Published on *The National Law Review* https://natlawreview.com

Nevada Amends Restrictive Covenant Statute

Article By:

Anthony L. Martin

Suzanne L. Martin

Corissa L. Pennow

On May 25, 2021, Nevada Governor Steve Sisolak signed into law Assembly Bill (AB) 47, which amends Nevada's noncompetition statute, NRS 613.195 and the Nevada Unfair Trade Practices Act. The changes will go into effect on October 1, 2021.

Nevada's Current Noncompetition Law

Under Nevada law (codified at NRS 613.195(1)), a non-competition covenant is void and unenforceable unless it: (1) "[i]s supported by valuable consideration"; (2) "does not impose any restraint that is greater than is required for the protection of the employer"; (3) "[d]oes not impose any undue hardship on the employee"; and (4) "[i]mposes restrictions which are appropriate in relation to the valuable consideration supporting the noncompetition covenant."

Additionally, under NRS 613.195(2), "a non-competition covenant [cannot] restrict a former employee from providing a service to a former customer or client if: (1) the former employee did not solicit the former customer or client; (2) the customer or client voluntarily chose to leave and seek new services from the former employee"; and (3) the former employee is otherwise complying with the time, geographical area, and scope of activity limitations of the covenant.

Amendments to NRS 613.195

AB 47 implements three changes to Nevada's noncompetition covenant law.

1. Noncompetition Covenants Involving Non-exempt Workers

First, AB 47 limits the application of non-competition covenants involving non-exempt workers. It provides that a non-competition covenant may not be applied to an "employee who is paid *solely* on an hourly wage basis, exclusive of any tips or gratuities." (Emphasis added.) While this language exempts hourly employees who receive tips or gratuities from non-competition covenants, it is silent on whether an employer could still subject an hourly employee who receives other types of

compensation (such as bonuses or commissions) to a non-competition covenant. For businesses with tipped employees, including many in the hospitality industry, where tipped employees are often privy to proprietary information (such as, recipes, which may enjoy some intellectual property protections), this caveat is a welcome one.

It has always been the case that a Nevada employer can file an action to enforce a restrictive covenant. And, some employees have attempted to do so through declaratory relief actions. But, AB 47 expressly provides that an employee can bring an action to challenge a non-competition covenant. If the court finds the covenant applies to an "employee who is paid solely on an hourly wage basis, exclusive of any tips or gratuities," the court is *required* to grant the employee reasonable attorneys' fees and costs.

2. Services Provided to Former Customers and Clients

Second, when NRS 613.195 went into effect, it stated that a restrictive covenant could not prevent a former employee from providing services to a client or customer, provided the client or customer had not been solicited in violation of the restrictive covenant and the employee was otherwise in compliance with the agreement. AB 47 modifies this language slightly, but in a significant way. Now, the statute will prohibit an employer from bringing an enforcement action against an employee when the employee is only providing services to the employer's former client or customer.

The amendment includes a requirement that in such an action, reasonable attorneys' fees and costs be awarded to the employee, as well. Employers considering restrictive covenant actions may need to conduct more robust due diligence before bringing an enforcement action to ensure the agreement is being violated, and it is not just a matter of clients and customers following the employee.

3. Reasonable Restrictions

Finally, AB 47 allows an employee to bring an action to challenge a non-competition covenant that does not have reasonable restrictions on time, geographic area, or scope of restricted activities. Nevada law already allowed an employer to bring an action to enforce a non-competition covenant. If the court determines there is valuable consideration for the covenant, but the noncompetition covenant is not reasonable in its restrictions, "the court shall revise the covenant" so it meets the requirements of a valid non-competition covenant and "enforce the covenant as revised."

Practical Implications

Though the amendments introduced by AB 47 may not appear to drastically change Nevada's noncompetition covenant law, in application, the changes are significant in explicitly recognizing employees' rights to challenge such agreements, prohibiting certain enforcement actions by employers, and mandating attorneys' fees awards for employees in such actions. The amendments reinforce the issues that employers may want to consider when drafting restrictive covenants and in determining to which members of their workforces will be subject to the covenants. Before filing an action to enforce a restrictive covenant, employers may want to engage in additional due diligence measures, including pre-litigation cease and desist discussions to further vet the scope of potential violations, which may include discussions with clients and customers about whether they were solicited or simply chose to "take their business elsewhere."

National Law Review, Volumess XI, Number 210