Legal Update Article

Nevada Further Limits Restrictive Covenants With Employees

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Meet the Authors

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Restrictive Covenants, Trade Secrets and Unfair Competition

Amendments to Nevada's non-compete statute, NRS 613.195, will ban non-compete agreements with hourly workers and limit employers' ability to sue to enforce certain customer servicing restrictions. The new law also will extend the required judicial "blue pencil" process to actions brought by employees challenging non-compete covenants.

Assembly Bill 47 (A.B. 47), signed by Governor Steve Sisolak, does not specify an effective date. Therefore, it will go into effect on October 1, 2021, pursuant to Nevada law.

Ban on Non-Competes for Hourly Employees

A.B. 47 bans non-compete covenants for employees who are "paid *solely* on an hourly wage basis, exclusive of any tips or gratuities." The law does not appear to affect covenants for hourly employees who also receive bonuses, profit sharing, or commissions from the employer.

If the employer or employee files a lawsuit to enforce or challenge the non-compete covenant and the court finds the covenant is unlawful because it "applies to [an employee paid solely on an hourly wage basis]," the court *is required* to award the employee their reasonable attorneys' fees and costs.

Ban on Actions to Enforce, Impose Certain Customer Servicing Restrictions

NRS 613.195 prohibited covenants that restricted a former employee from providing services to a former customer or client if:

a. "[T]he former employee did not solicit the former customer or client";
b. "[T]he customer or client voluntarily chose to leave and seek services from the former employee"; and
c. "[T]he former employee is otherwise complying with the limitations in the [non-compete] covenant as to time, geographical area and scope of activity to be restrained[.]"

The new law makes clear that an employer may not bring an action seeking to restrict any of these activities, even if the agreement itself does not explicitly do so.

If the employer or employee files a lawsuit regarding covenants with the former employee and the court finds the employer has wrongfully restricted or attempted to restrict the former employee from providing services to customers or clients in the manner described above, the court is once again *required to* award the employee their reasonable attorneys' fees and costs.

"Blue Pencil" in Employee-Initiated Challenges

NRS 608.195 required Nevada judges to revise, or "blue pencil," unreasonable non-compete agreements. If the agreement was supported by valuable consideration but was unreasonable as to time, geography, or activity restricted, the judge must revise the

agreement such that the restraint was no greater than necessary for the protection of the employer. However, such judicial revision was required only in actions brought by employers to enforce such agreements. In actions brought by employees to invalidate non-compete agreements, judges were not required to engage in the "blue pencil" process.

The new law extends the required judicial reformation process to actions brought by employees challenging non-compete covenants, giving employers fairer opportunity.

The exact parameters of Nevada's new requirements for restrictive covenant agreements will be fleshed out through future litigation and court decisions, which Jackson Lewis attorneys will monitor. Now, the significance of these amendments requires employers to give careful consideration in the drafting of non-compete covenants at the outset. Further, while A.B. 47 does not state whether its provisions are applicable retroactively to agreements that have been executed, employers should review their existing non-compete agreements with the new law in mind.

Please contact your Jackson Lewis attorney to discuss these developments and your specific organizational needs.