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Non-Compete Clarity: California Employers Must Provide Notice of Non-Competes to Employees By February 14, 2024

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New California laws intended to strengthen the state's long-standing ban on non-competition agreements are set to create immediate headaches for employers in the state that have, or plan to, impose non-compete or non-solicit clauses on their employees in the Golden State. The new amendments — S.B. 699 and A.B. 1076 — not only codify existing case law banning nearly all non-compete agreements, but go a step further by empowering employees to sue their employer for imposing or trying to enforce a non-compete against them, even if the non-compete was entered in another state where it would have otherwise been enforceable. An employee who wins such a case can also recover reasonable attorneys' fees and costs. The law became effective January 1, 2024.

These amendments also require employers to provide individualized, written notice to current and former employees (who were employed at any time after January 1, 2022, and have signed agreements containing non-compete clauses) by February 14, 2024, that any prior non-compete covenants or non-solicitation covenants violating the law are void. The notice must be delivered to the last known address and the email address of the employee or former

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employee. An employer who fails to comply may be subject to a penalty of $2,500 per violation.

General Prohibition on Non-Competes and Restrictive Covenants

California has long prohibited employers from entering agreements to prevent their employees from leaving to compete against them. Even prior to these amendments, section 16600 of the California Business and Professions Code broadly provides that, with a few narrow 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.” California’s strong stance against contractual restraints on post-employment non-competes is deeply rooted in the public policy of promoting employee mobility, innovation, and economic growth.

In California, non-compete agreements in the employment context are generally void (Cal. Bus. and Prof. Code §§ 16600, 16601, and 16602.5). The only exceptions are non-compete or restrictive covenants that fall within one of the narrow exemptions authorized by statute, all of which relate to the sale of the goodwill of a business, or of a substantial ownership stake in the business. Courts interpret these statutory exceptions very narrowly.

The recent amendments to the law explicitly adopt the holding of a 2008 California Supreme Court decision specifically holding that any employment non-compete agreement or clause, no matter how narrowly tailored, that does not meet the statutory requirements is unenforceable (Cal. Bus. & Prof. Code § 16600(b)).

While the statute does not define “non-compete clause” or “non-compete agreement,” California courts have defined them broadly to include customer non-solicitation clauses that are not tied to the protection of trade secrets and, on occasion, employee non-solicitation clauses. These covenants

should be the subject of notice, even if not an explicit non-compete.

What Do the New Laws Specifically Provide?

Put simply, the new amendments further tighten California's restrictions against non-compete agreements to impose consequences on employers who seek to impose them on their employees. Previously, the worst an employer could typically expect from entering into a non-compete would be a court's refusal to enforce it. Under the new law, however, employers can now be held liable for their non-compete provisions.

The amendments make it expressly unlawful for employers to include post-employment non-compete clauses in employment contracts or require employees to enter post-employment non-compete agreements, and impose tangible consequences for doing so. Employers attempting to enter into a new employee non-compete or enforce an existing one will be subject to injunctive relief or the recovery of actual damages, or both, and reasonable attorneys' fees and costs if the employee prevails.

Employers who have entered into non-compete agreements with California employees after January 1, 2022, need to take further action by notifying those employees that those agreements are void under California law. The notice requirement applies to any non-compete clause in any employment contract or any non-compete agreement that would apply to an individual performing employment in California regardless of where and when the contract was signed. The notice must be: (1) made by February 14, 2024; (2) a written individualized communication to the employee or former employee; and (3) delivered to the last known address and email address of the employee or former employee. A failure to provide proper notice constitutes unfair competition and can result in a penalty of $2,500 per violation. The amendment does not specify exactly how the penalty is calculated, such as whether it is $2,500 for

each employee or per clause or agreement. A violation of this requirement may also lead to the recovery of attorney's fees and costs.

While employers who have entered direct non-compete agreements with California employees should take action to comply with the new law immediately, the law also creates significant uncertainty for employers who have attempted to enter into other forms of restrictive covenants, such as non-competition agreements tied to trade secret protections or narrow employee non-solicit provisions, that have previously existed in a legal gray area under California law. If you have questions about your company's compliance with this new California legislation, please reach out to your Akerman Labor and Employment attorney for a consultation.
