

Non-Compete Agreements: Will Arkansas Courts "Blue Pencil" an Unreasonable Non-Compete Agreement?



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06/23/2022

In employment law, "blue penciling" a non-compete agreement refers to the practice whereby a court concludes that a non-compete agreement is unenforceable because it is overly broad, but rather than throw out the agreement altogether the Court will instead modify it to narrow it down to make it enforceable.

In Arkansas, the watershed date is July 22, 2015, which is when a landmark non-compete statute came into play. For non-competes signed before that date, there is no blue penciling. In such instances, we often find ourselves advising clients that if a non-compete is overbroad by an inch, it is overbroad by a mile, and it must be thrown out.

For non-competes signed after July 21, 2015, a reviewing court "shall" blue pencil a non-compete agreement that is unreasonable and imposes a greater restraint than is necessary to protect the protectable business interest of the employer. The court then enforces the non-compete agreement under the narrowed down terms and conditions.

We routinely advise businesses to review and revise their non-compete agreements to modern practice, and specifically to re-up non-compete agreements entered prior to the July 2015 date so that an employer later seeking to enforce a non-compete gets the benefit of blue penciling.

The question of whether courts will blue pencil non-competes comes up frequently in litigation, and it is a nuance in the law that varies widely across state lines, so evaluating a non-compete must always be done with an eye toward forum and law selection clauses.

This article is part of the Mitchell Williams Non-Compete Agreement series explaining how non-compete agreements are interpreted and enforced. The series will be published weekly for a total of 7 articles.

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