California Enacts New Laws Strengthening Its Prohibitions Against Non-Competes

By Julie Levinson Werner and Amy C. Schwind

California law has long held that noncompetes in the employment context are void under California Business and Professions Code § 16600 (§ 16600). Now, to further bolster its prohibition on such covenants, California has enacted two new laws that will crack down on employers' use of noncompetes. Both laws go into effect on January 1, 2024.

On October 13, 2023, California enacted AB 1076, which "codifies" existing case law as established in the California Supreme Court's 2008 decision *Edwards v. Arthur Anderson* by specifying that § 16600 is to be broadly construed to void the application of any noncompete agreement in the employment context or any noncompete clause in an employment contract, no matter how narrowly tailored.

AB 1076 then goes one step further, however, and adds that it shall be *unlawful* to include a noncompete clause in an employment contract, or to require an employee to enter into one, and includes onerous notification requirements for employers. By February 14, 2024, employers must notify current employees, and former employees who were employed after January 1, 2022, whose contracts include a noncompete clause or who were otherwise required to enter into a noncompete agreement, that any noncompete clause or noncompete agreement they may have signed is void. Each notice must be a written communication individualized to the employee or former employee and delivered to the person's last known address and email address. A violation of these new provisions constitutes unfair competition under California's Unfair Competition Law, which provides that a court must impose a civil penalty of up to $2,500 for *each* violation.

Last month, California enacted other legislation that also impacts the noncompete landscape in California. SB 699 provides that (1) a contract that is void under § 16600 is unenforceable regardless of where and when the contract was signed, (2) an employer shall not enter into a contract that includes a provision that is void under § 16600, and (3) an employer shall not attempt to enforce a contract that is void under § 16600 *regardless of whether the contract was signed and the employment was maintained outside California*. An employer that enters into or attempts to enforce a contract that is void under § 16600 commits a civil violation, and an employee, former employee, or prospective employee may bring a private action for injunctive relief, the recovery of actual damages, and attorneys' fees. This addition to the law incentivizes individuals to challenge a non-compete beyond just declaratory relief.

As presently worded, SB 699 restricts California-based employers from enforcing noncompetes against even employees working in other states, particularly in California courts. But it is unclear how courts in other states will handle challenges to noncompete agreements alleged to violate these California laws. For example, if a California employer requires its employee in New Jersey to sign a noncompete that is permissible under New Jersey law, can the California employer enforce the noncompete in a New Jersey court against the New Jersey-based employee? It is also unclear whether SB 699 in particular will pave a way for a California company to hire an employee in California who is subject to an otherwise enforceable noncompete executed in another state under that state's law.

Prohibited “noncompetes” in California also include customer/client nonsolicitation provisions, and therefore such provisions will also fall within the ambit of these two new laws. The new laws do not, however, affect existing limited exceptions to California’s noncompete prohibitions, which permit noncompetes and nonsolicits in connection with the sale or dissolution of corporations, partnerships, and limited liability companies.

The new legislation comes amid a growing trend in many other states attempting to curtail noncompete agreements, including legislation that was proposed in New York in June, detailed here, that has not yet been enacted.

Employers across the United States should consider how these changes in California may impact their operations, particularly given the increased legal risks associated with noncompete use. a

If you need assistance navigating the complex employment laws concerning restrictive covenants, please contact Lowenstein Sandler’s Employment Counseling & Litigation practice group.

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