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News & Types: Employment, Labor & Benefits Update

California Law: Non-Hire Clauses in a Land Without Non-Competes

12/11/2018

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Practices: Employment, Labor & Benefits

Executive Summary

By now, many HR professionals are aware that §16600 of the California Business and Professions Code expressly prohibits non-competition clauses in most employment contracts. However, far less clear is the legal status of agreements that prohibit employees, when their employment ends, from hiring away other employees from the company. In *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc*., one California Court of Appeals panel concluded in November 2018 that, when the employer's business is a recruiting/staffing firm, an agreement to not solicit employees was effectively a prohibited non-compete clause. Indeed, the 4th District Court of Appeals in *AMN Healthcare* went even further and suggested that *all* employee non-solicitation or non-hire clauses violate California law regardless of the nature of the employer's business or whether such clauses might be considered mere "reasonable restraints."

THE DECISION:

AMN Healthcare and Aya Healthcare are competitors in the business of recruiting traveling nurses for medical facilities throughout the country. When recruiters employed by AMN left to join Aya, AMN sued both Aya and the individual employees, who worked for both AMN and Aya as travel nurse recruiters. AMN alleged that the individuals' recruiting of nurses on behalf of Aya violated a clause in their AMN confidentiality and non-disclosure agreements that for one-year prohibited departing employees from soliciting for hire any AMN employees, including travel nurses who worked on temporary assignments through AMN.

§16600 of the Business and Professions Code states: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extend void."

Previously, in *Loral Corp. v. Moyes*, (1985) 174 Cal.App.3d 268, the 6th District Court of Appeals held that an employee non-solicitation agreement that prevented a former key executive from "raiding" the plaintiff's employees was a permissible reasonable restraint that did not violate §16600 because it did not prevent those employees from contacting the competitor, being hired by the competitor or competing with their former employer. In fact, the non-solicitation clause only prohibited the former key executive from taking the first step and initiating the process to hire away the plaintiff's employees. Such a restraint was, the court determined, more like a non-solicitation or non-disclosure agreement in that it reasonably prevented the executive's

disrupting, damaging, impairing or interfering with the plaintiff's business, without actually preventing or harming competition.

The court in *AMN Healthcare* rejected the rationale of *Loral v. Moyes* and expressly doubted the continued viability of any employee non-solicitation/non-hire clauses in a profession, trade or business of *any kind*. In doing so, AMN Healthcare pointed to the language of §16600 and the California Supreme Court's decision in *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 945.

In *Edwards*, the Court held that an employment agreement that prohibited a departing employee from soliciting business from or performing services for the clients that he worked with at the plaintiff accounting firm violated §16600. In doing so, the Court rejected the employer's argument that "restrain" in the Code meant "unreasonably restrain" or "prohibit". The *Edwards* court noted that the language of §16600 was unambiguous, did not contain any concept of reasonability and allowed only three specified exceptions (relating to the sale or dissolution of a business in which the individual held an interest).

As the appellate court in *AMN Healthcare* noted, the decision in *Loral v. Moyes* was decided more than 20 years before *Edwards*. Although the agreement in *Edwards* included an employee non-solicitation clause, that clause was not at issue in *Edwards* and, therefore, the Supreme Court in Edwards never discussed the holding of *Loral v. Moyes*. In rejecting the rationale and holding of *Loral v. Moyes*, the *AMN Healthcare* court noted that *Edwards* had expressly rejected the idea that a "reasonable" or "limited/narrow" restraint exception existed under §16600 and explicitly refused to adopt contrary decisions issued by the federal Ninth Circuit Court of Appeals.

The appellate court in *AMN Healthcare* noted that there is a factual distinction between imposing a non-hiring clause on people who make their livings as recruiters for a staffing firm and a key executive who immediately commenced raiding his former employer and causing disruption and damage by hiring away top managers. However, the court made it clear that, in its opinion, that factual distinction is irrelevant and that §16600 and *Edwards* are to be read literally as written – any contract that imposes any restraint on engaging in any business is void under §16600, subject only to the limited exceptions provided in the statute.

ACTION STEPS: Not only California-based employers, but all employers who have employees or "independent contractors" that work or reside in California, should be sure to review their existing employment agreements to ensure that post-employment restrictions are strictly limited to what is truly necessary to protect the company's confidential information, trade secrets and intellectual property. Out-of-date agreements and clauses can result in unnecessary litigation, confusion and waste of the company's resources.

Given the continued nationwide movement to restrict and, in some cases, prohibit non-compete and non-hiring clauses, employers must maintain a working knowledge of developments in every state in which they have personnel and regularly review and update even "standard" agreements to conform to developing case law and statutory changes