

## Publications

### *Labor and Employment Alert: Even When Parties Agree, North Carolina Courts Cannot Rewrite Overbroad Noncompete Agreements*

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The North Carolina Supreme Court recently confirmed that courts in that state are prohibited from rewriting an overbroad noncompete agreement to make it reasonable and enforceable – even when the parties' agreement specifically allows the court to do so. North Carolina has a "strict blue pencil test," which permits a court to enforce divisible and reasonable portions of a noncompete agreement while striking through (or "blue-penciling") the unenforceable portions. In *Beverage Systems of the Carolinas, LLC v. Associated Beverage Repair, LLC*, the Court analyzed a noncompete agreement made as part of a sale of a business; the agreement's provisions allowed a court to revise potentially overbroad temporal and geographic restrictions. The Court held that such a provision was unenforceable for there is "nothing but mischief in allowing such a procedure."

In North Carolina, courts will enforce a noncompete agreement made in connection with a business' sale if the agreement is reasonably necessary to protect the legitimate interest of the purchaser; is reasonable as to time and territory; and does not interfere with the public interest. Generally, a geographic scope is reasonable if it encompasses the area served by the business or the clients served. In *Beverage Systems*, the Court found the geographic scope to be unreasonable because it included areas beyond those necessary to maintain customer relationships. The Court explained that, when a noncompete agreement is found to be unreasonable, "the court is powerless unilaterally to amend the terms of the contract." In this case, blue-penciling was impossible because the agreement could not be interpreted as setting out reasonable and unreasonable geographic restrictions – so everything had to be stricken.

The Court then turned to the parties' contention that their agreement expressly permitted a court to modify overbroad temporal and territorial restrictions in order to make them reasonable. This, the Court found, was not within the Court's power and "parties cannot contract to give a court power that it does not have... Allowing litigants to assign to the court their drafting duties as parties to a contract would put the court in the role of scrivener, making judges postulate new terms that

the court hopes the parties would have agreed to be reasonable at the time the covenant was executed or would find reasonable after the court rewrote the limitation.”

This case highlights the importance of careful drafting of noncompete agreements. Whether and to what extent a court will enforce a noncompete agreement and whether a court will modify an overbroad agreement varies from state to state. In many states (like Ohio), courts are permitted to substitute reasonable restrictions for unreasonable ones. However, in other states (like North Carolina) the court will only strike through unreasonable restrictions. Contact your Vorys lawyer if you have questions about drafting or enforcing restrictive covenants in your employment agreements.