

LABOR & EMPLOYMENT LAW SECTION  
OF THE STATE BAR OF NEVADA

---

February 2015 – Volume 1, Issue 1

# Nevada Practitioners' Journal of Labor and Employment Law



---

## INSIDE THIS ISSUE:

- Tip Pools in Nevada: Legal Issues and Liabilities, *William B. Werner*
- The Enforceability of Non-Compete Agreements In Nevada, *Robert Rosenthal*
- A Few Unique Nevada Employment Laws You Ought to Know, *Jeffrey D. Winchester*
- Confidential and Special Relationships and Their Limited Application in the Employment Context, *Carol Davis Zucker*

# Table of Contents

Table of Contents .....	i
From the Editors .....	ii
Editorial Statement and Submission Guidelines .....	iii
Letter from Chief Justice Mark Gibbons .....	v
Letter from the Honorable Gloria Navarro .....	vi
Tip Pools in Nevada: Legal Issues and Liabilities .....	1
The Enforceability of Non-Compete Agreements in Nevada, Including an Analysis of Geographic Limitations.....	13
A Few Unique Nevada Employment Laws You Ought to Know .....	28
An Enigma Inside a Puzzle: “Confidential” and “Special” Relationships and Their Limited Application in the Employment Context .....	33

## DISCLAIMER

The Nevada Practitioners’ Journal of Labor and Employment Law is an electronic publication of the Labor and Employment Law Section of the State Bar of Nevada that provides scholarly works and law-related information to the bench and bar. Its content is not intended and should not be construed to be legal advice. Retain a qualified attorney if legal assistance is needed.

The opinions expressed are not necessarily those of the State Bar of Nevada, the Labor and Employment Section or the journal’s editorial staff.

**NEVADA PRACTITIONERS’  
JOURNAL OF LABOR AND  
EMPLOYMENT LAW**

---

**Journal Editorial Staff**

**Editor-In-Chief**

Edwin A. Keller, Jr.

**Issue Editor**

R. Todd Creer

**Associate Editors**

Mary H. Kinas

William B. Werner

Kaitlin H. Zeigler

**Design & Production**

Jennifer Smith, State Bar of Nevada

**Labor and Employment Section  
Executive Officers**

**Chairperson**

James P. Kemp

Kemp & Kemp

**Vice Chairperson**

Deanna C. Brinkerhoff

Holland & Hart

**Secretary**

Kristina E. Gilmore

City of Henderson

**Treasurer**

Peter Navarro

Jackson Lewis P.C.

**CLE Subcommittee Chairperson**

Matthew T. Cecil

Littler Mendelson P.C.

**Membership Subcommittee**

**Chairperson**

Ann M. McDermott

Nevada Office of the Attorney General

**Journal Subcommittee Chairperson**

Edwin A. Keller, Jr.

Kamer Zucker Abbott

**Northern Nevada Representative**

Rebecca Bruch

Erikson Thorpe & Swainston, Ltd.

## **From the Editors**

Together with the Executive Committee of the Labor and Employment Section of the State Bar of Nevada and the rest of the all-volunteer editorial staff, we are very pleased to present this inaugural issue of the Nevada Practitioners’ Journal of Labor and Employment Law.

Starting a journal of this type from the ground up has proven to be more challenging than any of us expected, but with the patient assistance and expert guidance of Jennifer Smith, the State Bar’s Publication Manager, we have taken the first significant step in building what we hope is a lasting forum for the exploration and advancement of the ever changing areas of labor and employment law in Nevada.

One of the primary purposes of the Labor and Employment Law Section is to enhance the roles and skills of lawyers engaged in the practice of labor and employment law through study, collection, development, and dissemination of materials on subjects of interest to labor and employment law practitioners. We view the creation of the Nevada Practitioners’ Journal of Labor and Employment Law as one important way of fulfilling that imperative.

The journal is designed to serve as a professional forum for the dissemination of ideas and perspectives on both the practical aspects and the broader policy implications of the labor and employment law issues confronted by practitioners, judges, legislators, and agency personnel in Nevada. To achieve its full potential, we need your support.

Please take the time to provide us with any feedback you may have, constructive or otherwise. More importantly, join your fellow colleagues and inaugural issue authors – Bill Werner, Rob Rosenthal, Jeff Winchester and Carol Zucker – by sharing your experience and expertise through the submission of educational and thought provoking articles for future issues of the journal.

*Edwin A. Keller, Jr.*

Editor-In-Chief

*R. Todd Creer*

Issue Editor

# Editorial Statement and Submission Guidelines

**Purpose:** The Nevada Practitioners' Journal of Labor and Employment Law is a publication of the Labor and Employment Law Section of the State Bar of Nevada designed to serve as a professional forum for the dissemination of ideas and perspectives on both the practical aspects and the broader policy implications of labor and employment law issues confronted by practitioners, judges, legislators, and agency personnel in Nevada. The goals of the journal are to advance the areas of labor and employment law, as well as the quality of the professionals involved in the same.

**Concentration:** A particular focus of the Nevada Practitioners' Journal of Labor and Employment Law is on the labor and employment issues litigated before Nevada's state courts, the United States District Court for the District of Nevada, and the United States Court of Appeals for the Ninth Circuit.

**Publication Cycle:** Each annual volume of the Nevada Practitioners' Journal of Labor and Employment Law will typically consist of two issues. The target publication date for each issue will be posted on the webpage of the Labor and Employment Section of the State Bar of Nevada at: <http://nvbar.org/content/labor-and-employment-law-section>.

**Submissions:** Contributions from all interested labor and employment law professionals are welcome for possible publication on a rolling basis. Please submit journal articles for consideration electronically as an email attachment directed to the Editor-In-Chief: Edwin A. Keller, Jr. ([ekeller@kzalaw.com](mailto:ekeller@kzalaw.com)).

Articles are selected by the journal's editorial staff at least four to six months in advance of the target publication date for the issue in which the articles are to appear. Well written articles of any size will be considered, but articles should generally range between 15 and 30 pages (8.5" by 11") with text double-spaced.

**Student Submissions:** The Nevada Practitioners' Journal of Labor and Employment Law will accept submission of articles from law students for publication consideration. Typically, no more than one student article will be selected for any particular issue.

**Author Guidelines:** Articles should be direct, professional in tone, and well-researched. As the journal is tailored to practitioners, articles are expected to address the current state of applicable law with supporting citation to relevant case authority, statutes, regulations, administrative decisions, advisory opinions, agency procedures, etc. Other legal references useful to practitioners related to the article's topic, such as motions, briefs, annotations, treatises, white papers, agency guidelines, advisory opinions, checklists and webpages, should also be identified.

**Article Format:** Microsoft Word is the preferred word processing format for all article submissions. Articles are to contain an introduction, main discussion and conclusion, as well as utilize text headings in the following format and progression: I., A., 1., a., (1). Authors should strive to use no more than three levels of text headings (e.g., I., A., 1.). Legal authority and other references are to be footnoted with citation conforming to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION®. Whenever a footnoted citation is preceded by the signals "See" or "See also," the cited reference(s) should include a parenthetical explanation. Quotes of more than a sentence should be in block quote format. Imbedded hyperlinks to source material are permitted. Authors should typically defer to Strunk & White's THE ELEMENTS OF STYLE for grammar and style issues.

**Copyright Assignment:** Authors whose work is selected for publication must enter into a Copyright Assignment Agreement with the State Bar of Nevada. If the State Bar of Nevada does not publish an author's work within one year of its selection, the copyright shall revert back to the author.

**Permissions:** Requests to reproduce portions of this publication should be addressed to Jennifer Smith, Publications Manager, State Bar of Nevada, 600 East Charleston Boulevard, Las Vegas, Nevada 89104, Tel: 702-382-2200; Fax: 702-385-2878; Email: [jennifers@nvbar.org](mailto:jennifers@nvbar.org).

**Citation:** The Nevada Practitioners' Journal of Labor and Employment Law may be cited as follows, by volume and page: 1 NEV. PRAC J. LAB & EMP. L. \_\_ (2015).

## WEB ACCESS & SUBSCRIPTION LIST

The Nevada Practitioners' Journal of Labor and Employment Law is accessible from the Labor and Employment Section's webpage: <http://nvbar.org/content/labor-and-employment-law-section>.

Members of the Labor and Employment Section automatically receive an email notification of, and link to, each new journal issue. Other readers wishing to receive notification of future journal issues can join an email subscriber list maintained by the State Bar of Nevada by sending a request to: [publications@nvbar.org](mailto:publications@nvbar.org). The journal subscriber list is open to all interested readers; you do not need to be a member of the State Bar of Nevada.

SUPREME COURT OF NEVADA

MARK GIBBONS, CHIEF JUSTICE  
201 SOUTH CARSON STREET  
CARSON CITY, NEVADA 89701-4702  
(775) 684-1500  
FAX (775) 684-1505



November 6, 2014

Dear Members of the Labor and Employment Law Section of the State Bar of Nevada:

As the Chief Justice of the Nevada Supreme Court, I am pleased to recognize and commemorate the inaugural issue of the *Nevada Practitioners' Journal of Labor and Employment Law*.

This welcomed addition to the resources available to Nevada practitioners will undoubtedly serve to advance professional discussions of important developments and perspectives in both the practical aspects and the broader policy implications of labor and employment law issues and will enhance the quality of legal practice in these areas. The dissemination of such ideas and information will in turn serve to assist the judiciary when called upon to resolve significant legal issues that have the possibility to touch the lives of all Nevadans.

I invite all Nevada practitioners involved in the areas of labor and employment law to read the articles that will be published in the Journal and to actively participate in making the Journal a lasting success by continuing to submit articles for publication, thus helping to develop this important area of the law.

Sincerely yours,

A handwritten signature in blue ink, which appears to read "Mark Gibbons", is written over the typed name.

MARK GIBBONS  
Chief Justice

cc: Elana Turner Graham  
President, State Bar of Nevada



UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

LLOYD D. GEORGE UNITED STATES COURTHOUSE  
333 LAS VEGAS BOULEVARD SOUTH, ROOM 7005  
LAS VEGAS, NV 89101-7083

GLORIA M. NAVARRO, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

TELEPHONE (702) 464-5490  
FACSIMILE (702) 464-5491

November 3, 2014

Labor and Employment Law Section  
State Bar of Nevada

Dear Readers,

It is with great pleasure that I write to commemorate the launch of the inaugural issue of the *Nevada Practitioners' Journal of Labor and Employment Law*.

Legal publications such as this are critical in disseminating the practical skills and knowledge that will enable members of the Nevada legal community to better continue to confront and address the current issues facing our state. This journal will serve as a forum for the discussion and spread of ideas regarding labor and employment law that will undoubtedly improve the quality of our profession and its practitioners. It will enable those with little experience in this area of law to quickly learn the basics, while also giving long-time practitioners an easy way to remain up-to-date on the latest developments. Having such a resource in Nevada, which through the generous assistance of its contributors, compiles the wealth of experience and expertise held by our employment law practitioners, will lead to a more robust, informed, and effective state bar that will be better equipped to overcome the challenges and advance the interests of our state.

I look forward to the many future issues of this journal and the improvements they will bring to the practice of law in Nevada.

Sincerely,



GLORIA M. NAVARRO, Chief Judge  
United States District Court

# Tip Pools in Nevada: Legal Issues and Liabilities

*By William B. Werner<sup>1</sup>*

## I. Introduction

Tips make up an important part of the Nevada economy and are the primary income of thousands of Nevadans, but in recent years, tips have also spawned a good deal of legal controversy. Conflicts between federal regulations and court decisions, and between state and federal laws, leave the law of tipping in Nevada somewhat unsettled—although much less so than in many other states. This article compiles the state and federal laws regulating tips in Nevada, paying particular attention to the current regulation of tip pooling.

Additionally, recent changes to the tax treatment of automatic gratuities and compulsory service charges leave the future of such practices in question. The operational consequences of those changes are described along with the effects of tip income on workers' and unemployment compensation.

## II. Mandatory Tip Pooling

Much of the recent litigation over tips nationwide has challenged tip pooling practices, particularly the distribution of pooled tips to non-tipped employees.<sup>2</sup> On the other hand, the employer's right, absent a contract otherwise, to require tipped employees to pool and split their tips is well-settled, even when it results in an employee receiving less from the pool than he or she

---

<sup>1</sup> Associate Professor, William F. Harrah College of Hotel Administration, University of Nevada, Las Vegas.

<sup>2</sup> See, e.g., *Budrow v. Dave & Busters of Cal., Inc.*, 171 Cal. App. 4th 875, 884 (2009) (cocktail server did not want to share tips with bartenders who made the drinks).



contributed.<sup>3</sup> The employer can also discharge an otherwise at-will employee for refusing to contribute all tips to the pool.<sup>4</sup>

The vast majority of cases challenging the distribution of pooled tips come from states that permit an employer to count the employees' tips toward a portion of its minimum wage obligation ("tip credit"), in large part because the Fair Labor Standards Act (FLSA) and related regulations impose tip pooling restrictions on employers utilizing tip credits.<sup>5</sup> Nevada is one of the seven states that do not allow any tip credit toward payment of the minimum wage.<sup>6</sup> To the extent ongoing conflicts over the distribution of pooled tips are resolved among the federal courts and the U.S. Department of Labor (DOL) based on the FLSA, the outcome is inapposite to Nevada employers, so long as Nevada does not allow a tip credit. There remains considerable dispute, however, whether and to what extent the federal regulation of tip pool distributions apply equally when no tip credit is taken.<sup>7</sup>

## **A. As a Condition of Employment**

As a matter of both employment and property law, a tip is the property of the employee to whom it is given or intended.<sup>8</sup> The employee, however, earns the tip while in the course of his employment under the employer's direction and control. While employers are prohibited by many state laws from confiscating the tips, state and federal courts alike have long and consistently recognized their right to otherwise dictate the distribution of the tips its employees receive.<sup>9</sup>

In *Williams v. Jacksonville Terminal Co.*, the U.S. Supreme Court provided the following foundation just a few years after the FLSA was enacted:

In businesses where tipping is customary, the tips, in the absence of an explicit contrary understanding, belong to the recipient.... Where, however, an arrangement is made by

---

<sup>3</sup> See, e.g., *Kilgore v. Outback Steakhouse of Fla.*, 160 F.3d 294, 303–04 (6<sup>th</sup> Cir. 1998) (mandatory tip pool is allowed by DOL regulations).

<sup>4</sup> See, e.g., *Baldonado v. Wynn Las Vegas, LLC*, 194 P.3d 96, 105–06 (Nev. 2008) (at-will employees have no contractual rights in tip-pooling and distribution policy)

<sup>5</sup> See Section II.(B)(2), *infra* (discussing FLSA and its application to tip pooling practices).

<sup>6</sup> NEV. CONST. art. 15, § 16 ("Tips or gratuities received by employees shall not be credited as being any part of or offset against the wage rates required by this section."); NRS 608.160(1)(b). The others are Alaska, California, Minnesota, Montana, Oregon, and Washington.

<sup>7</sup> See Section II. (B)(2), *infra* (discussing differing views of courts and DOL as to scope of FLSA's tip pooling restrictions).

<sup>8</sup> See *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 397 (1942) (noting in case involving railroad workers employed at will, and therefore subject to whatever terms and conditions were mutually agreed upon in formation of employment relationship, tips belong to recipient without agreement to contrary).

<sup>9</sup> See Neil Patrick McConnell, *Mr. Pink Never Leaves a Tip: How Current Tip Credit and Tip Pool Guidelines Leave Employees at the Mercy of Their Employers*, 114 PENN ST. L. REV. 621, 638–39 (2009) (discussing few restrictions placed on employers in non-tip credit states compared to tip credit states).

which the employee agrees to turn over the tips to the employer, in the absence of statutory interference, no reason is perceived for its invalidity.<sup>10</sup>

*Williams* is frequently cited as establishing the default rule that a mandatory arrangement to turn over or redistribute tips is presumptively valid—that the “arrangement” contemplated by *Williams* may be whatever the parties lawfully negotiate and therefore may be required as a condition of employment.<sup>11</sup> Thus, absent any other regulation, an employer who does not take advantage of a tip credit can prohibit all tipping, donate all the tips to charity, or take all of the tips as revenue.<sup>12</sup>

Nevada’s original wage and hour law permitted both a 100 percent tip credit toward minimum wage and confiscation of all employee tips.<sup>13</sup> But with the stated intent of consumer protection, it required the employer to post conspicuous public notice of such practices.<sup>14</sup>

However, in 1971, the statute was amended and to this day states that:

1. It is unlawful for any person to:
  - a. Take all or part of any tips or gratuities bestowed upon the employees of that person.
  - b. Apply as a credit toward the payment of the statutory minimum hourly wage established by any law of this State any tips or gratuities bestowed upon the employees of that person.
2. Nothing contained in this section shall be construed to prevent such employees from entering into an agreement to divide such tips or gratuities among themselves.<sup>15</sup>

Additionally, a 2006 constitutional amendment, which established a higher minimum wage to employees not offered health care insurance benefits, included the following reaffirmation of the state’s prohibition on crediting tips toward the minimum wage: “Tips or gratuities received by

---

<sup>10</sup> *Williams*, 315 U.S. at 397 (citations omitted).

<sup>11</sup> See, e.g., *Cumbie v. Woody Woo, Inc.*, 596 F.3d 577, 580–81 (9<sup>th</sup> Cir. 2010) (finding no violation for redistributing most of servers’ tips to kitchen staff).

<sup>12</sup> See *Or. Rest. & Lodging v. Solis*, 948 F. Supp. 2d 1217, 1224, 1227 (D. Or. 2013) (holding that FLSA provided no evidence of Congressional intent to regulate use of tips in absence of tip credit, but noting that employers taking advantage of lack of federal regulation would be “unwise”), *appeal docketed*, No.13-35765 (9<sup>th</sup> Cir. Aug. 22, 2013).

<sup>13</sup> 1939 Nev. Stat. 13 (“Every person who takes all or any part of any tips or gratuities bestowed upon his employees or who credits the same towards payment of his employee’s wages...”).

<sup>14</sup> *Id.* (“such acts tend to perpetuate a fraud or imposition upon the public”).

<sup>15</sup> **NRS 608.160** (2013).

employees shall not be credited as being any part of or offset against the wage rates required by this section.”<sup>16</sup>

The first reported challenge to mandatory tip pooling under NRS 608.160, brought in federal district court, confirmed the legality of the practice.<sup>17</sup> In *Moen v. Las Vegas International Hotel, Inc.*, the diversity action challenged both the Las Vegas Hilton’s distribution of dealers’ tips to other non-tipped employees and its requirement that dealers contribute their tips to the pool as a condition of continued employment.<sup>18</sup> The court found no prohibition in NRS 608.160 other than that the employer cannot “take” any of the tips, so any distribution of the tips among any employees is presumptively valid.<sup>19</sup> The court read the statute in light of the historical treatment of tips—that the employer was originally allowed to keep all the tips. The statute was amended in 1971 only to prohibit employers from taking both a tip credit and the tips. The court likewise found no prohibition against an employer’s requirement of tip pooling as a condition of employment.<sup>20</sup>

In 1983, the Nevada Supreme Court first addressed the mandatory tip pooling issue in *Alford v. Harolds Club*, which involved an action by casino dealers discharged from employment for refusing to comply with the casino’s new tip pooling policy that shared some of the tips with non-tipped employees.<sup>21</sup> Adopting the rationale from *Moen*, the court held that NRS 608.160 does not prohibit mandatory tip pooling.<sup>22</sup> Therefore, the plaintiffs’ action for wrongful termination for refusing to comply with the policy was properly dismissed because the conditional requirement was not wrongful.<sup>23</sup> The court stated:

Given that Harolds Club had the right to insist on its employees’ participation in a tip-pooling arrangement, it is difficult to see how appellants could have been “wrongfully” terminated when they refused to comply with such a legitimate employment policy.<sup>24</sup>

In 2008, the Nevada Supreme Court confirmed the employer’s right to require tip pooling as a condition of employment in Nevada and to prescribe the distribution of those tips to other employees without the consent of those employees contributing to the pool in *Baldonado v. Wynn*

---

<sup>16</sup> NEV. CONST. art. 15, § 16(A).

<sup>17</sup> *Moen v. Las Vegas Int’l, Inc.*, 402 F. Supp. 157 (D. Nev. 1975), *aff’d*, 554 F.2d 1069 (9<sup>th</sup> Cir. 1977).

<sup>18</sup> *Id.* at 158.

<sup>19</sup> *Id.* at 160.

<sup>20</sup> *Id.* at 162.

<sup>21</sup> *Alford v. Harolds Club*, 669 P.2d 721, 722–23 (Nev. 1983).

<sup>22</sup> *Id.* at 724.

<sup>23</sup> *Id.* at 724; *cf. Cotter v. Desert Palace, Inc.*, 880 F.2d 1142, 1145–46 (9<sup>th</sup> Cir. 1989) (trial court did not abuse discretion in denying preliminary injunction because employer was allowed to force tip-sharing).

<sup>24</sup> *Alford*, 669 P.2d at 724.

*Las Vegas, LLC*.<sup>25</sup> The case arose from a policy change implemented by the employer in 2006 that redirected 10 to 15 percent of the dealers' pooled tips to casino "team leads" who did not otherwise receive significant tips.<sup>26</sup> Several dealers sued to recover the tips that were paid to the leads, but the district court dismissed the case, holding that NRS 608.160 did not create a private right of action for employees to directly sue their employers.<sup>27</sup> The Nevada Supreme Court affirmed, holding that the plaintiffs were bound to exhaust their administrative remedy for violation of NRS Chapter 608 with the Nevada State Labor Commissioner.<sup>28</sup> The court likewise affirmed the district court's dismissal of the plaintiffs' claims for breach of contract, finding without dispute that the dealers were at-will employees.<sup>29</sup>

The Labor Commissioner then dismissed the claims, stating:

Based upon substantial evidence in the record, the plain language of the statutes, and prior case law, the Wynn may unilaterally establish and change a tip pooling agreement that is a term and condition of an underlying at-will employment agreement.... Only employers are directly excluded from sharing in the tips. A plain reading of the statute does not appear to place any limitations as to who may or may not be considered an employee for the purposes of tip pooling.<sup>30</sup>

Thus, Nevada and federal law clearly allow an employer to implement a tip pooling or tip sharing policy and to require employees as a condition of continued employment to abide by the policy. This is the case, however, only so long as the employer's policy is otherwise lawful. If an employer's distribution of the pooled tips violates state or federal law, then the employer may not require employees to comply and may not take action against an employee for refusing.

## **B. Distribution of Pooled Tips**

The most common ground for invalidating a tip pool is the inclusion in the pool of employees who are excluded by law from receiving a share of the tips. Under Nevada law, the only statutory exclusion is of the "employer" itself, which cannot "take" any of the tips. Employers in other states that credit tips toward the minimum wage are more confined and may include in the distribution only those employees who customarily and regularly receive tips. There remains a lingering conflict,

---

<sup>25</sup> 194 P.3d 96 (Nev. 2008).

<sup>26</sup> *Id.* at 99.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 104–05.

<sup>29</sup> *Id.* at 105–06.

<sup>30</sup> Opinion and Order at 9, 13, *Smith v. The Wynn* (Nev. State Lab. Comm'r July 12, 2010), available at <http://media.lasvegassun.com/media/pdfs/blogs/documents/2010/07/12/wynnrruling0710.pdf>.

however, whether the federal tip pool regulations applicable to employers using tip credits may also apply to employers who do not credit tips toward minimum wage obligations.

## 1. Nevada Law

The first case, *Moen*, found no violation of NRS 608.160 so long as the pooled tips were distributed among “employees” and not retained by the employer. The court noted that the non-tipped employees who were sharing in the dealer tips—boxmen, floormen, and cashiers—also contributed to the service that produced the tip. The court ruled that:

There is no reason to suppose that the last person in a service line is the only one entitled to share in the customer’s bounty.... It is ridiculous to assume that a satisfied player who hands over a tip intends it only for the particular person to whom the tip is given.<sup>31</sup>

The Nevada Attorney General then issued a 1980 opinion essentially agreeing with *Moen*.<sup>32</sup>

Until *Baldonado*, the Nevada Supreme Court cases addressing tip pooling involved the distribution of pooled tips only among the employees who earned the tips.<sup>33</sup> Nonetheless, both the *Moen* and *Alford* opinions noted, and perhaps contributed to, lingering confusion over potential statutory restrictions on the distribution of pooled tips. After considering the legislative history, *Moen* found that NRS 608.160 “was enacted to prevent the taking of tips by an employer for *the benefit of the employer*.”<sup>34</sup> Similarly, *Alford* framed the question before it as “whether NRS 608.160 prohibits the employer from unilaterally imposing a tip-pooling agreement on employees as a condition of their employment, even though the employer does not retain any part of the tips for his own use or *reap any direct benefit from the pooling*.”<sup>35</sup>

*Alford* considered evidence of the defendant benefitting from its change to mandatory dealer tip pooling, at least collaterally, in the form of improved employee morale and reduced employee turnover, as well as conformity to prevailing industry practices.<sup>36</sup> The Nevada Supreme Court, however, regarded the employer’s benefit as indirect and thus not the equivalent of taking the tips.<sup>37</sup> However, the court gave no indication what sort of “direct benefit” might invalidate a mandatory tip pool other than taking and keeping the tips.

---

<sup>31</sup> *Moen v. Las Vegas Int’l, Inc.*, 402 F. Supp. 157, 160 (D. Nev. 1975), *aff’d*, 554 F.2d 1069 (9<sup>th</sup> Cir. 1977).

<sup>32</sup> 80-A Op. Att’y Gen. 206 (1980).

<sup>33</sup> *Alford v. Harolds Club*, 669 P.2d 721, 722 (Nev. 1983) (casino dealers tips distributed among casino dealers); *Cotter v. Desert Palace, Inc.*, 880 F.2d 1142, 1143 (9<sup>th</sup> Cir. 1989) (dice dealers tips distributed among dice dealers and boxmen).

<sup>34</sup> *Moen*, 402 F. Supp. at 160 (emphasis added).

<sup>35</sup> *Alford*, 669 P.2d at 723(emphasis added).

<sup>36</sup> *Id.* at 722–23.

<sup>37</sup> *Id.* at 723 (“even though the employer does not ... reap any direct benefit from the pooling”).

*Baldonado* brought some clarity, while raising further questions. Following the Labor Commissioner’s ruling in favor of the Wynn,<sup>38</sup> the dealers petitioned the district court for judicial review.<sup>39</sup> The district court granted the petition and set aside the Labor Commissioner’s decision, ruling that the new tip pooling policy directly benefited the employer, which constituted the employer’s “taking” the tips.<sup>40</sup> The Nevada Supreme Court reversed and remanded, finding no basis in NRS 608.160 for a violation when the employer retains none of the tips.<sup>41</sup> The court rejected the relevancy of whatever benefit the employer might be said to gain from a mandatory tip pool, and strictly construed the statutory language: “NRS 608.160 prohibits an employer from taking and keeping his or her employees’ tips, but the statute does not prohibit a tip policy that splits the tips among the employees.”<sup>42</sup> Because the Wynn did not retain any of the tips for itself, it could not be said that Wynn had “taken” them.

The court acknowledged, though, that the *Alford*’s “reap any direct benefit” language was not inadvertent: “It is possible that an employer, while not keeping the tips, could take them for use in a manner impermissible under the statute.”<sup>43</sup> The court then also rejected the *Moen* “direct benefit test” since “every tip-pooling policy directly benefits the employer in some manner.”<sup>44</sup> However, the court still gave no indication as to what such an impermissible use might be, only declining to invalidate a practice of requiring dealers to share their tips with non-tipped workers, some of whom had some supervisory authority.<sup>45</sup> Because the statute merely prohibits “taking” the tips, and it does not seem to matter to what use the funds are ultimately put, it is difficult to determine just what other sort of use of employee tips may be found impermissible. The court’s opinion appears to leave some doubt as to whether the employer’s distribution of employee tips might violate Nevada law even where the employer does not take the tips.

Even in the absence of an impermissible use, questions remain whether some forms of tip pooling may violate other state statutes. In its order, the court in *Baldonado* remanded the case to the district court to review the Labor Commissioner’s decisions regarding the validity of Wynn’s tip pooling policy under two other Nevada statutes: NRS 608.100 and 613.120.<sup>46</sup> The court did not

---

<sup>38</sup> See Opinion and Order, *supra* note 30, at 9.

<sup>39</sup> *Wynn Las Vegas, LLC v. Baldonado*, 311 P.3d 1179, 1181 (Nev. 2013).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1182.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* Nevada Revised Statute 608.100(2) states “It is unlawful for any employer to require an employee to rebate, refund or return any part of the wage, salary or compensation earned by and paid to the employee.” Nevada Revised Statute 613.120(1) states “It shall be unlawful for any manager, superintendent, officer, agent, servant, foreman, shift boss or other employee of any person or corporation, charged or entrusted with the employment of any workers or laborers, or with the continuance of



address any issue concerning the agency status of the team leads who performed some, if not all, the work that floor and pit managers were doing before. The question remains, then, whether mandatory tip pooling may be prohibited or restricted by those other statutes.

No further opinions are available from the Nevada Supreme Court concerning the application of other Nevada law to the tip pooling procedure at issue in the *Baldonado* case or others like it.<sup>47</sup> Resolution of the questions left open in *Baldonado* may ultimately impose some restriction on an employer's right to require the pooling of employees tips when the tips are distributed to managers who might be considered the employer's "agents."

A separate challenge may also be founded on the definition of "person" for purposes of NRS 608.160, in particular, whether the statute may exclude supervisors and managers from participation in tip pools.<sup>48</sup> In comparison, the California Labor Code expressly prohibits an employer's "agents" from sharing in pooled tips.<sup>49</sup> The use of the word "agents" has resulted in the invalidation of tip pools that give a share of the tips to front line managers regardless of whether the managers also serve guests.<sup>50</sup> The California courts have also confirmed an employer's right to impose and enforce a tip pooling arrangement in which no agents share.<sup>51</sup>

## 2. Federal Law

While some questions remain under Nevada law, the legal status of tip pooling is even less clear under the FLSA. The tip credit provisions were added to the FLSA in 1966, which is also when food

---

workers or laborers in employment, to demand or receive, either directly or indirectly, from any worker or laborer, employed through his or her agency or worked or continued in employment under his or her direction or control, any fee, commission or gratuity of any kind or nature as the price or condition of the employment of any such worker or laborer, or as the price or condition of his or her continuance in such employment." Subsection (2) goes on to make such conduct a misdemeanor.

<sup>47</sup> On remand, the district court affirmed the Labor Commissioner's ruling that the Wynn did not violate [NRS 608.100](#) and [NRS 613.120](#). Order at 2, *Baldonado v. Tanckek*, No. A-10-622879-J (Nev. Dist. Ct. 8th Apr. 14, 2014). However, this subsequent district court order was not appealed to the Nevada Supreme Court.

<sup>48</sup> Chapter 608 provides a definition for "employer" under [NRS 608.011](#) as "every person having control or custody of any employment, place of employment or any employee," which the Nevada Supreme Court has interpreted to exclude individual management-level corporate employees. See *Boucher v. Shaw*, 124 Nev. 1164, 1170, 196 P.3d 959, 963 (Nev. 2008). However, NRS 608.160 uses the word "person" instead, which is not defined in the chapter. See [NRS 608.160](#).

<sup>49</sup> CAL. LAB. CODE § 351; see also *id.* § 350 (defining agent as "every person other than the employer having the authority to hire or discharge any employee or supervise, direct, or control the acts of employees").

<sup>50</sup> See *Jameson v. Five Feet Rest., Inc.*, 107 Cal. App. 4th 138, 143–44 (2003) (casino floor managers were "agents" of the employer because their duties included hiring, disciplining, and scheduling).

<sup>51</sup> See *Budrow v. Dave & Buster's of Cal., Inc.*, 171 Cal. App. 4th 875, 884 (2009) (no violation for sharing pooled tips with non-tipped employees); *Leighton v. Old Heidelberg, Ltd.*, 219 Cal. App. 3d 1062, 1068–69 (1990) (employer-mandated tip-pooling is not a taking).

and beverage servers first came under the protection of the law.<sup>52</sup> Section 3(m) was revised to establish the tip credit and included the following language:

The preceding 2 sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.<sup>53</sup>

Although the two sentences preceding this provision apply only to cases in which a tip credit is taken, the DOL has long taken the position that the limitations on tip pooling contained in Section 3(m) apply equally to all employers, not just those who credit tips toward their minimum wage obligations.<sup>54</sup> However, several federal courts, most recently the Ninth Circuit Court of Appeals, have rejected the DOL's position and refused to find violations of the FLSA where tips are shared with non-tipped employees, but no tip credit is taken.<sup>55</sup>

In light of recent opinions,<sup>56</sup> the DOL has announced that it will not attempt to enforce its position in the Ninth Circuit until the conflict is resolved.<sup>57</sup> If the Ninth Circuit's interpretation of the statute ultimately prevails, the only restrictions on distribution of pooled tips in Nevada would be those established by Nevada law. If not, then the distribution of pooled tips in Nevada would be restricted by federal law to those employees who customarily and regularly receive tips.

---

<sup>52</sup> PUB. L. NO. 89-601, §§ 101(a), 201, 80 Stat. 830, 830, 837 (1966).

<sup>53</sup> 29 U.S.C. § 203(m) (2012).

<sup>54</sup> See, e.g., 29 C.F.R. § 531.54 (2014) ("which can only include those employees who customarily and regularly receive tips"); *Fact Sheet No. 15: Tipped Employees Under the Fair Labor Standards Act*, DEP'T OF LAB. (July 2013), <http://www.dol.gov/whd/regs/compliance/whdfs15.pdf> (A valid tip pool may not include employees who do not customarily and regularly receive tips, such as dishwashers, cooks, chefs, and janitors"); Opinion Letter Fair Labor Standards Act (FLSA), WH-536, 1989 WL 610348 (Oct. 26, 1989) (even without a tip credit, "where tips are redistributed to employees who do not customarily and regularly receive tips, an employee who has originally received tips will be considered to have contributed all such improperly redistributed tips to the employer for purposes of determining whether he or she has received the minimum wage, free and clear").

<sup>55</sup> *Cumbie v. Woody Woo, Inc.*, 596 F.3d 577, 582 (9<sup>th</sup> Cir. 2010); *Cesarz v. Wynn Las Vegas, LLC*, No. 2:13-cv-00109-RCJ-CWH, 2014 U.S. Dist. LEXIS 3094 (Jan. 10, 2014), *appeal docketed*, No.14-15243 (9<sup>th</sup> Cir. Feb. 10, 2014); see also *Platek v. Duquesne Club*, 961 F. Supp. 835, 839 (W.D. Pa. 1995) (noting 3(m) applies only to wages and not tips, so it does not apply where there is no tip credit).

<sup>56</sup> See *Cumbie*, 596 F.3d at 582; *Or. Rest. & Lodging v. Solis*, 948 F. Supp. 2d 1217, 1227 (D. Or. 2013), *appeal docketed*, No.13-35765 (9<sup>th</sup> Cir. Aug. 22, 2013).

<sup>57</sup> See *Fact Sheet No. 15*, *supra* note 54, at \*2 n.1 ("As a matter of enforcement policy, the Department has decided that it will not enforce its tip retention requirements against any employer that has not taken a tip credit in jurisdictions within the Ninth Circuit while the federal government considers its options for appeal of the decision.").

### III. Compulsory Gratuities and Service Charges

It has long been a typical practice in the food and beverage industry to add mandatory gratuities or service charges to checks for banquet groups and large parties. This ensures equitable tip income for the employees serving such large groups while designating the payments as tip income for tax purposes. In a 2012 ruling, however, the Internal Revenue Service (IRS) defined “tips” to include only those amounts given at the customer’s sole discretion, excluding any payments, regardless of their characterization, that are required or mandated by the employer.<sup>58</sup> Thus, any such payments are considered (and taxed as) wages to the extent that they are paid to the employees.

Likewise under the FLSA, a compulsory service charge is not a tip for purposes of Sections 3(m) and 3(t) and may be retained in whole or in part by the employer.<sup>59</sup> But if the compulsory charge is designated or identified by the employer as a “gratuity” or “tip,” it is still treated as tip income subject to the restrictions set forth in Section 3(m) and the employer is not permitted to retain any part of the charge, at least when the employer is crediting employee tips toward the minimum wage. The extent to which such restrictions apply in Nevada is subject to the same disagreement identified earlier—whether the tip provisions of the FLSA apply equally to employers who do not take a tip credit.<sup>60</sup>

### IV. Collective Bargaining Agreements

The 2006 Minimum Wage Amendment to the Nevada Constitution included the following exemption for union contracts:

B. The provisions of this section may not be waived by agreement between an individual employee and an employer. All of the provisions of this section, or any part hereof, may be waived in a bona fide collective bargaining agreement, but only if the waiver is explicitly set forth in such agreement in clear and unambiguous terms. Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute, or be permitted, as a waiver of all or any part of the provisions of this section.<sup>61</sup>

---

<sup>58</sup> Rev. Rul. 2012-18, 2012-26 I.R.B. 1032.

<sup>59</sup> **29 C.F.R. § 531.55 (2014).**

<sup>60</sup> See, e.g., *Lu v. Jing Fong Rest., Inc.*, 503 F. Supp. 2d 706, 710 (S.D.N.Y. 2007) (compulsory service charge is not a tip); *Chan v. Sung Yue Tung Corp.*, Case No. 03 Civ. 6048(GEL), 2007 WL 313483, at \*14 (S.D.N.Y. Feb.1, 2007), *abrogated on other grounds by Barenboim v. Starbucks Corp.*, 698 F.3d 104 (2d Cir. 2012) (compulsory charge was identified as a “tip” and thereby became the property of the employee to whom it was given).

<sup>61</sup> **NEV. CONST. art. 15, § 16(A).**

The FLSA, however, contains no such exemption,<sup>62</sup> reducing the foregoing to only allow a union and employer to negotiate a wage higher than the federal minimum, but below the state minimum wage.

## V. Other Issues

### A. Industrial Insurance

A Nevada employee's "average monthly wage" for purposes of calculating workers' compensation benefits and employer premiums includes only those tips he or she has reported to the employer pursuant to 26 U.S.C. § 6053(a)<sup>63</sup> The United States Code provision, which is part of the Internal Revenue Code, requires all employees to report their tips to their employer within ten days of the end of the month.<sup>64</sup> This should be done on IRS Form 4070 (Employee's Report of Tips to Employer).<sup>65</sup> Only tips reported prior to the date of injury may be included.<sup>66</sup>

However, the Nevada Administrative Code defines "average monthly wage" in more detail to include both tips reported to the employer pursuant to NRS 616C.227 and "[t]ips which are collected and disbursed by the employer which are not paid at the discretion of the customer."<sup>67</sup> Automatic gratuities and service charges, to the extent they are distributed to the employees, are included in the average monthly wage regardless of how they are characterized, since they would be included as ordinary wages, if not tips.

### B. Unemployment Compensation

Likewise, an employee's wages for purposes of calculating unemployment compensation benefits include only those tips timely reported to the employer in accordance with 26 USC § 6053(a).<sup>68</sup> The wage is not affected by any subsequent amended tax filings and does not include tips reported more than ten days after the end of the month in which they were received.<sup>69</sup>

---

<sup>62</sup> [29 U.S.C. § 213 \(2012\)](#).

<sup>63</sup> [NRS 616A.065\(2\)\(b\)](#); [616B.227\(4\) \(2013\)](#). Further, tips amounting to less than \$20 per month and in forms other than cash are excluded from the average monthly wage. [616A.065\(2\)\(b\)\(1\), \(2\)](#).

<sup>64</sup> [26 U.S.C. § 6053\(a\) \(2012\)](#).

<sup>65</sup> Prior to 1991, the employee's report of tips to the employer were not required on any particular form. See NRS 616.027 (effective until 1991); NRS 616.401 (replaced in revision by NRS 616B.227 (1995)); see also *Donner v. State Indus. Ins. Sys.*, 799 P.2d 570, 573 (Nev. 1990) (average monthly wage includes tips periodically reported to the IRS but not to the employer). But see *State Indus. Ins. Sys. v. Woodall*, 799 P.2d 552, 556 (Nev. 1990) (employee was not eligible for disability compensation based on tips reported only in an annual tax return filed after date of the injury). The statute was revised in 1991 to specify the required manner of reporting tips for industrial insurance purposes. 1991 Nev. Stat. 2399 (adding "pursuant to [26 U.S.C. § 6053\(a\)](#)").

<sup>66</sup> [NRS 616B.227\(4\)](#).

<sup>67</sup> [NAC 616C.423\(1\)\(g\), \(h\) \(2012\)](#).

<sup>68</sup> [NRS 612.190\(1\)\(b\) \(2013\)](#).

<sup>69</sup> *Id.*

## **VI. Conclusion**

The various legal regulations and consequences associated with tip income continue to develop, particularly with respect to tip pooling practices. Nevada law is relatively settled and leaves employers considerable discretion in the implementation and enforcement of those practices. Conflicts among the federal courts and the DOL, however, leave substantial doubt. Counsel will be well advised to consider all the possible ramifications of tip income and to check for further changes in the law whenever faced with an issue relating to tips.

# The Enforceability of Non-Compete Agreements in Nevada, Including an Analysis of Geographic Limitations

*By Robert Rosenthal*<sup>1</sup>

## Introduction

Nevada jurisprudence has long recognized the legality of contractual non-compete agreements.<sup>2</sup> Generally speaking, if an agreement is reasonable in terms of its geographic scope and time, it will be enforced. Historically, Nevada courts have been reluctant to extend non-competes beyond Las Vegas, Reno, Clark County, and Nevada. However, due to the Internet, companies that previously conducted business in only one particular town or state are now able to offer their services globally. As a consequence, should Nevada courts still consider geographic restrictions reasonable, meaningful, or viable? This article discusses the basic legal requirements of non-compete agreements in Nevada, analyzes whether or not conventional concepts of geographic restrictions still apply, and addresses what a proponent of such an agreement must prove in order to obtain a preliminary injunction.

---

<sup>1</sup> Robert Rosenthal is an attorney with the law firm of Howard & Howard, and is licensed to practice in Nevada and California. Rosenthal serves as the partner in charge of Howard & Howard's labor and employment group in Las Vegas, where his practice emphasizes providing counseling and litigation-related advice to businesses and individuals on a variety of matters, particularly with respect to non-compete agreements and employment contracts.

<sup>2</sup> For the purpose of this article, a non-compete agreement is defined as a contract which restricts or limits a party from competing with a business after termination of employment.



## 1. State Statutes Governing Non-Compete Agreements

Nevada Revised Statute 613.200 provides:

Prevention of employment of person who has been discharged or who terminates employment unlawful; criminal and administrative penalties; exception.

...

4. The provisions of this section do not prohibit a person, association, company, corporation, agent or officer from negotiating, executing and enforcing an agreement with an employee of the person, association, company or corporation which, upon termination of the employment, prohibits the employee from:

- (a) Pursuing a similar vocation in competition with or becoming employed by a competitor of the person, association, company or corporation; or
- (b) Disclosing any trade secrets, business methods, lists of customers, secret formulas or processes or confidential information learned or obtained during the course of his or her employment with the person, association, company or corporation,<sup>3</sup>

if the agreement is supported by valuable consideration and is otherwise reasonable in its scope and duration.

---

<sup>3</sup> NRS 613.200(4). The proscriptions contained in the Nevada Unfair Trade Practices Act, at NRS 598A.010-.280 specifically do not apply to restrictive covenants, “which are part of a contract of sale for a business and which bar the seller of the business from competing with the purchaser of the business sold within a reasonable market area for a reasonable period of time.” NRS 598A.040(5)(a). Presumably, the proscriptions would be applicable at least to unreasonable employment agreement covenants. NRS 598A.030 provides,

1. The legislature hereby finds that:
  - (a) The free, open and competitive production and sale of commodities and services is necessary to the economic well-being of the citizens of the State of Nevada.
  - (b) The acts of persons which result in the restraint of trade and commerce:
    - (1) Act to destroy free and open competition in our market system and, thereby, result in increased costs and the deterioration in quality of commodities and services to the citizens of the State of Nevada.
    - (2) Result in economic hardships in the form of increased consumer prices and increased taxes upon many citizens of the State of Nevada least able to bear such increased costs.
2. It is the policy of this state and the purpose of this chapter to:
  - (a) Prohibit acts in restraint of trade or commerce, except where properly regulated as provided by law.
  - (b) Preserve and protect the free, open and competitive nature of our market system.
  - (c) Penalize all persons engaged in such anticompetitive practices to the full extent allowed by law, in accordance with the penalties provided herein.

## **2. What Is an Employer's Protectable Interest?**

Customer contacts and good will are protectable interests, but only in geographic areas where the former employer has done business.<sup>4</sup> In *Camco, Inc. v. Baker*, the Nevada Supreme Court held that a non-compete was unreasonable, and consequently unenforceable, as to a city in which the former employer had not signed a lease or begun construction of a store, or a future territory for possible expansion.<sup>5</sup>

## **3. What Is the Employer's Burden of Proof in Order to Demonstrate the Existence of an Enforceable Non-Compete Agreement?**

A former employer must be able to demonstrate that the non-compete agreement is supported by consideration and that its terms are reasonable.<sup>6</sup> With respect to "reasonableness," Nevada still looks to the case of *Hansen v. Edwards*, 83 Nev. 189, 426 P.2d 792 (Nev. 1967), where the court explained,

"[a]n agreement on the part of an employee not to compete with his employer after termination of the employment is in restraint of trade and will not be enforced in accordance with its terms unless the same are reasonable. Where the public interest is not directly involved, the test usually stated for determining the validity of the [non-competition] covenant as written is whether it imposes upon the employee any greater restraint than is reasonably necessary to protect the business and good will of the employer. A restraint of trade is unreasonable, in the absence of statutory authorization or dominant social or economic justification, if it is greater than is required for the protection of the person for whose benefit the restraint is imposed or imposes undue hardship upon the person restricted. The period of time during which the restraint is to last and the territory that is included are important factors to be considered in determining the reasonableness of the agreement."<sup>7</sup>

## **4. Does the Execution of a Non-Compete Agreement at the Inception of an Employment Relationship Provide Sufficient Consideration to Render the Agreement Enforceable?**

Nevada case law does not specifically address the question of what amount or type of consideration is sufficient to support a non-compete agreement. However, the Nevada Supreme

---

<sup>4</sup> *Camco, Inc. v. Baker*, 113 Nev. 512, 936 P.2d 829 (Nev. 1997).

<sup>5</sup> *Id.* at 520, 936 P.2d at 834.

<sup>6</sup> *See id.* at 518, 936 P.2d at 832.

<sup>7</sup> *Hansen*, 83 Nev. at 191-92, 426 P.2d at 793 (citations omitted); *see also Ellis v. McDaniel*, 95 Nev. 455, 458-59, 596 P.2d 222, 224 (Nev. 1979) ("There is no inflexible formula for deciding the ubiquitous question of reasonableness. However, because the loss of a person's livelihood is a very serious matter, post-employment anti-competitive covenants are scrutinized with greater care....").

Court in *Hansen* ruled that non-compete agreements executed at the inception of employment are legal and binding.<sup>8</sup>

## **5. Will a Change in the Terms and Conditions of Employment Provide Sufficient Consideration to Support a Non-Compete Agreement Which Was Executed After Employment Began?**

Nevada courts have yet to address this issue. However, the Nevada Supreme Court has analyzed the enforceability of a non-compete agreement on a former employee when a business sells its interests. In *Traffic Control Services, Inc. v. United Rentals Northwest, Inc.*, 120 Nev. 168, 87 P.3d 1054 (Nev. 2004), the court addressed the question whether a non-compete entered into between an employer and employee is assignable and enforceable by the employer's purchaser. The court held that a non-compete agreement is not enforceable by a purchaser of a business because such a covenant is personal in nature and, therefore, unassignable as a matter of law, unless the employee expressly consented to its assignment and was given separate and independent consideration.<sup>9</sup> In reaching its decision, the court reasoned that, "[t]he sale of a business fundamentally alters the nature of an employment relationship."<sup>10</sup>

## **6. Will Continued Employment Provide Sufficient Consideration to Support a Non-Compete Agreement Which Was Entered Into After the Employee Began Working?**

In *Camco, Inc. v. Baker*, the Nevada Supreme Court held that continued employment constituted valid consideration for an at-will employee's post-hire agreement not to compete with a former employer. The court in *Camco* adopted the majority position on this issue, explaining:

[t]his court has held that an at-will employee's 'continued employment' after formal delivery of [an employment] handbook provides sufficient consideration for modifying the employment agreement by inclusion of the handbook provisions. We agree. A non-competition provision is no more than a modification to the original employment contract, and thus the law articulated in *Southwest Gas* is dispositive.<sup>11</sup>

The court in *Camco* also noted that, "[c]ourts have concluded that in an at-will employment context 'continued employment' is, as a practical matter, equivalent to the employer's 'forbearance to discharge'; many courts have concluded that the consideration is equally valid phrased as a benefit to

---

<sup>8</sup> *Hansen*, 83 Nev. at 192, 426 P.2d at 793.

<sup>9</sup> *Traffic Control Servs., Inc.*, 120 Nev. at 172, 87 P.2d at 1057.

<sup>10</sup> *Id.*, 120 Nev. at 172, 87 P.2d at 1058.

<sup>11</sup> *Camco*, 113 Nev. at 517, 936 P.2d at 832.

the employee or a legal detriment to the employer.<sup>12</sup> Finally, the court concluded, “There is no substantive difference between the promise of employment upon initial hire and the promise of continued employment subsequent to ‘day one’.”<sup>13</sup>

## **7. What Factors Do Nevada Courts Use to Determine Whether Time and Geographic Restrictions in the Non-Compete Are Reasonable?**

The Nevada Supreme Court has yet to formally re-examine the geographic location and period of time non-competes will last in view of the globalizing nature of the economy. Accordingly, the current list of decisions has consistently defined the enforceable time period of non-competes, as well as narrowly construed their geographic limitations.<sup>14</sup>

## **8. Who Has the Burden of Proving the Reasonableness or Unreasonableness of the Non-Compete?**

The question of who has the burden of proof as to reasonableness or unreasonableness has not been specifically addressed by Nevada case law. Presumably, like most jurisdictions, the employer bears this burden in an action seeking to enforce a non-compete agreement.<sup>15</sup>

## **9. What Type of Time or Geographic Restrictions Has the Court Found to Be Reasonable?**

### **Reasonable:**

In *Ellis v. McDaniel*, the court held that an orthopedic surgeon’s two-year non-compete agreement, which was limited to the practice of general medicine only (not orthopedic surgery), and in the geographic area serviced by a medical clinic (five-mile radius of Elko), was reasonable.<sup>16</sup>

### **Reasonable:**

In *Hansen v. Edwards*, the court determined that a non-compete which limited a podiatrist from competing in the City of Reno was reasonable. (Note that the agreement did not include a time limitation; therefore, the court unilaterally applied a one-year limitation period.)<sup>17</sup>

---

<sup>12</sup> *Id.*, 113 Nev. at 517, 936 P.2d at 832 fn.7; see *Mattison v. Johnston*, 730 P.2d 286, 286 (Ariz. Ct. App. 1986); *Zellner v. Stephen D. Conrad, M.D., P.C.*, 183 A.D.2d 250 (N.Y. App. Div. 1992).

<sup>13</sup> *Camco*, 113 Nev. at 517, 936 P.2d at 832; see *Copeco, Inc. v. Calg*, 632 N.E.2d 1299, 1301 (Ohio 1992).

<sup>14</sup> See *Ellis v. McDaniel*, 95 Nev. at 459, 596 P.2d at 224 (holding that non-compete was enforceable in 5-mile radius of Elko and limited to two years); see also *Sheehan & Sheehan v. Nelson*, 121 Nev. 481, 491, 117 P.3d 219, 225 (Nev. 2005) (upholding covenant not to compete that did not prevent signatory to agreement from performing work for independent entity located outside geographic restriction, regardless of whether signatory resided in and conducted business within geographic limitation).

<sup>15</sup> See *Howard Schultz & Assocs. v. Broniec*, 236 S.E.2d 265, 268 (Ga. 1977); *Ma & Pa, Inc. v. Kelly*, 342 N.W.2d 500, 502, (Iowa 1984); *Snyder’s Drug Stores, Inc. v. Sheehy Props., Inc.*, 266 N.W.2d 882, 885 (Minn. 1978).

<sup>16</sup> *Ellis*, 95 Nev. at 459-60, 596 P.2d at 225.

### **Unreasonable:**

In *Camco, Inc. v. Baker*, the court examined a set of four non-compete agreements purporting to bar four former pawn shop management employees (one store manager, two regional managers, and one director of operations) from competing in any area within 50 miles of (1) any store either existing or under construction, and (2) any location targeted for corporate expansion by the employer. The court held the restriction “applying to areas ‘targeted’ by Camco for ‘corporate expansion’ is completely unreasonable.”<sup>18</sup>

### **Unreasonable:**

In *Jones v. Deeter*, 112 Nev. 291, 913 P.2d 1272 (Nev. 1996), the court considered a non-compete which contained a five-year limitation within a 100-mile radius of the former employer. The court ruled that the non-compete was unreasonable and entirely unenforceable because it placed too great a hardship on the former employee and was not reasonably necessary to protect the former employer’s interests.<sup>19</sup>

### **Unreasonable:**

In *Hotel Riviera v. Torres*, 97 Nev. 399, 632 P.2d 1155 (Nev. 1981) (trial court affirmed by Nevada Supreme Court on different grounds), the court held that a non-compete which contained an unlimited time period was unreasonable, and by extension, unenforceable.<sup>20</sup>

## **10. Can the Court Modify a Non-Compete Agreement?**

Courts in Nevada have not hesitated to modify, or “blue pencil” non-compete agreements if their terms are overbroad. For example, in *Ellis v. McDaniel*, the court modified the non-compete in order to permit plaintiff to practice orthopedic surgery, observing that:

Although an injunction against Dr. Ellis’ practice as a general practitioner is a reasonable restraint in order to protect the good will of the Elko Clinic, a prohibition against his practice as an orthopedic surgeon, a specialty in which none of the doctors at the Clinic is engaged, is not justified.... Thus, in the instant case, the public interest in retaining the services of the specialist is greater than the interest in protecting the integrity of the contract provision to its outer limits. Finally, assessing the relative hardships, we conclude that the loss to Dr. Ellis and the public by enforcing the covenant is far in excess of the threatened danger to the clinic resulting from a limited enforcement of the restriction to permit Dr. Ellis to practice his

---

<sup>17</sup> *Hansen*, 83 Nev. at 191, 426 P.2d at 793.

<sup>18</sup> *Camco*, 113 Nev. at 520, 936 P.2d at 834.

<sup>19</sup> *Jones*, 112 Nev. at 296, 913 P.2d at 1275.

<sup>20</sup> *Hotel Riviera*, 97 Nev. at 400-01, 632 P.2d at 1156-57.

specialty. We therefore exercise our equitable powers by denying enforcement of the covenant to the extent it purports to prohibit Dr. Ellis from practicing orthopedic surgery. Concurrently, we will enforce the covenant by prohibiting Dr. Ellis from engaging in the general practice of medicine within the time and space limitations set out in the contract.<sup>21</sup>

## **11. If the Employer Terminates the Employment Relationship, Is the Covenant Enforceable?**

Nevada case law does not specifically address this question; however, several Nevada district court judges have stated orally and in trial orders that it is relevant whether or not an employee was terminated with or without cause.<sup>22</sup>

## **12. If the Court Finds an Employee Has Breached a Non-Compete, Will the Court Measure the Period of Injunction From the Date of Termination of Employment or From the Date of the Court Order?**

Nevada courts use both starting dates. In *Hansen v. Edwards, supra*, the court held, “[t]he circumstances of this case warrant a confinement of the area of the restraint to the boundary limits of the City of Reno and a time interval of one year commencing February 10, 1967, the date of the [issuance of the] injunction.”<sup>23</sup> However, in *Ellis v. McDaniel, supra*, the court concluded, “[W]e will enforce the covenant by prohibiting Dr. Ellis from engaging in the general practice of medicine within the time and space limitations set out in the contract.”<sup>24</sup>

## **13. Forum Selection Clauses and Choice of Law**

Under Nevada law, “parties are permitted to select the law that will govern the validity and effect of their contract.”<sup>25</sup> However, the following limitations are imposed on the right to choose the applicable law: “The parties are required ... to act in good faith and not for the purpose of evading the law of the real situs of the contract. Additionally, the situs must have a substantial relationship to the transaction and the agreement must not be contrary to the public policy of the forum.”<sup>26</sup>

---

<sup>21</sup> *Ellis*, 95 Nev. at 459-60, 596 P.2d 222, 224-25.

<sup>22</sup> See, e.g., Trial Order, *Jenson Total Servs., Inc. v. Thermal Dynamics, Inc.*, No. 07-A-540910, 2007 WL 7308444 (Nev. Dist. Ct. 8<sup>th</sup> Nov. 5, 2007) (J. Villani) (denying Plaintiff’s Motion for Preliminary Injunction and citing *Sifco Industries, Inc. v. Advanced Plating Techs., Inc.*, 867 F. Supp. 155 (S.D.N.Y. 1994) for the proposition that employer’s action in terminating employee without cause necessarily destroys mutuality of obligation on which covenant not to compete rests).

<sup>23</sup> *Hansen*, 83 Nev. at 192, 426 P.2d at 794.

<sup>24</sup> *Ellis*, 95 Nev. at 459, 596 P.2d 225.

<sup>25</sup> *Engel v. Ernst*, 102 Nev. 390, 395, 724 P.2d 215, 216 17 (Nev. 1986).

<sup>26</sup> *Id.*; see also *Pentax Corp. v. Boyd*, 111 Nev. 1296, 1298, 904 P.2d 1024, 1026 (Nev. 1995).



In *Engel*, the Nevada Supreme Court reviewed a lower court's decision not to enforce a choice of law provision in favor of Colorado law because, in the lower court's view, the contract contained a covenant not to compete that offended Nevada public policy. The Nevada Supreme Court concluded that, if the contract did in fact contain such a provision, it would have upheld the lower court's decision not to enforce the choice of law provision.<sup>27</sup> However, because it determined that the provision in question actually was a liquidated damages clause having legitimate underpinnings—and not a covenant not to compete of the sort that would violate Nevada public policy, the Nevada Supreme Court held that the parties' selection of Colorado law was enforceable.<sup>28</sup>

In the context of enforcing non-compete agreements, the issue of forum selection clauses appears in cases where employees work for a business in one state, but the non-compete agreement is governed by the laws of another jurisdiction. The question then becomes: which law applies? The case of *Meras Engineering, Inc., v. CH20, Inc.*, No. C-11-0389 (EMC), 2013 WL 146341 (N.D. Cal. 2013), is particularly instructive with respect to this issue because non-compete agreements are illegal in California (there are several narrow exceptions).<sup>29</sup> In *Meras Engineering*, two California residents signed employment agreements whereby they agreed to be bound by the laws of Washington State. They proceeded to directly compete with their employer, and the employer sued under them in Washington. The employees counter-sued in California federal court, arguing that because they were California residents and conducted their work in California, their non-competes were void. The court disagreed, holding that by voluntarily signing the employment agreements, they knew they were subject to the laws of Washington State; therefore, the case had to be resolved in Washington.<sup>30</sup>

## **14. The Advent of the Internet and Its Effects on Geographical Limitations Contained in Non-Compete Agreements**

Non-compete agreements constitute a venerable and important part of how businesses legitimately protect their confidential information and customer relationships. Clearly, Nevada courts view such provisions with skepticism and they are narrowly construed. However, with the advent of the Internet, companies that used to sell their products or services within a limited geographic area are now able to conduct business on a global scale. Accordingly, companies that sell products and services solely online require national, and sometimes international, geographic scopes

---

<sup>27</sup> See *Engel*, 102 Nev. at 395-96, 724 P.2d at 217.

<sup>28</sup> *Id.*

<sup>29</sup> See California Business & Professions Code § 16600 *et seq.*, and *Edwards v. Arthur Andersen LLP*, 189 P.3d 285 (Cal. 2008).

<sup>30</sup> *Meras Eng'g., Inc.*, 2013 WL 146341 at \*15. It is critical to draft forum selection clauses very carefully. Courts scrutinize whether the specific language of a forum selection clause is exclusive, and therefore mandatory, not permissive, and whether the language encompasses the particular claims raised. A lack of clarity or ambiguity in the language of a forum selection clause or resulting from coterminous, inconsistent agreements weighs against finding forum selection to be mandatory. A well drafted clause includes exclusive language and an express waiver of objections to personal jurisdiction and to venue, and is not inconsistent with clauses in other agreements that may be part and parcel of the relationship between the parties.

in order to adequately protect the companies' legitimate business interests. Although the Internet presents new issues in determining the reasonableness of a geographic restriction, courts have applied the public policy considerations behind non-compete laws to find a solution. Surprisingly, courts have had few opportunities to address the particular issue of how the Internet affects the reasonableness of a geographic scope within a non-compete provision.

One unpublished case from the Eighth Judicial District Court in Las Vegas took on the issue of a non-compete provision that contained a very wide-reaching geographic restriction. In *Network Learning, Inc. v. Sisy*, Case No. 08-A-577960 (Nev. Dist. Ct. 8<sup>th</sup> 2009), the defendant executed a non-compete agreement with his employer that restricted him from working for a competitor for two years throughout the United States. The defendant eventually resigned from Network Learning and formed his own business for the purpose of directly competing with the plaintiff in the identical jurisdictions where Network Learning offered its services. The district court granted Network Learning's motion for a preliminary injunction throughout the United States, but decreased the time restriction to one year. In reaching its decision, the district court stated:

I don't believe that Defendants have really offered anything new or of substance such that the injunction should be denied. As I indicated before, it's a discretionary, somewhat fact-based decision every time I get one of these. I will agree that normally the ones I get are the ones that are easier from a territorial standpoint whether it's plumbers—I think our last one was a pest control service, but basically the same type where it is localized. So the cases from around the country, and most of them obviously are federal court cases, were very instructive. I still need to use the Nevada standard on these.

The cases that have been cited to the Court on what is essentially an unlimited territorial non-compete clause underscored the point that Mr. Rosenthal made that where a plaintiff can show, for instance, a national customer base that such a territorial restriction might be appropriate.

...I don't believe that under these specific facts of this case the geographical restriction within the United States is overbroad given their national scope, limited customer base and the widespread nature of the customer base across the nation. So I think the geographical restriction in this case is not overbroad. Given that unlimited geographical restriction in considering the potential harm to Mr. Sisy, I am going to find that the time period is unduly restrictive. Even the Nevada courts, in *Hansen* they modified the non-compete clause to one year and limited it to in the Reno city limits. I can tell, the greater the territorial limitation, the shorter the potential restriction on the employee's right to work. So I'm going to find that the time period here is unduly restrictive, modify it to one year from the date of termination which was May of 2008. I'm going to grant the preliminary injunction under those

circumstances. I'm going to order that the Defendants are enjoined from utilizing any property, data, or information owned or originating or generated by the Plaintiff or its customers. I am going to enjoin the Defendant from contacting customers and clients of the Plaintiff; [and] ... from engaging in activities in direct competition with Plaintiff, and from being employed with any company competing with Plaintiff.<sup>31</sup>

## **15. Under What Circumstances Are Courts Likely to Enforce a Non-Compete With No Geographical Limits?**

One scenario where courts will enforce non-competes with no geographic limits is where the employee, either because of the large size of the company, or because technology like the Internet allowed a small company to reach a large geographical area, actually worked for the employer in a national or global capacity. For example, in *Coates v. Heat Wagons, Inc.*, 942 N.E.2d 905 (Ind. App. 2011), the former employer manufactured, sold, and leased large heaters in steel mills, portable heater units, heater parts, air conditioning systems and related goods; the restrictive covenant provided, in part, that the former employee would not compete with his former employer by directly or indirectly working with any company involved in the “manufacture, marketing, leasing, distribution, or sale of products in, or services related to, heaters or heating or air conditioning systems and related parts and components markets in any of the states listed on Exhibit A, attached hereto.”<sup>32</sup> Later, it became known to the former employer that the former employee had a side business, unknown to the former employer, which competed in one market, namely, the market for the sale of portable heater parts. The former employer then filed suit against the former employee. The appellate court upheld the trial court’s order granting the former employer a preliminary injunction enforcing the restrictive covenant. The appellate court also affirmed the trial court’s decision to blue pencil the restrictive covenant’s geographical scope, wherein the trial court struck from the restrictive covenant those states with which the former employee did not have contact while employed by his former employer. Accordingly, the restrictive covenant, as upheld, prohibited the former employee from competing in the 13 states with which he did, in fact, have contact while employed by his former employee.<sup>33</sup>

Similarly, the court in *Talk Fusion, Inc. v. Ulrich*, No. 8:11-CV--T-33AEP, 2011 WL 2681677 (M.D. Fla. June 21, 2011), upheld a non-solicitation agreement with a broad geographical scope that encompassed “all markets in which Talk Fusion conducts business.”<sup>34</sup> The business at issue in that case involved the sale of video communication products for personal and commercial use. The former independent contractor sales associates began to work for a competitor, and began soliciting

---

<sup>31</sup> Transcript of Hearing on Plaintiff’s Motion for Preliminary Injunction, *In Network Learning, Inc. v. Sisyphe*, Case No. 08-A-577960, at 23-27 (Nev. Dist. Ct. 8<sup>th</sup> Feb. 12, 2009) (on file with author).

<sup>32</sup> *Coates*, 942 N.E.2d at 910.

<sup>33</sup> *Id.* at 921.

<sup>34</sup> *Talk Fusion, Inc.*, 2011 WL 2681677, at \*6.

other of Talk Fusion’s independent contractor sales associates to work for the competitor. In the independent contractor agreement, the former independent contractors had acknowledged and agreed that “because network marketing is conducted through networks of independent contractors disbursed across the entire United States and internationally, and business is commonly conducted via the Internet and telephone, an effort to narrowly limit the geographic scope of this non-solicitation provision would render it wholly ineffective. Therefore, Associates and Talk Fusion agree that this non-solicitation provision shall apply to all markets in which Talk Fusion conducts business.”<sup>35</sup> The court held that “[i]n light of the dynamic and wide-reaching nature of digital sales and social media-based marketing, and the highly restrictive temporal scope of the restrictive covenant [six months],” the geographic scope was reasonable.<sup>36</sup> The court, in effect, found that the very nature of the business meant that the former independent contractors had competed across the entire United States and internationally.<sup>37</sup> Accordingly, like *Coates*, the *Talk Fusion* case turned on the broad geographic nature of the business.

Another enforcement scenario involving a non-compete with a broad geographic scope exists in the scenario of a highly-ranked employee, or an employee in possession of highly sensitive competitive information. In *Zambelli Fireworks Mfg. Co., Inc. v. Wood*, 592 F.3d 412 (3<sup>rd</sup> Cir. 2010), plaintiff owned and operated one of the oldest and largest fireworks companies in the country, doing business in more than 40 states. The former employee worked for the company for seven years. The former employer, a family company with no family member who wanted take over the company, believed that the former employee was going to be the “next generation” and “future of the company,” a belief which led the former employer to pay for the former employee to get specialized certifications and licensing. The former employer ended up being acquired by another, larger company, and the former employee did not like the changes to the company. The former employee then left and went to work for a competitor. The Third Circuit Court upheld the district court’s holding enforcing the nation-wide restrictive covenant.<sup>38</sup> The court was primarily interested in the fact that the former employer had a legitimate business interest in its customer goodwill, and in the specialized training and skills that the former employee acquired on their dime, while working for them. Due to the highly sensitive information possessed by the former employee, the court was unconcerned about the national geographic scope, the somewhat lengthy two-year restriction, and the very broad scope of prohibited activity, namely, the fact that the former employee was prohibited from “engage[ing] in any manner in the pyrotechnic business.”<sup>39</sup>

---

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Zambelli Fireworks Mfg. Co.*, 592 F.3d at 416.

<sup>39</sup> *Id.*

Courts have also permitted broad geographic limitations where the scope of the restrictive covenant is narrowly tailored to address only particular clients and/or products or services with which the former employee actually worked during the course of his or her employment. In *Salas v. Chris Christensen Systems, Inc.*, No. 10–11–00107–CV, 2011 WL 4089999 (Tex. App. Waco Sep. 14, 2011), the former employer manufactured and distributed high quality dog grooming products used by dog show enthusiasts around the world. The former employee, Salas, was the Vice-President of Sales and Education Director. On appeal, the appellate court upheld the trial court’s imposition of a permanent injunction, which enjoined the former employee from “directly or indirectly interfere[ing] with, or endeavoring] to entice away from the Company any clients or account with whom the Employee had direct contact with at any time during his or her employment at Company, or for or with any other person, firm, corporation, partnership, joint venture, association, or other entity whatsoever, which is or intends to be engaged in providing or manufacturing pet supplies and related products manufactured and distributed by Company.”<sup>40</sup> The court upheld the five-year temporal limitation of the agreement, and although the non-compete did not contain a geographical limitation, the court found that “limiting the applicability of the covenant to particular client bases is an acceptable substitute for a geographic limitation in a non-compete agreement.”<sup>41</sup>

Similarly, in *Preferred Sys. Solutions, Inc. v. GP Consulting, LLC*, 732 S.E.2d 676 (Va. 2012), the Supreme Court of Virginia held that “[t]he lack of a specific geographic limitation is not fatal to the covenant [in that case] because the non-compete clause is so narrowly drawn to this particular project and the handful of companies in direct competition....”<sup>42</sup> The plaintiff, an information technology contractor for the federal Defense Logistics Agency, subcontracted with the defendant, a consulting firm that provided the services of one of its programmers. The subcontractor agreement contained a 12-month non-compete, providing that it would not directly or indirectly “(a) enter into a contract as a subcontractor with Accenture, LLP and/or DLA to provide the same or similar support that PSS is providing to Accenture, LLP and/or DLA and in support of the DLA Business Systems Modernization (BSM) program; [or] (b) enter into an agreement with a competing business and provide the same or similar support that PSS is providing to Accenture, LLP and/or DLA and in support of the DLA Business Systems Modernization (BSM) program.”<sup>43</sup> The defendant ultimately terminated its subcontractor and began working for Accenture, doing the same work for Accenture that it did for the plaintiff. The plaintiff successfully sued and was awarded \$172,395.96 in compensatory damages for defendant’s breach of the non-compete agreement. The defendant challenged this award on appeal, but it was affirmed.<sup>44</sup>

---

<sup>40</sup> *Salas*, 2011 WL 4089999, at \*18-\*19.

<sup>41</sup> *Id.* at \*19.

<sup>42</sup> *Preferred Sys. Solutions, Inc.*, 732 S.E.2d at 682.

<sup>43</sup> *Id.* at 680.

<sup>44</sup> *Id.* at 690.

Finally, in *KJR Management Co., LLC v. First Web Search, LLC*, a Nevada district court judge held that because the employer's computer search optimization and marketing business was highly competitive and not limited by traditional geographic considerations, the non-compete agreement signed by the employee was enforceable throughout the United States.<sup>45</sup>

## **16. What Must an Employer Prove to Obtain a Preliminary Injunction in Order to Enforce a Non-Compete Agreement?**

In order to obtain a preliminary injunction, an employer must meet the requirements of Nev. R. Civ. P. 65. Thus, a preliminary injunction seeking to preserve the status quo is normally available upon a showing that the party seeking it enjoys a reasonable probability of success on the merits and that the defendant's conduct, if allowed to continue, will result in irreparable harm for which compensatory damages is an inadequate remedy.<sup>46</sup>

In determining whether a former employer enjoys a reasonable probability of success on the merits of its case seeking an injunction to enforce a non-compete, the court must consider whether the provisions of the covenant are likely to be found reasonable at trial.<sup>47</sup> Lack of a subsequent employer's privity to a covenant not to compete does not bar the former employer from obtaining injunctive relief against the subsequent employer if the subsequent employer breached the covenant in active concert with the principal party subject to the covenant and with knowledge of the covenant.<sup>48</sup> As explained by the Nevada Supreme Court in *Las Vegas Novelty v. Fernandez*:

The court's failure to specifically articulate its reasons for issuing a permanent injunction does automatically void the injunctive order if the reasons for the injunction are readily apparent somewhere in the record and are sufficiently clear to permit meaningful appellate review. *Id.* at 118, 787 P.2d at 775; *see also Sowers v. Forest Hills Subdivision*, 129 Nev. --, --, 294 P.3d 427, 434 (2013). If the court had merely enjoined Alfred [the former employee] according to the terms of the covenant, the injunctive order would be reviewable and, hence, valid, because the reasons for its issuance are apparent elsewhere in the record and meaningful appellate review would be possible. Absent a statement of reasons, this court

---

<sup>45</sup> Trial Order, *KJR Mgmt. Co., LLC v. First Web Search, LLC*, No. A549570, 2009 WL 6597820, at \*3 (Nev. Dist. Ct. 8<sup>th</sup> Jan. 6, 2009)(citing *VAIS Arms, Inc. v. Vais*, 383 F.3d 287, 295-96 (5<sup>th</sup> Cir. 2004); *Natsource LLC, Paribello*, 151 F. Supp. 2d 465 (S.D.N.Y. 2001); *Weseley Software Dev. Corp. v. Burdette*, 977 F. Supp. 137, 144 (D. Conn. 1997); *Marcam Corp. v. Orchard*, 885 F. Supp. 294, 299 (D. Mass. 1995); and *Business Intelligence Servs., Inc. v. Hudson*, 580 F. Supp. 1068, 1073 (S.D.N.Y. 1984)); *see also Accelerated Care Plus Corp. v. Diversicare Mgmt. Servs. Co.*, No. 3:11-cv-00585-RCJ-RAM, 2011 WL 3678798, at \*4 (D. Nev. Aug. 22, 2011) (granting temporary restraining order enforcing non-competition agreement with one-year duration and unlimited geographical scope against two former management level employees and new employer).

<sup>46</sup> *See Camco v. Baker*, 113 Nev. at 520, 936 P.2d at 834.

<sup>47</sup> *Id.*

<sup>48</sup> *Las Vegas Novelty v. Fernandez*, 106 Nev. 113, 787 P.2d 772 (Nev. 1990).

cannot meaningfully review the limitations on enforcement of the covenant imposed by the district court. Why the district court limited the radius of enforcement from 20 miles to 10 miles from [the former employer] is especially unclear, given [the former employer's] allegations and affidavits suggesting that some of [its] important clients are located ... between 10 and 20 miles from (the former employer's business)].<sup>49</sup>

## 17. How Can an Employer Establish Irreparable Harm?

A former employer must show irreparable harm in order to obtain an injunction enforcing a noncompetition covenant, but the court need not reach that issue where the former employer has failed to show a reasonable likelihood of success on the merits.<sup>50</sup> The district court maintains discretion in determining whether to grant a preliminary injunction, and the Nevada Supreme Court will only reverse a decision “where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact.”<sup>51</sup> The Nevada Supreme Court has found that “acts committed without just cause which unreasonably interfere with a business or destroy its credit or profits, may do an irreparable injury.”<sup>52</sup> The court has also found that a district court’s finding of evidence that a former employee competed with his former employer, solicited his former employer’s employees, disparaged his former employer and disclosed his former employer’s confidential information, and misappropriated its trade secrets supports a demonstration of irreparable harm.<sup>53</sup>

## 18. What Damages Can an Employer Recover?

The substantial risk of losing patients to an employee is itself an adequate basis for a reasonably designed restraint.<sup>54</sup> In the short time that Hansen opened his office after terminating the employment contract, he acquired approximately 180 of Edwards’ customers. The court held that Edwards should have the opportunity to recoup this loss and, in addition, to readjust his office routine which had previously been geared to Hansen’s association.<sup>55</sup>

---

<sup>49</sup> *Id.*, 106 Nev. at 119, 787 P.2d at 776.

<sup>50</sup> See *Camco*, 113 Nev. at 18, 936 P.2d at 834; *Boulder Oaks Cmty. Ass’n v. B & J Andrews Enters., LLC*, 125 Nev. 397, 403, 215 P.3d 27, 31 (Nev. 2009).

<sup>51</sup> *Boulder Oaks Cmty. Ass’n*, 125 Nev. at 403, 215 P.3d at 31 (internal quotations omitted).

<sup>52</sup> *Sobol v. Capital Mgmt.*, 102 Nev. 444, 446, 726 P.2d 335, 337 (Nev. 1986); see also *Finkel v. Cashman Prof’l, Inc.*, 270 P.3d 1259, 1263 (Nev. 2012) (holding that district court’s finding of evidence that former employee competed with former employer, solicited former employer’s employees, disparaged former employer and disclosed former employer’s confidential information, and misappropriated its trade secrets supports demonstration of irreparable harm).

<sup>53</sup> *Finkel*, 270 P.3d at 1263.

<sup>54</sup> See *Hansen*, 83 Nev. at 192, 426 P.2d at 793-94.

<sup>55</sup> *Id.*

A plaintiff may not recover liquidated damages for a merely technical violation of a non-compete agreement; to trigger a liquidated damages clause, the breach must be material.<sup>56</sup>

## Conclusion

Clearly, the Internet and the new world-wide nature of commerce have thrown a monkey wrench into well-established principles governing non-competes. Limiting the geographic scope of non-compete agreements to a particular city or state is simply no longer realistic. Claims that geographic restrictions have become obsolete are premature, as more and more courts have demonstrated a willingness to take on the issue. Further, if employers take more care in drafting their agreements and justify within the contracts why the geographic restriction is so broad, courts will be more inclined to enforce them and grant injunctive relief.

---

<sup>56</sup> See *Sheehan & Sheehan*, 121 Nev. at 491, 117 P.3d at 225 (sale-of-business context).



# A Few Unique Nevada Employment Laws You Ought to Know

*By Jeffrey D. Winchester*<sup>1</sup>

## Introduction

You may have noticed that during slow news weeks, the media often dredges up stories about wild and whacky local statutes and ordinances. It should come as no surprise, then, that Battle Born Nevada would have a number of unusual and unique statutes applicable to the employer-employee relationship. After all, how many other states have a two-tiered minimum wage scheme that hinges upon whether or not the employer provides health insurance benefits? (The answer: none.) Here are some of the more obscure Nevada employment law statutes that every Nevada legal practitioner should know.

## One Bourbon, One Scotch, and One Beer

The image of Nevada as the “Wild West” replete with drinking, gambling, and the use of a wide variety of tobacco products is not only promoted by the Nevada Department of Tourism, those activities are protected by state law. Under NRS 613.333, employers may not discharge or otherwise discriminate against an employee who engages in “the lawful use ... of any product outside the premises of the employer during the employee’s nonworking hours, if that use does not adversely affect the employee’s ability to perform his or her job or the safety of other employees.”<sup>2</sup> Thus, as long as the employee’s “Wild West” mentality is checked at the door, the consumption of legal substances during his or her personal time cannot be the basis of discipline or discharge. And just to show it was serious, unlike many of Nevada’s anti-discrimination statutes, the Nevada Legislature

---

<sup>1</sup> Vice President, Employment Law, Caesars Entertainment Corporation. The author wishes to thank Caitlin Lorelli, Boyd School of Law, for her assistance with this article.

<sup>2</sup> [NRS 613.333\(1\)](#)

endowed this law with some real teeth: potential double damages, court costs, and attorneys' fees, in addition to a court order that the employee be re-employed.<sup>3</sup>

## **I Heard It Through the Grapevine**

We are all aware of the ancient proverb: “speak no evil.” But we all know how hard it can be when that certain employee has made life miserable for you and your staff for months and, sometimes, years, before moving on to other opportunities. Employers may be tempted to let unsuspecting colleagues know what they may be in for if they hire that former employee. However, pursuant to NRS 613.210, Nevada employers may not publish lists of former employees with the intent of preventing such former employees from obtaining work with another employer. Moreover, under NRS 613.200, anyone who “willfully does anything intended to prevent any person who for any cause left or was discharged from his, her, or its employ from obtaining employment in this State” is in violation of the law. Both statutes provide for fines and criminal misdemeanor penalties.

There is some good news for employers who are concerned an employee might run to a competitor with customer lists and trade secrets: the law carves out “reasonable” non-compete and trade secret agreements to afford employers protection of their freedoms as well.<sup>4</sup> Accordingly, employers should take care in reviewing non-compete and trade secret agreements to make sure they fall within the realm of reasonableness.<sup>5</sup>

## **Hey Good Lookin' What Ya Got Cookin'?**

As one of the many perks of being a Nevadan, “[a]ll uniforms or accessories distinctive as to style, color or material shall be furnished, without cost, to employees by their employer.”<sup>6</sup> Thus, as the casino-goers' revered saying goes, “it's on the house!” The perk does not stop there: the statute provides “[i]f a uniform or accessory requires a special cleaning process, and cannot be easily laundered by an employee, such employee's employer shall clean such uniform or accessory without cost to such employee.”<sup>7</sup>

If a Nevada employer wishes to require employees to provide their own scrubs, for example, they may do so, so long as the color and design of the scrubs is up to the employee. Likewise, employers may require employees to bring their own tools to work so long as, once again, the employee gets to pick the brand and type of tools he or she wishes to use.

---

<sup>3</sup> [NRS 613.333\(2\) - \(3\)](#)

<sup>4</sup> [NRS 613.200](#)

<sup>5</sup> See *Jones v. Deeter*, 112 Nev. 291, 913 P.2d 1272 (Nev. 1996) (finding five-year, 100-mile non-compete to be unenforceable).

<sup>6</sup> [NRS 608.165](#)

<sup>7</sup> *Id.*

## Brother, Can You Spare a Dime?

The saying goes “you break it, you bought it,” but under Nevada law this applies to employees only if the agreement to pay for the mistake is in writing. Other than “dues, rates or assessments becoming due to any hospital association or to any relief, savings or other department or association maintained by the employer or employees for the benefit of the employees,” employers may deduct amounts from paychecks only pursuant to written authorization by the employee.<sup>8</sup> For example, an employer cannot withhold wages to account for shortages in a casino cashier’s drawer. However, the Nevada Supreme Court held that, so long as the casino cashier voluntarily signs shortage slips that specify the shortage amount and the paycheck from which the amount will be withheld, the employer is authorized to withhold the amount of the shortage from the employee’s wages.<sup>9</sup> An employer is not prohibited from having a reimbursement policy such as this as long as the deduction is authorized in writing by the employee, and an employer may require written acknowledgement in writing prior to the commencement of employment.<sup>10</sup> Employers must be cautious, however, as employers “may not use a blanket authorization that was made in advance by the employee to withhold any amount from the wages due the employee.”<sup>11</sup>

The lesson: employers should never make unauthorized deductions from an employee’s pay, and should always get a signed, written authorization. Moreover, “at the time of payment of wages or compensation, the employer shall furnish the employee with an itemized list showing the respective deductions made from the total amount of wages or compensation.”<sup>12</sup>

## Breaking Up Is Hard to Do

Just like that memorable scene in the Tom Cruise movie *Jerry Maguire*, terminated Nevada employees will be yelling “show me the money!” as they exit the premises. This is because when an employee in Nevada is discharged, his or her final wages are “due and payable immediately.”<sup>13</sup> Although employers are given a three-day grace period to provide fired employees with their final paychecks, if an employer does not provide a final paycheck within three days, a penalty is assessed at the employee’s daily wage rate for up to 30 days.<sup>14</sup> When an employee resigns, the applicable statute gives the employer more leeway—the employer is required to give the employee his or her final

---

<sup>8</sup> [NRS 608.110\(1\)](#)

<sup>9</sup> *Coast Hotels & Casinos, Inc. v. Nevada State Labor Comm’n*, 117 Nev. 835, 34 P.3d 546 (Nev. 2001).

<sup>10</sup> *Id.* at 842.

<sup>11</sup> [NAC 608.160](#)

<sup>12</sup> [NRS 608.110\(2\)](#)

<sup>13</sup> [NRS 608.020](#)

<sup>14</sup> [NRS 608.040\(1\)](#)

paycheck at the next regular payday or seven days after the date of resignation, whichever comes first.<sup>15</sup>

## **It's Been a Hard Day's Night**

Nevada is known as a 24-hour state, and in turn Nevada recognizes a 24-hour workday. A “[w]orkday’ means a period of twenty four (24) consecutive hours which begins when the employee begins work.”<sup>16</sup> The implication and often overlooked effect of this statute is daily overtime for those who earn less than 1.5 times the minimum wage. For instance, if an employee works from 3 p.m. to 11 p.m. and is scheduled to come in at 1 p.m. the following day, the first two hours of work on the following day must be paid at the daily overtime rate, provided the employee is otherwise entitled to daily overtime.

## **I Owe My Soul to the Company Store**

Times have progressed since the hit song *Sixteen Tons*, about the days when workers were paid with non-transferable credit vouchers that could only be exchanged for goods sold at company stores in lieu of cash, was performed by Tennessee Ernie Ford. In Nevada, NRS 613.140 frees employees to shop, sleep, and eat wherever they like. “Any person or persons, employer, company, corporation or association ... who by coercion, intimidation, threats or undue influence compels or induces his or her employees to trade at any particular store or board at any particular boardinghouse in this state shall be guilty of a misdemeanor.”<sup>17</sup> This does not mean that employers cannot offer discounts on food, beverage, lodging, and other amenities, but rather, they cannot force their employees to take advantage of those deals.

## **Can't Get No Satisfaction**

Following the old adage “ask and you shall receive,” Nevada employers must give employees “a reasonable opportunity, during the usual hours of business, to inspect any records kept by that employer” on that employee.<sup>18</sup> Not all employees are entitled to see a copy of their personnel files; under NRS 613.075, if the employee worked for the employer for less than 60 days or if the request to inspect comes more than 60 days after termination, the employer may lawfully deny the request to inspect the file.<sup>19</sup>

The statute refers to files “containing information used by the employer ... to determine the qualifications of that employee and any disciplinary action taken against the employee, including

---

<sup>15</sup> [NRS 608.030](#)

<sup>16</sup> [NRS 608.0126](#)

<sup>17</sup> [NRS 613.140](#)

<sup>18</sup> [NRS 613.075\(1\)\(a\)](#)

<sup>19</sup> [NRS 613.075\(4\); 613.075\(7\)](#)

termination from that employment.”<sup>20</sup> However, the “records to be made available do not include confidential reports from previous employers or investigative agencies, other confidential investigative files concerning the employee or person referred or information concerning the investigation, arrest or conviction of that person for a violation of any law.”<sup>21</sup> Thus, when investigating employee misconduct, employers should keep a separate “confidential investigative file,” discoverable only pursuant to a subpoena or discovery request in the course of litigation.

## **You’re (Not) the One**

Contrary to popular belief, there are some forms of discrimination that are permissible in Nevada employment law. For instance, effective October 1, 2011, under Nevada law it is okay for a religious-based “school, college, university or other educational institution or institution of learning to hire and employ employees of a particular religion.”<sup>22</sup> Additionally, it is not unlawful to terminate or refuse to hire someone who is “subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any executive order of the President” and fails to meet the requirements.<sup>23</sup>

## **Conclusion**

The Silver State has a unique sense of mystery and intrigue, so why should its employment laws not include some similar uniqueness? These are only a few of the unusual employment laws here in Nevada—and the only thing certain is that the laws here will continue to develop in uncommon ways.

---

<sup>20</sup> [NRS 613.075\(1\)\(a\)\(1\)](#)

<sup>21</sup> [NRS 613.075\(1\)](#)

<sup>22</sup> [NRS 613.350\(4\)](#)

<sup>23</sup> [NRS 613.370](#)

# **An Enigma Inside a Puzzle: “Confidential” and “Special” Relationships and Their Limited Application in the Employment Context**

*By Carol Davis Zucker*<sup>1</sup>

## **I. Introduction**

A recent development in employment law has been the slight uptick in cases where an employee or former employee has sued her employer for breach of a “confidential” or “special” relationship. Such a claim asserts the employer failed in a duty to its employee that is fiduciary in nature, rather than contractual or in breach of any one of a number of common law or statutory duties, and seeks damages based upon the employer’s breach of an obligation to act in the best interests of the employee rather than itself. While the majority of courts have rejected these types of claims in the employment context, several have recognized rare circumstances in which such a special relationship may be found in employment, providing the employee with an additional, independent cause of action.<sup>2</sup>

For instance, a New York court rejected a cause of action by long-time television reporter Dan Rather, who alleged CBS News breached a “special relationship” based in large part upon his long-term tenure with CBS. Had he been successful, Rather could have recovered damages despite CBS’s compliance with the parties’ detailed employment contract.<sup>3</sup> Conversely, federal courts applying Colorado law found a breach of a “special confidential relationship” between a U.S. employer and an

---

<sup>1</sup> Carol Davis Zucker is a shareholder at Kamer Zucker Abbott which exclusively represents management in labor and employment law matters.

<sup>2</sup> See *DerKevorkian v. Lionbridge Techs., Inc.*, 316 Fed. Appx. 727, 737-39 (10<sup>th</sup> Cir. Dec. 3, 2008); *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 621-22 (9<sup>th</sup> Cir. 2004).

<sup>3</sup> *Rather v. CBS Corp.*, 68 A.D. 3d 49, 55-56, 886 N.Y.S. 2d 121, 125 (2009).

at-will French national employee, after the employer, by way of a program it offered, failed to secure promised legal permanent U.S. residency for her.<sup>4</sup>

In 2012, the federal district court in Nevada rejected the existence of a “confidential relationship” under Nevada law where a group of employees sued their employer over a salary and commission dispute. There, the plaintiffs requested the court impose a constructive trust on certain monies of the employer.<sup>5</sup> One element of a constructive trust is the existence of a “confidential relationship.”<sup>6</sup> Observing that plaintiffs faced a “steep burden,”<sup>7</sup> the court flatly rejected the existence of a special or confidential relationship, observing that such a relationship did not ordinarily exist between an employee and employer, and that there was no parent/child, attorney/client, or partner/co-partner relationship where fiduciary duties typically exist.

To date, the Nevada Supreme Court has not issued a published opinion in which it charged an employer with owing fiduciary obligations to one of its employees, except in the context of the tortious, bad-faith discharge of a long-term employee in breach of his employment contract.<sup>8</sup> As demonstrated in this article, it would be inappropriate to impose fiduciary duties upon an employer in the employment relationship except in the most unusual cases where an employer takes on an additional role, separate from the employer-employee relationship, that itself would create a fiduciary or similar relationship.

This article first explores and analyzes Nevada’s construction of “fiduciary,” “confidential” and “special” relationships (which impose similar duties), in the context of claims for a breach of those duties, as well as when the existence of such a relationship is an element of other claims. Next, this article reviews the few cases where courts have considered whether a “special” or “confidential” relationship existed in the employment context. Finally, this article sets forth the reasons why a breach of a “confidential” or “special” relationship claim is inappropriate in the vast majority of employment cases.

---

<sup>4</sup> *Derkevorkian v. Lionbridge Techs., Inc.*, No. CIV. 04CV01160LTBCBS, 2007 WL 638717, at \*5 (D. Colo. Feb. 27, 2007), *aff’d in relevant part*, 316 Fed. Appx. 727, 737-39 (10<sup>th</sup> Cir. 2008).

<sup>5</sup> *Rivard-Crook v. Accelerated Payment Techs., Inc.*, No. 2:10-cv-2215-MMD-GWG, 2012 WL 6138229 (D. Nev. Dec. 10, 2012). To establish a constructive trust, the claimant must prove that: (1) the “circumstances under which the property was acquired makes it inequitable that it should be retained by him who holds the legal title,” (2) a confidential relationship exists, and (3) recognition of the trust is necessary to prevent an injustice. *Randono v. Turk*, 86 Nev. 123, 128, 466 P.2d 218, 221-222 (Nev. 1970) (quoting from *Schmidt v. Merriweather*, 82 Nev. 372, 375, 418 P.2d 991, 993 (Nev. 1966)).

<sup>6</sup> *Rivard-Crook*, 2012 WL 6138229, at \*3.

<sup>7</sup> *Id.* at \*5.

<sup>8</sup> *K-Mart Corp. v. Ponsock*, 103 Nev. 39, 48, 732 P.2d 1364, 1370 (Nev. 1987). See discussion *infra* at 16-18.

## II. Fiduciary Relationships in Nevada

Aimed at protecting the “weaker” or less knowledgeable party in specific business interactions, a “fiduciary relationship is deemed to exist when one party is bound to act for the benefit of the other party. Such a relationship imposes a duty of utmost good faith.” In a fiduciary relationship, the parties “do not deal on equal terms,” as the “person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the weaker or dependent party.”<sup>9</sup>

The Nevada Supreme Court has identified a number of specific “fiduciary relationships” that arise by operation of law. These can be broken roughly into two groups. The first group can be viewed as “fiduciaries by contract,” where the objective of the parties’ agreement is the performance of the fiduciary duty. In such circumstances, a fiduciary with superior knowledge, training or education becomes bound to a weaker or less sophisticated party to provide the services or advice of the fiduciary. These include the relationships of attorney and client,<sup>10</sup> physician and patient,<sup>11</sup> joint venturers,<sup>12</sup> and investor and investment advisor.<sup>13</sup> Also explicitly contractual is the insurer-insured relationship, where the insurer specifically agrees, in advance and for payment, to protect the insured from the economic losses that flow from a specified harm by compensating the insured in the event of a specified loss. The Nevada Supreme Court has referenced these duties as either “akin” to a fiduciary relationship<sup>14</sup> or “fiduciary in nature.”<sup>15</sup>

The second group of “fiduciary” relationships arise by operation of law, but not by contract, such as the fiduciary relationship between a corporate officer or director and a corporation,<sup>16</sup> between fiancés,<sup>17</sup> and between spouses, where there exists “a duty [of one spouse] to disclose [to the other]

---

<sup>9</sup> *Hoopes v. Hammargren*, 102 Nev. 425, 431, 725 P.2d 238, 245 (Nev. 1986) (the physician-patient relationship is fiduciary in nature, and “is based on trust and confidence” and quoting *Barbara A. v. John G.*, 145 Cal. App. 3d 369, 193 Cal. Rptr. 422, 432 (1983)); *Stalk v. Mushkin*, 125 Nev. 21, 28, 199 P.3d 838, 843 (Nev. 2009) (citing and quoting Restatement (Second) of Torts § 874 cmt. a (1979)).

<sup>10</sup> See, e.g., *In re Jane Tiffany Living Trust*, 124 Nev. 74, 77-78, 177 P.3d 1060, 1062-63 (Nev. 2008); *Cook v. Cook*, 112 Nev. 179, 183, 912 P.2d 264, 266 (Nev. 1996); *Williams v. Waldman*, 108 Nev. 466, 471, 836 P.2d 614, 618 (Nev. 1992).

<sup>11</sup> *Hoopes*, 102 Nev. at 431, 725 P.2d at 245.

<sup>12</sup> *Leavitt v. Leisure Sports Incorporation*, 103 Nev. 81, 86, 734 P.2d 1221, 1224 (Nev. 1987).

<sup>13</sup> *Randono v. Turk*, 86 Nev. at 129, 466 P.2d at 222.

<sup>14</sup> *Powers v. United Servs. Automobile Ass’n*, 115 Nev. 38, 42, 979 P.2d 1286, 1288, (Nev. 1999).

<sup>15</sup> *Powers v. United Servs. Automobile Ass’n*, 114 Nev. 690, 701, 962 P.2d 596, 603 (Nev. 1998). The Ninth Circuit Court of Appeals, construing Nevada law, considers such duties to be “fiduciary relationships.” *Giles v. General Motors Acceptance Corp.*, 494 F.3d 865, 881 (9<sup>th</sup> Cir. 2007).

<sup>16</sup> *Leavitt*, 103 Nev. at 86, 734 P.2d at 1224.

<sup>17</sup> *Fick v. Fick*, 109 Nev. 458, 464, 851 P.2d 445, 449-50 (Nev. 1993) (fiancés owe each other the duty “to act with good faith and fairness to the other”) (citing *Sogg v. Nevada State Bank*, 108 Nev. 308, 312, 832 P.2d 781, 784 (Nev. 1992)).



pertinent assets and factors relating to those assets.”<sup>18</sup> The Nevada Supreme Court has noted that a fiduciary relationship is “particularly likely to exist” in other personal relationships, but requires additional facts be introduced besides the mere existence of a family relationship.<sup>19</sup>

### III. “Confidential” and “Special” Relationships in Nevada

So-called “confidential” or “special” relationships impose duties similar to fiduciary relationships, and are usually found to exist *ad hoc* based upon the conduct, statements and intent of the parties to a specific transaction or set of interactions. The Nevada Supreme Court has used the labels “confidential” and “special” somewhat interchangeably in designating the relationship, and sometimes interchangeably with “fiduciary.” One example involves insurer-insured relationships, where the Nevada Supreme Court referred variously to the relationship at issue as a “special relationship”<sup>20</sup> and “akin” to a fiduciary relationship or “fiduciary in nature.”<sup>21</sup> In the employment context, the Nevada Supreme Court found a “special relationship,” with duties “similar to the insured-insurer” relationship, between an employer and employee under a narrow and unique set of circumstances associated with a tortious breach of the implied covenant of good faith and fair dealing in an employment contract.<sup>22</sup>

Nevada courts have identified a “confidential” relationship in the context of either a claim alleging breach of that confidential relationship,<sup>23</sup> or as one element of either a claim for constructive fraud<sup>24</sup> or to impose the remedy of a constructive trust.<sup>25</sup> The grounds for finding the existence of a “special” and a “confidential” relationship are generally the same: The facts demonstrate one party placed confidence in the other party because of the person’s position, the latter party purported to act in the party’s interest, and knew or should have known of this confidence.<sup>26</sup>

In 1982, in *Long v. Towne*, the Nevada Supreme Court analyzed the elements of a “confidential relationship” in the context of a claim for constructive fraud brought by a purchaser of a lot in a mobile home park against the seller and the homeowners’ association.<sup>27</sup> The Court determined that a

---

<sup>18</sup> *Williams v. Waldman*, 108 Nev. at 472, 836 P.2d at 618.

<sup>19</sup> *Liapis v. District Court*, 128 Nev. Adv. Op. 39, 282 P.3d 733, 738 (Nev. 2012).

<sup>20</sup> *Ainsworth v. Combined Ins. Co.*, 104 Nev. 587, 592, 763 P.2d 673, 676 (Nev. 1988).

<sup>21</sup> *Powers v. United Servs. Automobile Ass’n*, 115 Nev. at 41-42, 979 P.2d at 1288.

<sup>22</sup> See discussion at pages 41-44, *infra*.

<sup>23</sup> *Perry v. Jordan*, 111 Nev. 943, 946, 900 P.2d 335, 337 (Nev. 1995).

<sup>24</sup> *Long v. Towne*, 98 Nev. 11, 13, 639 P.2d 528, 529-30 (Nev. 1982).

<sup>25</sup> *Randono v. Turk*, 86 Nev. at 128, 466 P.2d at 221-22.

<sup>26</sup> *Mackintosh v. California Fed. Sav. & Loan Ass’n*, 113 Nev. 393, 401, 935 P.2d 1154, 1159 (Nev. 1997).

<sup>27</sup> 98 Nev. 11, 13, 639 P.2d 528, 529-30 (1982).

confidential relationship did not exist, holding that case to involve a typical “vendor-vendee” relationship.<sup>28</sup>

In *Long*, the lot’s purchaser refused to pay the homeowners association assessments and charges, which led to the placement of a lien on the property making the property subject to foreclosure.<sup>29</sup> The purchaser sued the seller and the homeowners association, contending they committed constructive fraud in holding the foreclosure sale.<sup>30</sup> Noting that “[c]onstructive fraud is characterized by breach of a duty arising out of a fiduciary or confidential relationship,”<sup>31</sup> the Court defined the duty of the superior party in a confidential relationship as being the same as in a fiduciary relationship:

A “confidential or fiduciary relationship” exists when one reposes special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence.<sup>32</sup>

The purchaser was at least on notice of the facts; the Court observed that she had received copies of the covenants, conditions and restrictions (CC&Rs) on the property, as well as the rules of the homeowners association that permitted the assessments and the right of the association to foreclose and sell the property for failure to pay.<sup>33</sup> Because the plaintiff did “not trust” the seller, this could not be a “confidential” relationship. Because it was an arm’s-length transaction, the Court rebuffed the efforts of the purchaser to obtain relief from her obligations.<sup>34</sup>

A number of years later, in *Mackintosh v. California Federal Savings & Loan*, the Nevada Supreme Court reviewed another property sale transaction, this time finding what it termed a “special” relationship between the purchaser and the bank, which was both the seller of the property and the lender on the transaction. The Court there elaborated on the circumstances that would lead it to find a fiduciary obligation such that the failure to disclose a defect was a fraudulent concealment.<sup>35</sup>

The facts of *Mackintosh* were easily distinguished from *Long*. There, a bank offered to sell a house “as is” when it knew the house had serious basement flooding.<sup>36</sup> After the purchaser offered to pay the full asking price, the bank responded with a counteroffer making but one change – a requirement

---

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 12, 639 P.2d at 529.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 13, 639 P.2d at 529-30.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 12, 639 P.2d at 529.

<sup>34</sup> *Id.* at 13, 639 P.2d at 529-30.

<sup>35</sup> *Mackintosh v. California Fed. Sav. & Loan Ass’n (Mackintosh II)*, 113 Nev. at 401-403, 935 P.2d at 1159-1160.

<sup>36</sup> *Id.* at 395, 935 P.2d at 1156. The bank had obtained the house through foreclosure. *Id.*

that the purchaser obtain financing through the same bank.<sup>37</sup> This new condition, which the buyer accepted, was inconsistent with the bank's policy and one, the Nevada Supreme Court noted, that made the bank interested in making the sale at the same time it was to become the lender.<sup>38</sup> The bank did not inform the purchaser of the "material defect" in the house.<sup>39</sup> Likewise weighty for the Court was the evidence that a third-party lender without interest in making the sale would not have lent money on the home until the flooding was corrected.<sup>40</sup> Because the bank insisted on financing the purchase and made a few interim repairs, the purchaser reasonably believed the bank would disclose any other defects.<sup>41</sup> After the sale, the purchaser learned of the defect and sued for damages or rescission of the sale. The bank cited the sales contracts "as-is" clause in its defense.<sup>42</sup>

The Nevada Supreme Court focused on the doctrine of fraudulent concealment, observing that a duty to disclose ("to speak") could arise without a "fiduciary" relationship. Such a duty may arise, said the Court, where "one party imposes confidence in the other because of that person's position, and the other party knows of this confidence."<sup>43</sup> Although noting a "seller/lender" position creates an inference of a "special relationship," the Court noted that all facts must be considered.<sup>44</sup> The Court focused upon – and found "suspicious" – the bank's insistence that it finance the purchase against bank policy, and the purchaser's belief that, because of the financing requirement and the bank having made some repairs, the bank was aware of or would disclose any problems.<sup>45</sup>

As to the last requirement for a "special" or "confidential" relationship – that the bank be aware of the purchaser's special reliance – the evidence showed that the bank had no such actual knowledge.<sup>46</sup> The Court, however, held that actual knowledge was not needed and the plaintiff need show only "that the conditions would cause a *reasonable person* to impart special confidence in the seller/lender."<sup>47</sup> In other words, the circumstances alone should have led the bank to expect the purchaser to impart special reliance.<sup>48</sup>

---

<sup>37</sup> *Id.* at 395, 935 P.2d at 1158.

<sup>38</sup> *Id.* at 402, 935 P.2d at 1160.

<sup>39</sup> *Id.* at 395, 935 P.2d at 1158.

<sup>40</sup> *Id.* at 402, 935 P.2d at 1160.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 399, 935 P.2d at 1158.

<sup>43</sup> *Id.* at 401, 935 P.2d at 1159, *quoting Mackintosh v. California Fed. Sav. & Loan (Mackintosh I)*, 109 Nev. 628, 634-35, 855 P.2d 549, 553 (Nev. 1993).

<sup>44</sup> 113 Nev. at 401-02, 935 P.2d at 1160.

<sup>45</sup> *Id.* at 402-03, 935 P.2d at 1160.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* [emphasis in original].

<sup>48</sup> *Id.*

Not long thereafter, the Nevada Supreme Court analyzed a claim for breach of a “confidential” relationship in *Perry v. Jordan*,<sup>49</sup> and further explained the circumstances under which such a relationship could be found. In *Perry*, a sophisticated businesswoman sold her clothing boutique to her “friend” and “neighbor” and entered into a separate one-year agreement to continue to manage the business and train the purchaser’s teenaged daughters in the business.<sup>50</sup> The seller, the Court noted, was aware that the purchaser had only an eighth grade education, no retail experience, no interest in running the business, allergies and chemical sensitivities that precluded her from working in the store,<sup>51</sup> and an expressed desire for the boutique to provide future income for her daughters.<sup>52</sup> The seller made representations regarding the monthly income of the business,<sup>53</sup> but did not tell the purchaser that she had earlier listed the business for sale at a price one-third less than the sale price the two ultimately fixed.<sup>54</sup> The purchaser did not protect herself by reviewing the records of the business.<sup>55</sup> Unlike in *Mackintosh*, there was no mystery as to whether the purchaser placed reliance on the seller; the purchaser told the seller she was counting on her to make a success of the business.<sup>56</sup>

For a few months after the sale closed, the seller continued to operate the store, which still bore her name, pursuant to the management agreement. She took for herself the same amount of money she had earlier represented to be the store’s monthly earnings, obtained money when needed from the new owner/purchaser, made clear to others there would be no changes in the business, and entered into a new lease which she signed on behalf of the store as “President.”<sup>57</sup> The seller also “sold” the new owner/purchaser a computer that she in fact already owned – she had bought it when she purchased the business.<sup>58</sup> After four months, the seller walked away from the business, and it failed.<sup>59</sup>

On appeal of the jury verdict in favor of the new owner/purchaser, the Supreme Court found the existence of a “confidential relationship” and held that the seller had failed in her duty.<sup>60</sup> As with earlier decisions, the Court here noted this duty may arise out of a “fiduciary or confidential

---

<sup>49</sup> 111 Nev. 943, 900 P.2d 335 (Nev. 1995).

<sup>50</sup> *Id.* at 946-47, 900 P.2d at 337-38.

<sup>51</sup> *Id.* at 945, 900 P.2d at 337.

<sup>52</sup> *Id.* at 945, 900 P.2d at 336.

<sup>53</sup> *Id.* at 945, 900 P.2d at 336-37.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 946, 900 P.2d at 337.

<sup>58</sup> *Id.* at 945, 900 P.2d at 336.

<sup>59</sup> *Id.* at 946, 900 P.2d at 337.

<sup>60</sup> *Id.* at 948, 900 P.2d at 338.

relationship” and defined “confidential relationship” in much the same way as in earlier decisions.<sup>61</sup> The duty to speak “may arise in *any* situation where one party imposes confidence in the other because of that person’s position, and the other party knows of this confidence.”<sup>62</sup> In reliance upon the jury verdict, the Court then held there was sufficient indication of a confidential relationship.<sup>63</sup>

In finding a breach of the confidential relationship, the Nevada Supreme Court rolled together the transaction for sale of the business and the post-purchase performance under the management agreement. Taking them separately, there certainly was evidence in the sale of some concealment by the seller, but was there a “confidential” relationship with respect to this transaction? Certainly, circumstances were ripe for consideration of this theory, given the seller’s and purchaser’s friendship, the seller’s sophistication,<sup>64</sup> and the lack of education on the part of the purchaser.<sup>65</sup> The purchaser did not inspect the business records before the sale, but there was no showing the seller prevented or even discouraged her from doing so before parting with the six-figure cost. There also was no evidence that the seller “purported”<sup>66</sup> – a term meaning “claimed” or “professed”<sup>67</sup> – to act or advise the purchaser on the sale with respect to the purchaser’s interests.

It is with respect to the management contract that a traditional fiduciary duty more clearly existed. The seller worked for the new owner/purchaser in managing the shop, holding herself out and acting as “President” in signing a new lease and continuing to operate the shop as she had before, and took out the same monthly earnings as when she owned the shop.<sup>68</sup> Whether viewed as President of a corporation (if there was one), or simply as an agent, she owed a fiduciary duty to the new owner/purchaser.<sup>69</sup> Existing fiduciary law supplied the standard for the seller/President’s performance, and it was not necessary to address whether there was a “confidential” relationship. If addressed, moreover, the other elements of a “confidential” relationship were more easily satisfied under the rules laid out by Nevada courts: (a) the two were friends and neighbors; (b) there was

---

<sup>61</sup> *Id.* at 947-48, 900 P.2d at 337-38 (a confidential relationship arises when “one reposes a special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence”).

<sup>62</sup> *Id.* at 947, 900 P.2d at 337-38 [emphasis in original].

<sup>63</sup> *Id.* at 948, 900 P.2d at 338.

<sup>64</sup> *Id.* at 945, 900 P.2d at 336.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 947, 900 P.2d at 338.

<sup>67</sup> Black’s Law Dictionary (9<sup>th</sup> Edition 2009) (defining “purport” as “[t]o profess or claim, esp. falsely; to seem to be”); Oxford Modern Dictionary (defining “purport” as “appear or claim to be or do something, especially falsely; profess”) [www.oxforddictionaries.com/us/definition/american\\_english/purport](http://www.oxforddictionaries.com/us/definition/american_english/purport) (accessed August 27, 2014).

<sup>68</sup> *Mackintosh II*, 113 Nev. at 946, 900 P.2d at 337.

<sup>69</sup> See, e.g., *Leavitt*, 103 Nev. at 86, 734 P.2d at 1224 (a corporate officer has a fiduciary duty to the corporation); RESTATEMENT (THIRD) OF AGENCY § 8.01 (“An agent has a fiduciary duty to act loyally for the principal’s benefit in all matters connected with the agency relationship.”).

evidence the seller had gained the confidence of the owner/purchaser; and (c) the seller was aware of that confidence, given that the new owner/purchaser told the seller she was relying upon her to make the business successful, in order to provide jobs and income for her daughters who then were too young to work in the store, but would eventually be able to do so in light of the training the seller was to provide.<sup>70</sup>

A case by the U.S. Court of Appeals for the Ninth Circuit, *Giles v. General Motors Acceptance Corp.*, helped to distinguish a “confidential” relationship from a routine arm’s-length transaction even where the evidence demonstrated actual reliance of one party and “trust me”-type statements by the alleged fiduciary.<sup>71</sup> *Giles* involved allegations of fraud and other claims arising out of a financing agreement between the owners of a car dealership and the finance company.<sup>72</sup> Not unlike the weaker party in *Perry v. Jordan*,<sup>73</sup> the dealership’s owners did not read the contracts<sup>74</sup> and had a long-term relationship with the financing company.<sup>75</sup> One finance company representative told the owners that the “relationship was ‘like a marriage, what works for one works for the other,’” and the owners had a “personal friendship” with another representative.<sup>76</sup> The court found these facts insufficient to convert this business relationship into a “confidential” relationship.<sup>77</sup>

Review of these cases demonstrates that in Nevada, the standard for finding a “confidential” or “special” relationship, thereby imposing fiduciary obligations on one party to a transaction, is relatively straightforward – where one party, weaker in terms of knowledge or sophistication, imposes confidence in the other because of that person’s position, and that person both knows of that confidence and purports to act in the interests of the weaker party. A court is more likely to find such a relationship where, pre-transaction, the parties have a close relationship such as a long-time friendship or a family relationship; there exists a considerable disparity in business sophistication between the parties; or there is a significant difference in knowledge of the relevant facts, particularly if the reason this lack of relevant knowledge is attributable to the fiduciary and the “weaker” party would not have reason to anticipate the missing information.

---

<sup>70</sup> *Mackintosh II*, 113 Nev. at 945-46, 900 P.2d at 337.

<sup>71</sup> *Giles v. General Motors Acceptance Corp.*, 494 F.3d at 882-83.

<sup>72</sup> *Id.* at 869-87.

<sup>73</sup> 111 Nev. at 945, 900 P.2d at 336-37 (purchaser Jordan did not educate herself on the transaction by reviewing the store’s business records).

<sup>74</sup> 94 F.3d at 882.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 883.

## IV. “Confidential” and “Special” Relationships in the Employment Context in Nevada

Although Nevada courts have held that a “confidential” or “special” relationship may be found to exist in the employment context, the decisions have significantly limited this claim to exceptional circumstances, requiring some type of relationship that is unique and separate from an ordinary employment relationship. These cases have dealt with two groups of claims: claims for tortious breach of the implied covenant of good faith and fair dealing, and claims alleging the existence of a “confidential” relationship as with non-employment cases.

### A. “Special” Relationships: The Claim of Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing

Nevada’s formulation of a claim for tortious breach of the implied covenant of good faith and fair dealing requires proof of three elements:

1. Breach of an employment contract other than at-will; an at-will employee cannot bring such a claim;
2. The existence of a “special relationship of trust and reliance,” based upon more than one factor including, and at the least, longevity of employment and the employer’s adoption of another duty through providing an employee retirement plan; and
3. Termination of employment under circumstances involving dishonesty on the part of the employer.

In deciding *K Mart v. Ponsock* in 1987, the Supreme Court ventured in a limited way into “special” relationships in the employment context as an essential element of the claim for tortious breach of the implied covenant of good faith and fair dealing (or tortious “bad faith discharge”).<sup>78</sup> In so doing, the Court described the facts where such a special relationship would be found.

The facts of *K-Mart* involved a long-term employee (9 ½ years) discharged in breach of his contract of continued employment a mere six months before he was to become fully vested in K-Mart’s retirement plan under circumstances of dishonesty on the employer’s part and with the specific motive to deprive Ponsock of those benefits.<sup>79</sup>

In deciding what would constitute a “bad faith discharge,” the Court focused upon the relationship of the parties, as well as the employer’s specific motive. The Court first held that

---

<sup>78</sup> *Id.* at 51, 732 P.2d at 1372.

<sup>79</sup> *Id.* at 42, 732 P.2d 1365.

termination of employment, even in breach of an employment contract, is not equivalent to a bad faith discharge.<sup>80</sup> Ponsock's employment contract, the Supreme Court found, was not one where he was at-will,<sup>81</sup> but was created because K-Mart stipulated that the employee handbook formed "part of the contract" by which Ponsock was hired "until retirement" and for "as long as economically possible."<sup>82</sup> According to that contract, progressive discipline would be used and the company would "release" Ponsock only if he failed to improve.<sup>83</sup> K-Mart had breached the contract by terminating Ponsock without following progressive discipline.<sup>84</sup>

The Court recognized a *tort* claim for breach of the implied covenant because K-Mart and Ponsock had a "special relationship," not only because of their employment contract, but also due to Ponsock's long-term employment, plus maintenance of a retirement plan in which he was six months short of full-vesting after nearly ten years of employment.<sup>85</sup> The Court found the employer had breached its duty under the special relationship by firing Ponsock with the "unworthy motive" to deprive him of fully vesting in the retirement benefits upon which he had relied in staying with the company for those many years.<sup>86</sup> Because of this reliance, which the Court likened to an insurance contract, "a special relationship" had been formed.<sup>87</sup>

The Court, however, was emphatic in limiting its holding to the precise facts presented in *K-Mart*:

The special relationships of trust between *this* employer and *this* employee under *this* contract under *this* kind of abusive and arbitrary dismissal cries out for a relief and for a remedy beyond that traditionally flowing from a breach of contract.<sup>88</sup>

The Court further explained the nature of this tort:

The fact that such a covenant exists by legislative fiat most certainly does not mean that out of every contract can emanate a tort action. . . . A tort, however, requires the presence of a duty created by law, not merely a duty created by contract; and although a duty of good faith and fair dealing is created by law in all cases, it is only in rare and exceptional cases that the duty is

---

<sup>80</sup> *Id.* at 48, 732 P.2d. at 1370.

<sup>81</sup> *Id.* at 42, 732 P.2d at 1366.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 51, 732 P.2d at 1372.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* [emphasis in original].



of such a nature as to give rise to tort liability. *The kind of breach of duty that brings into play the bad faith tort arises only when there are special relationships between the tort-victim and the tort-feasor.*<sup>89</sup>

Since deciding *K-Mart*, the Nevada Supreme Court has remained insistent that the claim for tortious breach of the implied covenant is recognized only under a narrow set of facts, while providing further detail as to what constitutes (or does not) the “special relationship” contemplated in *K-Mart*.<sup>90</sup> Four principal cases tell the story. In the first, the Court ruled that an at-will employee cannot claim tortious breach of the implied covenant of good faith and fair dealing.<sup>91</sup> The Court held in a second case that, if the applicable retirement plan is one regulated under the Employee Retirement Income Security Act (ERISA),<sup>92</sup> the *K-Mart* formulation (*i.e.*, termination to thwart receipt of benefits under the retirement plan) would be preempted by the exclusive remedy under ERISA, which prohibits adverse employment actions motivated by the desire to interfere with receipt of the benefit.<sup>93</sup> In the third case, the Court reviewed, to some extent, the role of longevity of employment in determining whether a “special” relationship exists, by holding an employment relationship cannot develop into a “special” relationship in only two years of employment.<sup>94</sup>

In the fourth case of note, the Nevada Supreme Court found a “special relationship” between employer and employee in the unusual circumstance of a “lifetime” employment contract between a large nationwide employer and its founder, where the employment contract also provided his “retirement deal.” In *Shoen v. Amerco*,<sup>95</sup> the company’s founder alleged termination of employment in breach of his contract.<sup>96</sup> Shoen brought his sons into the business, giving them stock and high-level positions; his sons then allegedly forced their father out without cause and for inappropriate

---

<sup>89</sup> *Id.* [emphasis added].

<sup>90</sup> *Id.* at 47-52, 732 P.2d at 1369-1373. *See also* *Beales v. Hillhaven, Inc.*, 108 Nev. 96, 100, 825 P.2d 212 (Nev. 1992) (rejecting bad faith discharge claim, even though termination was for reasons other than those set forth in the contract, noting the narrow, fact-specific nature of the bad faith discharge claim in Nevada); *Marcoz v. Summa Corp.*, 106 Nev. 737, 749, 801 P.2d 1346, 1354 (Nev. 1990) (reaffirming the “narrow, fact-specific requirements” of *K-Mart*); *Smith v. Cladianos*, 104 Nev. 67, 70, 752 P.2d 233, 235 (Nev. 1988) (tortious discharge claims would be recognized in only “narrowly circumscribed circumstances” not typical of the employment relationship).

<sup>91</sup> *Martin v. Sears, Roebuck & Co.*, 111 Nev. 923, 955, 889 P.2d 951, 929 (Nev. 1995) (“[B]reach of contract and bad faith discharge are not applicable to at-will employment.”) (citing *Bally’s Employees’ Credit Union v. Wallen*, 105 Nev. 553, 555, 779 P.2d 956, 957 (Nev. 1989) (same)).

<sup>92</sup> **29 U.S.C. § 1003** *et seq.* (2014).

<sup>93</sup> **29 U.S.C. § 1140** (2014); *Marcoz*, 106 Nev. at 749, 801 P.2d at 1354. The United States Supreme Court essentially came to the same holding shortly after the Nevada Court issued the *Marcoz* decision. *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142-143, 111 S. Ct. 478, 482 (1990) (ERISA provides the exclusive remedy for claims alleging termination with the intent to avoid paying covered insurance benefits).

<sup>94</sup> *Western States Minerals v. Jones*, 107 Nev. 704, 717-18, 819 P.2d 206, 215 (1991).

<sup>95</sup> 111 Nev. 735, 896 P.2d 469 (1995).

<sup>96</sup> *Id.* at 742-43, 896 P.2d at 473-74.

reasons.<sup>97</sup> While reiterating the narrowness of this claim in Nevada, the Court found Shoen could maintain a claim for tortious breach of the implied covenant because of the nature of the relationship: The chief factors for the Court were the lifetime contract that also covered retirement, and Shoen's status as the founder of the company who gave his sons – who terminated him – their stock and brought them into the business.<sup>98</sup>

## **B. “Confidential” Relationships**

Outside of the claim for tortious breach of the implied covenant of good faith and fair dealing, the Nevada Supreme Court has not yet held that a “confidential” or “special” relationship has been created where the employer is charged with a fiduciary duty to an employee. In *Namow v. Egger*,<sup>99</sup> the Supreme Court noted an *employee's* confidential relationship with her employer when it imposed a constructive trust on property purchased with funds she had embezzled from her employer.<sup>100</sup>

In 2012, however, two Nevada federal district courts addressed whether a “confidential” relationship could exist in the employment context. In doing so, they generally followed *Perry* and the other Nevada cases, and made clear there should be some tie between employee and employer in addition to the usual employment relationship. In one case, the court found that no “confidential” relationship existed where a group of employees sought to impose a constructive trust over monies in the hands of their employer.<sup>101</sup> The plaintiffs contended that changes in their compensation plan deprived them of back commissions to which they were entitled under prior agreements.<sup>102</sup> Citing *Long*, *Mackintosh*, and *Perry*, the court rejected the plaintiffs' contention, noting significant limitations on the existence of a “confidential” relationship: “While exceptions exist to the typical rule that a garden variety employer-employee relationship is not a confidential relationship, those exceptions typically arise from fraudulent or inequitable conduct,” citing *Namow*, the Nevada Supreme Court case where an employee embezzled funds from her employer.<sup>103</sup> The Court found no allegations “of any special circumstances that take Plaintiffs' agreements . . . from an ordinary employment contract to one characterized by a ‘confidential relationship.’”<sup>104</sup> According to the court, no confidential relationship could be implied from longevity, evidence of a series of employment contracts since plaintiffs were hired, and/or a memorandum authored by a former CEO that

---

<sup>97</sup> *Id.* at 746, 869 P.2d at 476.

<sup>98</sup> *Id.* at 745-746, 896 P.2d 745-46.

<sup>99</sup> 99 Nev. 590, 668 P.2d 265 (1983).

<sup>100</sup> *Id.* at 593, 668 P.2d at 267.

<sup>101</sup> *Rivard-Crook v. Accelerated Payment Techs., Inc.*, 2012 WL 6138229, at \*4.

<sup>102</sup> *Id.* at \*1.

<sup>103</sup> *Id.* at \*4 (citing *Namow*).

<sup>104</sup> *Id.*

described how the plaintiffs should to be entitled to the commissions in the contract by which originally hired.<sup>105</sup>

This is similar to *Rather v. CBS Corp.*,<sup>106</sup> where the New York Appellate Division court rejected a claim for breach of a “confidential” or “fiduciary” relationship where the plaintiff relied upon and cited to the very long-term nature of his employment. Rather sued CBS after the network “disavowed” a 60 Minutes II broadcast he narrated that was derogatory to then-President and presidential candidate George W. Bush, made Rather apologize, and had Rather remain silent on “his belief the broadcast was true.”<sup>107</sup> He alleged that after the election, CBS informed him of his removal as evening news anchor, and failed to either make him a regular 60 Minutes reporter as promised or pay all amounts owed under his contract.<sup>108</sup> Instead, CBS kept Rather on the payroll, denied him the opportunity to “cover important news stories,” and then terminated his contract.<sup>109</sup> Rather asserted claims for breach of contract and breach of “fiduciary duty.”<sup>110</sup> The court first held there was no breach of contract, noting that CBS had no obligation to “use [Rather’s] services or broadcast any program” so long as it continued to pay him the applicable compensation, which it did.<sup>111</sup>

Rejecting Rather’s breach of fiduciary duty claim, the court first noted that “employment relationships do not create fiduciary relationships,” citing numerous New York cases.<sup>112</sup> The court went on to hold that neither Rather’s “four decade” tenure with CBS nor his claimed “status as ‘the public face of CBS News’” created a fiduciary duty on the part of CBS,<sup>113</sup> as he was represented by a leading talent agent, negotiated a very detailed 50-page contract that was “extensively amended,” and was paid a lucrative salary.<sup>114</sup> Characterizing the Rather-CBS relationship using verbiage similar to that of the Nevada Supreme Court in *Perry v. Jordan* and other cases, CBS and Rather did not have a relationship where CBS had either acted or purported to have acted or advised Rather with Rather’s interests in mind.

Another Nevada federal district court decided that a “confidential” relationship did or could exist between employees and an employer where the company gave the employees access to a program

---

<sup>105</sup> *Id.* See also *Shuffle Master, Inc., v. Smart Shoes, Inc.*, No. 2:09-cv-937, 2009 WL 3336115, at \*5 (D. Nev. Oct. 14, 2009) (rejecting the existence of a confidential relationship based upon assumption of contractual obligations).

<sup>106</sup> 886 N.Y.S.2d 121, 68 A.D.3d 49 (App. Div. 2009).

<sup>107</sup> *Id.* at 124, 68 A.D.3d at 52.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 124, 68 A.D.3d at 53-54.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 125-26, 68 A.D.3d at 55-56.

designed to assist them to obtain legal immigration status. The plaintiffs in *Hernandez v. Creative Concepts, Inc.*<sup>115</sup> were a group of undocumented aliens who used false immigration documents to obtain employment covered by a collective bargaining agreement between the employer and union. The plaintiffs alleged they were paid “lower than market wages.”<sup>116</sup> The employer gave the employees access to a program (operated by other defendants) designed to provide them with permanent resident status by filing documents with immigration authorities. The plaintiffs asserted they came to believe this program to be “deceptive” on the employer’s part and that they would not receive legal status.<sup>117</sup> The plaintiffs also maintained that they “believed” they would have to remain employed in order to attain permanent resident status.<sup>118</sup> After holding that most of the plaintiffs’ contract and tort claims against the employer were preempted<sup>119</sup> by the National Labor Relations Act<sup>120</sup> and the Labor Management Relations Act,<sup>121</sup> the court turned to the claim for breach of “confidential” relationship.

The plaintiffs in *Hernandez* contended that there existed more than the typical employment relationship because the employer knew the plaintiffs were undocumented, unsophisticated, “desperately wanted legal status,” and that the company allegedly “assured Plaintiffs . . . the plan was ‘legal and proceeding toward successful completion.’”<sup>122</sup> While noting, as did the judge in *Rivard-Crook*, that a confidential relationship generally does not arise from the employer-employee relationship, such a claim could be found if there were “additional ties.”<sup>123</sup> Citing *Perry*, the court found such an “additional tie” in the immigration program. The court relied upon evidence that the employees had “reposed special confidence” in the employer and that the employer knew or should have known of that reliance because the plan was presented by the employer, who “contracted with an outside consultant,” “legitimized the plan through an attorney,” and “assured” the employees of its likely success.<sup>124</sup> Given the position of the case at the time, a motion for summary judgment, the court did not deal with the issue as to whether the allegations were true or whether there was a breach.

*Hernandez* is not unlike the Tenth Circuit Court’s decision in *DerKevorkian v. Lionbridge Technologies, Inc.*,<sup>125</sup> where it found a confidential/fiduciary relationship arising out of the employer’s

---

<sup>115</sup> 862 F. Supp. 2d 1073, 1079-80 (D. Nev. 2012).

<sup>116</sup> *Id.* at 1080-81.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 1081-1091.

<sup>120</sup> 29 U.S.C. §§ 157-158 (2014).

<sup>121</sup> 29 U.S.C. § 185(a) (2014).

<sup>122</sup> 862 F. Supp. 2d at 1094.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> 316 Fed. Appx. 727 (10<sup>th</sup> Cir. 2008).

commitment to assist an employee in immigration matters. The plaintiff there was a legally-admitted French national employed at-will as a translator pursuant to a three-year H1-B visa (a non-immigrant work visa).<sup>126</sup> To remain in the country after those three years, the plaintiff was required by law to obtain permanent resident status (as an immigrant).<sup>127</sup> She applied for and was accepted in the company's "Permanent Resident Program" designed to "assist and support long-term employees in applying for lawful permanent resident status."<sup>128</sup> The plaintiff had to agree to work for the company for two years after obtaining the "green card," and to allow an attorney hired by the employer to handle the "green card" application.<sup>129</sup> The attorney hired by the company unmistakably worked for the employer, not the employee, as she communicated with the plaintiff only indirectly through the employer's coordinator of the Permanent Resident Program.<sup>130</sup>

There arose complications in the plaintiff's permanent residence process and delays resulting from technical legal issues and requirements posed by federal immigration law and the agencies involved.<sup>131</sup> The company declined one step proposed by the attorney due, apparently, to its cost,<sup>132</sup> as well as others proposed by the employee because of concerns regarding statements to the government that could be viewed as false.<sup>133</sup> For her part, the employee also declined to engage in steps urged by the company.<sup>134</sup> Given the built-in delays, the complications, and the inability to agree upon a course of action, the company did not submit the immigrant visa application, the H1-B visa expired, and the plaintiff had to leave the country.<sup>135</sup>

The court held that a confidential relationship is formed under Colorado law "when one party justifiably reposes confidence in another such that the parties drop their guard and assume that each side is acting fairly."<sup>136</sup> Although holding that Colorado does not recognize a tort of "breach of confidential relationship," the court went on to note that, "a confidential relationship may serve as an indication of fiduciary status."<sup>137</sup> Colorado law requires proof of the following for a breach of fiduciary duty, similar to Nevada's standards:

---

<sup>126</sup> *Id.* at 729.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 730.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 731.

<sup>135</sup> *Id.* at 731-32.

<sup>136</sup> *Id.* at 737.

<sup>137</sup> *Id.*

(1) that either the reposing of trust and confidence in the other party was justified, or the party in whom such confidence was reposed either invited, ostensibly accepted, or acquiesced in such trust; (2) the alleged trustee assumed a primary duty to represent the other party's interest in the subject of the transaction; (3) the nature and scope of the duty that arose by reason of the confidential relationship extended to the subject matter of the suit; and (4) that the duty was violated, resulting in damage to the party reposing such confidence.<sup>138</sup>

After determining the existence of a fiduciary relationship, the court noted the plaintiff's at-will status and found that the fiduciary relationship was not the employment relationship, but rather the program to obtain lawful immigration status: The plaintiff "relied" upon her employer "and its expertise and experience to assist her in obtaining whatever the documentation was necessary to remain a legal worker," and "assumed a fiduciary duty to assist her and support her in her green card application."<sup>139</sup> This was, the court noted, a "limited" duty on the part of the employer to obtain DerKevorkian's permanent residence visa: As DerKevorkian was an at-will employee who had no employment tenure rights, this limited duty increased as time passed to the day when DerKevorkian needed to receive her permanent residence visa, given the expiration of her H1-B visa.<sup>140</sup>

Under the analysis of *Hernandez* and *DerKevorkian*, even an at-will employee could claim a "confidential" – and therefore fiduciary – relationship with her employer where and to the extent the employer takes on a duty separate from and in addition to the employment relationship. That duty would be limited to the task for which the fiduciary duty arose – in *DerKevorkian*, the operation of the program to seek the permanent visa.<sup>141</sup>

## **V. Viability of Claims for Breach of "Confidential" Relationship in the Employment Relationship**

As outlined above, there is little Nevada jurisprudence on the imposition of fiduciary duties upon employers, and none from the Nevada Supreme Court. There is some indication from the two Nevada federal district court cases that to find such an obligation, there must be a relationship unique and separate from the employment relationship, what the *Hernandez* court referenced as "additional ties."<sup>142</sup> These cases, as well as *Rather* and *DerKevorkian*, well illustrate the analysis that should be followed: The "confidential" relationship should not be applicable in the employment relationship unless the employer specifically takes on a duty outside the employment relationship, in which it assumes a responsibility to act in the employee's best interest.

---

<sup>138</sup> *Id.* at 737-38.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 738 n.9.

<sup>141</sup> *Id.*

<sup>142</sup> 862 F. Supp. 2d at 1094.

There are a number of reasons a company should not be yoked to fiduciary responsibilities to its employees under ordinary circumstances in the administration of the employment relationship. The first involves the nature of the employment relationship. Unlike in fiduciary or fiduciary-like relationships outside the employment arena, a company does not employ employees simply to have employees. The very objective of the contract of employment, whether at-will or otherwise, is to hire and employ a person to act as its agent to conduct the company's or government entity's business. In particular, private businesses have a primary concern with the business (and/or the interests of the shareholders), and to operate the business in a way that either makes a profit for the owners or meets the bottom line need of a non-profit company. Government entities exist to fulfill a governmental mission and/or to provide a service to the public. Employment involves a company hiring an employee, whose work is needed to perform a job needed in the company or government entity, providing instructions as to the employee's duties and responsibilities in order to perform that job, and compensating her – monetarily and with non-cash employee benefits – for coming to work and performing the work.

At the same time, well-established common law creates fiduciary and other responsibilities on the part of an *employee* to her employer, all aimed at fostering and protecting the business that a company operates through its employees. As the company acts through its workers, all employees become its agents, who have a fiduciary responsibility to act in the best interests of the employer.<sup>143</sup> Similar statutory duties also arise from Nevada's Uniform Trade Secrets Protection Act,<sup>144</sup> prohibiting misappropriation or theft of trade secrets and, in essence, requiring an employee or former employee to maintain the confidentiality of and not use the company's trade secrets for the benefit of either the employee or any other person or company.<sup>145</sup> Imposition of fiduciary responsibilities upon an employer toward the employee would effect a change that would interfere with the basic purpose for which a business or government hires employees.

A third, equally important, reason involves the fact that, unlike most other economic relationships, each time a company hires an employee, or even considers whether to hire a candidate, the law imposes upon it a large and intricate set of additional duties designed to benefit and protect the employee as well as fulfill societal or policy goals. The more basic obligations include duties not to discriminate in hiring on the basis of certain immutable characteristics such as, for example, race or

---

<sup>143</sup> See, e.g., RESTATEMENT (THIRD) OF AGENCY § 8.01 ("An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship"). These general fiduciary principles require the agent to subordinate her interests to those of her principal – her employer – "and place the principal's interests first as to matters connected with the agency relationship." *Id.*, cmt. b. Moreover, the fiduciary principle also requires that an agent not use her position or the principal's property to benefit her, the agent, without the principal's/employer's consent. *Id.*

<sup>144</sup> [NRS Chapter 600A.](#)

<sup>145</sup> [NRS 600A.035-600A.50.](#)

gender,<sup>146</sup> real or perceived sexual orientation,<sup>147</sup> or gender identity;<sup>148</sup> to compensate “fairly,” as defined by Congress and the Nevada Legislature;<sup>149</sup> to provide health insurance to certain employees;<sup>150</sup> to provide a non-discriminatory<sup>151</sup> and safe workplace;<sup>152</sup> to provide medical treatment and compensate the employee, without regard to fault, if she is injured on the job or contracts an occupational disease;<sup>153</sup> to investigate an employee’s complaints of inappropriate treatment such as harassment<sup>154</sup> or unsafe working conditions, plus protect all aspects of the jobs of those who make complaints;<sup>155</sup> to permit an employee nearly absolute freedom to protest or advocate changes to working conditions on behalf of co-workers;<sup>156</sup> to provide protected time off from work, when the employee needs it for herself or her close relatives’ illnesses;<sup>157</sup> to fund unemployment benefit payments to former employee discharged for any reason except the employee’s gross misconduct;<sup>158</sup> to prohibit employers from demanding an employee to permit access the employee’s personal social media account;<sup>159</sup> precluding the employer from firing or otherwise discriminating against a whistleblowing employee<sup>160</sup> and to prevent the employer from preventing future employment of a former employee<sup>161</sup> or “blacklisting” her.<sup>162</sup>

---

<sup>146</sup> Title VII of the Civil Rights Act of 1964, [42 U.S.C. § 2000e](#) *et seq.* (prohibiting discrimination on the basis of race, color, national origin and gender; Age Discrimination in Employment Act, [29 U.S.C. § 626](#); [NRS 613.330](#) (prohibiting discrimination against those age 40 or above in favor of a younger employee); [NRS 613.330\(1\)](#) (prohibiting discrimination on the basis of the same characteristics as Title VII and the Age Discrimination statutes, as well as disability and real or perceived sexual orientation).

<sup>147</sup> [NRS 613.330\(1\)](#).

<sup>148</sup> *Id.*

<sup>149</sup> Fair Labor Standards Act, [29 U.S.C. § 201](#) *et seq.* (2014) (with section 202 noting purpose of the statute, including finding that payment of substandard wages is, *inter alia*, an “unfair method of competition”); [NRS 608.016-608.195](#).

<sup>150</sup> [Nev. Const. art. 15 § 16](#) (raising minimum wage by \$1.00 if qualifying health insurance is not provided to employee).

<sup>151</sup> *See, e.g.*, Title VII of the Civil Rights Act of 1964, [42 U.S.C. § 2000e](#) *et seq.* (2014); Age Discrimination in Employment Act, [29 U.S.C. § 626](#), *et seq.* (2014); [NRS 613.330](#).

<sup>152</sup> [29 U.S.C. § 654](#) *et seq.* (2014); [NRS 618.385](#).

<sup>153</sup> [NRS Chapters 616A-D](#) (industrial insurance); [NRS Chapter 618](#) (occupational diseases).

<sup>154</sup> *See, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 807-808 (1998) (creating an affirmative defense to claim of supervisory sexual harassment under Title VII of the Civil Rights Act, including proof by the employer that it took reasonable efforts to prevent and remedy harassment; fulfillment of the elements of the affirmative defense relieves employer of liability).

<sup>155</sup> *See, e.g., 42 U.S.C. § 2000e-3* (2014) (prohibiting retaliation for opposing discriminatory practice, or participating in a procedure under Title VII); [NRS 613.340](#) (same prohibitions as [42 U.S.C. § 2000e-3](#) under state law); *Hansen v Harrah’s*, 100 Nev. 60, 675 P.2d 394 (1984) (prohibiting retaliation for filing workers compensation claim).

<sup>156</sup> *See, e.g., National Labor Relations Act*, [29 U.S.C. §§ 157, 158](#) (2014) (overview of protected employee activities).

<sup>157</sup> Family Medical Leave Act, [29 U.S.C. §§ 2601-2654](#) (2014).

<sup>158</sup> [NRS Chapter 612](#).

<sup>159</sup> [NRS 613.135](#).

<sup>160</sup> *See, e.g., Hansen v. Harrah’s*, 100 Nev. 60, 675 P.2d 394 (1984).

<sup>161</sup> [NRS 613.200](#).

<sup>162</sup> [NRS 613.210\(2\)](#).



A more enhanced set of duties arises once the company takes the initiative to provide certain benefits other than wages, such as, for example, the extensive regulatory scheme that applies to most pension, health and other plans under ERISA.<sup>163</sup> In particular, ERISA sets up a significant number of fiduciary duties for trustees and administrators of benefit plans.<sup>164</sup> One section of ERISA protects employees from discriminatory treatment aimed at preventing an employee from collecting or becoming eligible for benefits.<sup>165</sup> Nevada law, as outlined above, also provides a claim for tortious breach of the implied covenant of good faith and fair dealing where it terminates a long-term employee in breach of her employment contract in order to prevent vesting in a retirement plan.<sup>166</sup> If the company is joined with an employee union in a collective bargaining agreement, not only does it have an obligation to comply with that agreement but it also is subject to a significant number of additional legal duties assigned by federal law to support and foster that relationship.<sup>167</sup>

The government's imposition of all of these duties has resulted in considerable protection to employees in most facets of the employment relationship. Imposition of fiduciary responsibilities on the employer is not necessary to provide protection to employees who, themselves, have fiduciary obligations to their employers.

As noted above, there is some indication from the case law that a “confidential” relationship can arise where the employer takes on some other role, if that other role is such that the employer is taking on fiduciary duties to employees as in *Hernandez* and *DerKevorkian*. What is not clear, however, is the question as to how to determine whether there has been a breach. In *DerKevorkian*, the Tenth Circuit Court of Appeals appeared to strictly limit the discussion of possible breach to the fiduciary relationship it determined had been created – the Program – and not the facts of the employment relationship itself. Since the issue in *Hernandez* was only whether a confidential relationship existed,<sup>168</sup> it is unknown whether the factors considered would have been those relative to the employment relationship or simply to the operation of the program relative to immigration status. Nevada law is not clear on this point; as outlined above, in *Perry v. Jordan*, the court analyzed all aspects of the parties’ relationship, both pre-purchase and the post-purchase operation of the business.

---

<sup>163</sup> 29 U.S.C. § 1003 *et seq.*

<sup>164</sup> *See, e.g., 29 U.S.C. §§ 1104, 1109* (2014).

<sup>165</sup> 29 U.S.C. § 1140 (2014) (prohibiting from discharge or other adverse employment actions to retaliate for receipt of benefits or in order to interfere with rights under ERISA-regulated benefit plans).

<sup>166</sup> *K-Mart*, 103 Nev. 39, 732 P.2d 1364.

<sup>167</sup> *See, generally*, J. Higgins, Ed., *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT*, Chs. 13-24 (6<sup>th</sup> Ed. 2012) (reviewing the law pertaining to the collective bargaining process, arbitration of grievances, strikes, lockouts, picketing and other forms of economic action).

<sup>168</sup> 862 F. Supp. 2d at 1094-95.

Analysis of employer actions relative to the entire employment relationship in order to determine whether there was a breach, and not just the facts pertaining to the fiduciary or confidential relationship created by the “additional ties” referenced in *Hernandez*, would result in judging by a fiduciary standard the conduct of employers in making ordinary decisions such as discipline or discharge. Even other types of decisions that affect employment, such as a strategic business decision or to cut costs by doing layoffs, could be judged by this heightened standard. When the standard becomes the “best interests of the employee,” rather than of the employer and compliance with statutory or contracted obligations, this standard would impermissibly apply a higher standard to judge disputes in a relationship where it is generally agreed (by those cases at least) that a company should not be held to a fiduciary duty standard.

## **VI. Conclusion**

It is, then, imperative that courts very strictly apply the multiple layers of analysis involved in reviewing a claim for breach of a confidential or special relationship when considering such claims in the employment context. This includes setting a high standard to determine whether such a relationship exists, requiring and focusing upon whether there exists the “additional tie” and whether the parties’ conduct with regard to that additional tie properly should have created a “confidential” relationship. An equally high standard also should be used to decide whether the employer has breached its duties under the specific relationship found to exist. Otherwise, even in a case where it is appropriate to find the existence of a fiduciary-like relationship, the analysis will upset the balance that exists and has existed in the employment relationship since the mid-twentieth century when state and federal governments began enacting legislation to protect employees in the U.S. economic system.

© State Bar of Nevada  
600 E. Charleston Blvd.  
Las Vegas, NV 89104  
702.382.2200  
[www.nvbar.org](http://www.nvbar.org)