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Employers everywhere should be familiar with California’s strict rules against the enforcement of non-compete agreements and non-solicitation agreements between employers and employees. Practically speaking, the rule has always been that non-compete agreements are not enforceable. Similarly, non-solicitation agreements regarding the solicitation of customers are not enforceable, but non-solicitation agreements regarding the solicitation of other employees (within reason) may be enforced under limited circumstances.

Non-Compete Agreements

California Business & Professions Code section 16600 makes clear that any non-compete provision between an employer and an employee – in other words, any contract that restrains a person from engaging in a profession, trade or business – will not be enforceable under California law. Additionally, California Labor Code section 925 clarified in January 2017 that forum-selection and choice-of-law clauses that select non-California forums and/or laws would not be enforced if the employee performs work in California. Thus, non-California employers with California employees have essentially had no choice but to avoid non-compete agreements entirely and ensure that employment agreements comply with California law.

However, a recent decision from the Delaware Chancery Court suggests there may be a small loophole for non-California employers. While the court acknowledged that section 16600 makes clear that non-compete agreements are void under California law, it noted that Section 925 includes a carve-out from the general rule that contract provisions that try to avoid the problem by choosing to use another state’s law are not enforceable in California. Specifically, the Delaware court noted that the statute includes a subsection stating that the rule prohibiting non-California choice-of-law provisions will not apply if the employee is represented by legal counsel when negotiating the terms of the agreement. The court held that because the employee in the case was represented by his personal attorney during negotiations of the employment agreement, the Delaware choice-of-law provision in the agreement would be upheld. The Court also noted that as Delaware law permits non-compete agreements, the non-compete provision would be enforceable against the California employee. Of course, if the employee had won the race to court and filed first in California, the outcome likely would have been different.

While California’s strong public policy interest against non-competes will always pose an uphill battle, the case at least provides the potential to have a non-compete agreement with a California employee.

Non-Solicitation Agreements

Consistent with the ban on non-competes, as set forth in section 16600, California law has been clear that an agreement between an employer and an employee prohibiting the solicitation of customers is not enforceable (unless directly tied to the use of company trade secrets), as it is considered a restraint on competition. However, an agreement prohibiting the solicitation of other employees may be enforceable so long as it includes reasonable time and geographic limitations.
A California appellate court issued an opinion a few weeks ago further narrowing the scope of when the solicitation of other employees may be prohibited. The employees at issue in the case were nurse recruiters who claimed that a restraint on their ability to contact and solicit employees (who were nurses) of their former employer was in fact a restraint on their profession and that the non-solicitation agreement violated section 16600. The appellate court agreed, finding that in this narrow circumstance and because of the employees’ profession (i.e., the recruitment of other employees), the non-solicitation of employees was, in effect, a non-compete agreement and therefore in violation of California law.

Before employers panic and conclude that all employee non-solicitation agreements in California are now void, it is important to remember that such agreements should still be enforceable so long as they are reasonably tailored and do not restrain the employees’ ability to engage in their profession. If the subject employees had not been in the business of recruiting employees, the outcome of the case would have been different. This is still an open issue that will have to be resolved in the future. As such, it is best to consult with legal counsel knowledgeable in the nuances of California law before preparing employment agreements.

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