No-Rehire Provisions Are No More in California Settlement Agreements

Insights
10.14.19

Between pumpkin carving and cookie baking, Californians now have one more thing to add to their holiday to-do lists: reviewing their standard settlement agreements to remove any no-rehire provisions. California employers have until the end of the year to revise their agreements to comply with AB 749, the legislation signed into effect by Governor Gavin Newsom October 12. What do California employers need to know about this new law?

The Basics

It is very common for employers to settle threatened claims or lawsuits with an agreement that includes a no-rehire provision. These provisions typically prohibit the employee from ever again applying for a job with the company anywhere in the country. If they do, the employer can reject the application and the employee can't protest that decision. Some agreements go so far as to say that the employer can fire them scot-free if the worker is accidentally hired by any division of the company or a subsidiary.

Under California's new law, these provisions will soon be no more. As of January 1, 2020, settlement agreements can no longer contain any provision that prohibits, prevents, or otherwise restricts an employee from obtaining future employment with that employer. The same is true for the any parent companies, subsidiaries, divisions, affiliates, or contractors. Any such provision that remains in a settlement agreement created on or after that date will be void.

This prohibition will only apply to no-hire provisions in agreements between employers and "aggrieved persons," meaning a person who has filed a claim against their employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer's internal complaint process. So a typical severance agreement offered to a worker upon their termination can still contain a no-rehire provision, so long as the severance is not offered as settlement of an employment dispute and that worker has not yet filed a claim against you.

#MeToo Motivation

AB 749, codified as California Code of Civil Procedure section 1002.5, is another piece of #MeToo legislation. The bill was co-sponsored by the California Employment Lawyers Association and Equal Rights Advocates. The idea behind it: no-rehire provisions can punish victims of harassment or discrimination and dissuade people from reporting issues in the workplace.

It also adds another chapter to California's longtime distaste for restraints on trade. No-rehire provisions, particularly those that encompass an employer's subsidiaries or other related entities, are seen as imposing substantial burdens on an employee's ability to work in their chosen occupation.

Exceptions From Coverage

For employers fearful that they must now rehire any and all bad apples who show up on your doorstep after you have fired them, take heart. AB 749 has considered and attempted to address that concern. The new law explains that it does not preclude you from agreeing to end a *current* employment relationship with an "aggrieved person."

An employer and current employee may mutually agree to terminate that relationship. Meaning an employee can still decide to quit at any point before or after their dispute against the employer settles. With AB 749, discussions as to future hiring are taken off the table in settlement negotiations. Practically, this eliminates an employee's ability to seek recovery for agreeing to never try to return to the employer. Instead, the employee can only demand money to settle their claim.

Moreover, AB 749 does not require you to continue to employ or rehire a person if there is a legitimate non-discriminatory or non-retaliatory reason for terminating the employment relationship. If an employee is unsuitable for the job, AB 749 will not spare the employee termination.

This legislation was designed to protected victims of workplace harassment, not perpetrators of it. The new law specifically provides that the employer and settling aggrieved person can enter into a no-rehire agreement if the employer has made a good faith determination that the aggrieved person engaged in sexual harassment or sexual assault.

Next Steps

California employers have until the end of the year to review your settlement agreements and revise as necessary to comply with this legislation. As you prepare for these changes, we recommend you get in touch with your regular Fisher Phillips attorney or one of the attorneys in any of our California offices:

Irvine: 949.851.2424

Los Angeles: 213.330.4500

Sacramento: 916.210.0400

San Diego: 858.597.9600

San Francisco: 415.490.9000