New Ruling Requires California Employers to Revise Employee Solicitation Restrictions in Employment Agreements

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California Business Professions Code section 16600 reflects a strong public policy against agreements "by which anyone is restrained from engaging in a lawful profession, trade, or business." For decades, California Courts have applied section 16600 to invalidate agreements prohibiting former employees from soliciting the company's *customers*. A recent decision from the California Court of Appeal, *AMN Healthcare, Inc.v. Aya Healthcare Services, Inc.*, signals that courts may now start invalidating agreements prohibiting former employees from soliciting the company's *employees*. At the same time, the decision provides useful guidance to companies seeking to prevent employees from using their access to secret information about a company's employees to raid the company's workforce.

AMN Healthcare concerned two companies that placed temporary "travel nurses" with healthcare facilities. The plaintiff company, AMN, required its employees to agree that for eighteen months after leaving the company, he or she "shall not directly or indirectly solicit or induce, or cause others to solicit or induce, any employee of the Company . . . to leave the service of the Company." In violation of this provision, AMN employees went to work for Aya and solicited their former colleagues at AMN to join them. AMN sued, among others, Aya and the employees who had violated the agreement. Yet instead of enforcing the agreement, the trial court ruled that the provision was unenforceable as an unlawful restraint on the former employees' right to pursue a lawful trade. The court entered an injunction preventing AMN from attempting to enforce the provision and ruled that AMN must pay the defendants' attorneys' fees.

The Court of Appeal affirmed the trial court's ruling. It held that the provision at issue "clearly restrained individual defendants from practicing their chosen profession – recruiting travel nurses." As the Court of Appeal noted, under California law even "reasonable" non-competition agreements are unenforceable unless they fit into a specified exception to section 16600, such as a business owner's sale of the goodwill of a business. Nor could AMN rely on case law upholding restrictions necessary to protect an employer's trade secrets. The agreement at issue sought to prohibit the use of any "confidential" information, not just trade secrets. The Court of Appeal explained, "section 16600 precludes an employee from engaging in his or her 'profession, trade, or business,' even if such an employee uses information that is confidential but not a trade secret."

The *AMN Healthcare* decision has a potentially far reaching impact on California employers. Attorneys have long counseled employers that agreements restricting an employee's solicitation of customers must be carefully crafted to do more than protect the employers' trade secrets. On the other hand, employment agreements frequently contain broadly worded provisions purporting to prevent the solicitation of employees. After *AMN Healthcare*, not only may such agreements be unenforceable, but an employer could be required to pay an award of attorneys' fees if the agreement is challenged.

The full impact of the decision remains to be seen. The former AMN employees were in the business of recruiting travel nurses so the Court of Appeal had no difficulty in holding that a contract prohibiting them from soliciting travel nurses restrained their pursuit of their trade. The decision did not address whether an employee non-solicitation provision directed to employees who did not earn their living by recruiting would likewise violate California law. Time will tell whether future decisions apply the *AMN Healthcare* ruling to such circumstances.

In the meantime, there are practical steps that employers can take to protect their legitimate interests. As with customer non-solicitation provisions, restrictions on employee solicitations should be closely tied to the protection of the employers' trade secrets. Employment agreements should be crafted to make clear that they are preventing the use of trade secret information to solicit a company's employees. For such provisions to be

enforceable, employers should take steps to treat information concerning their employees as trade secrets, including placing restrictions on access to such information.

For further information regarding this case and its implications for business, please contact Russell I. Glazer, (310) 789-1216 or RGlazer@troygould.com.