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News & Types: Employment, Labor & Benefits Update

Non-Solicitation of Employees

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Practices: Employment, Labor & Benefits

Executive Summary

In California, courts have found unenforceable provisions in employment agreements restricting competition and the non-solicitation of customers. Agreements have included provisions restricting former employees from soliciting their co-workers. However, recent California cases have held that employee non-solicitation clauses are unenforceable because they impose restraints on professions, trades, and businesses.

On November 2, 2018, the California Court of Appeals issued the decision in *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc*., holding that an employee non-solicitation clause as applied to traveling nurse recruiters was an invalid and unenforceable restraint on trade. In *AMN*, all employees of AMN Healthcare, Inc. were required to sign a Confidentiality and Non-Disclosure Agreement ("CNDA") as a condition of their employment. The CNDA included a non-solicitation of employees provision "preventing [former AMN employees] from soliciting any employee of AMN to leave the service of AMN for at least a one-year period." The court held that such provision was void under Section 16600 of the California Business & Professions Code, because it restrained a former employee from engaging in his or her profession, trade, or business. As the employees at issue here were in the business of recruiting and placing traveling nurses on a temporary basis in medical facilities, the employee non-solicit clause essentially restrained such recruiters from engaging in their chosen profession.

When *AMN* was decided, it was unclear whether such an employee non-solicitation provision is void and unenforceable only if the employees are in the business of recruiting candidates and applicants to place them in certain occupational industry – recruiters. However, on January 11, 2019, in *Barker v. Insight Global*, a federal district court in California, based on different facts not involving recruiters, held that employee non-solicitation clauses are unenforceable under California law, following *AMN* court's decision. In *Barker*, a former executive at Insight Global filed a lawsuit claiming that the non-solicitation clause found in his contract violated Section 16600 of the California Business & Professions Code. The former employee worked in the employee recruiting business, but none of his job duties involved actual recruiting functions. Significantly, the *Barker* court rejected Insight Global's argument that *AMN* should be limited to the particular facts of the case – those involving employee recruiting specialists.

It is still early to anticipate what the ultimate standard will be for the legality of employee non-solicitation in California because of potential decisions by the California Supreme Court or other courts in California, which may shed light on this topic. However, it appears that California's courts may be going in the direction of invalidating the employee non-solicitation provisions, because of their restraints on former employees' professions, trades, and businesses. Employers in California who include these types of non-solicitation

provisions should consult with an attorney to understand the risks associated with including such provisions. In addition, agreements including restrictive covenants should include a “savings clause,” allowing a court to re-draft unenforceable provisions. The Human Resource Department’s responsibility starts with an annual audit of all of the agreements currently in existence to determine whether they need to be changed.