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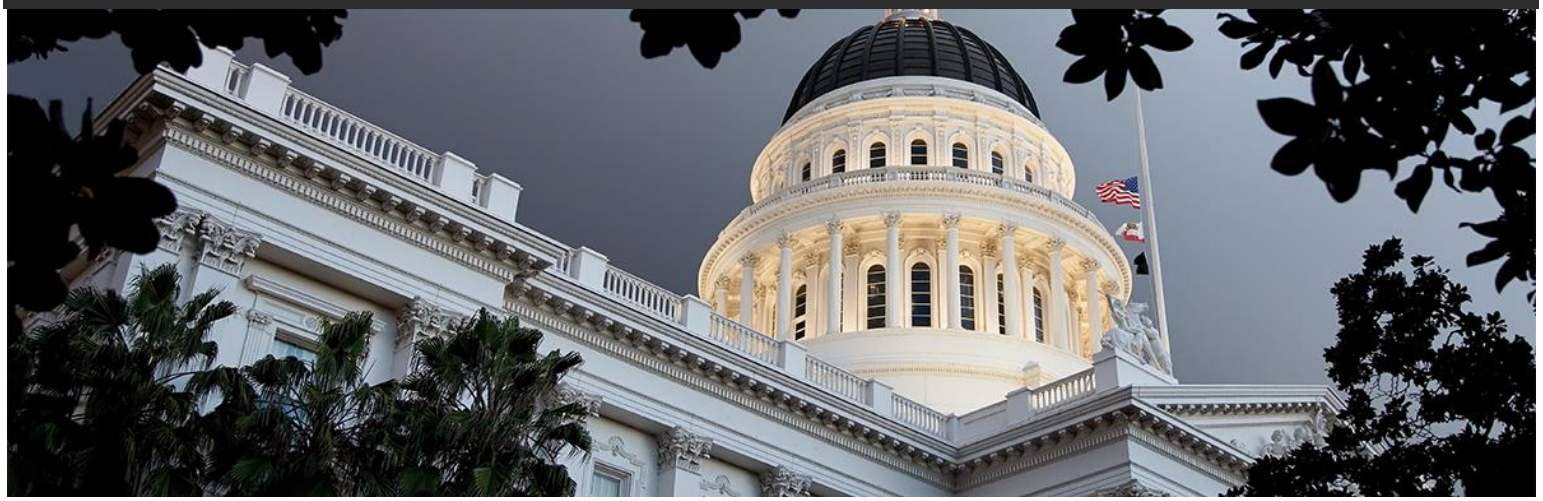

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Noncompete Provisions in Employment Agreements: Pending CA Legislation Further Limits Use

Go-To Guide:

- The proposed legislation recommends a 10% ownership interest to support a noncompete following the sale of a business.
- The proposed legislation would limit an employer's use of repayment provisions when an employee terminates the employment relation, as well as any replacement hire fee, retraining fee, reimbursement for immigration or visa-related costs, liquidated damages, lost goodwill, or lost profit (so-called de facto noncompetes).
- The proposed legislation includes financial penalties for imposing a noncompete on an employee or prospective employee as a term of employment, and singles out attorneys who use them for their employees or prospective employee.
- The proposed legislation clarifies that, where agreements seek to apply law other than California law, or select a forum other than California, independent counsel must not only represent the employee but also be paid for or selected by the employer.

California generally takes an unfavorable view of noncompete provisions, treating them as unenforceable in all but a few limited circumstances, as those familiar with California employment law know. See, e.g., Business and Professions Code 16600 and *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937.

Now, if recently introduced legislation finds support, those exceptions may be tightened further still. And employers and counsel would be subject to special penalties for violations.

Specifically, Assembly Bill 747, authored by Assemblymember Kevin McCarty and co-sponsored by the American Economic Liberties Project, California Nurses Association, and Democracy Policy Network, proposes the following changes to current California law. The changes are a grab bag, and grafted on various parts of California law:

1. The sale of a business exception (currently found in Business & Professions Code section 16601) would be defined for the first time to require at least a 10% stake in the business in order to qualify as an ownership interest that would support a noncompete following the sale of the business. Prior to this proposed change, case law has been unclear on what constitutes an ownership interest sufficient to support a noncompete.

2. A contract or contract term that would require an employee to pay for a debt if the employee's employment or work relationship with a specific employer was terminated would be characterized as a contract restraining a person from engaging in a lawful profession, trade, or business, and void as contrary to public policy.

3. The bill would prohibit an employer from presenting an employee or prospective employee a noncompete as a term of employment, or attempting to enforce the noncompete, where it is void. An employer who did so would be liable for actual damages and an additional penalty of $5,000 per employee or prospective employee. The bill does not specify whether the employer knew or should have known it was an unlawful restraint of trade. It also would allow employees or prospective employees to bring an action for injunctive relief, actual damages and penalties, as well as reasonable costs and attorneys' fees.

4. It would be a cause for suspension, disbarment, or other discipline for any attorney to enter with an employee, prospective employee or former employee, or present to same, or attempt to enforce, any employee contract or other agreement that violated the prohibition on contracts in restraint of trade.

5. It would amend Labor Code 925. That recently enacted provision protects an employee from agreeing to a forum outside California, or the choice of law other than California law, where it would deprive the employee of the substantive protection of California law subject to an exception where the employee is represented by independent counsel. The amendment clarifies the current exception and limits it to situations where the independent counsel is not paid for by the employer, and the counsel is not selected based upon the suggestion of the employee's employer.

See additional analysis including sponsors and those opposed. AB 747 recently passed out of the Assembly Labor & Employment Committee and will subsequently be heard in the Assembly Judiciary Committee.

Authors

This GT Alert was prepared by:

- Kurt A. Kappes | +1 916.868.0650 | Kurt.Kappes@gtlaw.com
- Magaly Zagal | +1 916.504.1667 | Magaly.Zagal@gtlaw.com

Albany. Amsterdam. Atlanta. Austin. Berlin.¬ Boston. Charlotte. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Houston. Las Vegas. London.* Long Island. Los Angeles. Mexico City.+ Miami. Milan.» Minneapolis. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Portland. Sacramento. Salt Lake City. San Diego. San Francisco. Seoul.∞ Shanghai. Silicon Valley. Singapore. Tallahassee. Tampa. Tel Aviv.^ Tokyo.¤ Warsaw.~ Washington, D.C.. West Palm Beach. Westchester County.