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KILLING THE MESSENGER: THE USE OF NONDISCLOSURE AGREEMENTS TO SILENCE WHISTLEBLOWERS

Jodi L. Short*

Nondisclosure agreements are a common feature of corporate life. Employers routinely require their employees to sign such agreements to protect the company’s legal rights in trade secrets and other valuable business information, the disclosure of which might hurt the company’s competitive position. Increasingly, however, employers are attempting to expand the reach of nondisclosure agreements beyond these commonplace and legitimate uses. In recent years, employers have used garden-variety employee-nondisclosure agreements to silence whistleblowers and deprive the public of important health and safety information.

In two recent, high profile cases, courts permitted employers to silence whistleblowers with nondisclosure agreements. In Baker v. General Motors, a Michigan state court enforced GM’s nondisclosure agreement with Ronald Elwell. The former GM engineer was enjoined from testifying about the dangers of GM’s fuel tank design in products liability suits against GM. In another widely publicized case, Brown & Williamson, the third largest U.S. tobacco company, used nondisclosure agreements to obtain a temporary restraining order against a former company executive and researcher, prohibiting him from disclosing information about the dangers of smoking cigarettes. Both rulings deprived the public of important health and safety information about the products of these two companies.

Ronald Elwell worked for GM for thirty years. Fifteen of those years were spent as a member of GM’s Engineering Analysis Group,

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2. See id. at 818-20.
where he studied the performance of GM vehicles involved in products liability litigation.\(^5\) Elwell's research concentrated on vehicular fires and improving the fuel line designs of certain GM products.\(^6\) In addition to his duties as a researcher, Elwell assisted GM lawyers in defending products liability suits, and testified on GM's behalf in over 80 suits.\(^7\)

For reasons that are not entirely clear, Elwell's relationship with his employer soured, and he was discharged.\(^8\) Elwell claimed that he was unwilling to continue providing assistance with GM's products liability defense after he discovered that GM had withheld vital information from him about the safety of its fuel tanks—rendering his prior testimony in support of GM untruthful.\(^9\) GM claimed that Elwell did not get along with his supervisors and was "disgruntled" over his retirement and severance packages.\(^10\) Convinced that GM's fuel tank design was unsafe, Elwell began to testify in products liability actions against GM, on behalf of plaintiffs and their decedents who had been injured by the allegedly faulty design.\(^11\)

Shortly after his termination, Elwell filed a wrongful discharge suit in Michigan state court against GM. The corporation counterclaimed, alleging that Elwell had breached a fiduciary duty to GM by disclosing privileged and confidential information.\(^12\) After a motion by GM and a hearing, the court issued a preliminary injunction, enjoining Elwell from "consulting or discussing with or disclosing to any person any of General Motors Corporation's trade secrets[,] confidential information or matters of attorney-client work product relating in any manner to the subject matter of any products liability litigation whether already filed or [to be] filed in the future which Ronald Elwell received, had knowledge of, or was entrusted with during his employments with General Motors Corporation."\(^13\)

To settle the wrongful discharge suit he filed against GM, Elwell entered into a confidentiality agreement barring him from testifying against GM in products liability cases unless ordered to do so by a court.\(^14\) The court entered the terms of the settlement agreement as a permanent in-

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5. See id. at 660-61.
6. See id. at 661.
7. See Meenach v. General Motors Corp., 891 S.W.2d 398, 399 (Ky. 1995).
8. See id. at 400.
9. See id.
10. See id.
11. See Baker, 118 S. Ct. at 661.
12. See id.; Meenach, 891 S.W.2d at 400.
14. See id.
The agreement/injunction substantially repeated the preliminary injunction, and went on to prohibit Elwell from

"testifying, without the prior written consent of General Motors Corporation, either upon deposition or at trial, as an expert witness, or as a witness of any kind, and from consulting with attorneys or their agents in any litigation already filed, or to be filed in the future, involving General Motors Corporation as an owner, seller, manufacturer and/or designer of the product(s) in issue."\(^{16}\)

After Elwell was enjoined in accordance with the terms of this nondisclosure agreement, he testified at a number of trials against GM.\(^{17}\) In each case, GM tried to enjoin Elwell's participation on the basis of the nondisclosure agreement and the Michigan injunction adopting it.\(^{18}\) Some courts sided with GM and quashed Elwell's testimony based on the injunction.\(^{19}\) As one court put it,

G.M. bought Elwell's silence on any matters that could be damaging to G.M.'s interest. Under the injunction, G.M. has not only prevented Elwell from speaking on his own behalf, but no one else may find out what he knows, effectively blockading a litigant's search for the truth and for redress.\(^{20}\)

In a similar and contemporaneous case, Jeffrey Wigand, a former vice president and chief researcher for Brown & Williamson, became the highest-ranking executive to break ranks and reveal information about the behind-the-scenes operations of a major tobacco company.\(^{21}\) His disclosures were instrumental in building a case against the tobacco companies and ultimately in forcing the tobacco industry to the bargaining table to negotiate a national tobacco settlement.\(^{22}\) Like General Motors, Brown & Williamson used nondisclosure agreements to silence Wigand on issues critical to the public health and safety. Based on several employment-related nondisclosure agreements signed by Wigand, Brown & William-

\(^{15}\) See id.

\(^{16}\) Id. (quoting proposed permanent injunction).

\(^{17}\) See id. at 662; Meenach, 891 S.W.2d at 400.

\(^{18}\) See Meenach, 891 S.W.2d at 400. Most of these courts admitted Elwell's testimony. See infra notes 43-54 and accompanying text.


son persuaded a Kentucky state court to enter a temporary restraining order prohibiting Wigand from disclosing anything he had learned during his employment at Brown & Williamson without the company’s consent.\(^\text{23}\)

In 1988, after a long career in health care, Wigand went to work for Brown & Williamson, which reportedly approached him to develop a “safer cigarette.”\(^\text{24}\) Wigand claimed that he was shocked at the poor quality of science being conducted at Brown & Williamson\(^\text{25}\) and disillusioned with the company’s secrecy and dishonesty about the dangers of its products.\(^\text{26}\) Wigand kept an extensive diary of his experiences at Brown & Williamson\(^\text{27}\) and conducted independent research on the dangers of certain common cigarette additives.\(^\text{28}\) He was fired in the summer of 1992, reportedly for being “difficult to work with” and for “talking too much.”\(^\text{29}\)

After his termination, Wigand began a campaign to expose what he viewed as grave misconduct and deception on the part of the tobacco industry.\(^\text{30}\) He filmed a segment for 60 Minutes, where he told investigative reporter Mike Wallace that cigarettes are merely “a delivery device for nicotine.”\(^\text{31}\) He became a “shadow expert” on the tobacco industry, advising anti-tobacco activists, U.S. Department of Justice investigators and FDA regulators about various aspects of the industry’s products and practices.\(^\text{32}\) Wigand also served as the “key witness in a singular legal attempt by [state governments] to seek reimbursement of Medicaid expenses resulting from smoking-related illnesses,”\(^\text{33}\) which resulted in a landmark national tobacco settlement.\(^\text{34}\)

Brown & Williamson launched a fierce counter-attack in response to Wigand’s activities. It reportedly hired someone to scrutinize Wigand’s past and private life and mounted a multi-million-dollar campaign to de-

\[\begin{align*}
\text{23.} & \quad \text{See Restraining Order, Brown & Williamson Tobacco Corp. v. Wigand, No. 95-C1-06560}\ & \text{(Jefferson Cir. Ct., Louisville, Ky. Nov. 21, 1995).} \\
\text{24.} & \quad \text{See Brenner, supra note 3, at 176.} \\
\text{25.} & \quad \text{See id. at 177.} \\
\text{26.} & \quad \text{See id. at 177-78.} \\
\text{27.} & \quad \text{See id. at 178.} \\
\text{28.} & \quad \text{See id. at 179.} \\
\text{29.} & \quad \text{Id.} \\
\text{30.} & \quad \text{See id. at 180-81.} \\
\text{31.} & \quad \text{Id. at 173.} \\
\text{32.} & \quad \text{See id. at 206.} \\
\text{33.} & \quad \text{Id. at 173.} \\
\text{34.} & \quad \text{See Freedman & Hwang, supra note 22, at A1.}
\end{align*}\]
stroy Wigand by disseminating damaging charges against him. Brown & Williamson also used litigation as a key component of its strategy to silence Wigand. Based on several confidentiality agreements signed by Wigand, Brown & Williamson sued to enjoin him from testifying in various state suits and to collect damages based on other disclosures. Based on the terms of the non-disclosure agreements, the Jefferson County Circuit Court granted a temporary restraining order enjoining Wigand from disclosing any information about his experiences at Brown & Williamson. Brown & Williamson eventually dismissed its case against Wigand as a part of the national tobacco settlement, but the restraining order had been in effect for over a year. During that time Wigand could discuss his views on critical issues of public health and safety only upon peril of contempt.

Although nondisclosure agreements effectively silenced whistleblowers like Elwell and Wigand, there is little case law on the use of nondisclosure agreements for these purposes. In the 1997-98 term, the United States Supreme Court considered some important procedural aspects of Elwell’s case. In Baker v. General Motors Corp., the Court considered whether the Full Faith and Credit Clause of the United States Constitution binds other state courts to enforce the Michigan state court’s injunction. The Court held that the courts of other states are not bound by the Michigan injunction in deciding whether to permit Elwell’s testimony.

While this decision clarifies a number of issues under the Full Faith and Credit Clause, it provides no substantive guidance on how nondisclosure agreements should be interpreted when used against a whistleblower. This question acquires a new urgency after Baker, because employers like GM and Brown & Williamson can no longer rely on a home town judgment obtained from a local court to block a whistleblower’s testimony in courts across the country. Courts must confront this issue ad hoc.

35. See Brenner, supra note 3, at 174.
36. See Hwang, supra note 21, at A3.
37. See Restraining Order at 2, Brown & Williamson Tobacco Corp. v. Wigand, No. 95-C1-05650 (Jefferson Cir. Ct., Louisville, Ky. Nov. 21, 1995); Brenner, supra note 3, at 172.
38. See generally Kim Wessel, B&W Dismisses Lawsuit Against Wigand; Ex-Executive Still Has Confidentiality Deal, COURIER-JOURNAL (Louisville, Ky.), Aug. 1, 1997, at 03B.
40. Id.
41. U.S. CONST. art. IV, § 1.
42. See Baker, 118 S. Ct. at 660.
43. See id. at 667-68.
and decide how to balance the employer’s right to bargain for an employee’s silence on confidential business matters with the public’s right to information affecting health and safety.

This Article argues that, with certain narrow exceptions, an employer should not be able to use a nondisclosure agreement to silence a whistleblower. This should be the case whether the disputed disclosures are made in connection with litigation, to private or government investigators, to the media, or to the public generally by some other means. Put simply, there is a difference between disclosures of confidential, competitive business information and disclosures concerning the public health and safety. The law must recognize this critical distinction.

Part I of this Article discusses the case law on whether an employee subject to a confidentiality agreement may testify in court against his or her employer. These cases demonstrate that the vast majority of courts permit such testimony, with restrictions placed solely on the revelation of trade secrets and privileged information—as they would be for any witness. Part II argues further that, even outside the courtroom, nondisclosure agreements entered into as part of an employment relationship are unenforceable except to the extent that they are reasonable. This means that they may protect only trade secrets, confidential information, and the legitimate, competitive interests of the employer. Under these criteria, employers likewise may not suppress public disclosures by whistleblowers outside the litigation context, unless confidential information or trade secrets are at issue. The Article concludes that the use of employee nondisclosure agreements to silence whistleblowers stretches these instruments far beyond their permissible boundaries, and courts should not permit employers to misuse them in this fashion.

I. A NONDISCLOSURE AGREEMENT IS NOT ENFORCEABLE TO PREVENT AN EMPLOYEE FROM PROVIDING TESTIMONY AGAINST THE EMPLOYER IN CIVIL LITIGATION

Several courts have considered whether an employee bound by a nondisclosure agreement is precluded from providing information arguably covered by that agreement in the context of civil litigation. Although there is some authority to the contrary, the majority of courts to consider the question have permitted the employee to provide both fact and expert testimony. Moreover, to the extent the employer may bar certain portions of the testimony, such as trade secrets and privileged material, courts place the burden on the employer to prove that the information the em-
ployee may reveal by her testimony is in fact protectable.\textsuperscript{44}

Elwell's dispute with General Motors produced much of the existing law on this issue. Elwell was called to testify in products liability cases across the country, and GM opposed his testimony in a wide variety of fora.\textsuperscript{45} Despite the broad language of the Michigan agreement/injunction prohibiting his testimony on all matters related to his former employer, these courts refused to issue a blanket injunction precluding Elwell's testimony.\textsuperscript{46} Rather, most courts permitted Elwell's testimony on the condition that he not testify as to privileged matters and trade secrets.\textsuperscript{47}

These courts reasoned that the public and institutional interests in full and fair disclosure in litigation outweighed GM's interest in silencing Elwell as to non-trade secret and non-privileged matters.\textsuperscript{48} A California appellate court refused to enforce the agreement/injunction, because "it violates fundamental California public policy."\textsuperscript{49} The court observed that the agreement/injunction prohibited Elwell from "offering \textit{any testimony whatsoever} without the prior written consent of GM. On its face, it extends far beyond matters which might legitimately constitute attorney work product or GM trade secrets."\textsuperscript{50} Although its literal coverage was broad, the court refused to enforce the agreement/injunction to its full extent because "[a]greements to suppress evidence have long been held void as against public policy, both in California and in most common law jurisdictions,"\textsuperscript{51} and the inevitable result of enforcing such a broad agreement would be "the suppression of highly relevant, discoverable evidence most probably very damaging to GM's position."\textsuperscript{52}

The Kentucky Supreme Court similarly observed that "the public interest would not be served by a blanket prohibition as to [testimony on] matters not within the scope of the attorney/client or work-product privi-

\textsuperscript{44} See infra notes 64-66 and accompanying text.
\textsuperscript{46} See Ake, 942 F. Supp. at 880-81; Williams v. General Motors Corp., 147 F.R.D. 270, 272-73 (S.D. Ga. 1993); Smith, 49 Cal. Rptr. 2d at 27-28; Meenach, 891 S.W.2d at 402.
\textsuperscript{47} See Ake, 942 F. Supp. at 881; Williams, 147 F.R.D. at 273; Smith, 49 Cal. Rptr. 2d at 24-27; Meenach, 891 S.W.2d at 402.
\textsuperscript{48} See Ake, 942 F. Supp. at 881; Williams, 147 F.R.D. at 273; Smith, 49 Cal. Rptr. 2d at 27; Meenach, 891 S.W.2d at 402.
\textsuperscript{49} Smith, 49 Cal. Rptr. 2d at 21.
\textsuperscript{50} Id. at 26.
\textsuperscript{51} Id. (quoting Williamson v. Superior Court, 148 Cal. Rptr. 39, 44 (Cal. 1978)).
\textsuperscript{52} Id. at 27.
lege[sic], or which do not involve divulging trade secrets." 53 A district court in Georgia addressing the same issue noted that "[a]ny interest [a former employer] might have in silencing [a former employee] as to unprivileged or non-trade-secret matters is outweighed by the public interest in full and fair discovery." 54 These courts applied this reasoning to permit both fact and expert testimony.55

Courts have allowed employees to testify against their employers in other contexts as well. In Favala v. Cumberland Engineering Co.,56 Jesus Favala sued the manufacturer of a machine that had injured him when it drew his hand into the device's rotating blades.57 After filing suit, Favala notified the manufacturer of his intent to depose Roy Gerstenberg, then Vice President of the manufacturer's Product Integrity department.58 Soon after the manufacturer was served with notice of the deposition, it entered into a confidentiality agreement with Gerstenberg which prohibited him from divulging "the trade secrets and proprietary, confidential, private or non-published information relating to the business, operation or financial affairs of the Company. . . ."59 Despite the agreement, Favala took Gerstenberg's deposition.60 Gerstenberg's employer filed a motion to bar Gerstenberg's testimony at trial, asserting, among other things, that his testimony would violate the confidentiality agreement.61

The court concluded that Gerstenberg could testify "so long as he did not divulge the substance or subject of his communications with [his employer's] attorney."62 The court rejected the employer's concern that Gerstenberg might divulge confidential matters during his testimony, stating that "[t]his generalized fear . . . does not justify the complete barring of Gerstenberg's testimony in this case."63

In determining what information is eligible for protection under this standard, courts have held that the burden is on the employer to "establish that the specific matters [it objects to] are indeed subject to privilege or protection."64 In order to obtain protection for those portions of an

53. Meenach, 891 S.W.2d at 402.
55. See Williams, 147 F.R.D. at 273; Meenach, 891 S.W.2d at 402.
56. 17 F.3d 987 (7th Cir. 1994).
57. See id. at 988-89.
58. See id. at 989.
59. Id. (quoting confidentiality agreement).
60. See id.
61. See id.
62. Id. at 990.
63. Id. at 991.
64. Williams v. General Motors Corp., 147 F.R.D. 270, 273 (S.D. Ga. 1993); accord Favala,
employee's testimony which are legitimately protectable, the employer cannot rely on a "generalized fear" that the employee may reveal damaging information. Instead, it must identify specific information which should be precluded from testimony.

Although there is a strong trend among courts to permit testimony by employees bound by nondisclosure agreements against their employers, there is some case law to the contrary. However, under close scrutiny, these cases do not undermine the reasoning of the majority of courts discussed above. In Uniroyal Goodrich Tire Co. v. Hudson, the Sixth Circuit upheld an injunction issued by a district court in Michigan. The injunction precluded a former Uniroyal employee from testifying as an expert witness against Uniroyal or consulting with plaintiffs' counsel in a products liability action pending in Georgia. While employed by Uniroyal, the former employee signed a nondisclosure agreement providing that he would maintain in confidence at all times during and after his employment, all information gained in the course of or arising from his employment. After leaving his employment, the former employee became an expert witness and consultant for plaintiffs in products liability actions pending against Uniroyal.

Uniroyal sought to enjoin expert testimony by the former employee on the grounds that such testimony would violate the nondisclosure agreement and would result in the disclosure of confidential information harmful to Uniroyal's business interests. The district court preliminarily enjoined the former employee from using or disclosing any Uniroyal trade secrets or confidential information, or revealing information about certain topics enumerated in the preliminary injunction, except "in an official proceeding of a court of record." Despite the breadth of the nondisclosure agreement, which precluded the disclosure of any information

17 F.3d at 990; Smith v. Superior Court, 49 Cal. Rptr. 2d 20, 28 n.6 (Cal. Ct. App. 1996) (quoting Williams, 147 F.R.D. at 273); Meenach v. General Motors Corp., 891 S.W.2d 398, 402 (Ky. 1995).
65. Favala, 17 F.3d at 991.
66. See Williams, 147 F.R.D. at 273.
69. See id. at *30-31.
70. See id.
71. See id. at *3.
72. See id. at *4.
73. See id. at *5.
74. See id. at *8 (quoting injunction).
learned while at Uniroyal, the preliminary injunction prohibited only the disclosure of trade secret and confidential information; it did not place any further limits on the former employee's ability to testify at deposition or at trial. Thus, at least with respect to trial or deposition testimony, the Uniroyal preliminary injunction is consistent with the policies expressed in the cases discussed above.

After this preliminary injunction was entered, the former employee served as an expert consultant to the Georgia products liability plaintiffs by reviewing and tabulating certain information for plaintiffs' counsel. Uniroyal, of course, was not present during these consultations and thus could not have posed objections to the revelation of particular information. The district court ruled that the employee's consultations with plaintiffs' counsel violated the preliminary injunction and, as a penalty, issued a broader injunction completely prohibiting the former employee from testifying as an expert witness at the Georgia trial.

In upholding the broader injunction, the Sixth Circuit agreed with the district court that the information the former employee had disclosed to the Georgia plaintiffs "qualified for trade secret protection." The court observed that this, as well as other confidential information, was disclosed to plaintiffs' attorneys in violation of the district court's original preliminary injunction, and it was therefore appropriate for the district court to enjoin him from testifying as an expert. The Sixth Circuit also noted that such an injunction did not violate public policy by unduly interfering with the fact finding process, because the injunction did not preclude the former employee from testifying "as a fact witness at any trial." In addition, the court noted that "prohibiting [him] from testifying as an expert . . . will not unduly burden plaintiffs" because he "is not the only tire failure expert available to these parties, and plaintiffs are perfectly free to hire another expert tire failure analyst to support their claims."

Despite their holdings, the Uniroyal decisions substantially support the reasoning of the decisions permitting the disputed employee testi-

75. See id. at *3.
76. See id. at *7.
77. See id. at *8-9.
78. See id. at *9, *21.
79. Id. at *26.
80. See id. at *18-19.
81. Id. at *30.
82. Id. at *30-31.
83. Id. at *31.
mony. Even though the Uniroyal nondisclosure agreement prohibited the employee from disclosing any matters learned while at Uniroyal, the district court's initial injunction did not prevent the employee from revealing all information learned during the course of his employment. Rather, it only prohibited him from revealing trade secret and confidential business information. Moreover, he was not precluded in any way from testifying as an expert at trial. It was only after the employee violated the terms of the initial preliminary injunction that the district court issued the broader injunction barring all testimony.

Another Sixth Circuit case addressing this issue is Zanders v. National Railroad Passenger Corporation. In that case, the court refused on procedural grounds to disturb an Ohio injunction prohibiting a former employee from disclosing confidential information about her former railroad employer. Under the supervision of the railroad's attorneys, the former employee had "investigated and drafted answers to employment discrimination complaints" brought against the railroad. Upon her resignation, the employee entered into an agreement not to disclose any confidential information obtained in the course of her employment. Subsequently, the employee was listed as a witness for employment discrimination claimants suing the railroad. Concerned that the former employee might disclose attorney-client or work product privileged information, the railroad filed suit against her in Ohio state court and obtained an injunction barring her from disclosing any information acquired in the course of her employment. The injunction did not apply, however, to disclosures "required by law in a proceeding in which [the railroad] has the opportunity to assert any applicable claim of privilege." After ruling against the former employee on procedural grounds, the Sixth Circuit opined in dicta that the Ohio injunction did not violate public policy. The court reasoned that although the former employee was a party to privileged communications in the course of her employment, the Ohio in-
junction specifically allowed her to testify as a fact witness in any court proceeding in which the railroad would have the ability to raise objections.\textsuperscript{95} As in \textit{Uniroyal}, the \textit{Zanders} court drew a distinction between disclosures made in connection with litigation (where the railroad could object, seal the record, or otherwise act to protect its interests) and other extra-litigation communications.

In sum, there is broad agreement among courts that an employer cannot use a nondisclosure agreement to prohibit an employee from participating as a witness in civil proceedings. This is especially true where the employer has the opportunity to participate in the proceedings and object to the disclosure of protectable material such as privileged information and trade secrets. This is a fair and sensible approach, consistent with the strong public policy favoring full disclosure in litigation. Consequently, a nondisclosure agreement should not prevent a whistleblower from testifying against her employer.

\textbf{II. AN EMPLOYMENT-RELATED NONDISCLOSURE AGREEMENT IS NOT ENFORCEABLE TO PREVENT A WHISTLEBLOWER’S DISCLOSURES OF THE EMPLOYER’S WRONGDOING OUTSIDE THE LITIGATION CONTEXT, TO THE MEDIA OR TO THE PUBLIC GENERALLY}

The legal issues surrounding whistleblower disclosures are much more complicated than the above discussion suggests, because whistleblowers can utilize countless avenues outside the controlled confines of judicial proceedings to reveal, prevent or punish their employers’ wrongdoing. For example, a whistleblower might approach the media and provide interviews, sources or documents to reporters, or she might serve as a media consultant on the issues in question. She may participate in a law enforcement investigation, which would entail disclosures to government investigators or other law enforcement personnel. The whistleblower might even opt to operate outside all these traditional structures and post the damaging information on the internet.

Different questions are raised by disclosures outside the litigation context, where there is no countervailing interest in full and fair disclosure, and where the employer has no notice or opportunity to assert applicable objections. As discussed above, some courts have explicitly drawn distinctions between permissible disclosures made in litigation and impermissible disclosures made outside the structured court environ-

\textsuperscript{95} \textit{See id. at 1133-34.}
Nevertheless, there are substantial limits on what types of disclosures a confidentiality agreement may be used to restrict outside the litigation context, because employee non-disclosure agreements are restraints on trade. Even in a purely commercial context, an employee nondisclosure agreement is unenforceable unless the agreement is reasonable, meaning that it protects only the employer's legitimate business interests in confidential or trade secret information. Employment-related nondisclosure agreements that restrict the free flow of information outside these limits should be struck down or enforced only insofar as they are consistent with these limits. In most cases involving whistleblowers, a nondisclosure agreement cannot meet this standard.

A. Employment-Related Nondisclosure Agreements Are Not Enforceable Unless They Are Reasonable

Contracts in restraint of trade are against public policy and are unenforceable unless they are reasonable. "A promise is in restraint of trade if its performance would limit competition in any business or restrict the promisor in the exercise of a gainful occupation." It has long been held that covenants not to compete restrain trade and thus are disfavored by the law. Covenants not to compete typically prohibit an employee from working for a competitor of the employer or from establishing a competing business for a certain period of time after the employee terminates her employment. Unless the parameters of such agreements are narrowly drawn, they would prevent former employees from obtaining new employment. Consequently, courts scrutinize such agreements to ensure they are no more restrictive than necessary to protect the employer's legitimate competitive interests.

96. See notes 76 and 95 and accompanying text.
98. See Prudential, 629 F. Supp. at 469.
100. Id. § 186(2).
101. See ANTHONY C. VALIULIS, COVENANTS NOT TO COMPETE: FORMS, TACTICS, AND THE LAW § 1.6, at 6 (1985).
102. See generally RESTATEMENT, supra note 99, § 188 cmt. g; DONALD J. ASPELUND & CHARLES S. BAKER, EMPLOYEE NONCOMPETITION LAW § 3.02 (1997).
103. See RESTATEMENT, supra note 99, § 188 cmt. g.
104. See generally VALIULIS, supra note 101, § 1.4, at 4.
There has been significantly more controversy over whether nondisclosure agreements, like covenants not to compete, so severely limit competition that they should be considered disfavored restraints on trade. One treatise on employment contracts asserts:

It is often easier to uphold and enforce a non-disclosure clause than a clause restricting competition. The reason for this is obvious. In a typical non-disclosure clause, though employees may agree not to disclose certain confidential information, ... they are not otherwise restricted from competing. ... These agreements restrain trade, if at all, to a much less extent than do covenants not to compete.

As the economy becomes increasingly information-driven, however, these historic distinctions are becoming irrational and meaningless. In fact, because nondisclosure agreements restrict speech, they might be viewed as even more insidious than covenants not to compete. In any event, employee nondisclosure agreements restrain trade in at least three ways. First, nondisclosure agreements undermine competition in the general economy by circumscribing the free flow of information. Free information flow is an essential element of competition, and restricting it in any way restrains competition. Second, nondisclosure agreements restrain trade much like covenants not to compete by making it more difficult for individuals to obtain new employment in the same field. The skills and industry knowledge an employee learns at one job often constitute her most valuable assets in seeking and obtaining a subsequent job. Therefore "[r]estraints cannot be lightly placed upon [an employee’s] right to compete in the area of his greatest worth."

Finally, nondisclosure agreements restrain the employee’s ability to trade on the information she has obtained. Trafficking in information is, in and of itself, a lucrative economic activity in today’s economy. A person who possesses valuable information of interest to the public may have numerous profitable opportunities available, including serving as a confidential media source, writing a tell-all book, becoming an expert witness, or working as a litigation or media consultant. The very real economic value of these opportunities cannot be ignored simply because

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105. See 1 Kurt H. Decker, Covenants Not to Compete § 3.7, at 56 (2d ed. 1993).
106. Id.
108. See Aspelund & Baker, supra note 102, § 2.0111 (describing the public interest in the free flow of information).
109. See generally id. § 3.02.
some might find them distasteful. If a nondisclosure agreement prohibits an employee from pursuing these economic opportunities, it restrains trade. This is not to say that these activities and disclosures must be permitted. Rather, it means that if an agreement purports to preclude an individual from pursuing economic opportunity, it restrains trade and must be scrutinized. While it may be decided in a given case that an employer’s interest in confidentiality outweighs an employee’s interest in selling her story to the National Enquirer, the analysis should be performed on a case-by-case basis, as it is for all restraints of trade.

Courts are increasingly recognizing the parallels between nondisclosure and noncompete agreements. Although courts are not unanimous on this issue, significant judicial authority holds that nondisclosure agreements restrain trade and should be scrutinized under the same or similar standards as covenants not to compete. Especially where the employer has drafted a broad nondisclosure agreement with undefined restrictions, nondisclosure and noncompetition agreements are almost indistinguishable. For instance, it is not uncommon for employers to draft extremely broad nondisclosure agreements to ensure the most expansive coverage of information. One such agreement defined “confidential information” as


all information provided to the employee during the course of his employment that was related in any way to the employer’s business.\textsuperscript{113} Read literally, this kind of agreement covers everything from confidential customer lists to the brand of copy paper used by the employer. Enforced literally, it could produce absurd results, and it would certainly restrict an employee’s ability to function in a similar job.\textsuperscript{114} One court observed that enforcement of such a nondisclosure agreement “amounts in effect to a post-employment covenant not to compete.”\textsuperscript{115}

Regardless whether the courts of a state have explicitly equated nondisclosure agreements and covenants not to compete, there is broad judicial consensus that employee nondisclosure agreements, like covenants not to compete, must satisfy a test of “reasonableness” in order to be enforced.\textsuperscript{116} The “reasonableness” test courts have articulated takes into account the employer’s interests in protecting certain information, the employee’s interest in obtaining new employment of her choice, and the public policy in fostering the spread of ideas to promote competition.\textsuperscript{117} In general,

an agreement in restraint of trade is reasonable if, on consideration of the subject, nature of the business, situation of the parties and circumstances of the particular case, the restriction is such only as to afford fair protection to the interests of the [employer] and is not so large as to interfere with the public interests or impose undue hardship on the [employee].\textsuperscript{118}

\textsuperscript{113.} See Service Ctrs. of Chicago, 535 N.E.2d at 1133-34.

\textsuperscript{114.} Enforced literally, the terms of these agreements would prohibit an employee from discussing innocuous matters such as what kind of coffee the employer serves in addition to matters fundamental to the employee’s professional livelihood. For example, information learned from trade publications supplied by the employer and read on the job could be complicated. See id. at 1135 (“[E]mployee has a right to make use of the general knowledge and skills acquired through experience in pursuing the occupation for which he is best suited.”); Great Lakes Carbon, 497 F. Supp. at 470.

\textsuperscript{115.} Service Ctrs. of Chicago, 535 N.E.2d at 1137.


\textsuperscript{117.} See Kloeckner-Pentaplast, 1985 U.S. Dist. LEXIS 22857, at *18; Salsbury Lab., 735 F. Supp. at 1553-54; Disher, 464 N.E.2d at 643; State Med. Oxygen and Supply, 782 P.2d at 1275.

\textsuperscript{118.} Hammons v. Big Sandy Claims Serv., 567 S.W.2d 313, 315 (Ky. Ct. App. 1978) (citing
Courts analyzing covenants not to compete typically impose an additional requirement that is not readily applicable to the analysis of nondisclosure agreements. These courts require that covenants not to compete contain reasonable temporal and geographic limits on the employer’s prohibitions.\(^{119}\) Thus, a covenant not to compete will be found reasonable only if it restricts an employee’s employment options for a limited period of time and in a limited geographic area. Although some courts have adopted this approach to analyze nondisclosure agreements,\(^ {120}\) it is not entirely satisfying in this context. Nondisclosure agreements present more complex time/space problems than covenants not to compete, because information is not so easily bridled or monitored as the movement of a single employee. Thus, although one court calls nondisclosure agreements lacking duration and geographic limits “palpably unfair,”\(^ {121}\) others have explicitly rejected time and space limitations on nondisclosure agreements because the release of secret information can be harmful whenever and wherever it occurs.\(^ {122}\) Also, as one court observed, time limits are built into the agreement when confidential information is at issue because the secrecy obligation, by definition, can remain in effect only so long as the information in question remains secret.\(^ {123}\) Geographic limits are also irrelevant in an age where information can be transmitted globally at the touch of a button. Consequently, while the “reasonableness” test should be applied to nondisclosure agreements as it is to other restraints of trade, these particular criteria cannot be readily imported from the case law on covenants not to compete.

There are two major components to the “reasonableness” standard courts have applied to employment-related nondisclosure agreements. First, regardless what they purport to cover, such nondisclosure agree-
ments may only protect trade secrets and confidential information. Second, nondisclosure agreements may only be used to protect the legitimate competitive interests of the employer. Contracts which attempt to restrict the disclosure of corporate wrongdoing are not reasonable under this standard and thus should not be enforceable against whistleblowers.

B. Employment-Related Nondisclosure Agreements May Only Protect Trade Secrets and Confidential Information

The crux of the "reasonableness" standard is the requirement that the information protected by a confidentiality agreement must be confidential. Courts are in broad agreement that nondisclosure agreements, no matter how extensive their coverage, may only be used to restrict the disclosure of trade secret and confidential information.\(^\text{124}\) Even courts that do not regard nondisclosure agreements as restraints of trade have upheld them only insofar as they protect confidential information.\(^\text{125}\) Thus, courts will strike down broad agreements purporting to cover non-confidential information, or will enforce these agreements only to the extent necessary to prevent disclosure of trade secret or confidential information.\(^\text{126}\)

There is extensive literature and state law on what entitles certain material to protection as a trade secret.\(^\text{127}\) The Uniform Trade Secrets Act (U.T.S.A.), which has been adopted in forty-one states and the District of Columbia,\(^\text{128}\) is the leading framework for trade secret protection.\(^\text{129}\) The U.T.S.A. defines "trade secret" as:


125. See Zep Mfg., 824 S.W.2d at 663 (finding nondisclosure agreement is not a restraint of trade because it prevents only the disclosure of trade secrets and confidential information); Bell Fuel Corp. v. Cattolico, 544 A.2d 450, 460 (Pa. Super. 1988) (stating that nondisclosure agreements are not a restraint of trade but to be afforded protection "the information must be a particular secret of the employer, not a general secret of the trade, and must be of peculiar importance to the conduct of the employer's business"); 1st Am. Sys., 311 N.W.2d at 57 (holding that nondisclosure agreements are not restraints on trade, but will not be enforced if "a trade secret or confidential relationship does not exist").

126. It is important to remember that this analysis is not about contract construction. The "reasonableness" standard is a judicially constructed and imposed test to regulate the use of private contracts which purport to restrain speech and trade. Thus, the analysis is not about what the words of the nondisclosure agreement say. Rather, courts must decide what constitutes trade secret and confidential information and whether that information is covered by the terms of the agreement.

127. A complete discussion of this literature is outside the scope of this Article.


information, including a formula, pattern, compilation, program, device, method, technique or process, that:

(i) derives independent economic value actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.\(^\text{130}\)

Although this definition of trade secret can embrace a broad range of proprietary information, the information in question must satisfy certain elements in order to qualify for trade secret protection. First, a trade secret must have a certain degree of novelty, although it need not rise to the level required for a patent.\(^\text{131}\) Second, it must have economic value in that a competitor would materially benefit from knowing the information because it would not have to spend time and money to create the same information independently.\(^\text{132}\) Third, the information cannot be generally known or readily ascertainable.\(^\text{133}\) Finally, the information must be the subject of reasonable efforts to maintain secrecy.\(^\text{134}\)

Proving each element necessary to receive trade secret protection can place an onerous burden on an employer. Moreover, although this definition of trade secret is broad enough to encompass most material an employer would wish to protect, its precise coverage varies from state to state. Courts in many states have refused to extend its protection to forms of business information not traditionally thought of as trade secrets, such as customer lists and marketing information.\(^\text{135}\)


\(^{131}\) See Kinney & Lange, supra note 129, at 354.

\(^{132}\) See id. at 355.

\(^{133}\) See id. at 355-57.

\(^{134}\) See id. at 357.

\(^{135}\) Compare Saunders v. Florence Enameling Co., 540 So. 2d 651, 654 (Ala. 1988) (affirming that pipe coating process not known outside manufacturer's company constitutes trade secret), and Proctor & Gamble Distrib. Co. v. Vasseur, 275 S.W.2d 941, 944 (Ky. 1955) ("The right to discovery and inspection of matters which constitute trade secrets and the corresponding right to maintain them, or, in some instances, to safeguard them, present difficult questions of definition and of limitation on the court's discretion."), and Aries Info. Sys., Inc. v. Pacific Management Sys. Corp., 366 N.W.2d 366, 368 (Minn. Ct. App. 1985) (finding that a specially designed computer software system not known to others in the industry constitutes trade secret); with Aero Drapery of Ky., Inc. v. Engdahl, 507 S.W.2d 166, 169 (Ky. 1974) (stating that forms and charts developed and used by drapery manufacturer did not constitute trade secrets), and Birn v. Runion, 222 S.W.2d 657, 659 (Ky. 1949) (holding customer lists did not constitute trade secrets). See also AMP Inc. v. Fleischhacker, 823 F.2d 1199, 1205 (7th Cir. 1987) (denying trade secret status to employer's customer and financial information where employer could not "point to any tangible work product, such as blueprints, designs, plans, processes, or other technical specifications, at risk of misappropriation"), superseded by 765 ILL. COMP. STAT. 1065/8 (West 1999).
quently, there are gaps in trade secret coverage that may leave a substantial portion of an employer’s valuable business information unprotected.

As a result, courts have permitted employers to protect confidential information in addition to trade secrets through the use of nondisclosure agreements. Unfortunately, there is scant discussion of what courts mean by the term “confidential” in the context of nondisclosure agreements. This is true even though the vast majority of courts have required that non-trade secret information covered by nondisclosure agreements be confidential.

Courts construing nondisclosure agreements have primarily attempted to draw the parameters of confidentiality by defining what it is not. First, there is broad consensus that confidential information does not include the general skill, knowledge and experience an employee has gained on the job. Thus, a nondisclosure agreement may not be used to preclude him from making use of those assets. One court stated that “one who has worked in a particular field cannot be compelled to erase from his mind all of the general skills, knowledge, acquaintances and overall expertise acquired during his tenure with the former employer.” To hold an employee to such a standard would create too severe a restraint on the employee’s ability to earn a living. Moreover, an employer may not overcome this requirement by showing that the employee would be able to obtain some other job without using the general skills and knowledge she obtained through her prior employment. An employee has a right to compete in the area of her greatest worth.

For instance, Great Lakes Carbon Corp. v. Koch Industries, Inc. involved an individual who had prepared bids for petroleum coke supplies

136. See supra notes 124-26 and accompanying text.
137. See generally Valius, supra note 101, § 2.5, at 21 (“To be protectible, the information must truly be confidential.”).
140. See id.; see also Samuel Bingham, 651 F. Supp. at 106 & n.4.
142. See id. (quoting ILG, Indus., Inc. v. Scott, 273 N.E.2d 393, 396 (Ill. 1971)).
for his former employer. The court held that a nondisclosure agreement did not preclude him from using his general knowledge of the industry and pricing principles gained through his old job to prepare similar bids for a new employer. These bid estimates were not protectable, because they were “dependent on too many unpredictable variables and personal judgments entering into the equation.” Consequently, they could not reasonably be restrained by a nondisclosure agreement.

Courts also agree that, regardless what its terms purport to protect, a nondisclosure agreement will not be enforced to bar disclosure of publicly available data or information that could be obtained by analyzing publicly available data. Thus, the components of a compilation of previously uncollected but otherwise publicly available information are not protectable with a nondisclosure agreement. Also unprotected is information which individuals with skills comparable to the employee’s could ascertain by examining publicly available data or products. A Kentucky court refused to enforce a nondisclosure agreement by which an employer sought to prevent his former employee from disclosing information about a device used for timing harness races. The court found it “difficult to see” how information relating to this device could be confidential given that it was a publicly available commodity which “almost anyone could examine.”

Courts have placed another important limitation on the employer’s ability to classify information as confidential under a nondisclosure agreement. Many have placed the burden on the employer to define precisely what material it considers confidential, both in the nondisclosure agreement itself and in the proceedings to enforce it. Courts often strike down broad nondisclosure agreements which give no fair notice to the employee of what information cannot be disclosed. Such agreements

144. See id. at 469-70.
145. Id. at 469.
146. See id.
147. See ASPELUND & BAKER, supra note 102, § 5.01[2][d] (stating that “there can be no confidence with respect to public knowledge”). See 1 DECKER, supra note 105, at 85 (“Information that is not confidential and can be obtained from other sources is not protectable.”).
149. See Mid-States Enters. v. House, 403 S.W.2d 48, 50 (Ky. 1966).
150. See id.
151. Id.
cannot fairly be enforced against employees, for "[o]ne restricted by such a broad agreement cannot reasonably be expected to pick his or her way across such intellectual land mines without inadvertently setting off one or more." Similarly, the employer also bears the burden in litigation of proving that the information sought to be protected is in fact confidential. Courts have refused to enforce nondisclosure agreements where the employer "failed to identify with any degree of particularity the alleged trade secrets or confidential information in need of protection." If an employer cannot meet this burden, the nondisclosure agreement cannot be enforced.

Without other restrictions, these straightforward and widely followed limitations on nondisclosure agreements would permit a significant portion of the kinds of disclosures made by employee-whistleblowers. First, the exception permitting the use of general knowledge and skills will in many cases allow former employees to serve as expert witnesses or in a consulting capacity, insofar as such activities involve the offering of the individual's informed opinion based on her accumulated general skill and expertise. Second, the rule exempting publicly available information from coverage would prevent an employer from using a nondisclosure agreement to enjoin an individual who has already made public disclosures from further disclosing the same information. In cases involving nondisclosure agreements, courts have declined to enjoin the employee's disclosures where doing so would amount to "'locking the barn door after the horse has been stolen.'" This rule prevents the whistleblower from being sidelined in the debate she has sparked.


154. See, e.g., ASPELUND & BAKER, supra note 102, § 501[2][a] ("The burden of proof is on the party claiming trade secret status.").

155. Service Ctrs. of Chicago, 535 N.E.2d at 1135.

156. As a consequence, employers drafting nondisclosure agreements for legitimate business reasons should think carefully about the kinds of information they want to protect. The agreements should be more narrowly drafted to provide employees some guidance about the kind of disclosures that are prohibited.

The cases on nondisclosure agreements discussed in this section make clear that confidentiality is a prerequisite to the enforcement of nondisclosure agreements, and they provide some guidance on where the outer limits of confidentiality lie. They do not, however, define what information is or is not confidential.

C. In Order to Protect Information as Confidential, the Employer Must Prove That Its Release Would Harm the Employer's Competitive Interests

In order to protect information as confidential, the employer must show that its disclosure would cause competitive harm. This means that it would aid the employer's competitors at the employer's expense, or, conversely, that it would hinder the employer in her ability to compete with competitors. While few cases explicitly state this criterion, the vast majority follow it or implicitly endorse it. In addition cases from analogous areas of law illustrate the principle that competitive harm is the touchstone of business confidentiality.

The types of information that courts deem confidential are almost invariably of competitive value to the employer in the most traditional sense—non-trade secret material such as customer lists, marketing information and product development materials. When enforcing nondisclosure agreements in contexts where a former employee is using or disclosing information in connection with new employment, courts have emphasized that the agreement is being enforced to protect the employer from competitive harm. Moreover, courts have refused to enforce nondisclosure agreements where disclosure of the information at issue could not be used to harm the employer competitively. For instance, in Amer-


159. See, e.g., Roto-Die Co. v. Lesser, 899 F. Supp. 1515, 1518 (W.D. Va. 1995) (recognizing that information such as customer lists, marketing information, and product development information, "if disclosed to competitors, would destroy a company's ability to compete").

160. See, e.g., Slijepcevich v. Caremark, Inc., No. 95C7286, 1996 U.S. Dist. LEXIS 110, at *4 (N.D. Ill. Jan. 4, 1996) ("[C]ourts will enjoin former employees only when there is a threat that they will disclose secret information to a competitor."); Great Lakes Carbon Corp. v. Koch Indus., Inc., 497 F. Supp. 462, 469 (S.D.N.Y. 1980) (noting that the employer did not lose any business due to disclosures and considering this as a factor militating against enforcement of the nondisclosure agreement); Durham, 198 S.E.2d at 149 ("Covenants not to disclose and utilize confidential business information are related to general covenants not to compete because of the similar employer interest in
ican Shippers Supply Co. v. Campbell, the employer considered its customer lists confidential, yet the court refused to enforce a nondisclosure agreement where “no evidence indicated these lists could have been used to undercut competition.”

The Sixth Circuit and the Eastern District of Michigan explicitly disagreed with this position in Uniroyal Goodrich Tire Co. v. Hudson. In enjoining a former Uniroyal employee from revealing certain information learned while employed by Uniroyal, the district court stated:

[The former employee] emphasizes that the agreements can only protect [the employer] from a true competitive injury. The Court has repeatedly disagreed with that contention. The signed contract in question states that [the employee] “will not divulge Information to others.” It does not state that [the employee] “will not divulge Information to a competitor,” or that [the employee] “will not disclose Information which will cause a competitive injury.”

However, while ostensibly rejecting competitive harm as fundamental to the existence of confidential information, the district court nevertheless justified the injunction it issued by reference to the competitive harm that might result from disclosure: “The economic value of [the information at issue] lies in the competitive advantage over others that [the employer] enjoys by virtue of exclusive access to the data, and disclosure or use by others of the data would destroy that competitive edge.” Affirming the district court, the Sixth Circuit noted the court’s finding that the information at issue “could” find its way into the hands of competitors and Uniroyal’s basis for seeking injunctive relief was that “it would be placed at a severe competitive disadvantage and was in imminent peril of suffering significant competitive losses if its confidentiality agreements” were not enforced.

Thus, despite their assertions to the contrary, the Uniroyal courts did view competitive harm as an important element for enforcement of a nondisclosure agreement. These seemingly contradictory positions can be reconciled if the district court language rejecting the competitive harm argument is read to mean simply that a nondisclosure agreement covers maintaining competitive advantage.

162. Id. at 1044 (quoting Licocci v. Cardinal Assocs., Inc., 445 N.E.2d 556, 561 (Ind. 1983)).
164. Id. (footnote omitted).
165. Id. at 353 (emphasis added) (citing Ruckelhaus v. Monsanto, 467 U.S. 986, 1012 (1984)).
167. Id. at *5.
more than just disclosures made directly to a competitor. The courts’ analysis can be interpreted to mean that the information must be such that, regardless where or to whom disclosed, it would cause the former employer competitive harm if learned by a competitor. This position is entirely consistent with the arguments advanced in this section.

Whatever can be gleaned from cases involving employment-related nondisclosure agreements, there is little law directly addressing the meaning of confidentiality in this context. So the precise parameters of the term remain murky. In other contexts, however, courts have grappled directly with the issue of what makes business information confidential and what kinds of harm are sufficient to warrant its protection.

For instance, courts construing the Freedom of Information Act (FOIA) have directly addressed the definition of confidentiality. These courts have concluded that information is not confidential unless its release would cause competitive harm. FOIA requires government agencies to release information in response to a public request unless the requested information falls into one of nine enumerated exemptions.\footnote{\footnote{168. 5 U.S.C. § 552 (1996 & Supp. 1998).}}\footnote{169. See 5 U.S.C. § 552(b).} \footnote{170. 5 U.S.C. § 552(b)(4) (emphasis added).} FOIA Exemption 4 exempts from disclosure business materials that are “trade secrets and confidential or financial information obtained from a person and privileged or confidential.”\footnote{171. AMERICAN CIVIL LIBERTIES UNION, LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS 84 (Allan Robert Adler ed., 20th ed. 1997).} Courts interpreting this definition have made clear that the term “‘[c]onfidential’ . . . means more than that the information would not customarily be available for public perusal.”\footnote{172. National Parks and Conserv. Ass’n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) (emphasis added).} Instead, courts have deemed information to be confidential for purposes of Exemption 4 only if its release would cause “substantial harm to the competitive position” of the business submitter.\footnote{173. Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983) (alteration in original) (quoting Mark Q. Connelly, Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosures of Business Data, 1981 Wis. L. REV. 207, 235-36);}
Courts have made clear that mere embarrassment attendant to a disclosure of secret information does not constitute substantial competitive harm even if it is so severe that it could indirectly harm the company’s bottom line. In *General Electric Co. v. United States Nuclear Regulatory Commission*, General Electric (GE) unsuccessfully challenged the NRC’s threatened release to anti-nuclear activists of an internal GE report criticizing some of its own nuclear reactor designs. The court rejected GE’s assertion that the report was confidential under FOIA Exemption 4 because its release would cause the company competitive harm. The court reasoned that “the principal demanders of the report are opponents of nuclear power, who would like to embarrass the entire industry rather than shift business from [one producer to another].” As such, any harm attendant to the disclosure would not be “competitive.”

Similarly, the harm whistleblowers may inflict on a company is not competitive harm, because their disclosures are not calculated to disadvantage their employers vis-à-vis competitors. Jeffrey Wigand did not disclose information about Brown & Williamson in the hopes of increasing sales of Phillip Morris products. Although such revelations may harm the employer’s reputation, and even its bottom line, these kinds of injuries do not represent competitive harm as that term has been interpreted under FOIA.

Similarly, a showing of competitive harm is also a prerequisite to obtaining a protective order where embarrassment or harm to reputation is the primary injury asserted by the employer. Under Federal Rule of Civil Procedure 26(c), a protective order maintaining the confidentiality of designated court filings may be granted upon good cause to protect a party from, among other things, “embarrassment.” Unlike FOIA Exemption 4, this Rule explicitly permits parties to obtain a remedy where the sole injury is embarrassment. Nevertheless, in applying this Rule, courts have recognized that the harm of embarrassment is not the same for corporations as it is for individuals. Where a corporation is con-

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*see also* CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1154 (D.C. Cir. 1987) (stating that unfavorable publicity is not a competitive injury).


175. *See* id. at 1396.

176. *See* id. at 1402-03.

177. *Id.* at 1403.

178. *See* id.

179. FED. R. CIV. P. 26(c).

ncerned, reputational injury is measured in terms of competitive harm:

As embarrassment is usually thought of as a nonmonetizable harm to individuals, it may be especially difficult for a business enterprise, whose primary measure of well-being is presumably monetizable, to argue for a protective order on this ground. . . . [T]o succeed, a business will have to show with some specificity that the embarrassment resulting from dissemination of the information would cause a significant harm to its competitive and financial position.181

Under this standard, courts have found that even real economic injuries, such as stock price fluctuation and damage to general business standing, do not rise to the level necessary to show competitive harm.182 The case law on protective orders reflects the reality, recognized implicitly by courts construing nondisclosure agreements, that where corporations are concerned, concepts like embarrassment and reputation have little meaning apart from competitive injury. Thus, to articulate a legitimate business interest deserving of protection, a corporate employer must articulate an interest bearing on its competitive position.

In sum, in order to establish that information is confidential for purposes of protection by a nondisclosure agreement, the employer must show more than the secrecy of the information in question. It also must show that disclosure may reveal to competitors something that would enable them to better compete with the employer. In a legitimate challenge to disclosures of trade secrets or bona fide confidential business information, the employer will have little trouble making this showing. As discussed above, the vast majority of cases easily meet these criteria even if they do not make the criteria explicit. However, in a suit against a whistleblower to silence accusations of wrongdoing, it would be extremely difficult for an employer to show that information about its own secret misdeeds should be protected as confidential under this standard. Consequently, the standard strikes the appropriate balance between protection of the employer, protection of the whistleblower, and protection of the consuming public.

III. CONCLUSION

While employee nondisclosure agreements remain an important tool for employers to protect trade secrets and confidential business information from competitors, they should not be used to prevent a whistleblower from informing the public about wrongdoing. This is espe-

181. Id. (emphasis added) (citation omitted).
cially true when that wrongdoing implicates public health and safety. Nondisclosure agreements should never be used to prevent a whistleblower from testifying as to non-privileged and non-trade secret matters in civil litigation. And outside the litigation context, nondisclosure agreements should be enforced only to the extent they are reasonable. This means that they can be used only to further the employer's legitimate interest in protecting trade secrets or confidential information that would cause the employer competitive harm if revealed. Most whistleblower disclosures do not fall within these parameters.

It has been observed that our society has a deep need to "project onto whistle-blowers our need for heroism, when revenge and anger are often what drive them." It cannot be denied that there are disgruntled employees who would spread lies about their employers to exact vengeance for some imagined wrong, and admittedly, there are risks to the approach proposed in this Article. Nevertheless, while these risks exist, there are remedies available. Employers already have legal recourse against employees who defame them, and pursuing a defamation action would not be significantly more taxing on the employer's resources than litigating the validity of a nondisclosure agreement. In contrast, consumers no satisfactory means to uncover wrongdoing that a corrupt and wealthy corporation has marshaled its resources to hide. To mitigate this imbalance and protect the important interests at stake, courts should not permit employers to misuse nondisclosure agreements as tools of deception.