4 Things Employers Need to Know About the New Noncompete Laws in California

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Everyone knows that noncompete agreements are generally unenforceable in California and there's not much more to be said, right? California lawmakers think differently and thus have taken steps to equip employees with new ways to challenge them. On September 1, Governor Newsom signed a bill into law that prohibits employers from entering into noncompetes with California employees that are void under state law, and also prohibits employers from attempting to enforce such noncompetes against California employees – regardless of whether the employee executed the agreement in another state or worked in another state when executing the agreement. Separately, the governor signed another bill on October 13 that will implement a new burdensome notice requirement for employers, requiring them to notify current and former employees about unlawful noncompete covenants in their employment agreements. Here are four things you should know about these new noncompete laws in California.

1. What Conduct Does SB 699 Prohibit and How Can Employers Violate the New Law?

California has a long history of disfavoring noncompetes. Under California Business and Professions Code section 16600, every contractual covenant that restrains anyone from engaging in a lawful profession, trade, or business of any kind is void, except under limited statutory exceptions. Those narrow exceptions include the sale of a business, the dissolution of a partnership, or upon the dissolution or termination of interests in a limited liability company. Ultimately, most noncompetes with California employees are void.

When passing SB 699, the legislature explained that many employers still use noncompete agreements for their deterrent effect, which has a chilling effect on employee mobility. As such, the law prohibits employers from entering into noncompete agreements that are void under California law. In fact, an employer that enters into or seeks to enforce an unlawful noncompete will commit a civil violation once the new law takes effect on January 1, 2024.

Further, the new law impacts noncompete agreements signed by employees working outside of the state. The legislature explained that "California employers increasingly face the challenge of employers outside of California attempting to prevent the hiring of former employees" although "California's public policy against restraint of trade law trumps other state laws when an employee

seeks employment in California, even if the employee had signed the contractual restraint while living outside of California and working for a non-California employer."

Based on this context, the terms the new law prohibit employers from attempting to enforce a noncompete that is unlawful in California, regardless of whether the contract was initially signed and the employment was initially maintained outside of California but the employee subsequently moves to California. This presumably applies to any current or former employer, regardless of location, that attempts to enforce a noncompete in this state.

This raises the question as to whether SB 699 invalidates noncompetes that were signed by employees working in states that allow such agreements but then the employee moves to California to take a job in California. It appears so. Here is an example of how this might happen:

- A California company seeks to hire an employee to work in California.
- The employee previously lived and worked in Utah, a state that allows some noncompetes.
- While previously working for the Utah company, the employee entered into a noncompete that satisfied the requirements to be valid under Utah law.
- After the California company hired the employee, the Utah company takes action to enforce the noncompete against the employee and prevent him from taking the job.
- The employee can now rely on SB 699 to prevent enforcement of that noncompete.

2. Employees Can Sue for Violation of SB 699

Before the adoption of SB 699, lawsuits in California to invalidate noncompetes have focused on declaratory relief. Under the new law, however, employees are entitled to new remedies when suing employers who attempt to implement or enforce unlawful noncompete agreements. Specifically, employees can seek damages, injunctive relief, and even reasonable attorneys' fees and costs. Significantly, there is no counterpart attorneys' fee provision for employers who prevail in litigation over SB 699.

One open question is what effect SB 699 has on noncompetes between a business and its independent contractors, as those provisions could be void under section 16600 (but are not referenced in the penalties provision of the new law). We will continue to track developments as this law is enforced.

3. What is AB 1076 and How Does it Change Existing Law?

AB 1076 expressly codifies existing caselaw that explained that any noncompete in the employment context, no matter how narrowly tailored, is void. This new law further clarifies that California's invalidation of noncompete agreements is not limited to contracts where the person being restrained from engaging in a lawful profession, trade, or business is a party to the contract.

Additionally, AB 1076 creates a new notice requirement for employers. Once the law takes effect, employers will need to notify current and former employees whose contracts included an unlawful noncompete that such noncompetes are void. The notice would need to be contained in a written individualized communication to the employee or former employee, and delivered to their last known address and email address. A failure to send these notices would be a violation of California Unfair Competition Law, which can carry civil penalties.

Employers will only have a few months to comply with this new notice requirement, which requires notice by February 14, 2024. Of note, this new law is retroactive, meaning all existing agreements, for current employees and former employees who were employed after January 1, 2022, are subject to its requirements. So, even if employers enter into compliant agreements with their current employees, employers will still need to satisfy this new notice requirement for non-compliant agreements with former employees.

4. What Should Employers Do Next?

With the enactment of SB 699, you should consider reviewing your template California employment contracts to ensure they do not contain an unlawful noncompete that may run afoul of the new law. Also, you may not be able to rely on noncompete agreements signed by employees working outside of California once the employee begins working in this state. As such, employers should avoid *solely* relying on noncompete agreements – in states where they are valid – to protect confidential and trade secret information. Instead, a multifaceted approach to protecting confidential and trade secret information will help ensure that an employer is not left exposed if a noncompete is challenged as unenforceable under SB 699.

Further, employers both inside and outside California should review and identify potentially non-compliant agreements with current and former employees who are residents of California. This includes but is not limited to those employees who signed valid non-competes when they were residents of other states but now reside in California. You should then correct non-compliant agreements with current employees and notify former employees. Such a notice should include a representation that your company will not attempt to enforce any agreement or provision of any agreement to the extent deemed unenforceable under section 16600.

Conclusion

Fisher Phillips will continue to monitor this situation and provide updates as warranted, so make sure that you are subscribed to Fisher Phillips' Insights to get the most up-to-date information direct to your inbox. If you have any questions, contact your Fisher Phillips attorney, the authors of this Insight, any attorney in any of our California offices, or any attorney in our Employee Defection and Trade Secrets Practice Group.

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