EMPLOYMENT LAW

NEW RULES FOR NEVADA NONCOMPETES

by Kenneth K. Ching

Nevada Companies Must Review Their Noncompete Agreements

The Nevada Supreme Court recently has injected substantial uncertainty into any Nevada contract that contains a noncompete agreement, and companies need to conduct a careful review of any contract that contains a noncompete to ensure that those contracts remain enforceable under the new rules.

In short, the Nevada Supreme Court has held that if a noncompete agreement is determined by a Nevada court to be unreasonable in any way, the court will not reform or modify the noncompete agreement, but will instead find it wholly unenforceable. Because of this rule, the bottom line for companies is that they must review any of their contracts that contain a noncompete agreement to determine whether the contract remains enforceable. This advice applies most directly to employment contracts, but other contracts such as assets purchase agreements, severance agreements, and settlement agreements may be affected as well.

Overly Broad Noncompetes Are Now Entirely Unenforceable

This situation arises from the 2016 case *Golden Road Motor Inn, Inc. v. Islam*. Islam was a casino host at the Atlantis in Reno. When she was hired at the Atlantis, she signed a noncompete agreement. The noncompete agreement said that if Islam's employment with the Atlantis ended for any reason, she was prohibited from being employed "in any way affiliated with, or provide any services to, any gaming business or enterprise located within 150 miles of Atlantis . . . for one (1) year . . . ." The Court found this noncompete overly broad and entirely unenforceable.

Even aside from the new rule of *Golden Road*, this agreement was overly broad, and courts across the country scrutinize any contract that limits a person's ability to work and earn a living. The rule in Nevada has long been that a noncompete agreement can only be as restrictive as is necessary to protect an employer's "legitimate interests." So the question becomes what legitimate reason was there for restricting Islam from working within 150 miles of the Atlantis? Even more importantly, what reason did the Atlantis have for prohibiting Islam from "provid(ing) *any services to, any gaming business . . .*"? Did the Atlantis really mean to prohibit Islam from working as a food server at the Thuder Valley Casino in Lincoln, California – or did it instead mean to prohibit her from misappropriating the Atlantis' player information and taking that information, along with her services as as a casino host, to the Grand Sierra Resort only three miles away? Common sense says the Atlantis meant to prevent the latter (which is precisely what happened here), but unfortunately that's not what the noncompete agreement explicitly said.

The Nevada Supreme Court found that Islam's noncompete agreement was unreasonable, especially because of its prohibition on Islam providing any services whatsoever to any gaming business. This result is not surprising. However, what is surprising is that instead of reforming the agreement to impose a more reasonable restriction on Islam, the Court instead found the entire agreement was invalid. Previously, many companies have expected a Nevada court to revise an overly broad agreement rather than invalidate the whole agreement. For example, here, the Court might have said that it would only prohibit Islam from working as a casino host at casinos that directly compete with the Atlantis. Instead, the Court said that it would not modify the agreement and the noncompete was entirely unenforceable.

The reasoning behind this decision is debatable. The Court noted that if it were to revise the noncompete, it would be imposing a different contract on the parties than they had ever agreed to – yet surely the parties intended to enter into some kind of binding agreement, as opposed to no agreement at all, which is the result of *Golden Road*. Nevertheless, that is the position the Nevada Supreme Court has taken: in Nevada, a noncompete agreement will be invalidated in its entirety if it is determined to be unreasonable in any way.

Many Contracts Are Now in Jeopardy

Golden Road has one very important and practical implication for employers. Prudent employers must review their noncompete agreements to ensure that they only impose reasonable restrictions on an employee's ability to work. Such restrictions must be as limited as possible to protect an employer's legitimate interests. It is possible that noncompete agreements written before *Golden Road* were written with overly broad terms based on the assumption that a Court would modify the noncompete if its terms were deemed unreasonable. In fact, many noncompetes specifically say that if a Court finds its terms unreasonable, the court should modify the terms to make them reasonable. But now a company should expect that a Nevada court will invalidate the entire noncompete agreement if any aspect of it is deemed unreasonable, meaning that the company would effectively have little contractual protection against a current employee who left the company in order to compete directly against it.

Additionally, *Golden Road* creates instability not only in noncompete agreements, but any contract (executive employment contracts, purchase and sale agreements, etc.) which contains a noncompete agreement. The Nevada Supreme Court was adamant that it would engage in no "rewriting" of any contracts (*even if the contract itself asked the Court to do so*), and thus an unreasonable noncompete invalidates the entire contract. It seems unlikely that the Court contemplated the possibility that an invalid noncompete agreement might lead to the invalidation of an entire asset purchase agreement (for example, a dentist who purchases a dental practice on the condition that the seller-dentist does not open up a new practice across the street). However, this is arguably the logical conclusion of *Golden Road*. Courts are usually good at avoiding such extreme and impractical results,

however, any company which has used noncompete agreements must consider whether any of its contractual relationships are affected.

Noncompete Agreements Can Be Modified and Made Enforceable

Despite the fact that *Golden Road* has injected uncertainty into companies' contractual relationships, the good news is that companies can proactively head-off future problems with their noncompete agreements. In general, it should be a simple matter for a company's legal counsel – if necessary – to write a modified noncompete agreement which is careful only to impose restrictions on an employee which are necessary to protect the company's legitimate interests. Such a modified agreement can usually be ratified and made enforceable by an employee signing the agreement and continuing his or her employment with the company.

Dickinson Wright's attorneys have extensive experience with noncompete agreements and are available to assist your company with the effective use of, and, if necessary, modification, of its noncompete agreements.

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