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Employers Beware: Employees Are Seeking Damages for Unenforceable Noncompetes

Client Alerts

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We have seen a rise in employees going on the offensive and suing their former employers for damages for not informing them that their noncompete is invalid under the applicable state law or for exaggerating the scope of a valid noncompete. Therefore, employers should ensure that the noncompetes they seek to enforce are valid in the jurisdiction where the employee works (and resides, if different) and to be accurate as to the scope of any noncompete—and in California, to affirmatively inform employees if the noncompete they signed is invalid.

Suits Under Amended Section 16600 of the California Business and Professions Code

Recently, class action plaintiffs' attorneys have filed a number of lawsuits against non-California-based employers under Section 16600 of the California Business and Professions Code, which was amended last year to require employers to inform their employees that their noncompetes are invalid.[1]

Section 16600.1 of the California Business and Professions Code, which was added last year, required employers, by February 14, 2024, to notify all current and former employees who were employed after January 1, 2022, that their noncompetes are void under California law. This notification requirement is very similar to the notification obligation that was in the now-defunct noncompete ban rule by the Federal Trade Commission. Section 16600.1's required notice must be individualized, provided in writing, and delivered to each affected employee's last known physical address and email address on or before the February 14 deadline. As we explained in our prior client alert, such notice can be very costly for employers. The potential consequences for failing to do so, however, also can be costly for employers because Section 16600.1 further provides that failure to give the notice is considered an act of unfair competition and can result in civil penalties of up to $2,500 per violation.

The potentially significant statutory penalties likely are the impetus for the recent rash of lawsuits. In the first case to be filed regarding employers' failure to notify, *Stashik*, the lead plaintiff was employed by corporations headquartered in Washington and Maryland while working as a machine operator for their Irvine, California locations from April 22, 2024 to September 2024. He seeks to certify a class consisting of all current or former employees who worked for those companies in

California, who were subject to a noncompete clause or other restrictive covenants that he alleges restrain engagement in a lawful business, profession or trade in violation of California law, and who did not receive individualized written notice by the February 14, 2024 deadline.

He further alleges that the defendants, by maintaining or attempting to enforce their noncompetes, chilled employee mobility and violated "fundamental California public policies that protect employee freedom to engage in lawful work." The amended section 16600.5 provides that 1) all noncompete clauses are unenforceable regardless of where and when the contract was signed and 2) that an employer or former employer shall not attempt to enforce a contract that is void and unenforceable under the Act regardless of whether the contract was signed and whether the employment was maintained outside of California. Commentators have suggested that this language arguably permits any employee seeking employment in California to use California law to void a noncompete or similar restrictive covenant in connection with previous employment in any state, regardless of the governing law for that covenant.[2]

One important aspect of the amendment to note is that the term "noncompete" is not defined in the statute; instead, it provides that the term "noncompete" should be read broadly in accordance with *Edwards v. Arthur Andersen LLP*, 44 Cal.4th 937 (2008) "to void the application of any noncompete agreement in an employment context, or any noncompete clause in an employment contract." In *Edwards*, the court held that a covenant restricting solicitation of customers was void as a form of noncompete, though it did not address whether an employee non-solicit was valid. Although several federal courts in California and California appellate courts have held that Section 16600 also bars employee non-solicits, the California Supreme Court has yet to weigh in on that issue.

Regardless of whether *Stashik* succeeds on the merits, it serves as an important reminder that employers should review all agreements with current and former California employees hired after January 1, 2022, including employees who worked for employers in one state and later moved to California.

Suits Targeting Non-Solicits Under Other States' Noncompete Bans

The recent California lawsuits are part of a growing trend of offensive legal actions by employees seeing to void restrictive covenants under noncompete bans. Late last year, a proposed class of Amazon workers filed a complaint alleging that the company violated a Washington law prohibiting noncompetes for low-wage workers by requiring employees to enter illegal non-competition covenants "disguised" as non-solicitation agreements.[3] The complaint alleged that the Washington noncompete prohibition must be liberally construed by courts to cover non-solicitation clauses as well. Recently, the court denied Amazon's motion for judgment on the pleadings and the workers' motion for partial summary judgment, so the case will move forward.

Tortious Interference Suits Based on Inaccurate Noncompete Description

In other states where noncompetes are not banned, employees are looking for creative ways to avoid their noncompete obligations. For example, in Illinois, an employee sued his former employer alleging tortious interference because the former employer allegedly misrepresented the scope of a noncompete he had signed in a letter that the former employer sent to the employee and his new employer.[4] Specifically, while the agreement said that the noncompete applied only to the territory in which the employee worked and the employee was planning on working outside of that territory, his former employer's letter said that the noncompete was nationwide. Ultimately, the new employer withdrew its offer of employment. The court denied the former employer's motion to dismiss, holding that there was a dispute over the actual geographic reach of the noncompete as represented in the letter even though the former employer provided the new employer with a copy of the noncompete agreement so the new employer could see the actual language of the noncompete. In doing so, the court explained that a factual inquiry was required to determine whether the terms of the noncompete could be "plausibly construed broadly" or the employer had "knowingly advanced a frivolous interpretation of the agreement." The court further held that although the former employer had a strong claim that its actions were justified because they were limited and made to enforce its legal rights under the noncompete, those issues could not be resolved on a motion to dismiss, in part because the employee could overcome any such privilege by showing that the former employer's conduct had been malicious. The former employer recently moved for summary judgment.

Key Takeaways

Given the continued assault on noncompetes and other restrictive covenants that arguably affect employee mobility, including suits filed by former employees for damages against their former employers, employers should review their restrictive covenants to ensure that they comply with the applicable law where the employee works and resides. Also, when employers send letters to former employees and their new employers about the employee's continuing obligations, including any restrictive covenants, the former employer should be precise in the way it describes the scope of the restrictions. Jenner & Block's Trade Secrets and Restrictive Covenants team is well-situated to assist employers in remaining in compliance and protecting their confidential information and other business interests in this complex legal landscape.

Footnotes

[1] *See, e.g.* Class Action Complaint, *Stashik v. Oakley, Inc.*, (Cal. Super. Ct. May 14, 2025) (the first such case to be filed).

[2] Even before the recent amendments to 16600, California courts have held that the protections of Section 16600 apply to California residents and employees of California-based companies, including those who have not yet moved to California. *See, e.g.*, *Application Group, Inc. v. Hunter Group, Inc.,* 61 Cal.App.4th 881, 905 (Cal.App.1. Dist, 1998).

[3] Class Action Complaint, *Burns v. Amazon.com Servs. LLC*, No. 24-2-22574-9 SEA (Wash. Super. Ct. Oct. 2, 2024).

[4] *Ellicson v. Oden Machinery, Inc.,* 2023 WL 4181227 (N.D.Ill., 2023).

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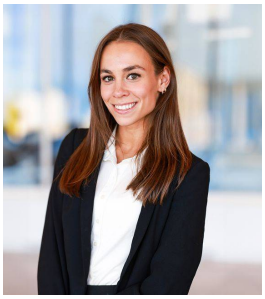

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