Contractual Employee Non-solicitation Provisions Under Attack: Employer Loses Battle in Case Involving Unique Facts

Insights
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California's prohibition against contracts that restrain a person's ability to engage in a lawful business, profession, or trade is well-established and well-known. Ten years ago, in *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, the state Supreme Court confirmed that the only exceptions to that rule – Business & Professions Code section 16600 -- are statutory exceptions, and rejected the "rule of reasonableness" that some courts had used to uphold the validity of non-competition covenants. The enforceability of employee non-solicitation contractual provisions was not at issue in *Edwards*, but the California Court of Appeal in San Diego recently had the opportunity to weigh in on that issue. In *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.*, the appellate court, in a published decision, invalidated the former employer's employee non-solicitation provision on the ground that it restrained the former employees from practicing their chosen profession. While this ruling may, at first glance, create some doubt about the continued viability of such contractual provisions, a close look at the facts of the *AMN Healthcare* decision reveals that the outcome depended on very specific circumstances that are not present for most employers using these provisions.

AMN and Aya compete in the business of providing healthcare professionals – including "travel nurses" -- to medical care facilities on a temporary basis. They employ recruiters to recruit and place travel nurses. AMN required its recruiters to sign a Confidentiality and Non-Disclosure Agreement (CNDA) that among other things prohibited the recruiters, for at least one year, from soliciting AMN employees to leave the company. Specifically, section 3.2 of the CNDA stated: "Employee covenants and agrees that during Employee's employment with the Company and for a period of eighteen months after the termination of the employment relationship with the Company, Employee shall not directly or indirectly solicit or induce, or cause others to solicit or induce, any employee of the Company or any Company Affiliate to leave the service of the Company or such Company Affiliate." (Another version of section 3.2 that was at issue in the case prohibited solicitation for one year after termination of employment.) AMN's position was that this contractual provision prohibited former AMN employees from recruiting travel nurses who were on temporary assignment with AMN.

Four AMN recruiters left AMN to join Aya. They recruited several AMN travel nurses to leave AMN assignments and accept assignments through Aya. In response, AMN sued the four former employees for breach of contract and other claims (and also asserted several claims against Aya).

As to the contract claim, AMN contended that the defendant employees breached the CNDA by soliciting AMN travel nurses to leave AMN and become Aya employees. In response, the former AMN employees requested dismissal of the contract claim on the basis that the employee non-solicitation provision of the CNDA was an unlawful restraint on trade in violation of section 16600.

The Court of Appeal agreed; its reason is critical to understanding the scope of its decision. The court began by reviewing California's well-established law: subject to narrow exceptions, a contract that restrains a person from engaging in a lawful profession, trade, or business is void. This law furthers the state's public policy favoring employees' mobility and betterment over employers' competitive business interests. Then the court concluded that the non-solicitation provision was unlawful because it prevented the recruiters from doing the very thing that they chose to do as their profession: recruit travel nurses. In so deciding, the court relied on undisputed evidence showing that enforcing the contract would limit the number of nurses with whom the former AMN recruiters could work and, as a result, limit the amount of compensation that the recruiters could earn while employed with their new agency, Aya.

Employers should not overreact to the *AMN* decision. In the vast majority of situations, an employee non-solicitation provision does not prevent a former employee from engaging in their chosen business or trade. Employment agencies and other staffing companies, of course, should promptly review their employee non-solicitation provisions to assess whether they are now in more danger of being invalidated, and make changes accordingly. For all other employers, if your non-solicitation provision has not been evaluated recently, then now is a good time for your FP lawyer to review and ensure that it remains viable under the current state of California law.

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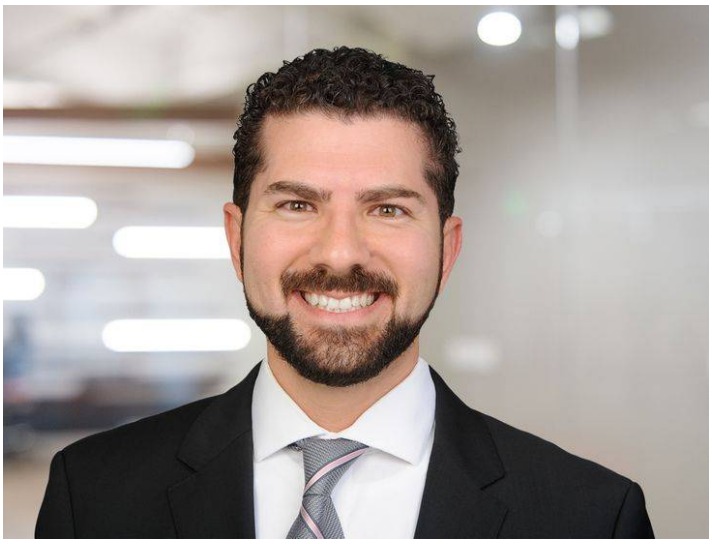

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