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Nevada Redefines Non-Compete Standards; Employers Should Promptly Review Their Agreements

The Nevada Legislature recently passed, and the governor approved, a new law addressing employee non-compete agreements, which went into effect on June 3, 2017. The law expressly defines the standards for enforceable non-compete provisions, as well as provisions that may not be enforced. And, most notably, the new law requires courts to modify certain (but not all) non-compete agreements if found to be overbroad in scope or restraint, apparently in response to a Nevada Supreme Court ruling last year that essentially abolished such blue-penciling. The text of the new law can be found in **Assembly Bill No. 276**.

Standards for Non-Competes

Chapter 613 of the Nevada Revised Statutes has now been amended to set forth the particular standards for an enforceable non-compete covenant. To satisfy the new standards, a non-compete covenant:

- must be supported by valuable consideration;
- may not impose any restraint that is greater than required to protect the employer;
- may not impose undue hardship on the employee; and
- must be appropriate in relation to the consideration supporting the non-compete covenant.

Void and Unenforceable Provisions

The law also proscribes certain restrictions on post-employment conduct, permitting employees to provide services to former customers or clients who seek out the former employee without any contact instigated by the former employee. Specifically, employers *may not* restrict a former employee from providing service to a former client or customer if:

- the former employee did not solicit the former customer or client;
- the customer or client voluntarily chose to leave and seek services from the former employee; and
- the former employee is otherwise complying with the limitations in the covenant as to time, geographical area and scope of activity to be restrained (other than any limitation that violates these proscriptions).

Non-compete provisions that violate these restrictions are void and unenforceable. It remains to be seen how this will play out; for instance, would an announcement of new employment to a former customer constitute “contact instigated by the former employee”? Critically, only the non-compete *provision* is void if noncompliant, and not the entire agreement (which would have been the likely result under the recent Nevada Supreme Court case).

Additional Requirement in Connection with RIFs and Reorganizations

Non-compete provisions are enforceable against employees terminated as a result of a reduction in force, reorganization or similar restructuring of the employer *only during the period in which the employee is being paid* salary, benefits or equivalent compensation, including severance pay.

Courts Must Blue-Pencil Certain Covenants

Nearly one year ago, in *Golden Road Motor Inn, Inc. v. Islam*, the Nevada Supreme Court essentially abolished blue-penciling of non-compete agreements and held that the entire agreement, rather than just the overbroad provision, would be invalidated. (See our prior client alert on this topic, "**Nevada Supreme Court Confirms That Overbroad Non-Compete Agreements Will Be Invalidated, Not Modified**.") Although the court in *Golden Road* emphasized that it was not creating new law with this ruling, but rather clarifying existing law, Nevada has now legislatively abrogated part of that ruling. Specifically, if a court finds that an otherwise valid non-compete agreement is overbroad in scope or restraint, the law provides that the court *"shall revise the covenant* to the extent necessary and enforce the covenant as revised."

Note that not all non-compete agreements must be modified. The non-compete covenant must be supported by valuable consideration, and no judicial remedy is carved out to cure a lack of consideration. In addition, to the extent the provision violates the proscriptions outlined above regarding work for former customers not solicited by the former employee, it is void and unenforceable, and not subject to the mandate of judicial modification. The court must, however, revise time, geographical scope or scope of activity restraints that are not reasonable, impose a greater restraint than is necessary for the protection of the employer and impose undue hardship on the employee so as to be lawful and enforceable.

What Should Employers Do Now?

This new law provides relief to Nevada employers if an otherwise valid non-compete provision is found to be unreasonable in scope. However, given the requirements now delineated in the statute, employers should promptly review their non-compete agreements in conjunction with legal counsel to ensure they are in compliance.

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