

Silguero v. Creteguard, Inc.
**Employer's Agreement to Enforce Previous Employer's Invalid Noncompete Agreement
Gives Rise to Wrongful Termination Claim in Violation of Public Policy**
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In 2000, a Court of Appeal held that an employer cannot lawfully make the signing of an employment agreement that contains an unenforceable covenant not to compete a condition of continued employment. More recently, the California Supreme Court and Courts of Appeal have addressed the enforceability of noncompetition agreements and held that, with a few exceptions, post-employment noncompete agreements are unenforceable and violate the public policy of the State of California. In fact, agreements prohibiting employees from "directly or indirectly soliciting" their former employer's customers have been struck down as violating public policy.

In a significant expansion of the law and a troubling development for California employers, the Court of Appeal in *Silguero v. Creteguard, Inc.*—Cal. Rptr. 3d—, 2010 WL 2978222, *1 (Cal. Ct. App. 2d Dist. July 30, 2010) ("*Silguero*"), recently held that an employer may be liable for wrongful termination in violation of public policy when it terminates an employee who had entered into an unenforceable covenant not to compete with her prior employer. From a practical standpoint, the *Silguero* decision places employers in the difficult position of (1) having to determine whether a prior noncompete agreement is enforceable and (2) whether it can terminate an employee whose employment violates the terms of that prior agreement. By extension, the *Silguero* decision raises additional issues, including whether an employer may refuse to hire an applicant under similar circumstances.

Overview of Claims in the Appellate Court's Decision

The issue before the *Silguero* court was whether a terminated sales employee had a viable claim for wrongful termination in violation of public policy against her employer when it terminated her after being informed by her prior employer that she had entered into an agreement with the prior employer that prohibited the employee from engaging in sales activities for a period of time following that employment, where that agreement was unenforceable under California law.

The Complaint alleged that Silguero had entered into a Confidentiality Agreement with Floor Seal Technology, Inc. ("FST") during her employment at FST that, among other things, prohibited her from engaging in sales activities for 18 months following either her departure or termination. Following FST's termination of her employment, Silguero found employment with Creteguard, Inc. FST contacted Creteguard and asked for its cooperation in enforcing its agreement with Silguero,

including the provision prohibiting her from engaging in sales activities for the 18-month period. Thereafter, Creteguard's CEO informed Silguero that it was terminating her employment, stating: "it has been brought to my attention...that you have signed a confidentiality/noncompete agreement with your past employer[.] [W]e regret to inform you that [Creteguard] is unable to continue your employment effective today 11/14/07[.] [A]lthough we believe that noncompete clauses are not legally enforceable here in California, [Creteguard] would like to keep the same respect and understanding with colleagues in the same industry."

In her tenth cause of action for wrongful termination in violation of public policy, Silguero alleged that the noncompetition agreement enforced by Creteguard was void pursuant to Section 16600¹, that no statutory exception to 16600 applied and that Creteguard's enforcement and ratification of an illegal and void noncompete agreement violated the public policy of the State of California.

In supporting Silguero's claim, the Court of Appeal noted that the California Supreme Court had previously "recognized that although employers have the power to terminate employees at-will, they may not terminate an employee for a reason that is contrary to public policy." Finding that Section 16600 provides a legislative declaration of a fundamental public policy, the Court held that Creteguard's termination of Silguero constituted a wrongful termination in violation of public policy. The Court observed that permitting the claim against Creteguard under the circumstances before it furthered the interest of employees and their own mobility and betterment, "deemed paramount to the competitive business interests of the employers where neither the employee nor his new employer has committed any illegal act accompanying the employment change."

Ramifications of the *Silguero* Decision

California employers have known for some time that they face potential liability if they do not hire or terminate an employee who refuses to sign an unenforceable noncompete agreement. The decision in *Silguero* goes a step further by prohibiting an employer from terminating an employee, and by extension, refusing to hire an applicant, because that employee or

¹ Business and Professions Code Section 16600 provides: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."



applicant has entered into a noncompete or nonsolicitation agreement that a court may determine at some point in time is unenforceable in California.

This development presents far greater challenges for California employers that are unsure as to whether the restrictive covenants contained in the prior agreement(s) are enforceable. What may have been the safer and therefore preferred course in the past—assuming that a noncompete agreement may be enforceable and, therefore, rejecting an applicant that is subject to a prior restrictive agreement—may be more risky today in light of the *Silguero* decision.

The predicament facing employers in California only gets more complicated when the enforceability of agreements not to compete is less clear, including those agreements entered into outside of the State of California, or where choice of law provisions designate other state laws as controlling, leaving the enforceability of those restrictive covenants even more murky. Employers should seek guidance when considering (or even not considering) an applicant who is subject to a prior covenant not to compete or other restrictive covenants.



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