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CLIENT ALERT

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SOMEONE CALL A NURSE: NON-SOLICITATION OF EMPLOYEE AGREEMENTS ARE DYING IN CALIFORNIA

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Most employers who do business in California know that restrictive covenants are just different in the Golden State. Since 1872, California law and public policy have favored worker mobility and open competition.[2] Barring three narrow statutory exceptions, "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."[3]

Nevertheless, California has permitted companies to enforce reasonable restrictions on employees to prevent them from trying to solicit their fellow co-workers to leave and join a new employer.[4] Two recent decisions – one from a California state appellate court and one from the U.S. District Court for the Northern District of California may have changed the landscape.

Late last year, the Court of Appeals for California's Fourth Appellate District explored whether so-called "employee non-solicitation" agreements are still viable in California but did so under unique factual circumstances. AMN Healthcare is a staffing agency that placed nurses (called "travel nurses") in short-term assignments in medical facilities around the country. Certain employees, known as "travel nurse recruiters," signed agreements limiting their ability to solicit any AMN employee to leave the company for at least one-year. After some of these travel nurse recruiters joined a competitor, Aya Healthcare, AMN sought to enforce the agreements.

Importantly, AMN treated the travel nurses as employees when they were on assignment. Therefore, the employee non-solicitation agreements would have significantly impeded the travel nurse recruiters' ability to do their actual jobs - recruiting travel nurses - for Aya Healthcare.

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[2] AMN Healthcare, Inc. v. Aya Healthcare Servs., Inc., 28 Cal. App. 5th 923, 935 (Ct. App. 2018).

[3] Cal. Bus. & Prof. Code § 16600

[4] See Loral Corp. v. Moyes, 174 Cal. App. 3d 268, 219 Cal. Rptr. 836 (Ct. App. 1985).

The appellate court invalidated the restrictions preventing solicitation of employees because, on those facts, the agreements improperly restrained the defendants "from engaging in their chosen profession, even in a 'narrow' manner or a 'limited' way."[5] The court further expressed "doubt" as to "the continuing viability" of employee non-solicitation agreements.[6] Despite this "doubt," many companies held out hope that AMN would be limited to the unique facts of that case.

The "doubt" has become a certainty. Shortly after the decision in AMN, the Northern District of California weighed in, taking the position that employee non-solicitation agreements are no longer enforceable in California. In Barker v. Insight Global, LLC,[7] the Court explicitly rejected an argument that AMN should be limited to its facts. Instead, the Court concluded that AMN represented a "material change in law." Id. at *6. In so doing, the Court held that employee non-solicitation agreements are simply unenforceable in California.

While Barker is not binding on California state courts, between the decision in AMN and the analysis in Barker, we think that it is likely that California state courts now will refuse to enforce employee non-solicitation agreements except in narrow circumstances, such as those in which a former employee misappropriates trade secrets to assist with solicitation. In light of these recent developments, employers and their attorneys should consider reviewing agreements (employment and otherwise) that include employee non-solicitation provisions.[8]

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5 AMN Healthcare, Inc., 28 Cal. App. 5th at 939.

6 Id.

7 2019 U.S. Dist. LEXIS 6523 (N.D. Cal. Jan. 11, 2019).

8 In California, employers face the risk of significant penalties if they require employees to agree to contractual terms prohibited by law, so regular review of agreements can help reduce potential exposure.