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# Nevada Confirms Its Restrictive Covenant Law, But Rejects Blue Penciling

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In the first decision to reach the Nevada Supreme Court on whether state district courts may modify or "blue pencil" non-competition agreements, the high court has concluded that doing so would violate Nevada law. *Golden Road Motor Inn Inc. d/b/a Atlantis Casino Resort Spa v. Islam,* 132 Nev. Adv. Op. 49 (July 21, 2016). The 4-3 decision signals a clear change in direction that affects the enforceability of non-competition agreements in Nevada.

The Court explained that under Nevada law, an overly broad term prohibiting an employee from "employment, affiliation, or service" with a competitor, which "extends beyond what is necessary" to protect the former employer's interests, is unreasonable and "renders the noncompete agreement wholly unenforceable."

Distinguishing this case from prior published decisions, the Court reasoned that exercising "judicial restraint when confronted with the urge to pick up the pencil is sound public policy … as our use of the pencil should not lead us to the place of drafting." The Court explained its role as interpreting contracts, not writing them, and that altering a contract, even minimally, would "conflict[] with the impartiality that is required of the bench…."

Further, the Court stated that "[a] strict test for reasonableness is applied to restrictive covenants in employment cases because the economic hardship imposed on employees is given considerable weight." Employers clearly hold a superior bargaining position when such contracts are presented to employees and, in the context of a restraint of trade, the Court said that "a good faith presumption benefiting the employer is unwarranted."

This clear change in direction affects the enforceability of non-competition agreements in Nevada. Employers must ensure that non-competition provisions are drafted clearly and are reasonable in all respects. Employers must be mindful of whether the provisions "extends beyond what is necessary" to protect their interests. Questions to ask include:

- Is the period of non-competition longer than necessary?
- Is the geographic scope (the territory in which competition is prohibited) larger than needed when compared to the work the former employee performed and information to which the employee was exposed?
- Does the non-competition clause prevent the former employee from being employed in the same industry generally, or is the restriction limited to the same or substantially similar type of work the former employee performed while employed with the former employer?
- Does the language in the non-competition provision (or the contract in which it appears) provide factual support upon which a court may rely to assess the reasonableness of the time, territory, and job restrictions?

Similar courts in many other states, the Nevada Supreme Court has stated that non-competition agreements generally are disfavored and will not be enforced unless narrowly drafted. By following an “all or nothing” approach to overbroad agreements, Nevada is in the minority when compared to courts that take either the strict *blue pencil* approach (*see, e.g.,* our article, North Carolina Supreme Court Reiterates Limited Blue Pencil Approach to Overbroad Non-Competes) or the reasonable reformation approach. Accordingly, careful drafting is required.

Employers, particularly those seeking to use non-compete agreements in a multistate environment, should take the time to review and revise form and contract-specific non-competition agreements to ensure the agreements are enforceable.



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