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Nevada's High Court Won't Get Out Its Pencil To Save Overbroad Non-Compete

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In the highly state-law specific world of non-compete agreements, it is always newsworthy when a state's supreme court weighs in on one of the two key areas where state laws vary. Indeed, we typically only see one or two such decisions per year. Here, the Nevada Supreme Court has answered the question, what color pencil does it use when it finds a non-compete agreement is overly broad? In *Golden Road Motor Inn, Inc. v. Islam*, the court found that a one-year, 150-mile non-compete imposed on a casino host was overly broad because it would have prohibited the host – in effect a customer relations representative for the casino – from being employed even as a custodian. The key question then becomes: what, if anything, will the court do to the agreement, i.e. will it narrow the restriction to make it enforceable? Courts take three approaches to this:

- The most enforcement-friendly approach is to simply rewrite the provision to provide whatever restriction the court finds reasonable. In this case, the court, for example, could apply the non-compete only to host positions and/or reduce the 150-mile radius. This is the approach the Ohio Supreme Court has set forth.
- The court could "blue pencil" the document, which technically means it will not rewrite the agreement, but it will strike offending language.

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Often this will save some aspects of the agreement. Indiana historically has taken a blue pencil approach, though one case in recent years suggests there are limits to when courts will apply this approach. (Also note that courts and commentators sometimes tend to use the term “blue pencil” to include the first, full modification approach, though that is not how the term was originally used. So when reading cases and articles, be careful to understand how it is being used by the writer.)

- Some courts will not modify the agreement at all. If it is too broad, the employer simply has no restriction at all, which is the least enforcement-friendly approach.

The Nevada Supreme Court chose door No. 3 and held that it would not modify the agreement. Therefore, since it found the non-compete too broad, there was no restriction at all. If you have non-competes and you might be “competed with” in Nevada, there is a possibility this could affect you even if you have choice of law and venue provisions in your document that specify more enforcement-friendly states. Any employer seeking to enforce non-competes who might find a former employee competing with it from Nevada should consider discussing this decision with experienced non-compete counsel. This post from my colleague Hans Murphy spells out how different states approach this in more detail.