

Management Alert



Nevada Adds Requirements for Valid Non-Competition Agreements and Allows Blue-Penciling

By Robert B. Milligan and Sierra Chinn-Liu

On June 3, 2017, Governor Sandoval signed Assembly Bill 276 into law, amending Nevada Revised Statute 613, which governs non-competition agreements. Notably, the law adds requirements to the enforceability and validity of non-competition agreements, and now allows courts to “blue-pencil,” directly at odds with Nevada Supreme Court’s recent decision in *Golden Road Motor Inn, Inc. v. Islam*, 376 P.3d 151 (Nev. 2016).

Golden Road Motor Inn and Blue-Penciling

In *Golden Road Motor Inn*, the Nevada Supreme Court refused to adopt the blue pencil doctrine, which refers to a court’s ability to strike or modify unreasonable or overly broad clauses in a non-compete agreement, and enforce the revised or modified agreement. The Court refused to blue pencil for the employer because the court viewed it as inappropriate to rewrite the parties’ contract, as courts generally are not empowered to make private agreements. The Court held that an unreasonable clause in a non-competition agreement rendered the entire agreement unenforceable. Now, under Nevada’s amended law, the court is empowered to revise a non-competition agreement to the extent necessary and to enforce the revised agreement.

The *Golden Road Motor Inn* Court expressly noted that the Georgia Legislature “implemented laws attempting to advance blue penciling in Georgia courts,” but the provision, which stated that courts must reform unlawful contracts, was held unconstitutional. A revised provision, stating that courts may blue pencil, “did not affect Georgia’s precedent,” allowing for the survival of the courts’ anti-blue-pencil rule.

Given the practice of some Nevada judges against blue-penciling, the impact of this change to Nevada law is uncertain, as some courts may not do as they are empowered to. Thus, Nevada employers should still ensure their non-compete agreements contain appropriate specificity.

Four Requirements for Enforceable Non-Competes

The law also establishes rules for valid non-competition agreements. Under the new law, a non-competition agreement is void and unenforceable unless the agreement satisfies four requirements. The agreement must:

- (1) be supported by valuable consideration;

- (2) not impose a restraint greater than what is required to protect the employer;
- (3) not impose an undue hardship on the employee; and
- (4) impose restrictions that are appropriate in relation to the valuable consideration supporting the agreement.

In addition, the law provides that a non-competition agreement is only enforceable during the time in which the employer is paying the employee's salary, benefits, or equivalent compensation if an employee is terminated because of a reduction in force, reorganization, or similar restructuring.

Limits on Restricting Former Employees' Contact with Customers

Finally, the law limits the reach of employers over former employees' contact with customers. A non-competition agreement may not restrict a former employee from providing services 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 the services of the employee; and
- (3) the former employee is otherwise complying with the non-competition agreement.

In light of these changes, employers should review their existing non-competition agreements for compliance with the updated Nevada law and ensure that their agreements and practices are consistent with the new law's requirements.

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