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CALIFORNIA EMPLOYMENT LAW ALERT
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THE NEW "GOLDEN RULE": YOU CAN SETTLE UNTO OTHERS (BUT YOU SHOULD AVOID NO RE-EMPLOYMENT PROVISIONS)

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Imagine a typical employment dispute that results in litigation, with the plaintiff alleging racial discrimination and the defendant denying it did anything wrong. Imagine that the plaintiff and defendant reach a settlement before trial, and announce that settlement in open court, including a specific colloquy on the record with a magistrate judge. Imagine that the settlement includes a substantial payment to the plaintiff, and that in exchange, he specifically agrees to dismissal of the suit, a release of all claims, and that he will not become employed with defendant, its related companies, or companies that it contracts with in the future.

Now imagine that when the defendant seeks to have plaintiff sign a written confirmation of the settlement, it turns out that the settlement is unenforceable.

That is the surprising result of a recent case from the United States Court of Appeals for the Ninth Circuit.[1] In Golden, the Ninth Circuit, in a 2-1 decision, held that a no re-employment provision might void a settlement agreement. In light of this decision, all settlement agreements in California that include so-called "no-hire" provisions are potentially subject to challenge, and clients should consider revising standard agreement templates to delete such provisions, at least until the law becomes clearer.

California law has historically disfavored agreements that inhibit an employee's ability to seek or obtain employment. Indeed, section 16600 of the California Business and Professions Code, which provides that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void" has long been interpreted by California courts to prohibit the enforcement of non-compete clauses. However, California state courts have never faced the question of whether a no re-employment provision in a settlement agreement would violate section 16600.

Now, in Golden, the Ninth Circuit has predicted that a no re-employment provision would, in fact, violate section 16600. The facts of Golden are as follows: Dr. Golden lost his staff privileges at a facility operated by California Emergency Physicians Medical Group ("CEP") and sued CEP. Before trial, the parties reached a settlement, announced it in open court, and eventually reduced the agreement to writing. The written settlement agreement included a provision that stated: "Golden shall not be entitled to work or be reinstated at any CEP-contracted facility or at any facility owned or managed by CEP," and furthermore that "if CEP contracts to provide services to, or acquires rights in, a facility that is an emergency room . . . at which Golden is employed or rendering services, CEP has the right to and will terminate Golden from any work in the emergency room without any liability whatsoever." Effectively, this provision would preclude Golden from working with CEP in nearly any capacity in the future

[1] Golden v. California Emergency Physicians Medical Group, et al., No. 12-16514 (9th Cir. April 8, 2015).

(which is precisely what a company that is being sued would like to do with the person doing the suing). It does not prevent Golden from seeking employment with competitors of CEP, and thus it does not constitute a non-compete clause.

Nevertheless, the court concluded that section 16600 is not meant solely to prohibit non-compete agreements, but likely also prohibits other agreements that would limit employment. In light of this holding, the majority found that – if this provision poses a "restraint of a substantial character"[2] on Dr. Golden's medical practice -- the settlement agreement could not be enforced. The Court left it up to the lower court to determine, on remand, whether the restraint is "of a substantial character" or not.

In light of the decision in Golden, companies should think carefully about provisions in settlement agreements that prohibit or limit future employment opportunities. Consider, for example, a paragraph that is included in a settlement agreement and is entitled "No Re-Employment." It states:

> Employee hereby agrees and recognizes that his employment relationship with Employer has been permanently and irrevocably severed and that Employer has no obligation, contractual or otherwise, to hire, rehire or re-employ him/her in the future, and he agrees not to seek re-employment with Employer or any of its affiliates in the future, including any assignment to or on behalf of Employer as an independent contractor, whether directly or through any third party.

Under the "Golden Rule," this paragraph may pose significant risks to the enforceability of the settlement agreement as a whole. In short, unless and until such time as the California Supreme Court revisits this issue, all companies should review the language of their settlement agreements in California, and remove any provisions that may pose a litigation risk in this new environment.

Please feel free to contact us with any questions regarding Golden or California employment or settlement issues.[3]

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[2] See Chamberlain v. Augustine, 156 P. 479 (Cal. 1916).

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