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NEVADA EMPLOYERS: TIME TO REVIEW YOUR NON-COMPETES

State Supreme Court Decision Forces Businesses To Get It Right The First Time

Insights
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If you are using a noncompetition agreement in Nevada, you may want to consider reviewing that agreement. The Nevada Supreme Court recently held that state courts shall not modify – or "blue pencil" – non-compete agreements in order to bring them into compliance with the law. The court explained that if a non-compete agreement contains even a single provision which "extends beyond what is necessary" to protect a company's interests, then the entire agreement will be deemed unenforceable.

This significant decision may require you to review your non-compete agreements to ensure they are up-to-date, and revise and update them as necessary (*Golden Road Motor Inn, Inc. v. Islam*).

SUMMARY OF DECISION

In *Golden Road*, casino host Sumona Islam entered into an agreement with her employer, Atlantis Casino Resort Spa, to refrain from any type of employment with any other gaming establishment within 150 miles for one year following the end of her employment. After she left her job at Atlantis, the fate of this noncompetition agreement became an issue for the courts.

After several years of litigation, the case made it to the Nevada Supreme Court. There, the court found that the industry restriction in the agreement was overbroad and unreasonable because it prevented Islam from working in any position at any gaming establishment. The court

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hypothesized that if Islam were to obtain employment as a custodian in another casino, she would technically be in violation of the terms of the agreement. However, because it would be highly unlikely that she could lure casino players away from her former employer in such a role, the breadth of the noncompetition language was held to be unreasonable. The court adamantly refused to add language to the agreement which would limit future employment to "employment as a casino host" or some other restriction that would place the agreement into the realm of the reasonable.

WHAT THIS DECISION MEANS FOR NEVADA COMPANIES

In practice, this means that Nevada companies now get one shot to draft an enforceable noncompetition agreement. Any single unreasonable or overbroad provision and the entire agreement could go up in smoke.

Enforceability

The court denounced the "blue pencil" approach, stating that the court is "not free to modify or vary the terms of an unambiguous agreement," and thus, should "refrain from rewriting the parties' contract." Because the employer (and drafter of the agreement) "holds a superior bargaining position," the court said it will not further aid the employer by editing the agreement to preserve enforceability. The role of the courts is limited to interpretation, it said, not drafting. This new approach raises the stakes for what is already a difficult task of achieving enforceability.

Reasonableness

In Nevada, non-compete agreements are generally disfavored as restraints on trade and future employment. A non-compete agreement is unreasonable if it is broader than required to protect the benefiting party, or if it imposes an undue hardship upon the restricted party. Special consideration is given to the economic hardship the agreement imposes on the employee. Thus, the provisions of the agreement will be heavily scrutinized to ensure they are narrowly tailored to the interests the company seeks to protect.

Luckily, the Nevada Supreme Court provided some guidance on what factors the courts should look to will examine when evaluating reasonableness. Generally, courts in Nevada will examine:

- The length of the timeframe of non-competition;
- The geographic scope (radius or territory) where competition is prohibited;
- The scope of work prohibited (courts will consider the description of the industry, title of the position, and job functions being restricted); and
- Any other restrictions imposed by the agreement as a whole.

However, the court was clear: there is no magic formula. Rather, the inquiry must focus on whether the agreement is narrowly tailored to the specific needs of each individual company. The court also indicated that the language of the agreement itself should indicate the factual basis for the restrictions so the court can easily assess the reasonableness of those restrictions.

WHAT SHOULD YOU DO?

In the wake of this decision, you should carefully consider each of the above reasonableness factors in terms of your business needs and the information you would want to protect from defecting employees. For example, a city-wide radius might be appropriate for a general practice physician, whereas a five-mile radius might be unreasonable for an orthopedic specialist whose competition does not reasonably include a general practice clinic located in that city.

We recommend that you conduct a pointed review of your non-compete agreements to identify those interests you truly need to protect. You should use caution when identifying competitors and the scope of work so as to avoid overbroad language and unreasonable restrictions that would violate the standards set by the Nevada Supreme Court.

If you have any questions about this decision or how it may affect your business, please contact your Fisher Phillips attorney or one of the attorneys in our Las Vegas office at 702.252.3131.

This Legal Alert provides information about a specific court decision. It is not intended to be, and should not be

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