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California Expands Noncompete Restrictions

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This year, California was one of many states to enact legislation restricting noncompetes. California has long had the strictest noncompete law, and employee noncompetes are already void under California Business and Professions Code § 16600 ("Section 16600"). On September 1, 2023, California passed new legislation ("SB 699") that further broadens Section 16600 and provides employees with new legal remedies.

The Current Law

Unless one of the narrow statutory exceptions applies, Section 16600 provides that any contract restraining a person from "engaging in a lawful profession, trade, or business of any kind" is void. As such, employee noncompete agreements and several other types of restrictive covenants are generally unenforceable in California. Importantly, Section 16600 by itself does not provide employees with a private right of action through which a court may award damages.

SB 699

Over half of the text of SB 699 is dedicated to legislative findings regarding the prevalence and negative impact of noncompetes across the United States. It is this nationwide context that underscores SB 699's substantive amendments, which are codified in new California Business and Professions Code § 16600.5 and update the current law in three significant ways.

First, SB 699 explicitly provides that any agreement that is void under Section 16600 is unenforceable in California regardless of where and when the agreement was signed. This means that even if an employee worked and resided outside of California, to the extent the employee subsequently obtains employment in California, any prior noncompete to which the employee is subject will not be enforceable. This is consistent with the historical approach taken by California courts in refusing to enforce such a restrictive covenant, based on the reasoning that California's fundamental public policy interests outweigh the interests of another state. SB 699 all but eliminates the need for this analysis.

Second, while Section 16600 currently only *voids* unlawful restrictive covenants, SB 699 explicitly

makes it *unlawful* for:

- Employers and former employers to *attempt to enforce* a noncompete, regardless of whether the agreement containing the noncompete was signed outside of California or if the employee was employed outside of California; and

- Employers to *enter into* a noncompete with an employee or prospective employee.

SB 699 treats an employer's unlawful efforts to enforce or enter into unlawful restrictive covenants as a civil violation, which is significant given the new relief available under SB 699 (described below).

Third, SB 699 provides current, former, and prospective employees with a private right of action to seek injunctive relief and/or actual damages against employers that enter into or attempt to enforce an unlawful restrictive covenant. Prior to SB 699, there was no specific entitlement to actual damages under Section 16600. Employees or prospective employees that prevail in such actions are now also entitled to reasonable attorney's fees and costs. Previously, employees would typically seek declaratory relief when challenging an unlawful noncompete and then could only recover attorney's fees if they also alleged and proved a claim of unfair competition in violation of California Business and Professions Code § 17200 (and a court exercised its discretion to award such fees).

Next Steps

SB 699 is scheduled to take effect on January 1, 2024, codified as Business and Professions Code Section 16600.5. The California legislature also continues to debate additional restrictive covenant legislation that would further strengthen Section 16600 protections. For now, employers should begin reviewing and revising their restrictive covenant agreements for compliance with SB 699 and seek advice from counsel before attempting to enforce such agreements against current, former, or prospective employees in California.

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