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California Appellate Court's Expansive Opinion Creates Doubt Over Employee Non-Solicitation Agreements

Although California law generally prohibits non-competition agreements, some courts in a number of unpublished opinions have enforced non-solicitation clauses restricting former employees from pirating their former colleagues. A California appellate court, however, recently invalidated such a provision in a published opinion, calling into question an employer's ability to rely upon such agreements.

In *AMN Healthcare Inc. v. Aya Healthcare Services*, AMN sought to enforce a non-solicitation provision against former employees and their new employer. The trial court ruled in favor of the individuals and corporate defendant Aya, enjoining AMN from enforcing a provision that prohibited the non-solicitation of employees.

AMN appealed, and the Court of Appeal affirmed. The *AMN* court "doubt[ed] the continuing viability" of non-solicitation provisions generally, without resolving this issue. Employers who have included provisions in their employee agreements and contracts that prohibit soliciting employees may want to review their enforceability.

Pre-*AMN*

Section 16600 of California's Business and Professions Code provides that, with only certain exceptions, "every contract by which anyone is restrained from engaging in a lawful professional, trade or business of any kind is to that extent void."

Long prior to the *AMN* decision, there have been several cross currents in California case law on non-solicitation and non-compete provisions, some developing separately and in isolation of the others. In the seminal case of *Loral Corp. v. Moyes*, 174 Cal. App. 3d. 269 (1985), the court upheld a provision in an agreement that restrained a former executive officer of the plaintiff from raiding the plaintiff's employees. The court reasoned that the non-solicitation clause was enforceable because it did not unduly restrict the ability of plaintiff's employees to work for the executive's new employer.

In its 2008 decision in *Edwards v. Arthur Andersen*, 44 Cal. 4th 937 (2008), the California Supreme Court sought to clarify under what circumstance a non-compete might be enforced against employees, consistent with Business and Professions Code 16600. Rejecting a line of federal cases that interpreted Section 16600 to permit non-competes that barred employees from pursuing only a small or limited part of their business, trade, or profession, the *Edwards* court unequivocally held that a non-compete could not be enforced except in very limited, statutorily defined situations involving the sale of a business or dissolution of a partnership. The *Edwards* court was clear, however, that it was not addressing the non-solicitation provision in the agreement that prohibited recruiting employees, as the former employee had not challenged that provision. Accordingly, the court left the *Moyes* decision intact, apparently permitting employers to continue to enforce non-raiding agreements.

However, in the 10 years following *Edwards*, some unpublished opinions addressed *Moyes'* continuing validity. The *AMN* decision has now put *Moyes'* status in doubt.

The Underlying Facts in *AMN* and the *AMN* Trial Court's Opinion

AMN and Aya are competitors in the business of providing health care professionals, including traveling nurses, on a temporary basis, to medical care facilities throughout the country. The individual defendants were former travel nurse recruiters of AMN, who the court noted (without explaining why) left AMN for different reasons and at different times, and joined Aya, where they performed the same general type of work.

As a condition of employment with AMN, the individual defendants/recruiters signed a Confidentiality and Non-Disclosure Agreement (CNDA), which included a provision preventing them from soliciting any AMN employee to leave AMN's service for at least one-year following the individual defendants'/recruiters' departure from AMN. Critically, the travel nurses and other health care professionals were considered AMN employees while on temporary assignment to AMN's clients, so they were technically AMN employees, and thus subject to the non-solicitation restriction.

As noted, the recruiters/defendants left to join a competitor, and began soliciting the same travel nurses and health care professionals they had solicited while at AMN. AMN sued, seeking to enforce the non-solicitation provision. The recruiters/defendants moved for summary judgment on AMN's complaint, arguing that the non-solicitation of employee provision in the CNDA was an improper restraint on their ability to engage in their profession. The trial court agreed, and granted summary judgment against AMN. In doing so, the trial court focused on the non-solicitation's impact on the recruiters, which prevented them from engaging in their profession. Specifically, the non-solicitation agreement limited the recruiters'

ability to recruit. The court enjoined AMN from enforcing the non-solicitation provision in the CNDA as to any California AMN employee and awarded the recruiters attorney fees.

The Court of Appeal's Decision

AMN appealed, and the Court of Appeal affirmed. The court broadly expanded the trial court's analysis, likely adding uncertainty to what has already been a cloudy area. Rather than simply limiting the ruling to recruiters, whose very job it is to recruit, the Court of Appeal decided to broaden the rationale. In that regard, the appellate court "doubt[ed] the continuing viability of *Moyes* post-*Edwards*." Having articulated this "doubt," the court decided not to resolve this issue, ultimately finding only that the non-solicitation agreement at issue was unenforceable based on the facts presented.

Takeaways

Employers with employees in California, or employers based in California, would be well-advised to consider whether provisions not to solicit employees should continue to be included in agreements. Employers should also carefully consider whether to attempt to enforce such agreements based on the particular circumstances, as the *AMN* court has made the outcome of such litigation less certain.

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