CALIFORNIA EMPLOYEE NON-SOLICITATION PROVISIONS FACE UNPREDICTABILITY

In late 2018, the Court of Appeal for California's Fourth Appellate District reached a concerning decision for employers with restrictive covenant agreements in California.

Established California law prohibits employers from entering into non-competition and customer-based restrictions with their employees other than for explicit statutory exceptions. However, case law had provided that employers could enter into contracts with their employees that would prohibit post-employment solicitation of co-workers on behalf of a new employer. In *AMN Healthcare Inc. v Aya Healthcare, et al.* (*AMN*), and in at least one additional decision, courts found precisely such provisions unenforceable, calling into question their viability and legality going forward.

THE BOTTOM LINE

The California Court of Appeal rejected an employee non-solicitation provision for recruiters, and one federal court in California has taken a broad reading of that decision and concluded that all employee non-solicitation provisions are invalid. This development serves as a reminder to employers to review their existing restrictive covenant agreements, particularly in California, to ensure that they are lawful and enforceable.

AMN HEALTHCARE INC. V AYA HEALTHCARE, ET AL.

The *AMN* case concerns two competing companies that provide temporary healthcare professional employees, including "travel nurses," to medical care facilities throughout the country. As a condition of employment with AMN Healthcare Inc. (AMN), employees signed agreements that prohibited them from soliciting any AMN employee, including the travel nurses who were placed on assignment, to leave AMN. These restrictions were in place for at least one year post-employment with respect to the solicitation of regular AMN employees, and lasted for 18 months in the case of soliciting travel nurses.

In 2015, AMN sued four of its former recruiters who, after joining Aya Healthcare, solicited away AMN travel nurses. The defendants claimed that the employee non-solicitation provision in their agreements improperly restrained them from engaging in their profession of recruiting, in violation of California Business and Professions Code section 16600.

The trial court held that the post-termination, non-solicitation of employee provision, if enforced, prevented former AMN employees from recruiting travel nurses and similar professionals who were on temporary assignment with AMN, even if those same travel nurses had applied to, were known by, and/or had previously been placed by a competitor of AMN. Accordingly, the trial court held that this constituted an unlawful restraint on trade and enjoined AMN from enforcing the employee non-solicitation provision. The Court of Appeal affirmed.

AFTEREFFECTS ON EMPLOYEE NON-SOLICITATION PROVISIONS

The *AMN* decision has raised concern among California employers who feared they would no longer be able to rely on employee non-solicitation provisions to protect themselves against poaching by former employees.

The Court of Appeal's decision emphasized, among other things,

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that the restriction on the defendants' ability to solicit AMN employees would restrain the defendants from engaging in their chosen profession – recruiting. This stands in contrast to the employee non-solicitation provisions that have been upheld in California and across the country in industries other than recruiting, where the employees against whom the provisions are enforced can practice their chosen profession without needing to solicit employees from their former employers.

The *AMN* court contrasted the role of a recruiter from that of an executive officer, such as the defendant whose non-solicitation agreement was at issue in *Loral Corp. v. Moyes* (*Loral*), the precedential 1985 case endorsing contractual employee non-solicitation provisions in California. There, the Court of Appeal determined that employee non-solicitation provisions only "slightly" impact employment opportunities and therefore do not defy Section 16600's prohibition of contracts "by which anyone is restrained from engaging in a lawful profession, trade, or business." This distinction may be used by California courts to discourage the expansion of the *AMN* decision outside the scope of the recruiting industry – a unique profession in which solicitation is part and parcel of the job.

Unfortunately for employers, however, one court has already taken a more expansive reading of the *AMN* case. In January 2019, the U.S. District Court for the Northern District of California in *Barker v. Insight Global* (*Barker*) reconsidered its own prior decision in which it had dismissed claims, in part, because of a finding that employee non-solicitation provisions are enforceable under California law. In reconsidering that prior decision, the court held that it was "convinced by the reasoning in *AMN* that California law is properly interpreted . . . to invalidate employee non-solicitation provisions." The *Barker* court added that it was "not persuaded that the secondary ruling in *AMN* finding the non-solicitation provision invalid under *Loral* based upon these employees' particular job duties abrogates or limits the primary holding" that the non-solicitation provision is void as a matter of law.

While *Barker* remains the only reported case interpreting the *AMN* decision so far, and it is notably within the bounds of the recruiting industry (Insight Global is a staffing company), we will be watching the dockets closely to assess how the jurisprudence develops regarding employee non-solicitation provisions in California.

In light of the possibility that the *AMN* case may render all employee non-solicitation provisions unenforceable, California employers must be cautious when including these provisions in any employment or confidentiality agreements. The consequences of the use of a standard restrictive covenant agreement can be severe in California, even if intended only for deterrent effect.

Unlike most jurisdictions, in California an employer that enters into an unenforceable restrictive covenant is violating law and the state's public policy. Accordingly, case law in California indicates that an employee may win a judgment against an employer for the mere inclusion of such a provision, even if the employer never intends to enforce it. With that judgment, in addition to a finding that the covenant is unenforceable, the victorious employee could seek attorneys' fees (which were awarded to the employees in the *AMN* case).

FOR MORE INFORMATION

David Fisher
Counsel
212.468.4861
dfisher@dglaw.com

Marissa L. Comart
Associate
212.468.4952
mcomart@dglaw.com

or the D&G attorney with whom you have regular contact.

Davis & Gilbert LLP
212.468.4800
1740 Broadway, New York, NY 10019
www.dglaw.com