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Future Not Looking Bright For California Employee Nonsolicits

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On Jan. 1, new legislation aimed at curbing the use of unenforceable noncompete agreements took effect in California.

The new laws, which impose potentially harsh consequences on employers for requiring employees to sign or attempting to enforce noncompete agreements, have left many employers wondering about the fate of employee nonsolicitation agreements.

For decades, employers have relied on a California state appeals court decision from 1985 to implement post-termination restrictions on employees attempting to steal proprietary information from their former employers' workforces.

In 2018, however, another California state appeals court decision seemingly called the viability of these provisions into question.

While the California Supreme Court has yet to definitively weigh in, federal district and unpublished appeals court decisions suggest the days of employee nonsolicitation provisions may be numbered.

Loral v. Moyes and Decades that Followed

In November 1985, a California state appeals court issued its decision in Loral Corp. v. Moyes.[1]

In that case, the Sixth Appellate District held that an agreement between an employer and one of its former employees that precluded the employee from "disrupting, damaging, impairing or interfering with his former employer's business by 'raiding' its employees" did not run afoul of California Business and Professions Code Section 16600 — i.e., the statute that generally prohibits restraints on trade.

Reversing a judgment in favor of the former employee, the court in Loral noted that while an agreement could not lawfully preclude a departing employee from hiring his former employer's employees, a restriction on soliciting a former employee's workers was permissible under Section 16600.

In the years following Loral, it was generally accepted that employee nonsolicitation provisions were enforceable in California, notwithstanding the state's long-standing aversion to most post-termination restrictive covenants.

Despite the practical difficulty in proving breach, these provisions became commonplace in employment agreements, and were viewed by many employers as one of the few valuable post-termination restrictions that could be used to prevent departing employees from disrupting operations after they were gone.

The Shift Following AMN v. Aya

More than 30 years after Loral, the Fourth Appellate District seemingly upended the law regarding employee nonsolicitation provisions in AMN Healthcare Inc. v. Aya Healthcare Services Inc., albeit the case involved unique facts.[2]

In AMN, the at-issue employee nonsolicitation provisions had been applied to recruiters for traveling — i.e., temporary — nurses.

Notably, the court expressed some skepticism about the ongoing validity of Loral in light of the California Supreme Court's 2008 decision in Edwards v. Arthur Anderson LLP, a case that invalidated customer nonsolicitation provisions under Section 16600.[3]

However, in 2018, the AMN court held that even if Loral remained good law, the employee nonsolicitation provisions under consideration were unlawful under Section 16600 because, as applied to nurse recruiters, they "clearly restrained [the] individual defendants from practicing with [their new employer] their chosen profession."[4]

Within months of AMN, two separate 2019 decisions from the U.S. District Court for the Northern District of California — Barker v. Insight Global LLC and WeRide Corp. v. Kun Huang — extended AMN's holding beyond the unique context of traveling nurse recruiters to invalidate employee nonsolicitation provisions in cases where the departing employees did not recruit talent for a living.[5]

Over the next several years, federal district courts have gone both ways in evaluating

employee nonsolicitation provisions, though most recent decisions have invalidated them.[6]

Thus, although neither AMN nor any other published California decision explicitly overruled Loral, most courts have considered employee nonsolicitation provisions and concluded that they do not pass muster under Section 16600.

What Unpublished California Decisions Suggest About Employee Nonsolicits

Although they are not citable or binding precedent on California courts, unpublished California appeals court decisions may provide insight into how judges — possibly, the same judges — might evaluate employee nonsolicitation agreements.

While they both limited their holdings to the specific provisions at issue, at least two unpublished appeals court decisions invalidated employee nonsolicitation provisions in recent years.

In Moss Brothers Auto Group v. Shaver, the Fourth Appellate District, the same district as AMN, affirmed a trial court's order in 2022 sustaining a demurrer to a cause of action for breach of an employee nonsolicitation provision.[7]

Although both parties requested that the court publish its decision and definitively weigh in on the validity of Loral, the court declined to do so, finding the language of the particular contract was impermissibly overbroad — even applying Loral.[8]

In 2023, the same panel of judges affirmed a trial court's order in Frazer LLP v. Rendon, granting summary adjudication to a defendant in a case involving an employee nonsolicitation provision.[9]

As in Moss Brothers, although the panel acknowledged that Loral's ongoing validity had been called into question, the court's decision did not directly take it on.

Instead, the panel invalidated the at-issue restrictions because they went far beyond what was reasonable — including by preventing a departing partner from hiring his

former accounting firm's employees.

For Now, the Law Remains Uncertain

As noted above, a number of federal district court decisions have now interpreted AMN to prohibit employee nonsolicitation provisions generally. Yet, federal courts are not the final arbiter of substantive California law and, to date, no binding California authority has endorsed this view.

Thus, as a technical matter, Loral remains good law, and there is at least an argument that employee nonsolicitation provisions are permissible if reasonably narrowly tailored.

However, things could change. One of the new pieces of legislation that took effect earlier this year, Business & Professions Code Section 16600.5, may up the ante and increase the likelihood that the California Supreme Court definitively addresses this issue.

Section 16600.5 provides, among other things, that "[a]ny contract that is void under this chapter is unenforceable regardless of where and when the contract was signed."

Although the language is vague, by referring to a "contract" instead of a "provision" or "clause," Section 16600.5 at least raises the possibility that a court could invalidate an entire agreement if it contained an unenforceable nonsolicitation provision.

Of course, this would be a significant departure from the usual preference to sever offending contractual provisions.

Yet, even if Section 16600.5 does not place entire agreements at risk, it may nonetheless lead to more litigation about employee nonsolicitation provisions.

The new law provides for a private right of action and the possibility of recovery of attorney fees for employees seeking to challenge restrictive covenants.

The possibility of recovering attorney fees in suits seeking declaratory or injunctive relief

may give employees and the plaintiffs bar a greater incentive to bring cases challenging employee nonsolicitation agreements which could, in turn, lead to a case definitively addressing whether Loral remains good law.

[1] Loral Corporation v. Moyes , 174 Cal. App. 3d 268 (1985).

[2] AMN Healthcare, Inc. v. Aya Healthcare Services, Inc. , 28 Cal. App. 5th 923 (2018).

[3] Edwards v. Arthur Anderson LLP , 44 Cal. 4th 937 (2008).

[4] Id. at 936.

[5] See Barker v. Insight Global, LLC , 2019 WL 176260, at *3 (N.D. Cal. Jan. 11, 2019) ("[T]he Court is convinced by the reasoning in AMN that California law is properly interpreted post-Edwards to invalidate employee nonsolicitation provisions."); WeRide Corp. v. Kun Huang , 379 F. Supp. 3d 834, 852 (N.D. Cal. 2019) ("The Court finds the reasoning of Barker and AMN, including their application of Edwards, to be persuasive. Paragraph 5, as a restraint on employment, is invalid.").

[6] See, e.g., Hamilton v. Juul Labs, Inc. , 2020 WL 5500377, at *7-*8 (N.D. Cal. Sept. 11, 2020) (concluding that a plaintiff had not sufficiently pled that the employer knew a post-employment non-solicitation provision was illegal at the time it was signed because: (1) it was signed before the AMN decision and (2) there was no allegation that the employee non-solicitation provision prevented the plaintiff from engaging in her profession); Parsable, Inc. v. Landreth , 2022 WL 19692034, at *4 (N.D. Cal. Aug. 5, 2022) (citation omitted) (granting motion to dismiss; "A non-solicitation clause works a restraint on any former employee 'by restricting who may work alongside them.' … It is therefore void under California law."); Race Winning Brands, Inc. v. Gearhart , 2023 WL 4681539, at *11 (C.D. Cal. Apr. 21, 2023) ("[T]he Confidentiality Agreement's non-solicitation clause is contained in an employment agreement and prevents Defendant from soliciting Plaintiff's other employees to work with Defendant for one year following his termination. Accordingly, the non-solicitation provision in the Confidentiality Agreement is void … absent a statutory exception.").

[7] Moss Brothers Auto Group v. Shaver , 2022 WL 17546280 (Cal. Ct. App. 2022).

[8] See id. at *4. ("While the federal courts applying California law have held all nonsolicitation provisions violate section 16600, no California court has yet to do so.

Although the policies underlying section 16600 might suggest we accept and apply this rule of law, this is not the case in which to do so. We need not address the per se invalidity of nonsolicitation provisions in general because the specific nonsolicitation provision [plaintiff] required its employees to sign is impermissibly overbroad.").

[9] Frazer, LLP v. Rendon , 2023 WL 5602370, *7 & n. 3 (Cal. Ct. App. Aug. 30, 2023).

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