman* court held that the plaintiff did have adequate time to "investigate her claims and determine the extent of her damages," as evidenced by the fact that she received immediate medical care and promptly filed administrative and criminal complaints.[41] The two district court cases cited by *Fayak* in turn cite *Thurman*.[42] Those lower court cases also acknowledge the specific-reasonableness approach.[43]

Interestingly, the fourth case cited by *Fayak* employed a totally different methodology. In *Maxwell v. University Hospitals Health Systems, Inc.*,[44] the state trial court cited familiar Ohio precedent holding that shortened limitation periods are enforceable if reasonable.[45] But the court then continued to assess the enforceability of the limitation provision under an unconscionability standard, not a simple reasonableness one.[46] The court held that a six-month limitation period is necessarily reasonable because "180 days has already been deemed a reasonable time for filing similar claims by the Ohio legislature."[47] Absent from this analysis was any question of reasonableness under the circumstances; the court instead asked only if the length of the limitation period was inherently and facially unreasonable.

Thus, of the four cases cited in *Fayak*, three endorse a specific, fact-bound, reasonableness-under-the-circumstances approach. Indeed, the employee in *Fayak* argued that even if the limitation period was not

40. *Id.* at 357–58 (citing precedent concerning limitation periods of a given length but then also asking whether the period was reasonable "in this case").

41. *Id.* at 358.

42. Terry v. Cent. Transp., Inc., No. 1:09-CV-2432, 2011 WL 3296852, at *5 (N.D. Ohio July 29, 2011); Hoskins v. DaimlerChrysler Corp., No. 3:03-CV-338, 2005 WL 5588084, at *4 (S.D. Ohio Mar. 30, 2005).

43. *Terry*, 2011 WL 3296852, at *4 (holding first that the limitation period is not "inherently unreasonable" and second that "Plaintiff has presented no evidence that he lacked sufficient opportunity to investigate and file the action" and "made no showing as to why it might have been specifically unreasonable in the present case"); *Hoskins*, 2005 WL 5588084, at *4 (applying *Thurman*'s holding that a six-month limitation period is reasonable "in the absence of any argument to the contrary by Plaintiffs").

44. No. CV-15-840036 (Ohio Ct. Com. Pl. Apr. 28, 2017).

45. *Id.* at 2.

46. *Id.* at 5. However, that is not necessarily to suggest that the court erred in focusing on unconscionability—the plaintiff argued that the limitation provision was procedurally unconscionable but failed to argue that it was substantively unreasonable. Plaintiff's Combined Brief in Opposition to Defendants' Motion for Summary Judgment and Cross Partial Motion for Summary Judgment at 27, *Maxwell*, No. CV-15-840036 [hereinafter *Maxwell* Plaintiff's Brief].

47. *Id.* (citing statutes of limitations for different claims).

"void and unenforceable as a matter of law," a jury could still reasonably conclude that the limitation period was unreasonable as applied to the plaintiff.[48] The employee argued that the limitation provision barred her claims before loss or damage could be realized, as evidenced by the fact that "the United States Social Security Administration was not able to determine that Plaintiff Fayak was permanently and totally disabled until months after the date of her employment termination."[49] But the court did not address this argument at all.[50] Thus, although the *Fayak* court indirectly endorsed the reasonableness factors that drove the analysis in *Thurman*,[51] it viewed reasonableness in this context as general, not specific. Instead of asking whether "the claimant has sufficient opportunity to investigate and file an action,"[52] the *Fayak* court in essence asked whether a given limitation period necessarily and inherently deprives *all* potential claimants of the ability to investigate and file. Under the *Fayak* approach, if one or more courts have persuasively held that a limitation period of a given length is not facially unreasonable, the provision is enforceable no matter the specific hardships. This also explains the court's citation to *Maxwell*: the fact that the legislature has deemed a given time period sufficient to bring related claims shows only that the time period is not inherently unreasonable; it does nothing to respond to a complaint that the time period is too short in a given case.[53] The Ohio Court of Appeals is not alone in this general-

48. Appellant's Opening Brief, *supra* note 1, at 16–17.

49. *Id.* at 17–18.

50. *See supra* notes 36–37 and accompanying text.

51. *See supra* notes 39–41 and accompanying text.

52. Timko v. Oakwood Custom Coating, Inc., 625 N.W.2d 101, 104 (Mich. Ct. App. 2001) (quoting Herweyer v. Clark Highway Servs., Inc., 564 N.W.2d 857, 859 (Mich. 1997), *overruled by* Rory v. Cont'l Ins. Co., 703 N.W.2d 23, 43 (Mich. 2005)).

53. *See supra* note 46 and accompanying text. Of course, this argument could raise another objection. For statutes of limitations for related claims to be at all relevant to analyzing the reasonableness of a limitation provision, the statute of limitations for the claim at issue must be longer than those other statutes of limitations (otherwise, the contractual provision would simply restate the applicable statute of limitations, not shorten it). But this raises the question whether the legislature had some reason for making the applicable statute of limitations longer than that for similar claims. One might conceivably argue that a given time period is unreasonable (even generally) for the same reason(s) that motivated the legislature to make the statute of limitations longer than that for related claims (or, inversely, that special reasons make a shortened statute of limitations reasonable for related claims that do not apply to the action at issue).

reasonableness approach,[54] but the specific-reasonableness standard does enjoy broad support.[55]

The distinction between general and specific reasonableness has been presented as a question of whether "the reasonableness of the limitation is a question of law for the court" or "a question of fact for the jury."[56] The Sixth Circuit has held that reasonableness can be a legal question for the court, but only "if reasonableness is not contested."[57] This serves as an important reminder: the mere absence of a specific, fact-bound reasonableness analysis does not mean that the court has adopted general reasonableness as the rule of decision. If, in the "proceedings, the briefs, [and] oral argument," the plaintiff fails to present a unique, factual basis for the unreasonableness of the limitation provision, a court could hold the clause to be reasonable by general reference to precedent while still preserving for future cases "the right of [the plaintiff] to attack the reasonableness of the limitation as a matter of fact."[58] This is why it is necessary to point out that Ms. Fayak *did* make a specific, factual allegation in her argument that the limitation provision was unreasonable as applied.[59]

2. Reasonableness as Balancing Interests

The reasonableness factors identify important employee interests that a court must consider when analyzing the reasonableness of a limitation provision—namely, the ability to recognize a potential claim

---

54. *See In re* All Am. Semiconductor, Inc., 490 B.R. 418, 427 (Bankr. S.D. Fla. 2013) (enforcing a contractual limitation period outside of the employment context and holding that, under California law, "a court does not need to look at the particular facts of a case to determine if a shortened limitations period is reasonable[;] a court must only determine if 'the period of limitation, *in itself*, [is] unreasonable'" (quoting William L. Lyon & Assocs., Inc. v. Superior Ct., 204 Cal. App. 4th 1294, 1296 (2012)).

55. *See, e.g.*, Badgett v. Fed. Express Corp., 378 F. Supp. 2d 613, 623 (M.D.N.C. 2005) (considering enforceability of a limitation period in an employment contract and holding that "[r]easonableness . . . usually depends on all the facts and circumstances of a particular case"). Interestingly, the *Fayak* court cited *Badgett.* Fayak v. Univ. Hosps., No. 109279, 2020-Ohio-5512, 2020 WL 7062683, at *5 (Ohio Ct. App. Dec. 3, 2020).

56. Ord. of United Com. Travelers of Am. v. Duncan, 221 F.2d 703, 706–07 (6th Cir. 1955).

57. *Id.* at 707.

58. *Id.* (citing Appel v. Cooper Ins. Co., 80 N.E. 955, 957 (Ohio 1907)).

59. *See supra* note 49 and accompanying text. For a counter example, see *Maxwell* Plaintiff's Brief, *supra* note 46, which failed to allege specific facts to suggest unreasonableness and thus obviated the need for the court to evaluate the provision in light of any unique circumstances.

and the preservation of the right of action against abrogation.[60] But merely identifying the protected interests does not instruct courts regarding the extent to which the interests may permissibly be impaired (or whether the interests may permissibly be more or less impaired under certain circumstances).[61] When does a limitation provision make it *too* difficult to discover loss or damage, or make it *too* burdensome to investigate a claim in time?

One theoretical way to make the reasonableness standard more concrete is to ask whether the degree of burden placed on the employee is justified by a greater (or at least equally) legitimate interest on the part of the employer. This conception of reasonableness is commonly associated with tort law, in which an act is "unreasonable" if "the magnitude of the risk outweighs the value which the law attaches to the conduct which involves it."[62] In this context, the "risk" would be that the limitation provision might hinder the employee's ability to investigate his or her claim. The "value" (against which the risk would be balanced) would be the limitation provision's ability to protect the employer against stale claims. Although reasonableness as balancing is most commonly associated with tort, courts employ a reasonableness-as-balancing test in other contexts, too; under the Fourth Amendment, "there is 'no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails.'"[63] Perhaps this example, which mandates

60. *See supra* notes 28–29 and accompanying text.

61. This could be characterized as a "standard," by which the rule of decision "tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation." Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 Harv. L. Rev. 22, 58 (1992) (citing Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1687–88 (1976) (listing "reasonableness" as an example of a "standard")). Such a standard is unlike a "rule," which "binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts." *Id.* (citing Pierre Schlag, *Rules and Standards*, 33 UCLA L. Rev. 379, 381 (1985)). However, transforming this standard into a balancing test (as I propose) does not strip this rule of decision of its standard-like qualities. *Id.* at 60 ("Balancing is standard-like . . . .").

62. Restatement (Second) of Torts § 283 cmt. e (Am. L. Inst. 1965); *see also id.* § 291. This balancing conception "suggests that the reasonableness of a risk depends on what is being risked and its value, the reason it is being risked, at what costs and with what prospects." Zipursky, *supra* note 23, at 2152. This view of reasonableness, which prevailed in all versions of the Restatement of Torts, was largely influenced by scholar Henry Terry. *Id.* at 2151–52 (referencing Henry T. Terry, *Negligence*, 29 Harv. L. Rev. 40 (1915)).

63. Terry v. Ohio, 392 U.S. 1, 20–21 (1968) (quoting Camara v. Mun. Ct., 387 U.S. 523, 536–37 (1967)).

the balancing of "interests,"[64] maps more closely onto the reasonableness of a contractual clause than does the somewhat forced application of risk and value from tort law.

But despite the theoretical applicability of a balancing standard, courts do *not* apply reasonableness in this way to limitation provisions. Neither *Fayak* nor *Thurman* made any reference whatsoever to the employer's interest or the value to the employer of the limitation period.[65] Another case, *Soltani v. Western & Southern Life Insurance Co.*,[66] though not involving an employment contract, illustrates how courts largely eschew a balancing conception of reasonableness in evaluating limitation provisions. In *Soltani*, policyholders challenged two separate clauses in their insurance contract: a limitation provision and a requirement of notice before filing a lawsuit.[67] Regarding the notice requirement, the court applied roughly the sort of balancing inquiry that I am describing. The court held that the notice clause could be enforced only if the insurer had "reasonable justification for the arrangement—i.e., a justification grounded in something other than the [insurer]'s desire to maximize its advantage . . . ." The court continued, "Without such justification, we must assume that it is [unenforceable]."[68] The court proceeded to investigate the insurer's motives, ultimately holding that there was "little justification" for the notice clause.[69] But in its discussion of the limitation provision, this discussion of employer interests and "justification" was entirely absent.[70] Instead, in its substantive unconscionability analysis, the court held that the provision was "not unreasonable" merely by reference to precedent holding that limitation periods of a given length are enforceable.[71]

---

64. *Id.*

65. *See* Fayak v. Univ. Hosps., No. 109279, 2020-Ohio-5512, 2020 WL 7062683, at *4–5 (Ohio Ct. App. Dec. 3, 2020); Thurman v. DaimlerChrysler, Inc., 397 F.3d 352, 355–58 (6th Cir. 2004).

66. 258 F.3d 1038 (9th Cir. 2001).

67. *Id.* at 1040.

68. *Id.* at 1046 (quoting Armendariz v. Found. Health Psychcare Servs., 6 P.3d 669, 694 (Cal. 2000)).

69. *Id.* at 1046–47.

70. *See id.* at 1042–45.

71. *See id.* at 1043–44. This analysis is also reminiscent of the *Fayak* approach, which cited precedent without considering any unique circumstances of the case. *See supra* notes 37–55 and accompanying text. However, *Soltani* does not perfectly exemplify my observation in Part I.A.1 because *Soltani* applied an unconscionability analysis rather than a pure reasonableness standard. *See Soltani*, 258 F.3d at 1043–45; *supra* Part I.A.1. *Soltani*'s application of a balancing standard for the notice provision but not for the limitation provision also foreshadows the inconsistency that I will identify in Part II and critique in Part III. *See infra* Parts II and III.

Although discussion of employer interests is often noticeably absent, some courts *have* justified contractual limitation periods by general reference to the interests of the defendant. Even in the early case of *Riddlesbarger v. Hartford Insurance Co.*,[72] the Supreme Court held that it was not "unreasonable" for an insurance company to impose a limitation provision given the company's interest in having any claims heard "whilst the transaction is recent, and the proofs respecting it are accessible."[73] More recently (and in the employment contract context), the court in *Badgett v. Federal Express Corp.*[74] noted that limitation provisions "reflect[] the [same] policy underlying statutes of limitations, namely to encourage promptness in bringing actions so as to avoid a loss of evidence from the death or disappearance of witnesses, destruction of documents, or failure of memory."[75] The *Badgett* court even noted, "The record is absent of any evidence that FedEx used the limitations clause for anything other than to protect itself against the loss of evidence based on the passage of time, the very rationale of statutes of limitations."[76]

In *Cook v. Northern Pacific Railway Co.*,[77] the Supreme Court of North Dakota came close to a balancing conception of reasonableness, holding: "The question whether [a limitation provision] is reasonable depends to a considerable extent upon the purpose sought to be subserved by such a stipulation, which is to apprise the [defendant] promptly, to the end that it may protect itself against fraudulent and unjust claims for damages."[78] The *Cook* court then considered the provision's specific, as-applied impairment to the plaintiff's interest: "Another consideration which has some weight with us in arriving at the above conclusion is the fact that plaintiff did not, and in the nature of things could not, within the limited time fixed in such stipulation, know of the extent of the injuries inflicted."[79]

The *Riddlesbarger* and *Badgett* courts' inquiring whether the defendants were motivated by legitimate interests does set these analyses apart. But requiring that an employer *have* a legitimate interest is not the same as requiring that the stated interest be *greater*

72. 74 U.S. (7 Wall.) 386 (1868).

73. *Id.* at 390 (considering a limitation provision, though outside of the employment context).

74. 378 F. Supp. 2d 613 (M.D.N.C. 2005).

75. *Id.* at 622 (citing Mo., Kan. & Tex. Ry. Co. v. Harriman Bros., 227 U.S. 657, 672 (1913)).

76. *Id.* at 626.

77. 155 N.W. 867 (N.D. 1915). *Cook* involved a limitation provision in a shipment contract, not an employment contract. *Id.* at 868.

78. *Id.* at 869.

79. *Id.* at 870.

than the burdens to the employee.[80] Similarly, the *Cook* court, although considering both the plaintiff's and defendant's interests, did not take the next step of weighing the interests against one another. As best can be identified, no court has applied that sort of cost-benefit balancing. Later, I will attempt to demonstrate the wisdom of that approach.

B. Other Approaches

Not all jurisdictions analyze contractual limitation periods through a reasonableness lens, or at least not exclusively so. In a pair of recent decisions, the United States Court of Appeals for the Sixth Circuit held that limitation provisions in employment contracts are unenforceable as applied to federal employment discrimination claims. In *Logan v. MGM Grand Detroit Casino*,[81] the court held that a specific statutory limitation period contained in a federal cause of action is a "substantive right" that "is not waivable in advance by employees."[82] The court also recognized the legislative intent behind the complex "cooperative mechanisms" built into Title VII, noting that "[a]ny alterations to the statutory limitation period necessarily risk upsetting this delicate balance."[83] The Sixth Circuit did acknowledge the prevailing "reasonable" standard but held that such an approach was a creature of state law and not "a general rule that federal courts must enforce contractual limitation periods" to bar federal claims.[84] In *Thompson v. Fresh Products, L.L.C.*,[85] the court expanded the holding in *Logan* to apply not just to Title VII claims but also to employment claims under the Americans with Disabilities Act of 1990 (ADA)[86] and the Age Discrimination in Employment Act of 1967 (ADEA).[87]

A California appellate court applied a similar analysis, focused on legislative intent, and held an employment contract limitation provision unenforceable in *Ellis v. U.S. Security Associates*.[88] The court ostensibly

80. That said, one might argue that no explicit balancing was necessary in *Badgett* because the court found that the limitation provision did not place any real burden on the plaintiff. *See Badgett*, 378 F. Supp. 2d at 626 (finding that the employee had "no trouble" investigating her claims).

81. 939 F.3d 824 (6th Cir. 2019).

82. *Id.* at 829.

83. *Id.*

84. *Id.* at 834 (construing Ord. of United Com. Travelers of Am. v. Wolfe, 331 U.S. 586, 625 (1947)).

85. 985 F.3d 509 (6th Cir. 2021).

86. Pub. L. No. 101–336, 104 Stat. 327.

87. Pub. L. No. 90–202, 81 Stat. 602; *Thompson*, 985 F.3d at 519–21.

88. 169 Cal. Rptr. 3d 752 (Ct. App. 2014).

noted that limitation provisions are enforceable if "reasonable"[89] and concluded that the provision was "not reasonable."[90] But beyond this recitation of reasonableness, the court's argument largely rested on the limitation provision's insult to the state statutory scheme under which the employee was suing, the Fair Employment and Housing Act (FEHA).[91] The court held that a contractually shortened limitation period would "thwart" the FEHA by forestalling "administrative enforcement" and limiting the "possibility of settlement"—thus violating the public policy embodied in the legislative scheme.[92]

As shown, shifting the analysis toward legislative intent provides an alternative option for plaintiffs to attempt to invalidate limitation provisions. But it is not guaranteed to be a winning strategy.[93] I intend to show that a modified reasonableness standard would be more faithful to precedent and strike an appropriate balance between employer and employee interests.[94]

Finally, one major alternative approach to reasonableness is simply to enforce limitation provisions under essentially all circumstances. The Supreme Court of Michigan took a "drastic step"[95] in *Rory v. Continental Insurance Co.*[96] *Rory* dispensed with the state's previous reasonableness approach, holding that "freedom of contract" principles preclude courts from conducting their "own independent assessment of 'reasonableness.'"[97] Thus, limitation provisions must "be enforced as written" unless they violate law or explicit public policy.[98] Such is the case in Indiana, too, where a provision "limiting the time in which a suit may be brought to a period less than that fixed by the statute of

89. *Id.* at 757 (quoting Moreno v. Sanchez, 131 Cal. Rptr. 2d 684, 695 (Ct. App. 2003)).

90. *Id.* at 758.

91. Cal. Gov't Code § 12900 (1959); *Ellis*, 169 Cal. Rptr. 3d at 755, 759–61.

92. *Id.* at 760.

93. *Cf.* Fayak v. Univ. Hosps., No. 109279, 2020-Ohio-5512, 2020 WL 7062683, at *4–5 (Ohio Ct. App. Dec. 3, 2020) (refusing to apply the logic of *Logan* to Ohio's employment discrimination laws, even though "the law governing Title VII" typically applies to Ohio's statutory scheme).

94. *See infra* Part III.

95. Rory v. Cont'l Ins. Co., 703 N.W.2d 23, 43 (Mich. 2005) (Kelly, J., dissenting).

96. 703 N.W.2d 23 (Mich. 2005).

97. *Id.* at 30.

98. *Id.* at 31, 33 (concluding that public policy proscribes only "contractual provisions that forbid or preclude the commencement or maintenance of a lawsuit," not provisions that merely impose "conditions").

limitations is binding, unless it contravenes a statute."[99] Although I can hardly improve upon Justice Kelly's comprehensive and persuasive dissent in *Rory*,[100] I will later respond to the freedom-to-contract objection, defend judicial review of contractual limitation periods, and make the case for a reasonableness standard.[101]

II. Alternative Approaches to Enforcement of Provisions in Employment Contracts

A. Covenants Not to Compete

Covenants not to compete, also known as noncompete agreements,[102] within employment contracts offer a first point of comparison as to enforcement of shortened limitation periods. These covenants normally bar an employee from working for one of his or her employer's competitors (or engaging in competitive business of his or her own) after termination of employment.[103] Although "commonplace for over a century,"[104] covenants not to compete have long been subject to judicial scrutiny, with American courts placing strict limits on their enforceability.[105] In particular, enforceable covenants not to compete must be "reasonable."[106] An analysis of the law concerning restrictive covenants not to compete will exemplify (1) how courts can justify

99. Zehner v. MFA Ins. Co., 451 N.E.2d 65, 67 (Ind. Ct. App. 1983) (imposing no reasonableness requirement).

100. *See* 703 N.W.2d at 43–54 (Mich. 2005) (Kelly, J., dissenting).

101. *See infra* Part III.

102. *See* Kenneth R. Swift, *Void Agreements, Knocked-Out Terms, and Blue Pencils: Judicial and Legislative Handling of Unreasonable Terms in Noncompete Agreements*, 24 Hofstra Lab. & Emp. L.J. 223, 223 n.1 (2007) (using the two terms interchangeably).

103. Harlan M. Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 625–26 (1960).

104. Swift, *supra* note 102, at 224.

105. *See* Sherman v. Pfefferkorn, 135 N.E. 568, 569–70 (Mass. 1922) ("It long has been settled that contracts restraining freedom of employment can be enforced only when they are reasonable and not wider than is necessary for the protection to which the employer is entitled and when not injurious to the public interest.") (collecting cases); *see also* Swift, *supra* note 102, at 225 ("Most courts also note that the law looks at these contracts with 'disfavor' and subjects them to careful scrutiny." (quoting Sysco Food Servs. of E. Wis., L.L.C. v. Ziccarelli, 445 F. Supp. 2d 1039, 1043 (E.D. Wis. 2006); Intermountain Eye and Laser Ctrs., P.L.L.C. v. Miller, 127 P.3d 121, 127 (Idaho 2005); Cranston Print Works Co. v. Pothier, 848 A.2d 213, 219 (R.I. 2004); Murfreesboro Med. Clinic, P.A. v. Udom, 166 S.W.3d 674, 678 (Tenn. 2005); Trilogy Software, Inc. v. Callidus Software, Inc., 143 S.W.3d 452, 459 (Tex. App. 2004))).

106. *Sherman*, 135 N.E. at 569.

placing limitations on the freedom to contract within the employment sphere and (2) why courts might choose a reasonableness standard and how they might conceptualize and apply one.

1. Justifying Judicial Scrutiny

Modern common law restrictions upon the enforceability of covenants not to compete trace their origin to the influential 1711 case of *Mitchel v. Reynolds*.[107] In *Mitchel*, the court held that "[g]eneral restraints," that is, covenants not to compete without limitations on duration or location, "are all void."[108] Even if the covenant not to compete is limited to "particular circumstances," it is not automatically enforceable; instead, "the court is to judge, whether it be a reasonable and useful contract."[109] The court noted that covenants not to compete cause two forms of "mischief": first, "to the party, by the loss of his livelihood, and the subsistence of his family," and second, "to the [public], by depriving it of a[] useful member."[110] The *Mitchel* court also noted that noncompete agreements are particularly odious when made part of an employment contract.[111] This is because noncompete agreements can create "great abuses" from "masters, who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom, when they come to set up for themselves."[112] The court's concern that employers may use "indirect practices to procure such bonds" suggests that restrictive covenants within employment contracts ought to be scrutinized not just because of their ill effects but also because of the imbalance of bargaining power between employee and employer. *Mitchel*'s justification for withholding enforcement of covenants not to compete is the basis of modern law on

107. (1711) 24 Eng. Rep. 347; 1 P. Wms. 181 (Gr. Brit.).

108. *Id.* at 349; 1 P. Wms. at 185.

109. *Id.* at 352; 1 P. Wms. at 196.

110. *Id.* at 350; 1 P. Wms. at 190.

111. *Mitchel* concerned a covenant not to compete within a lease assignment, not an employment contract. *Id.* at 347; 1 P. Wms. at 181.

112. *Id.* at 350; 1 P. Wms. 190.

the subject,[113] which universally subjects covenants not to compete to at least some judicial scrutiny.[114]

Modern law also reflects *Mitchel*'s concern that employers' superior bargaining power may in effect force employees to execute covenants not to compete.

> The average, individual employee has little but his labor to sell or to use to make a living. He is often in urgent need of selling it and in no position to object to boiler plate restrictive covenants placed before him to sign. To him, the right to work and support his family is the most important right he possesses. His individual bargaining power is seldom equal to that of his employer.[115]

This notion of employees' relatively weaker bargaining power demonstrates that covenants not to compete should be treated even more skeptically in employment contracts than in contracts to sell a business (such as the one at issue in *Mitchel*).[116] On this point, "[t]oday the courts are in almost universal agreement."[117]

At the same time, courts are acutely aware that limiting enforcement of covenants not to compete impinges upon the freedom to contract. Plainly put, "[t]wo principles, the freedom to contract and the freedom to work, conflict when courts test the enforceability of covenants not to compete."[118] This concern was raised as early as *Mitchel*, in which the court noted that "[t]he law is not so unreasonable, as to set aside a man's own agreement for fear of an uncertain injury to him, and fix a certain damage upon another; as it must do, if contracts with a consideration were made void."[119] Furthermore,

---

113. Blake, *supra* note 103, at 630–31 ("*Mitchel v. Reynolds* is a remarkable opinion . . . . There is very little in the modern approach to the problem [of enforcement of covenants not to compete] for which a basis cannot be found in [Lord] Macclesfield's opinion."); *see, e.g.*, Gibbs v. Consol. Gas Co. of Balt., 130 U.S. 396, 409 (1889) ("[*Mitchel*] is the foundation of the rule in relation to the invalidity of contracts in restraint of trade . . . .").

114. *See supra* notes 105–06 and accompanying text; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 186 (AM. L. INST. 1981) ("A promise is unenforceable on grounds of public policy if it is unreasonably in restraint of trade.").

115. Arthur Murray Dance Studios of Cleveland v. Witter, 105 N.E.2d 685, 704 (Ohio Ct. Com. Pl. 1952). This trial court opinion has been widely cited and even followed by other state high courts. *See* H & R Block, Inc. v. Lovelace, 493 P.2d 205, 211 (Kan. 1972).

116. *Arthur Murray*, 105 N.E.2d at 703–04.

117. Blake, *supra* note 103, at 646–48 (citing *Arthur Murray*, 105 N.E.2d at 704).

118. *See* Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531, 539 (Wyo. 1993).

119. Mitchel v. Reynolds (1711) 24 Eng. Rep. 347, 351; 1 P. Wms. 181, 191 (Gr. Brit.). *See also* Blake, *supra* note 103, at 629–37 (discussing *Mitchel* and its impact on the modern law of covenants not to compete).

covenants not to compete vindicate a variety of legitimate employer interests, including the protection of confidential information and business practices.[120] Employees may also gain a competitive advantage over their employers if they develop a "special influence" over their employers' customers during their employment.[121] The benefits gained by the enforcement of noncompete agreements are not merely private interests, but also public ones in the form of increased efficiency and the development of socially valuable technologies. Employers argue that without noncompete agreements, companies could not recover the costs of research and development or allow for open information sharing within organizations, which is necessary for maximum efficiency.[122] Judicial scrutiny applied to noncompete agreements conflicts not just with the freedom to contract for its own sake, but also with valuable private and public interests. Thus, a bare reference to the freedom to contract should not bind a court to enforce an injurious covenant. This thought will be explored further shortly.

2. Reasonableness

The decision to withhold enforcement of at least some noncompete agreements does not necessarily lead to the conclusion that reasonableness is the standard by which covenants not to compete should be judged. That decision too traces back to *Mitchel v. Reynolds*, which is credited as devising "a rule of reason."[123] But *Mitchel* also flatly prohibited general covenants not to compete (that is, covenants without restrictions to time or place), forestalling the notion that any such covenant could be reasonable.[124] Due to economic and technological advancements, by the nineteenth century, English courts no longer regarded some general noncompete agreements as so unreasonable.[125] Courts ultimately abandoned the general–partial distinction in favor of a true reasonableness test, thereby enforcing otherwise unenforceable covenants.[126] This more permissive "rule of reason . . . derived much of its content from the predominant importance accorded freedom-of-contract ideas."[127] It may surprise the modern reader to learn that the reasonableness standard was adopted *in furtherance of*, and not in spite of, the freedom to contract.

120. *Hopper*, 861 P.2d at 540.

121. *Id.*

122. Blake, *supra* note 103, at 627.

123. *Id.* at 630; *see also supra* note 109 and accompanying text.

124. *See supra* note 108 and accompanying text.

125. Blake, *supra* note 103, at 639–41.

126. *Id.*

127. *Id.* at 643.

A covenant not to compete is "unreasonabl[e]," and thus unenforceable, if either (1) it is "greater than is needed to protect the [employer]'s legitimate interest" or (2) "the [employer]'s need is outweighed by the hardship to the [employee] and the likely injury to the public."[128] This conception of reasonableness is emphatically a balancing test.[129]

As applied, this test has two interesting characteristics. First, most courts focus predominantly on "the extent of a[n] [employer's] protectible interest"; the questions of employee hardship or detriment to the public "are seldom, as separate considerations, given much attention."[130] As a practical matter, an employer must demonstrate "special circumstances" that necessitate the covenant; protection from "ordinary competition" is not a legitimate business interest.[131] Thus, without articulating a legitimate business interest, an employer cannot prevail merely by arguing that the impact to the employee is minimal.[132] Second, this reasonableness test is "almost always fact-intensive in nature."[133] As such, courts avoid declaring that a particular covenant is "facially reasonable" in "all circumstances."[134] These characteristics will

128. Restatement (Second) of Contracts § 188 (Am. L. Inst. 1981).

129. *See supra* notes 61–64 and accompanying text. Certainly, the second prong of the Restatement formulation requires a court to engage in the "difficult task of balancing competing interests." Restatement (Second) of Contracts § 188 cmt. a (Am. L. Inst. 1981). The first prong could be read to consider an employer's needs without necessarily balancing them against the interests of the employee or the public. But this is probably "artificial—even inaccurate—in its description of the deliberation that actually takes place. For example, the permissible limits of employer protection cannot be defined without simultaneous attention to the correlative interests of the employee . . . ." Blake, *supra* note 103, at 649. Thus, the reasonableness test in practice more closely resembles "a balancing of all the factors." *Id.* Note that although Professor Blake's work predates the Second Restatement of Contracts, the First Restatement's approach is substantially similar. *See generally* Restatement (First) of Contracts § 515 (Am. L. Inst. 1932).

130. Blake, *supra* note 103, at 649–50; *see also Swift*, *supra* note 102, at 232–33 ("Most decisions analyzing noncompete agreements begin with an analysis of whether the employer is protecting a legitimate business interest.").

131. Blake, *supra* note 103, at 651; Swift, *supra* note 102, at 232–33; Boulanger v. Dunkin' Donuts Inc., 815 N.E.2d 572, 578 (Mass. 2004); Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531, 539 (Wyo. 1993).

132. *See* Blake, *supra* note 103, at 650 (noting that "'undue hardship' to the employee" is "measured against the urgency of the employer's claim to protection, rather than against some extrinsic standard").

133. Swift, *supra* note 102, at 232; *see also Hopper*, 861 P.2d at 540 ("The reasonableness of a covenant not to compete is assessed based upon the facts of the particular case and a review of all the circumstances.").

134. Mod. Env'ts, Inc. v. Stinnett, 561 S.E.2d 694, 696 (Va. 2002).

be helpful in reimagining the judicial approach to limitation periods in employment contracts.

B. Forum-Selection Clauses

The enforcement of forum-selection clauses in employment contracts provides another useful point of comparison. Forum-selection clauses, also known as choice-of-forum agreements, designate in which court(s) the parties may bring suits.[135] Forum-selection clauses are especially interesting because, much like contractual limitation periods, forum-selection clauses bar a litigant from resolving a claim in an otherwise proper court. Like covenants not to compete, forum-selection clauses are generally unenforceable if they are "unreasonable and unjust."[136] A closer look at forum-selection clauses in employment agreements will provide more perspective on appropriate limitations on the freedom to contract in the employment context and will demonstrate yet another version of reasonableness.

Historically, American courts refused to enforce forum-selection clauses because they "were 'contrary to public policy'" or "'oust[ed] the jurisdiction' of the court."[137] Pointing in part to the "ancient concepts of freedom of contract," the Supreme Court departed from this history in *The Bremen v. Zapata Off-Shore Co.*[138] and enforced a forum-selection clause.[139] Yet despite "compelling reasons" to enforce similar forum-selection clauses, including the "elimination of . . . uncertainties," the Court did not hold that all forum-selection clauses are automatically enforceable.[140] Instead, the Court preserved judicial scrutiny over forum-selection clauses in two ways. First, the Court noted that the forum-selection clause under consideration was "made in an arm's-length negotiation by experienced and sophisticated businessmen."[141] Neither party was subjected to "overweening

135. Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After* Carnival Cruise*: A Proposal for Congressional Reform*, 67 Wash. L. Rev. 55, 56 n.1 (1992).

136. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972). Most jurisdictions have followed *Bremen*. Borchers, *supra* note 135, at 57; *see also* Restatement (Second) of Conflict of Laws § 80 (Am. L. Inst. 1988).

137. *Bremen*, 407 U.S. at 9; *see also* Nute v. Hamilton Mut. Ins. Co., 72 Mass. 174, 184–85 (1856); Benson v. E. Bldg. & Loan Ass'n, 66 N.E. 627, 628 (N.Y. 1903) ("[T]he jurisdiction of the court . . . is prescribed by the Constitution of the state and the statutes passed under it. It can neither be added to nor subtracted from by the agreement of the parties.").

138. 407 U.S. 1 (1972).

139. *Id.* at 10–11, 20.

140. *Id.* at 12–14.

141. *Id.* at 12.

bargaining power."[142] Second, a forum-selection clause should not be enforced if it is "'unreasonable' under the circumstances."[143] Note that, just as with covenants not to compete, the reasonableness test for forum-selection clauses was not a paternalistic innovation; it was developed to *respect* freedom to contract and *enforce* historically unenforceable agreements.[144] Still, even a sophisticated and unsympathetic party can escape the forum-selection clause if "trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court."[145] Although the law of forum-selection clauses has since been muddied,[146] *Bremen* continues to control enforcement of forum-selection clauses in federal courts, including in the employment context.[147]

One characteristic of the forum-selection reasonableness test is particularly interesting for present purposes. On the one hand, the inquiry is highly deferential to the forum-selection clause. "[A] valid forum-selection clause should be given controlling weight in all but the most exceptional cases."[148] Clearly, this reasonableness test is not like the reasonableness test used to evaluate covenants not to compete; here, the employer need not establish that the forum-selection clause protects one of its legitimate interests. Yet courts still engage in a fact-driven analysis. For example, in *DeBello v. VolumeCocomo Apparel, Inc.*,[149] the court considered a forum-selection clause in an employment contract as applied to an employee's Title VII employment discrimination claims.[150] The court noted that the employee is "an experienced professional who was hired for an executive position at a relatively high salary . . . ."[151] Unlike many workers, this employee "had the opportunity to consult with an attorney and make changes to the [a]greement."[152] Under a less fact-driven approach, courts might be content to hold, "The plaintiff lives within *X* miles of the chosen forum,

142. *Id.*

143. *Id.* at 10 (collecting cases).

144. *See supra* notes 126–27, 139 and accompanying text.

145. *Bremen*, 407 U.S. at 18.

146. Borchers, *supra* note 135, at 59; *see also* Matthew J. Sorensen, Note, *Enforcement of Forum-Selection Clauses in Federal Court After* Atlantic Marine, 82 FORDHAM L. REV. 2521, 2524 (2014).

147. *See, e.g.*, DeBello v. VolumeCocomo Apparel, Inc., 720 F. App'x 37, 39–40 (2d Cir. 2017).

148. Atl. Marine Const. Co., Inc. v. U.S. Dist. Ct., 571 U.S. 49, 63 (2013) (quoting Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 33 (1988)).

149. 720 F. App'x 37 (2d Cir. 2017).

150. *Id.* at 38–39.

151. *Id.* at 41.

152. *Id.*

and thus the forum-selection clause is reasonable." Instead, courts consider factual details such as the location of witnesses and whether the residency of the parties has changed since the agreement was executed.[153] This alternative conception of reasonableness will also aid the forthcoming discussion.

III. Reimagining Judicial Review of Limitation Periods in Employment Contracts

A. Justifying Judicial Scrutiny and a Reasonableness Standard

Having seen that courts apply judicial scrutiny, in the form of a reasonableness standard, to noncompete agreements and forum-selection clauses, should the same logic apply to contractual limitation periods for bringing employment claims? Courts justify judicial review of covenants not to compete and forum-selection clauses because unlimited enforcement impairs important public policies—namely, the right to gainful employment (and the availability of skilled workers for the benefit of the public) and the jurisdiction of the courts.[154] But contractual limitation periods in employment contracts offend *exactly the same interests*.

First, shortened contractual limitation periods impinge upon a person's right to employment (and upon the public's interest in having his or her labor available). When a court enforces a shortened limitation period, it extinguishes an otherwise potentially valid employment claim. This has two natural effects. First and most obviously, the individual employee loses the opportunity to secure remuneration through damages. Second, there is a knock-on public effect, whereby reduced enforcement of employment law reduces employer compliance.[155] Both

153. *See, e.g.*, IntraSee v. Ludwig, Nos. 10CA00916, 11CA010024, 2012-Ohio-2684, 2012 WL 2236609, at *4–5 (Ohio Ct. App. June 18, 2012).

154. *See supra* notes 110, 137 and accompanying text.

155. Although confounding variables, such as legislative action, make it difficult to provide a conclusive answer, "[l]itigation may be an effective tactic in the movement for [equal employment opportunity (EEO)]." Paul Burstein & Mark Evan Edwards, *The Impact of Employment Discrimination Litigation on Racial Disparity in Earnings: Evidence and Unresolved Issues*, 28 L. & Soc'y Rev. 79, 107 (1994). "[C]ourts may have a substantial impact" in various ways, including by incentivizing businesses to "create new offices (such as EEO offices) and institutionalize new procedures." *Id.* The "relative earnings" of Black employees "rose along with victories in court through the mid-1970s." *Id.* at 104. Although litigation victory rates rose in the 1980s and wages did not, this can potentially be explained by simultaneous decreases in the administrative enforcement of employment discrimination laws. *Id.* at 104–05; *see also* Elizabeth Hirsh & Youngjoo Cha, *For Law and Markets: Employment Discrimination Lawsuits, Market Performance, and Managerial Diversity*, 123 Am. J. Socio. 1117, 1152 (2018) ("Our results show that without

of these effects impair an individual's ability to participate in the workforce (and thus impair the public's access to the individual's labor) because unemployment (such as after being fired due to employment discrimination) affects the ability to gain future employment, particularly high-quality jobs.[156] In fact, unlike covenants not to compete, which limit a person's ability to work in a given field, unemployment affects the ability to obtain future employment in *any* field.[157] Thus, judicial review of shortened limitation periods for employment claims is justified by the same public policies that mandate scrutiny upon covenants not to compete.

Second, enforcement of shortened contractual limitation periods necessarily deprives courts of the ability to hear otherwise actionable claims. Early courts noted this but distinguished contractual limitation periods from forum-selection clauses. In *Nute v. Hamilton Mutual Insurance Co.*,[158] the Supreme Judicial Court of Massachusetts held:

---

taking into account any subconditions, employment discrimination lawsuit verdicts and settlements lead to initial negative but longer-term positive effects on white women's, black women's, and black men's representation in management."). That said, other research suggests that at least some types of private employment litigation may not effectively incentivize employer compliance. *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1024 (1991) ("With the enormous increase in discharge cases, the probability that a worker will bring a discriminatory firing suit is now substantially higher than the probability that a worker will bring a failure to hire suit. Consequently, antidiscrimination laws [and lawsuits] may actually provide employers a (small) net disincentive to hire women and minorities."); Hirsh & Cha, *supra*, at 1153 (finding empirically that "direct financial penalties applied through sanctions are not particularly effective at promoting diversity in management and, in some cases, have adverse effects"). Setting aside the conflicting real-world impact of employment litigation, certainly the point of antidiscrimination laws is to "provide[] an incentive to end discriminatory behavior by making such behavior costly to employers . . . ." Donohue & Siegelman, *supra*, at 1023.

156. "[D]ischarge may be a signal to future employers that the discharged worker is defective. This may cause such workers to drop down to lower-paying, less desirable jobs upon being discharged." Donohue & Siegelman, *supra* note 155, at 1031. This bears out empirically. Intermittent employment reduces "access to steady, good jobs in subsequent employment." Katherine Weisshaar & Tania Cabello-Hutt, *Labor Force Participation over the Life Course: The Long-Term Effects of Employment Trajectories on Wages and the Gendered Payoff to Employment*, 57 DEMOGRAPHY 33, 55 (2020). "We demonstrate that non-steady high employment pathways have significantly reduced wages relative to steady high employment . . . ." *Id.* These effects can be largely explained by the effect of unemployment on "occupational prestige" and "skill deterioration." *Id.*

157. *See supra* note 156.

158. 72 Mass. 174 (1856).

"[T]here is an obvious distinction between a stipulation by contract as to the time when a right of action shall accrue and when it shall cease, on the one hand; and as to the forum before which, and the proceedings by which an action shall be commenced and prosecuted."[159] The difference is that limitation periods are "matters of contract, and depend on the will and act of the parties."[160] Contrarily, "the remedy does not depend on contract, but upon law . . . ."[161] This distinction was perhaps valid in 1856, before the advent of modern employment law; today, many claims are based not on the breach of an employment contract but instead on violations of *statutory* law, such as Title VII, the ADA, and the ADEA.[162] To turn the *Nute* court's logic: such statutory remedies do not "depend on the contract, but upon law."[163] Accordingly, judicial review of limitation periods is justified by public policy—just like forum-selection clauses, limitation periods strike to the heart of the court's ability to provide a remedy established by law.

Initially, the standard by which courts judge forum-selection clauses (asking whether enforcement will deprive a party of their day in court[164]) bears rhetorical similarity to the standard by which some courts judge contractual limitation periods (asking whether the clause "work[s] a practical abrogation of the right of action"[165]). But upon further examination, the two are logically distinct. Obviously, enforcement of a limitation period necessarily extinguishes the claim. Thus, courts are not asking whether *enforcement* would deprive the party of a remedy (it always will); they are asking whether the *clause itself* inherently deprives the party of a day in court. The inquiry is whether the plaintiff *ever* had the opportunity to pursue his or her claim. On the other hand, when evaluating forum-selection clauses, courts ask whether enforcement *at that moment* would cause abrogation. Courts do not ask whether there was *any moment in the past* at which the forum-selection clause would have been reasonable. In this way, courts place a much greater degree of scrutiny upon forum-selection clauses than contractual limitation periods despite the similar public policies at issue.

---

159. *Id.* at 180.

160. *Id.*

161. *Id.* at 181.

162. *See supra* notes 85–87 and accompanying text.

163. Of course, some employment claims sound in breach of contract, and so this argument would not apply. Still, abrogation of those claims implicates the unemployment concerns that justify judicial review of covenants not to compete.

164. *See supra* note 145 and accompanying text.

165. Ellis v. U.S. Sec. Assocs., 169 Cal. Rptr. 3d 752, 758 (Ct. App. 2014) (quoting 51 AM. JUR. 2D *Limitation of Actions* § 81 (2011)).

The courts that enforce limitation clauses without any judicial scrutiny have pointed to three arguments. First, there is no public policy against shortening the time to bring a claim.[166] Second, enforcement of limitation periods actually *comports* with public policy by ensuring the speedy disposition of claims.[167] Third, imposition of a reasonableness standard impairs the freedom to contract.[168] The foregoing analysis of covenants not to compete and forum-selection clauses provides a response to each of these points.

As to the first, there emphatically *are* public policies at stake in the form of promoting gainful employment and preserving the jurisdiction of the courts. In *Rory*, the court held that limitation periods do not violate public policy because the court had "previously held that Michigan has 'no general policy or statutory enactment . . . which would prohibit private parties from contracting for shorter limitation periods . . . .'"[169] But this adherence to precedent is tautological; it is as if the court wrote, "We have not identified a relevant public policy because we have not previously identified a relevant public policy." Indeed, like virtually all jurisdictions, Michigan courts do not automatically enforce forum-selection clauses[170] or noncompete agreements.[171]

Furthermore, contractual limitation periods uniquely conflict with two other public policies. First, they offend "the policy favoring disposition of cases on the merits rather than on procedural grounds."[172] Second, when applied to federal employment discrimination claims, they disturb the "strong federal public policy favoring enforcement of the civil rights laws so important to the advancement of modern society . . . ."[173] Future courts should conduct a more searching analysis

166. Rory v. Cont'l Ins. Co., 703 N.W.2d 23, 32 (Mich. 2005).

167. *See supra* note 75 and accompanying text.

168. *Rory*, 703 N.W.2d at 30.

169. *Id.* at 32 (quoting and overruling Camelot Excavating Co. v. St. Paul Fire & Marine Ins. Co., 301 N.W.2d 275, 283 (Mich. 1981)).

170. *See* Omne Fin., Inc. v. Shacks, Inc., 596 N.W.2d 591, 597 (Mich. 1999) ("[C]ontractual provisions establishing venue for potential causes of action that may arise *after* the contract is executed are unenforceable.").

171. *See* Woodward v. Cadillac Overall Supply Co., 240 N.W.2d 710, 715 (Mich. 1976) (Williams, J., concurring) (noting that covenants not to compete are subject to "strict scrutiny and reasonable limitations" under Michigan law).

172. Ellis v. U.S. Sec. Assocs., 169 Cal. Rptr. 3d 752, 757 (Ct. App. 2014) (quoting Fox v. Ethicon Endo-Surgery, Inc., 110 P.3d 914, 919 (Cal. 2005)).

173. Red Bull Assocs. v. Best W. Int'l, Inc., 862 F.2d 963, 967 (2d Cir. 1988). Of course, some cases may involve only state-law claims, such as the previously referenced Fayak v. University Hospitals, No. 109279, 2020-

of public policy, considering the relationship between contractual limitation periods and well-established judicial policies.

On the second argument, shortened limitation periods may indeed further some positive goals, including the speediness of justice. But so do covenants not to compete, which promote innovation and business efficiency.[174] And so do forum-selection clauses, which reduce litigant uncertainty.[175] The mere fact that a contractual provision may accomplish something good does not exempt it from judicial review for reasonableness.

Finally, to the third point, the history of covenants not to compete and forum-selection clauses has shown that tests of reasonableness do not stand in opposition to the freedom to contract. Rather, reasonableness has been a moderating principle, adopted in the very spirit of the freedom to contract, that *permits* enforcement of otherwise invalid clauses.[176] Courts apply judicial scrutiny to covenants not to compete with full knowledge of the tradeoffs with the freedom to contract.[177] The freedom to contract should not, and historically does not, trump the other important factors that courts are bound to consider.[178]

Ohio-5512, 2020 WL 7062683, at *1 (Ohio Ct. App. Dec. 3, 2020), *appeal denied*, 166 N.E.3d 1247 (2021).

174. *See supra* notes 120–22 and accompanying text.

175. *See supra* note 140 and accompanying text.

176. *See supra* notes 126–27, 138–39 and accompanying text.

177. *See supra* notes 118–19 and accompanying text.

178. In her dissent in *Rory*, Justice Kelly sets forth a separate counterargument to the freedom-to-contract point. Rory v. Cont'l Ins. Co., 703 N.W.2d 23, 52–53 (Mich. 2005) (Kelly, J., dissenting). She notes that consumers rarely read contracts of adhesion where "one side presents a contract on a take-it-or-leave-it basis and is in a place of considerable power over the other . . . ." *Id.* at 52. The focus on freedom to contract "either ignores or intentionally obfuscates the fact that adhesion contracts are not fairly made or bargained for by individuals managing their own affairs." *Id.* at 53. "If the consumer does not read and comprehend the individual clauses of the contract, there can be no agreement on the particular terms in them. There can be no meeting of the minds." *Id.* at 52. This is an important point that courts should consider. Indeed, the imbalance of bargaining power between employee and employer was a historical justification for judicial scrutiny of noncompete clauses. *See supra* notes 112, 115–17 and accompanying text. That said, modern courts typically entertain concerns about the relative bargaining power of contracting parties through the doctrine of unconscionability. *See* 8 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 18:10 (4th ed. 2010). Collateral attacks on the procedural formation of contractual limitation clauses, such as unconscionability or lack of consideration, have largely failed. *See supra* note 19 and accompanying text. For this reason, the scope of this Note is

B. Reconceptualizing Reasonableness as a Fact-Bound Balancing Test

As previously noted, the reasonableness test that many courts apply to contractual limitation periods is not a balancing test.[179] Employers seeking to enforce limitation clauses do not need to demonstrate a legitimate interest that is furthered by a limitation period.[180] But in the case of covenants not to compete, courts *do* employ a reasonableness test that balances the relevant interests.[181] In the interest of consistency, courts should adopt the workable and well-established balancing test by which covenants not to compete are measured.

Under such a balancing test, contractual limitation periods would be enforceable only if an employer could show some special need for the limitation.[182] The onus would no longer be on the employee to demonstrate a grave hardship. Just as employers cannot justify covenants not to compete by a bare desire to stymy "ordinary competition,"[183] employers could not justify limitation periods by a bare desire to protect themselves against litigation. In practice, this could substantially reduce the proportion of limitation periods that are enforceable. This is because it often "seems more likely that the sole purpose behind a contractually shortened period of limitations is simply to provide the employer with a means to avoid litigation."[184] After all: "There is no evidence that allowing a longer statute of limitations discourages plaintiffs from being diligent in their pursuit of a remedy for their wrong."[185] Similarly, there is an "attenuated" (at best) "relationship between fraudulent claims and the statute of

limited to direct attacks on the validity and enforceability of limitation provisions as such.

179. *See supra* notes 65–71 and accompanying text.

180. *Id.*

181. *See supra* notes 128–29 and accompanying text. Interestingly, the reasonableness test for covenants not to compete was not always so thorough. Around the turn of the twentieth century, a "rigorous freedom-of-contract approach" took hold. Blake, *supra* note 103, at 642. During that time, "[t]he reasonableness test was always employed, but the values it embodied during the era were such that almost any restraint no larger than the market in which the covenantee did business was held suitable." *Id.* This is exactly the trend that I suggest appears in cases like *Fayak*, whereby courts ostensibly apply a reasonableness test but in actuality enforce almost any limitation period, no matter the hardship. *See supra* notes 35–37.

182. *See supra* notes 130–32 and accompanying text. There is already very limited support for this proposition as it relates it limitation clauses. *See supra* notes 72–79.

183. *Id.*

184. Tuoriniemi & Reinsch, *supra* note 19, at 786.

185. *Id.* at 784.

limitations."[186] Still, perhaps certain employment environments or types of claims are particularly vulnerable to loss of evidence, fraudulent claims, or delay in prosecution. A balancing test allows courts the flexibility to consider such unforeseen circumstances.

At the same time, it is often difficult for employees to recognize that they have a viable claim.[187] Employment discrimination, for example, does not normally take the form of "slurs or physical threats."[188] Instead, employees more frequently experience discrimination in pay, benefits, performance assessments, promotion, and the allocation of work assignments.[189] It may take a while for workers to even recognize such a pattern. Once they do, employees might first attempt to handle the issue interpersonally or raise an internal complaint.[190] It is true that courts may allow a plaintiff to pursue a "hostile work environment claim" under a "continuing violation theory," so long as some of the discriminatory conduct occurred within

---

186. *Id.*

187. *See generally* William F.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 Law & Soc'y Rev. 631 (1981). Pursuing legal action ("claiming") first requires recognizing that one has been injured ("naming") and assigning responsibility to another for the wrongdoing ("blaming"). *Id.* at 635–36. In an employment dispute, the transformation of blaming may be particularly challenging, as it requires an employee to view their injury "both as [a] violation[] of norms and as remediable." *Id.* at 635. One might suspect that many workers are unfamiliar with employment law and do not immediately, or ever, recognize that their employers have committed redressable wrongs. Indeed, some have argued that this is by design. *See* Donohue & Siegelman, *supra* note 155, at 1023 ("[O]thers have pointed out that civil rights opponents intended the private enforcement mechanism as a deliberate road-block to plaintiffs' effective pursuit of their rights, especially given that 'many of those discriminated against would be poor and legally unsophisticated.'" (quoting Paul Burstein, Discrimination, Jobs, and Politics 28 (1985))). The same sorts of inequalities that hamper effective access to the courts and other venues for dispute resolution may impact the ability of a would-be plaintiff to transform their injury into a dispute in the first place. *See* Felstiner et al., *supra*, at 636–37.

188. Maryam Jameel & Joe Yerardi, *Despite Legal Protections, Most Workers Who Face Discrimination Are on Their Own*, Ctr. Pub. Integrity (Feb. 28, 2019), https://publicintegrity.org/inequality-poverty-opportunity/workers-rights/workplace-inequities/injustice-at-work/workplace-discrimination-cases/ [https://perma.cc/S7VJ-WPK9].

189. *Id.*

190. *See, e.g.*, Ellis v. U.S. Sec. Assocs., 169 Cal. Rptr. 3d 752, 754 (Ct. App. 2014) (noting that the employee first rejected an unwanted proposition, then tried to ignore the issue, then complained to management, and then finally contacted management again after her pay was reduced).

the limitation period.[191] But "the continuing violation doctrine 'applies differently to claims of discrete discriminatory acts than to claims of hostile work environment.'"[192] Imagine an employee who is denied a promotion and then subjected to a year of discriminatory abuse. During this year, she tries to resolve the problem internally; when her efforts fail, she sues. If the employee is subject to a six-month contractual limitation period, her hostile-work-environment claim may survive, but her claim to recover for the "discrete discriminatory act" of denying her promotion would be time barred, "even when the discrete discriminatory act relates to other acts alleged in a timely filed complaint."[193] A reasonableness balancing test would appropriately consider these prejudicial effects on employees.

Regardless of whether courts adopt a conception of reasonableness as balancing, they should clarify that the reasonableness of a limitation period depends on the particular circumstances of the case. Although most courts follow this approach,[194] others have endorsed all limitation periods of a certain length.[195] Even forum-selection clauses, which are viewed far more permissively than covenants not to compete, are judged with regard to the unique facts.[196] Recall the employee in *Fayak* who argued that she could not have identified her claims before loss or damage could be realized.[197] She alleged that even "[t]he United States Social Security Administration was not able to determine that [she] was permanently and totally disabled until months after the date of her employment termination."[198] Under a fact-bound approach, a court would be free to consider such a powerful fact while still maintaining a strong presumption in favor of enforcing contractual limitation periods. Justice, as well as consistency within the broader law of employment contracts, demands at least that much.

191. *E.g.*, Dindinger v. Allsteel, Inc., 860 N.W.2d 557, 570 (Iowa 2015) (applying a statute of limitations, rather than a contractual limitation period).

192. *Id.* (quoting Farmland Foods, Inc. v. Dubuque Hum. Rts. Comm'n, 672 N.W.2d 733, 741 (Iowa 1990)).

193. *Id.* (quoting *Farmland Foods, Inc.*, 672 N.W.2d at 741).

194. *See supra* note 55 and accompanying text.

195. *See supra* notes 36–37, 54 and accompanying text.

196. *See supra* notes 148–53 and accompanying text.

197. *See supra* notes 49–50 and accompanying text.

198. *Id.*

Conclusion

On the topic of a covenant not to compete, Lord Shaw wrote in the 1913 case of *Mason v. Provident Clothing & Supply Co.*:[199]

> I have referred, my Lords, to the apparent antagonism between the right to bargain and the right to work. The extreme of the one destroys the other. But the public interest reconciles these two, and removes all antagonism by the establishment of a principle and a limit of general application. It may be that bargains have been entered into with the eyes open, which restrict the field of liberty and of labour, and the law answers the public interest by refusing to enforce such bargains in every case where the right to contract has been used so as to afford more than a reasonable protection to the covenantee. In every case in which it exceeds that protection, the public interest, which is always upon the side of liberty, including the liberty to exercise one's powers or to earn a livelihood, stands invaded, and can accordingly be invoked to justify the nonenforcement of the restraint. In such a case it may be "plainly and obviously clear that the plaintiff's interest did not require the defendant's exclusion or that the public interest would be sacrificed.'"[200]

These poignant words apply with equal force to contractual limitation periods, which invade the public interests of access to employment, enforcement of civil rights law, and the openness of the courts. For well over a hundred years, courts have held that the freedom to contract is not absolute. It is but one of many competing principles in the law. When these principles are in conflict, it is the role of the courts to consider the facts and balance the interests.

Andrew Thompson[†]

199. [1913] AC 724.

200. *Id.* at 739–40 (quoting Tallis v. Tallis (1853) 118 Eng. Rep. 482, 491; 1 El & Bl. 391, 412).

† J.D. 2023, Case Western Reserve University School of Law. I thank the entire Law Review staff for their careful edits. I also thank Professor Jonathan Entin both for his guidance while drafting this Note and for his years of service to the law school; he will be missed in retirement. Most of all, I thank my parents; my parents-in-law; and my wife, Kelsey, for her unending love and support.