AMN Healthcare's impact on the enforceability of non-solicitation provisions in California raises two new unanswered questions

By Jim Heffner

California Employee mobility and the right to compete are sacrosanct in California, and have been since its Legislature enacted section 16600 of the *California Business and Professions Code*, which voids "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind."

Although the language of section 16600 was enacted nearly 150 years ago, courts continue to refine their interpretation of just how much protection to give employees in their mobility and right to compete. Given the statutory language, the trend is almost always to err on the side of the employee and offer "more protection." Maintaining this course, the November 2018 decision by the Fourth District Court of Appeal in *AMN Healthcare, Inc. v. AYA Healthcare Services, Inc*. (2018) 28 Cal.App.5th 923 again provides more protection by voiding a post-employment non-solicitation provision without considering its reasonableness. Yet, interestingly, *AMN Healthcare* leaves open two important questions in the context of post-employment non-solicitation, or anti-solicitation, provisions.

To understand the importance of these questions, we need to briefly go back 10 years before *AMN Healthcare*, when the California Supreme Court issued critical guidance in the context of non-compete provisions in *Edwards v. Arthur Anderson LLP* (2008) 44 Cal.4th 937. In this case, the Court provided more protection for employees by interpreting section 16600 to prohibit narrowly tailored non-competes, geographic non-competes, "reasonable" non-competes, and all other non-compete agreements not falling within one of section 16600's limited statutory exceptions. At the core of the opinion, the Court rejected reasonable restraints on trade that balanced competitive business interests with the interests of employees in their mobility.

Although *Edwards* was a substantial step toward employee protection, it did not specifically address the enforceability of anti-solicitation provisions. This allowed employers to use the pre-*Edwards* decision in *Loral Corp. v. Moyes* (1985) 174 Cal.App.3d 268 to justify the continued use and enforcement of "reasonable" anti-solicitation provisions. In *Loral*, the court distinguished provisions prohibiting competition from those limiting how a former employee may compete. It upheld a narrowly tailored anti-solicitation provision on a specific set of facts involving an anti-raiding provision.

Critics of *Loral* have argued that the decision did not survive *Edwards* because it applied a reasonableness approach to section 16600 that *Edwards* rejected. It was not until *AMN Healthcare* that a court of appeal clearly agreed by expressly rejecting *Loral's* use of a reasonableness standard in finding an employer's post-employment anti-solicitation provision invalid under section 16600.

Although there is no shortage of commentary on the changes mandated by *AMN Healthcare*, two interesting questions linger.

First, does the *AMN Healthcare* decision mean that no post-employment anti-solicitation provision is enforceable in California? This question arises because the former employee in that case was a recruiter and the provision therefore directly impacted her core job duties. The answer to this question is likely yes. Both *Edwards* and *AMN Healthcare* arguably reject any reasonableness standard. And although no court of appeal has yet interpreted *AMN Healthcare*'s scope, federal courts have weighed in. In *Barker v. Insight Global* (N.D. Cal Jan. 1, 2019) 16-cv-07186, 2019 WL 176260, at *1-3, the Northern District of California rejected the argument that *AMN Healthcare*'s ruling was limited by the particular job duties of the employee. Similarly, in *WeRide Corp. v. Kun Huang* (N.D. Cal Apr. 1, 2019) F.Supp.3d, 2019 WL 1439394, at *1-10, the court relied on *Edwards*, *AMN*, and *Barker* when it ruled an employee anti-solicitation agreement unlawfully restricted the business, profession, or trade of a technology company's director of hardware. With these recent decisions, employers and employees should carefully consider whether any post-employment anti-solicitation provision is enforceable in California. Stay tuned because numerous pending actions may provide further clarity.

As a second question, can an employer still maintain a claim for breach of an anti-solicitation provision when the former employee used a misappropriated trade secret to accomplish the solicitation? This question arises because California courts have consistently held that section 16600 does not prohibit claims for misappropriation of trade secrets where a former employee uses misappropriated trade secrets to compete. Although *AMN Healthcare* recognized this trade secret exception, it did not confront the issue of whether a breach contract claim survives because the evidence did not show that trade secrets were misappropriated in that case. If an employer is limited to pursuing its claim as a tort theory of misappropriation, the contracting parties may not be afforded the benefits of other provisions of the agreement, such as attorney fee provisions and certain arbitration provisions. Parties should carefully consider this point and other tactical considerations as they frame their claims and challenges.

I look forward to watching these issues develop and will continue to provide updates as we get more clarity around them. If you would like additional information on the impact of *AMN Healthcare*, remaining non-contract options for restraining former employees, or generally on the movement of information or employees between competitors in California, please reach out to me at jheffner@hahnlaw.com.

JAMES E. HEFFNER, PARTNER

jheffner@hahnlaw.com
619.810.4307
600 West Broadway, Suite 1500, San Diego, CA 92101