

“BLUE PENCILING” NON-COMPETITION AGREEMENTS

In some states, when a court finds that the restrictions in a non-competition agreement are unenforceable because they are overbroad, the court may modify the agreement to narrow the covenant so that it becomes enforceable. “Blue penciling,” strictly defined, is when a court will strike certain parts of or certain words in the agreement. In certain states, reformation is allowed under a more lenient theory of modification of non-competition agreements. We include reformation states under the list of states that allow a form of “Blue Penciling.”¹

States NOT PERMITTING “Blue Penciling”

Arkansas	The covenant must be valid exactly as written or it will not be enforced.
California	In the employment context, courts will typically not reform a covenant that is void and illegal under the statute. In the sale-of-business context, courts may narrow restrictive covenants and then enforce the narrowed restriction.
Georgia	In the employment context, courts will not blue pencil a covenant not to compete, even in the presence of a severability clause. In the sale-of-business context, courts may blue pencil.
Nebraska	Reformation is not permitted, even with the presence of a clause allowing a court to reform an overbroad covenant.
North Dakota	By statute, covenants not to compete are void, with exceptions in the contexts of sale of a business and anticipation of a partnership dissolution. Courts have geographically narrowed covenants in the sale-of-business context.

¹ For a more thorough discussion of blue-penciling and types of modification in each state, see Brian M. Malsberger, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY (7 ed. BNA 2008).

States NOT PERMITTING “Blue Penciling”

Oklahoma	By statute, non-competition provisions are not enforceable. Courts may modify a non-solicitation clause if all essential elements are present and the modification would not be extensive.
Virginia	Virginia courts do not blue pencil. However, the United States District Court for the Western District of Virginia has applied a savings provision in a termination agreement to sever and save independent clauses within a restrictive covenant agreement.
Wisconsin	By statute, a restrictive covenant agreement that imposes an unreasonable restraint in any way is illegal, void, and unenforceable, even to the extent one of multiple provisions would be reasonable.

States PERMITTING “Blue Penciling” (including “reformation” states)

Alabama	Courts may enforce the terms to the extent reasonable. Parties may contract to allow judicial reduction of the scope of the covenant, if found to be overbroad.
Alaska	Reasonable alterations – in accordance with the parties’ intent – are permitted, so long as the employer demonstrates the covenant was drafted in good faith.
Arizona	Courts may excise grammatically severable portions and enforce a covenant to the extent reasonable. Step-down provisions that permit a court to cross-out some unreasonable sections in favor of more reasonable ones without rewriting them are a permissible application of the blue pencil rule.
Colorado	Courts have discretion to blue pencil.
Connecticut	Courts may blue pencil when the parties have indicated an intent to make the terms of the covenant severable.

States PERMITTING “Blue Penciling” (including “reformation” states)

Delaware	Reasonable alterations are permitted, such that courts may enforce a covenant to the extent reasonable.
Florida	For covenants executed on or after July 1, 1996, statute requires a court to modify the restraint and enforce to the extent reasonable necessary to protect the legitimate business interests. For covenants executed before July 1, 1996, courts may modify to provide reasonable time, geographic, and scope of activity restrictions.
Hawaii	Courts may engage in partial enforcement and modify an overbroad covenant.
Idaho	Courts will strike unreasonable language, but will not add clauses to make the covenant reasonable. The covenant as originally written must not lack essential terms regarding area, time, and subject matter limitations.
Illinois	Courts may modify terms. They must consider the fairness of the restraint initially imposed. When terms are severable, courts are more willing to modify and partially enforce, so long as the unreasonable terms are not essential.
Indiana	So long as contract terms are divisible, courts may strike offending language only.
Iowa	Reasonable alterations are permitted.
Kansas	Modification is permitted. Courts also have the equitable power to extend such restrictions.
Kentucky	Courts may enforce a covenant to the extent it is equitable to do so.
Louisiana	Courts have the power to delete overbroad geographical restrictions in the presence of a severability clause, and some have reduced overbroad temporal terms.

States PERMITTING “Blue Penciling” (including “reformation” states)

Maine	Courts evaluate the reasonableness of the clause to determine the extent to which it is enforceable.
Massachusetts	Courts may enforce to the extent that the provision is reasonable.
Michigan	By statute, courts may modify overbroad covenants to using a “rule of reasonableness.” MICH. COMP. LAWS ANN. § 445.7742(1).
Minnesota	Reasonable alterations are permitted, but the court must provide an explanation of why the revision is warranted.
Mississippi	This state follows the “reasonable alteration” approach.
Missouri	This state follows the “reasonable alteration” approach. Courts may restrict the geographic area and shorten the duration of the restrictive covenant.
Nevada	Courts may enforce for the purpose of preventing competition with the former employer and may consider the public interest in limiting the scope of the covenant.
New Hampshire	In the employment context, courts do not blue pencil restraints but may partially enforce terms or sever terms, but the employer must first demonstrate that it acted in good faith in obtaining the covenant.
New Jersey	Courts may alter overbroad covenants to the extent reasonable under the circumstances. The public interest will be considered in the medical profession context.
New York	Courts may modify terms that are unnecessary to protect the employer’s legitimate interest, but a court may also decline to alter the terms where the covenant evidences overreaching.

States PERMITTING “Blue Penciling” (including “reformation” states)

North Carolina	This state adheres to the strict blue pencil doctrine, such that courts may not rewrite the covenant, but sever overbroad provisions and enforce the remainder.
Ohio	This state follows the “reasonable alteration” approach, in which courts have discretion to modify an overbroad covenant. By statute, non-competition provisions are not enforceable. Ohio Stat. Tit. 15 § 219A.
Oregon	Based on the facts and circumstances of the case, a court may modify a covenant and even supply a time or geographic limitation if one was not originally provided.
Pennsylvania	This state follows the “reasonable alteration” approach, such that courts may reform to enforce those provisions that are reasonably necessary for the protection of the employer. Courts may both add to and subtract from the terms.
South Dakota	Courts may excise illegal terms and enforce the covenant as amended.
Tennessee	This state employs the “rule of reasonableness,” such that courts should enforce a covenant after modifying it to the extent necessary to protect the employer’s interests without imposing undue hardship on the employee.
Texas	Courts may shall reform non-compete clauses as necessary so as to make restrictions as to time, area, and scope of activity reasonable, provided that the non-compete clause is ancillary to an otherwise enforceable agreement. Courts have not reformed covenants where the employment is at-will.
Washington	Courts will enforce a covenant to the extent reasonable. Courts will partially enforce or reword overbroad terms where possible and where restrictions will not do injustice to the parties or cause injury to the public.

States PERMITTING “Blue Penciling” (including “reformation” states)

West Virginia	Courts may enforce to the extent necessary to protect the employer’s legitimate interest, so long as it does not place undue hardship on the employee, impair the public interest, or offend the rule of reason.
Wyoming	Courts may narrow the terms and enforce a covenant to the extent reasonable, so long as the covenant was obtained in good faith and fair dealing.

States in Which the Issue is UNSETTLED

District of Columbia	Partial enforcement is permitted, but it is unclear whether modification requires strict severability of the overbroad terms. The covenant must be obtained in good faith and fair dealing.
Maryland	It is unclear whether Maryland employs a strict blue pencil excision approach or a more flexible approach.
New Mexico	We are not aware of any clear statement on these issues.
Rhode Island	Courts may blue pencil covenants in the employment context, but it is an open question whether courts may rewrite indivisible terms of an unreasonable covenant in the post-employment covenant context. The “partial modification” approach was adopted in a case involving a covenant in a financing distributorship agreement.
South Carolina	Courts may no longer rewrite a contract, but it is unclear whether they may apply a true “blue pencil” approach.