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California courts target enforceability of employee non-solicitation agreements

By Matthew McLaughlin and Conor McNamara

Two recent court rulings have challenged the long-held view that reasonable post-employment employee non-solicitation provisions, unlike non-competition and customer non-solicitation provisions, are enforceable in California. While it remains to be seen whether other California courts will adopt the rationale of these recent rulings, employers should nevertheless assess the continued use of employee non-solicitation clauses in their employee agreements.

The decisions

For decades, employers have relied on the California Court of Appeal's 1985 decision in *Loral Corp. v. Moyes*,[1] in which the court found that the employee non-solicitation provision at issue was not void under California Business & Professions Code Section 16600 as it only "slightly affected" the former employee, to support the enforcement of non-solicitation-of-employee provisions under California law.

However, late last year, in *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.*,[2] a California Court of Appeal found that the employee non-solicitation provision at issue violated Section 16600 because it constituted an improper restraint on the former employees' ability to engage in their chosen profession, trade or business. In *AMN*, the employees at issue were employed as recruiters whose job was to recruit travelling nurses to assist with temporary staffing shortages in health care systems and organizations. The employees were required to sign Confidentiality and Non-Disclosure Agreements that included a non-solicitation of employees provision purporting to prevent those employees from soliciting AMN employees for one year, which would have restricted the number of nurses the recruiters could work with while employed by their new staffing agency. In affirming the lower court's ruling that the employee non-solicitation provision was void under Section 16600, the Court of Appeal questioned the continuing viability of *Loral* in light of the California Supreme Court's 2008 decision in *Edwards v. Arthur Andersen LLP*,[3] but

[1] 174 Cal. App. 3d 268, 280 (1985).

[2] 28 Cal. App. 5th 923 (2018).

[3] 44 Cal. 4th 937 (2008).

concluded that even if *Loral* survived *Edwards*, the specific non-solicitation clause at issue in *AMN* effectively restrained the recruiters from engaging in their chosen profession and thus constituted an unenforceable restraint on trade. In *Edwards*, the California Supreme Court analyzed the non-competition and *customer* non-solicitation provisions contained in a former Arthur Andersen accountant's employment agreement and concluded that those post-employment restraints were not subject to a reasonableness standard under Section 16600; however, the court did not address the employee non-solicitation provision in the agreement, nor did it expressly overrule *Loral*.

Most recently, a federal judge in California interpreted the *AMN* decision broadly and refused to limit its holding to recruiters. In *Barker v. Insight Global, LLC*,[4] the U.S. District Court for the Northern District of California concluded that California law, in light of *AMN* and *Edwards*, "is properly interpreted . . . to invalidate employee non-solicitation provisions." The court further rejected the argument that the holding in *AMN* should be limited because of the particular job duties—employee recruiting—at issue in that case.

Impact on employers

These recent decisions raise questions about the continued viability of employee non-solicitation provisions in California. *Barker's* broad interpretation of *AMN* is not controlling on California state courts, and those courts could continue to follow *Loral* and regard *AMN* as distinguishable in light of the nature of the work at issue in that case, namely the recruitment of employees. However, until the California Supreme Court or the California Legislature has an opportunity to address the validity of employee non-solicitation provisions, employers should carefully consider the risks and benefits of including an employee non-solicitation provision in a contract with a California employee. Experienced counsel, who are part of Nixon Peabody's Non-compete and Trade Secrets team and Nixon Peabody's Labor and Employment group, are available to assist you in this analysis.

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[4] 2019 U.S. Dis. LEXIS 6523 (N.D. Cal. Jan. 11, 2019).