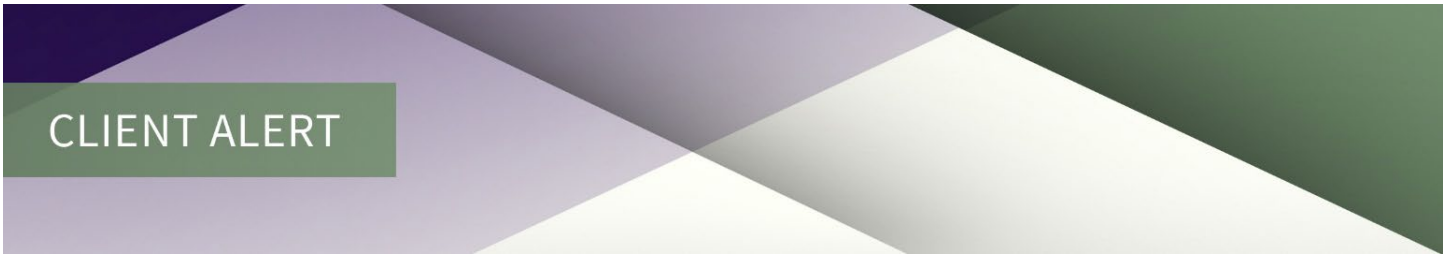

New Laws Add Teeth To California's Prohibition On Employee Non-Competes

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California recently enacted Senate Bill (SB) 699 and Assembly Bill (AB) 1076, amending California's Business & Professions Code Section 16600, which generally prohibits employers from requiring that their employees enter into post-employment non-competition covenants. Both laws go into effect on January 1, 2024. This Client Alert summarizes the key provisions of each law below.

Background

Business & Professions Code Section 16600 voids any contractual provisions by which a person is restrained from engaging in a lawful profession, trade, or business of any kind, except as otherwise provided for certain limited circumstances (e.g., covenants entered into in connection with certain sales of an ownership interest in a business). California courts have broadly interpreted Section 16600 to prohibit employers from entering into post-employment non-competition agreements as well as post-employment customer non-solicitation agreements. While the issue has not been definitively settled, courts have also held that this prohibition extends to post-employment employee non-solicitation provisions as well. As of January 1, 2024, there will be two changes to this law that expand California's prohibition of these types of agreements with employees.

SB 699

SB 699 establishes that any contractual provision that is void under Section 16600 is "unenforceable regardless of where and when the contract was signed." Therefore, employers are prohibited from attempting to enforce a contract in California that is void under Section 16600 regardless of whether the contract was signed and the employment was maintained outside of California. Under the plain language of the statute, an out-of-state employer would be prohibited from seeking to enforce a non-compete against a former employee who relocates to California and begins working for a competitor, even if the non-compete was expressly governed by and valid under another state's laws.

The law provides employees with a private right of action for injunctive relief and actual damages. "An employee, former employee, or prospective employee may bring a private action to enforce" the law and a prevailing plaintiff may recover "reasonable attorney's fees and costs." The addition of a private right of action and statutory attorneys' fees for prevailing plaintiffs increases the risk of litigation for employers going forward.

SB 699 leaves open questions about its impact on Labor Code Section 925, which includes an exception that allows employers to enter into employment contracts with California employees that are governed by non-California law when the employee is represented by independent counsel.

Furthermore, SB 699 raises federal constitutional issues, such as regulation of interstate commerce and full faith and credit.

AB 1076

AB 1076 codifies existing California case law that has broadly interpreted Section 16600 to void all non-competes, no matter how narrowly tailored, unless they fall into a statutory exception. This restriction also applies to any non-solicitation covenants that are deemed to be impermissible non-competes.

The new law also requires employers to give written notice to any current employee, and to any former employee who was employed after January 1, 2022, whose contract included a non-compete clause, or who was required to enter a non-compete agreement that did not satisfy an exception, that the non-compete clause is void. The written notice must be given by February 14, 2024 in an individualized communication to the employee or former employee, delivered to the last known physical address and email address of the employee.

Any violation of this provision constitutes an act of unfair competition under California Business and Professions Code Section 17200, et seq., which provides for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation.

Next Steps

These new laws continue to build on California's strong public policy against post-employment restrictive covenant agreements. Employers should review agreements with current and former employees based in California that include restrictive covenants to determine whether notice must be provided within the required time frame.

Employers should also consult counsel to carefully review and assess any restrictive covenant agreements with California employees.

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