



# Nevada Changes The Game On Non-Compete Agreements

Insights

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The Nevada Supreme Court has long recognized the legality of non-compete agreements between employers and employees. Recently, however, the Nevada state legislature updated the rules on non-compete agreements, specifying how employers should draft their provisions and preventing employers from restricting former employees from providing services to customers or clients. If you use a non-compete agreement in Nevada, it is critical to review that agreement and determine if revisions are necessary.

## Overview Of New Law

Under the new law, a non-compete agreement in Nevada must:

- Be supported by valuable consideration;
- Not impose any restraint that is greater than required to protect the employer;
- Not impose any undue hardship on the employee; and
- Impose appropriate restrictions in relation to the valuable consideration supporting the non-compete agreement.

In addition, non-compete agreements may not restrict a former employee from providing services to a customer or client if the former employee did not solicit the customer or client, the customer or client voluntarily chose to leave and seek services from the former employee, and the former employee otherwise complies with the limitations in the non-compete agreement, excluding any limitation on providing services to a customer or client who seeks the services of the former employee without solicitation.

Any provisions in a non-compete agreement that violate this new law are deemed void and unenforceable.

Further, if an employee's termination is due to the employer's reduction of force, reorganization, or similar restructuring, a non-compete agreement is only enforceable during the period when the employer pays the employee's salary, benefits, or equivalent compensation, including severance pay. Thus, employers who currently incorporate non-compete provisions as part of an employment agreement should revise them accordingly. If employers anticipate terminating an employee, they need to amend their current non-compete provisions or enter into a new severance agreement that

includes the non-compete provisions with an applicable severance package.

### **Valuable Consideration**

In the past, the Nevada Supreme Court noted that valuable consideration for a non-compete agreement can include an employee's continued employment at will, agreeing with the majority of states that have considered the issue. Generally, undefined statutory terms are construed with the meaning that the courts give them. Thus, the new law theoretically should not affect the legal principle that continued employment at will constitutes valuable consideration because there is no alternate definition of "valuable consideration" from the legislature.

However, the requirement that the non-compete agreement must impose appropriate restrictions in relation to the valuable consideration may cause disputes in the future. On the one hand, the concept of sufficient consideration, by definition, implicates an analysis of proportionality to some extent. On the other hand, this new language suggests that the restrictions in place must be proportional to the consideration supporting the agreement. The new law has created an open question as to how much consideration is truly "enough" in Nevada. Employers who want to mitigate this potential risk and err on the side of caution should offer a benefit beyond continued employment, such as a one-time cash bonus, raise, promotion, or specialized training.

### **Revising The Agreement**

Finally, this law responds to the 2016 case of *Golden Road Motor Inn, Inc. v. Islam*, in which the Nevada Supreme Court rejected the "blue pencil" doctrine and held that state courts cannot modify non-compete agreements. Before this law, if a non-compete agreement included even one provision that "extends beyond what is necessary" to protect the employer's interests, then the entire agreement was unenforceable.

Now, under the new law, state courts must modify the agreement. If a court finds that a non-compete agreement, supported by valuable consideration, contains improper provisions, then the court shall revise the agreement to the extent necessary to comply with the law. In particular, these revisions must ensure that the limitations as to time, geographical area, and scope of activity are reasonable and do not impose a restraint greater than necessary to protect the employer.

How the Nevada Supreme Court will handle this legislative mandate in the future is currently unknown. In *Golden Road*, the Nevada Supreme Court specifically noted that the Georgia Legislature tried a similar approach in 1990, only to have the Georgia Supreme Court deem the legislative attempt to advance blue penciling as unconstitutional. Moving forward, the most prudent option is to review your agreement carefully and ensure it is reasonable, without relying on the courts to revise it.

### **Action Needed**

This law took effect upon passage and approval, which was on June 3, 2017. You should immediately review all of your non-compete agreements to ensure compliance with the new law. Although state courts can enforce a non-compete agreement that they revise under the new law, you cannot depend on the courts to have your best interest in mind when they modify your agreement.

To protect your company, it is still important to avoid overbroad language and unreasonable restrictions. You should consider the type of information you wish to prevent former employees from disclosing, such as business methods, trade secrets, and other confidential information acquired within the course of employment. Drafting the proper provisions now can save you time and hassle in the future, such as when you want to obtain a preliminary injunction to enforce your agreement in court.

For more information, please contact any attorney in the [Las Vegas](#) office of Fisher Phillips at (702) 252-3131.

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*This Legal Alert provides an overview of a specific Nevada state law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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