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Different Strokes For Different Folks (Or Red, Blue, And Purple-Pencil America): How The 50 States Differ On Revising Non-Competes

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Employers with multistate operations who utilize non-compete covenants to protect their businesses frequently run into questions about whether those agreements will be enforceable across state lines. While many states (fortunately) tend to view restrictive covenants somewhat similarly, there are some critical – and perhaps surprising – exceptions. For example, North Dakota will not enforce non-compete agreements by statute, and while Oklahoma may enforce a non-compete, the terms spelled out by that's states law are extraordinarily more restrictive than in other jurisdictions.

One key distinction in how states view non-compete agreements is whether the state's courts are willing to revise an otherwise overbroad covenant. For example, say a non-compete has a geographic scope that applies to Indiana, Illinois, Missouri, Ohio and Kentucky, but that the employee in question never worked or called on customers in Kentucky.

In states adhering to what is known as the "red-pencil" doctrine, the fact that one provision in a non-compete agreement is overbroad may cause the court to hold the entire covenant unenforceable. In the cited example, if Kentucky was considered to be geographically overbroad, then a court in a "red-pencil" jurisdiction could toss out the entire non-compete. By contrast, in states adhering to the "blue-pencil" doctrine, a court may strike out an offending provision (such as the reference to Kentucky) and presto – the agreement

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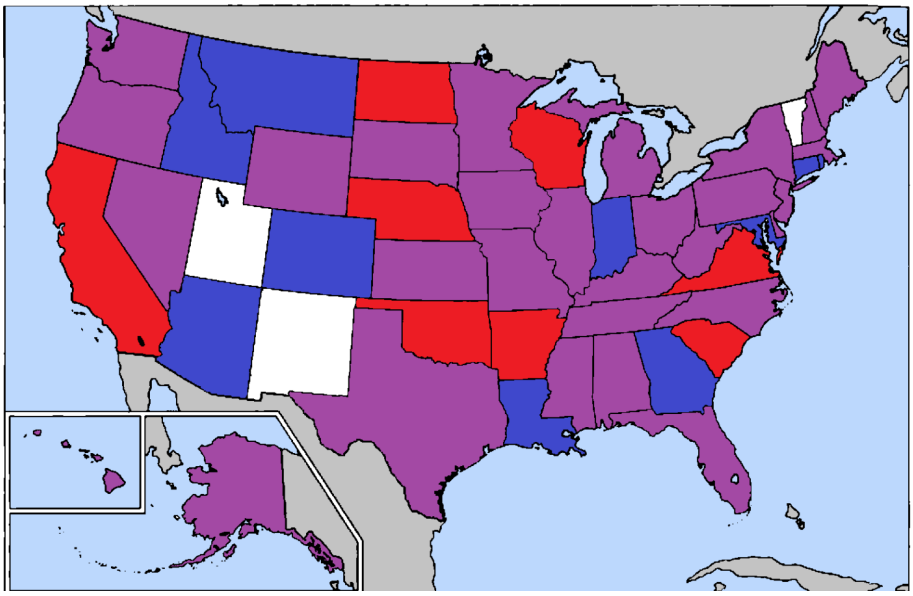
which once was overbroad is now enforceable. In these states, a court will not rewrite the parties agreement, but will strike out terms so that the provision can pass muster. By the same token, if a company in a blue-pencil state drafts an agreement which cannot easily be made enforceable by deleting terms, that company runs the risk of having the agreement be regarded as unenforceable.

In between the red and blue-pencil positions are states which may allow the reformation of an overbroad term in an agreement. Going back to the cited example, say the employee in question never called on customers in Kentucky, but did call on customers in Michigan. A court in a reformation state could nix the Kentucky provision and insert Michigan in its place. In other words, unlike a blue-pencil state, courts in reformation states can tweak the agreement as reasonably necessary to make it enforceable. Consistent with the theme of red and blue-pencil states, let's call these "purple-pencil" jurisdictions.

Since they say a picture speaks a thousand words, here is a map of where the various states currently fall in terms of the red-pencil, blue-pencil and purple-pencil (or reformation) doctrines:



As can be seen, while much of the country adheres to some version of the "purple-pencil" or reformation doctrine, this is by no means uniform (*p.s. – if you are wondering why Vermont, New Mexico and Utah are blank this is because they have yet to definitively articulate where they stand on the issue*). The above map underscores the importance that employers must place in ensuring that their non-competes are appropriately tailored to the requirements of each local jurisdiction that might be asked to enforce the agreement. Different states have different rules and just because an agreement may be valid and enforceable in one state does not guarantee that the same agreement will be valid or enforceable in another.