

**BLOGS**

Legislation and Rulemaking

Nebraska Implements New Noncompete Legislation

On April 7, 2016, the Nebraska legislature passed and Governor Pete Ricketts signed into law modifications to Nebraska’s Franchise Practices Act (the “Franchise Act”) and Seller-Assisted Marketing Plan Act (the “SAMP Act”) that direct courts and arbitrators to use what is generally known as the “blue pencil” rule when asked to enforce noncompete provisions in franchise agreements subject to Nebraska law. See Franchise Act, Neb. Rev. Stat. §§ 87-402, -404; SAMP Act, Neb. Rev. Stat. § 59-1724. Nebraska had been one of only a handful of jurisdictions in which courts refused to reform noncompete agreements that were found to be overbroad and unenforceable. As a result, franchisors with agreements subject to Nebraska law faced concerns that a noncompete provision found unreasonable in scope would be tossed out in its entirety and would permit former franchisees to operate a competing business without restrictions. The new legislation is a dramatic reversal of this long-standing rule under Nebraska law.

The new legislation, LB 942, modified the Franchise Act to (1) define the term “noncompete agreement” as “any agreement between a franchisor and a franchisee, a guarantor, or any person with a direct or indirect beneficial interest in the franchise that restricts the business activities in which such persons may engage during or after the term of the franchise.” The new law also states that if a court or arbitrator finds that the restrictions in a noncompete provision are unreasonable, “the arbitrator or court *shall* reform the terms of the noncompete agreement to the extent necessary” to make it reasonable and enforceable. Not only does the legislation authorize the reformation of unreasonable noncompete provisions, it further provides that the “arbitrator or court shall then enforce the reformed provision against the franchisee, the guarantor, or a person with a direct or indirect beneficial interest in the franchise[.]” This amounts to a legislative mandate that arbitrators or judges reform noncompete provisions that they find unreasonable in scope, duration, or restricted activities and to enforce the reformed provision against not only the former franchisee, but also against personal guarantors or others with an interest in the franchise. This legislation is **retroactive** and applies to noncompete agreements signed at any time, including before the effective date of the new law.

In addition to modifications to the Franchise Act, the new legislation also modified the SAMP Act governing seller assisted marketing plans to include a requirement that a copy of any contract that contains a noncompete agreement be included in the disclosure document required by the SAMP Act.

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