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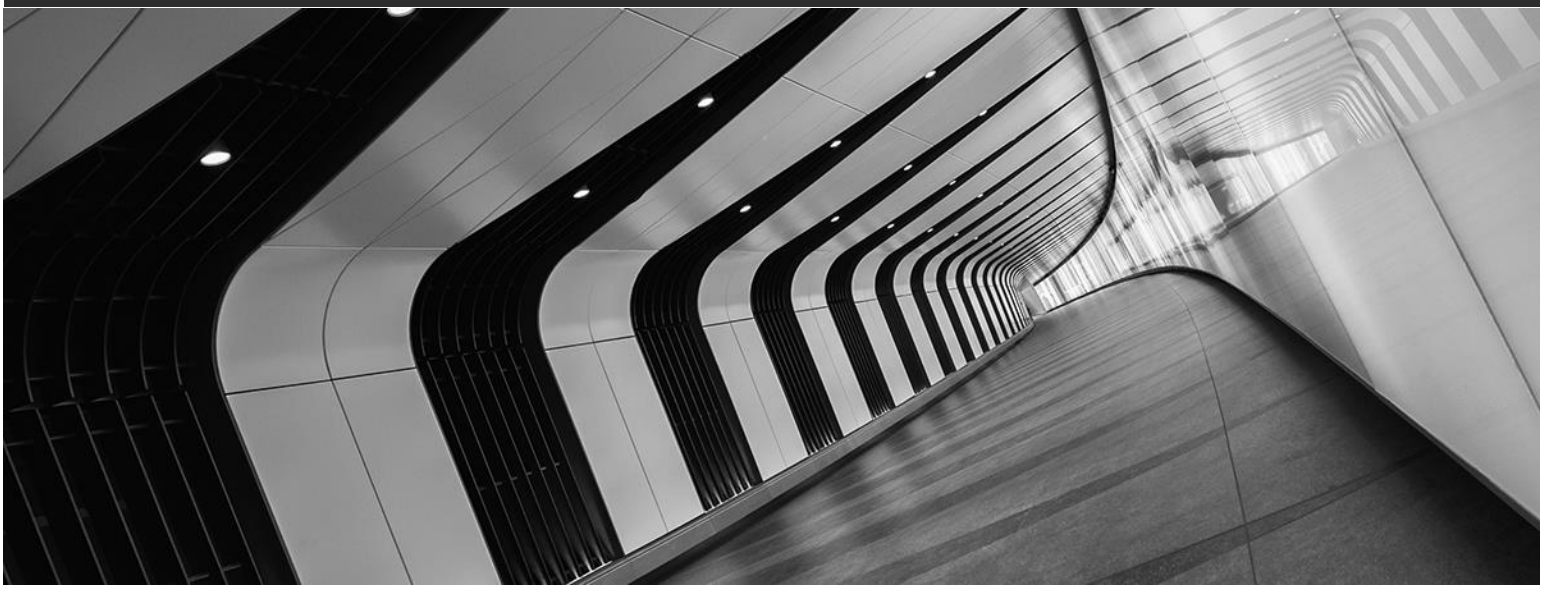
California Appellate Court Casts Doubt on Enforceability of Nonsolicitation Agreements



By Kurt A. Kappes and Mark D. Lurie | December 14, 2018 | The Recorder

A California appellate court, in a recent published opinion, invalidated a nonsolicitation clause restricting employees of a health care staffing company from pirating their former colleagues. The opinion calls into question an employer's ability to rely on nonsolicitation agreements.

California-based employers or those with employees in California, as a result, would be well-advised to consider whether provisions not to solicit employees should continue to be included in agreements. Furthermore, employers should carefully consider whether to attempt to enforce such agreements, as this opinion has made the outcome of such litigation less certain. In fact, the degree to which the court was willing to go to invalidate such a provision demonstrates that exceptions to non-compete agreements will continue to be narrowly construed to include only those contained in certain statutory exceptions. And, the court's willingness to award the defendants' their attorney fees should also be included in the calculus of whether to attempt to enforce such agreements.

The case in question was AMN Healthcare v. Aya Healthcare Services. AMN—a health care facilities agency—sought to enforce a nonsolicitation provision against former employees and their new employer, Aya, which is a competitor to AMN. 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 "doubted the continuing viability" of nonsolicitation provisions generally, without resolving this issue.

Prior to this AMN decision, there have been several cross currents in California case law on nonsolicitation and noncompete provisions, some developing separately and in isolation of the others.

California law generally prohibits non-competition agreements. 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."

However, some courts in a number of unpublished opinions have enforced nonsolicitation clauses restricting former employees from pirating their former colleagues.

In the seminal case, Loral 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 found 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 attempted 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 noncompete 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 nonsolicitation provision in the agreement that prohibited recruiting employees, as the former employee had not challenged that provision. The court, therefore, left the Moyes decision intact, permitting employers to continue to enforce non-raiding agreements.

In the 10 years following Edwards, a number of unpublished opinions addressed Moyes' continuing validity; but the AMN decision has now put Moyes' status in doubt.

AMN and Aya are competitors in the lucrative business of providing staff to medical care facilities across the country. The individual defendants were former recruiters at AMN, who left the company for different reasons and at different times. They joined Aya, where they performed the same general type of work.

The defendants/recruiters, as a condition of employment with AMN, had signed a Confidentiality and Nondisclosure Agreement (CNDA). The agreement 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, while on temporary assignment to AMN's clients, the travel nurses were considered AMN employees and were thus subject to the nonsolicitation restriction.

After leaving to join Aya, the recruiters began soliciting the same travel nurses and health care professionals as they had at AMN. AMN sued, seeking to enforce the nonsolicitation provision.

The recruiters moved for summary judgment on AMN's complaint, arguing the nonsolicitation of the employee provision in the CNDA was an improper restraint on their ability to engage in their profession. The trial court agreed, granting summary judgment against AMN. The court focused on the nonsolicitation's impact on the recruiters, which prevented them from engaging in their profession. Specifically, the nonsolicitation agreement limited the recruiters' ability to recruit. The court enjoined AMN from enforcing the non-solicitation provision in the CNDA and awarded attorney fees to the recruiters.

AMN appealed, and the Court of Appeal affirmed. Likely adding uncertainty to what has already been a cloudy area, the court broadly expanded the trial court's analysis. Rather than simply limiting the ruling to recruiters, whose very job it is to recruit, the Court of Appeal broadened the rationale, stating it "doubted the continuing viability of Moyespost-Edwards."Having articulated this "doubt," the court chose not to resolve this issue, finding only that the nonsolicitation agreement at issue was unenforceable based on the facts presented.

Though the implications of this opinion remain to be seen, employers who have included provisions in their employee agreements and contracts that prohibit soliciting employees may want to review their enforceability. Assuming that other courts follow the broad holding, and the case is not limited on appeal or otherwise, now that such provisions have been called into question, enterprising plaintiff's counsel may attempt in an appropriate case to use any adverse employment action arising out of the refusal to so sign an agreement containing a provision, as the basis for an unfair business practice claim, under D'Sa v. Playhut, 85 Cal. App. 4th 927 (2000). If an employer terminates an employee who refuses to sign an agreement that contains an unenforceable noncompete provision, such action would constitute a wrongful termination in violation of public policy and would entitle the employee to recover tort damages, including punitive damages, as well as economic damages.

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