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Recent California Cases Invalidate Employee Non-Solicitation Provisions

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Many California employers use employee non-solicitation provisions in their employment agreements. These provisions prohibit employees, both during their employment and for one to two years thereafter, from soliciting the company's employees or independent contractors to leave the company.

California law has long prohibited any contract "by which anyone is restrained from engaging in a lawful profession, trade or business of any kind." Cal. Bus. Prof. Code Section 16600. Because of this law, post-employment non-competition or customer non-solicitation provisions are not enforceable in California.

Employers have traditionally distinguished employee non-solicitation provisions by relying on a 1985 California appellate court case called *Loral v. Moyes*. 174 Cal. App. 3d 268 (1985). There, the court held a non-solicitation provision did not violate Section 16600 and was enforceable. The court found such prohibition was a reasonable and limited restriction that had little impact on employee mobility and helped promote a stable work force by preventing employee raiding and poaching.

However, two recent California cases have doubted the continuing viability of *Loral* and have found such employee non-solicitation provisions unenforceable.

First, in a November 2018 opinion in *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.*, a California appellate court invalidated a post-employee non-solicitation provision on the grounds that it restrained trade in violation of Section 16600. 28 Cal. App. 5th 923 (2018). The provision in question prevented travel nurse recruiters from soliciting company employees (including travel nurses) for 12 to 18 months post-employment. The court reasoned that such provision unlawfully restrained recruiters from engaging in their profession, i.e., soliciting travel nurses within their network regarding new employment opportunities. The court recognized that *Loral* had permitted such non-solicitation provisions, but the court "doubted the continuing viability of *Loral*" in light of a 2008 California Supreme Court case called *Edwards v. Anderson*. In *Edwards*, the California Supreme Court held *any* restraint on a person's ability to engage in their profession is impermissible, even a reasonable or narrow one. 44 Cal. 4th 937 (2008).

Commentators initially wondered how much *AMN* was limited to its facts, since a provision limiting solicitation of employees has the greatest impact on a *recruiter's* ability to engage in his or her profession. The *AMN* court's reasoning may not apply as clearly to other professions, where recruitment or hiring are not a part of the employee's job. Also, only the California Supreme Court has the power to overrule *Loral*,and it has not explicitly done so – in *Edwards* or any other case.

Next, in a January 2019 opinion in *Barker v. Insight Global, LLC*, a federal district court in the Northern District of California similarly held a provision restricting a regional director from soliciting employees or contractors during his employment and one year thereafter was unenforceable. 2019 WL 176260 (N.D. Cal. Jan. 11, 2019). The court held it was "convinced by the reasoning in *AMN* that California law is properly interpreted post-*Edwards* to invalidate employee non-solicitation provisions." Notably, the court rejected the employer's attempt to limit the *AMN* ruling to the employees' particular job duties.

The federal court in *Barker* also lacks the power to overrule *Loral*, but the *Barker* decision shows that at least one other judge agrees with the *AMN* court that *Loral*'s days may be numbered.

Recommendations for employers

Due to this pair of cases, California law is in flux as to the continued viability of employee non-solicitation provisions. During this period of uncertainty, employers should consult with counsel on whether to keep such provisions in their California employment documents.

Of course, an employer's most conservative response would be to remove such employee non-solicitation provisions from any agreements with California employees. If such provision is not of particular importance to an employer, it may be prudent to do so.

However, *Loral* has not yet been explicitly overruled. We anticipate additional case law from the California appellate courts (and eventually perhaps the California Supreme Court). In the meantime, an employer may decide not to remove such a widespread and longstanding employer protection from its agreements until a more definitive ruling has been made.

Any decision to retain such provisions in California agreements should be made in careful consultation with counsel. Employers who retain such provisions should make sure such agreements have robust severability provisions. More importantly, such employers should contact counsel in the event that (1) a potential hire refuses to sign an agreement on the grounds that such provision is not enforceable and (2) the employer considers enforcing such non-solicitation provision against a departing employee.

We are closely monitoring the developments in this area. Please feel free to contact us with any questions about the evolving state of the law and how to assure compliance.

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