Nevada Supreme Court Changes Course on "Blue-Penciling" Non-Competition Agreements

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The Nevada Supreme Court recently addressed the question of whether lower courts may blue-pencil an otherwise unenforceable noncompetition agreement pursuant to a provision in the agreement that allows for court modification to redeem unreasonably restrictive clauses. The court's decision is instructive not only for Nevada employers but for all businesses that operate in states with similar statutory structures.

Brief History and Background

The question of whether Nevada courts could judicially modify an overbroad noncompetition agreement was seemingly answered in the negative by the Nevada Supreme Court in 2016 (*Golden Road Motor Inn, Inc. v. Islam*). A year after that decision, Nevada enacted a statute (N.R.S. 613.195) which, among other things, directed courts to revise non-competition agreements that are supported by adequate consideration, but contain unreasonable time and geographic restrictions:

> *If an employer brings an action to enforce a noncompetition covenant and the court finds the covenant is supported by valuable consideration but contains limitations as to time, geographical area or scope of activity to be restrained that are not reasonable, impose a greater restraint than is necessary for the protection of the employer for whose benefit the restraint is imposed and impose undue hardship on the employee, the court shall revise the covenant to the extent necessary and enforce the covenant as revised. Such revisions must cause the limitations contained in the covenant as to time, geographical area and scope of activity to be restrained to be reasonable and to impose a restraint that is not greater than is necessary for the protection of the employer for whose benefit the restraint is imposed.*

Recent Case

In Duong v. Fielden Hanson Isaacs Miyada Robison Yeh, Ltd., a pair of anesthesiologists had signed noncompetition agreements in 2016 that prohibited them from working at several facilities after termination. The agreements also contained a provision that stated "any such portion shall nevertheless be enforceable to the extent such court shall deem reasonable, and, in such event, it is the parties' intention ... and request that the court reform such portion in order to make it enforceable."

When the Duongs' employment ended, their former employer filed a lawsuit alleging breach of the noncompetition agreement and requested a preliminary injunction. The lower court found that the noncompetition agreement was overbroad and that NRS 613.195(5) applied. It therefore blue-penciled the noncompetition agreement and granted a preliminary injunction enforcing the revised agreement. The Duongs appealed the district court's ruling and argued that the *Golden Road* decision meant that the district court could not blue-pencil a noncompetition agreement entered into before NRS 613.195(5)'s effective date of June 3, 2017.

The Nevada Supreme Court began its analysis by noting that *Golden Road* did not address the question of whether a district court may modify "a noncompetition agreement that contains an express blue-penciling provision like the agreement" in the case before it. The court explained that "*Golden Road* merely held that a district court cannot, on its own, blue-pencil an unreasonable noncompetition agreement but did not prohibit courts from blue-penciling an unreasonable noncompetition agreement pursuant to the parties' agreement." The court further explained that "the noncompetition agreement at issue in *Golden Road* did not include a provision authorizing the court to blue-pencil the agreement if deemed unreasonable." The Court concluded by affirming the district court's order granting the preliminary injunction based on the blue-penciling provision in the noncompetition agreement, but declined to address the question of whether NRS 613.195(5) is retroactive.

What Does this Decision Mean for Your Business?

The court's decision in *Duong* is instructive for employers in the majority of states that permit courts to blue-pencil or revise overbroad but otherwise valid non-competition agreements. Noncompetition agreements should always contain a provision that permits a court to revise the time and geographic restrictions when it concludes they are unreasonable under the circumstances. That said, you should still exercise caution when drafting time and geographic restrictions to ensure they are reasonable, as courts in some jurisdictions may decline to reform intentionally overbroad noncompetition agreements.

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