Nevada Supreme Court Confirms That Overbroad Non-Compete Agreements Will Be Invalidated, Not Modified

The Nevada Supreme Court recently held that it is improper for Nevada courts to modify overbroad non-compete agreements. The Court emphasized that it was not creating new law with this ruling, but rather clarifying existing law. Regardless, this decision highlights the need for employers to ensure that their non-compete agreements are reasonably drafted so as to increase the likelihood of enforceability, including narrowly crafting proscriptions on post-employment work for competitors.

In its July 21, 2016, opinion, the Nevada Supreme Court refused to modify or "blue pencil" a non-compete agreement between Atlantis Casino Resort and Sumona Islam, a former casino host at Atlantis. In that agreement, Islam covenanted not to "be employed by, in any way affiliated with, or provide any services to, any gaming business or enterprise located within 150 miles of Atlantis Casino Resort for a period of one (1) year after the date that the employment relationship between Atlantis and [Islam] ends." Atlantis sought enforcement of this provision after Islam allegedly stole Atlantis' trade secrets, quit her job with Atlantis, and promptly used the trade secrets in her new job with a nearby competitor.

The Court concluded that the agreement was unenforceable under Nevada's established criteria for reasonable non-compete agreements. In particular, the Court found that the covenant at issue was overbroad and unenforceable because it prohibited Islam from performing *all* types of work for gaming establishments within the restricted geographic area, including, for example, as a custodian. The Court found that this severely restricted Islam's ability to be gainfully employed, and was more restrictive than necessary for Atlantis to protect its proprietary information.

Atlantis argued that the Court should modify, or "blue-pencil," the agreement to render it enforceable by reflecting the parties' claimed intent that Islam be prohibited only from working *as a casino host* in gaming establishments within the restricted geographic area. The Court refused, stating that it was not in the business of re-writing parties' contracts. The Court found that the non-compete language was "unambiguous," and therefore not subject to blue-penciling. The Court also found it problematic that even the deletion of certain words or an overbroad provision would not make the agreement enforceable; instead, the Court would have had to rewrite the work restriction to add the "casino host" limitation. Notwithstanding Islam's admitted wrongful conduct, and relying in large part upon public policy considerations, the Court held that the overbroad provision rendered the entire non-compete agreement "*wholly unenforceable*." The Court concluded that this "'all or nothing' approach encourages employers to carefully draft agreements devoid of 'overreaching terms for fear that the entire agreement will be voided.'"

Take-away: This ruling underscores the critical importance of drafting enforceable non-compete agreements in the first instance. Rather than imposing broad or all-encompassing restrictions in an effort to "chill" post-termination competition, restrictions should be crafted as narrowly and precisely as possible in order to safeguard the employer's protectable interests. For instance, non-compete

410 17th Street, Suite 2200
Denver, Colorado 80202

provisions should not attempt to restrict employees from engaging in a broad range of activities for competitors, but should specify the type of work the employee is prohibited from undertaking, and impose narrow geographic and time limitations—and those limitations must be reasonable and designed to protect the employer's trade secrets or other protectable interests.

What to do now: Employers should promptly review and, if necessary, revise their restrictive covenant agreements in conjunction with legal counsel to ensure enforceability, or risk such agreements being invalidated in their entirety. Such a review should also include other recent legal developments, such as the federal Defend Trade Secrets Act, which provides certain civil remedies in federal court for actual or threatened misappropriation of trade secrets, with some remedies contingent upon employers notifying employees of the Act's immunity provision.

Christine A. Samsel
Shareholder
csamsel@bhfs.com
310.500.4622 (CA)
303.223.1133 (CO)

Hannah M. Caplan
Associate
hcaplan@bhfs.com
303.223.1258

Albert Z. Kovacs
Shareholder
akovacs@bhfs.com
702.464.7076