Employee Nonsolicitation Terms Now Likely Void In California

By **Dylan Wiseman and Alexandra Grayner**
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California law is well-settled that, subject to few exceptions, noncompete agreements are unenforceable. The law has been less clear, however, on the enforceability of employee nonsolicitation agreements. Past cases applied a "reasonableness standard" that considered several factors, resulting in inconsistent court decisions. Nevertheless, the uncertainty may be over. On Nov. 1, 2018, the California Court of Appeal for the Fourth Appellate District in AMN Healthcare Inc. v. Aya Healthcare Services Inc.[1] held that employee nonsolicitation agreements, even if reasonable and narrowly tailored, are void unless they fall within one of three statutory exceptions that pertain to the sale of a business.[2] As a practical matter, in the employment context, employee nonsolicitation agreements are now likely to be considered void.

We encourage employers to review their existing employment and confidentiality agreements and to remove employee nonsolicitation clauses.

The employee nonsolicitation provision in AMN was embedded within a nondisclosure agreement that all employees of AMN Healthcare Inc. were required to sign as a condition of their employment. It provided that, for at least one year after terminating their employment with AMN, former AMN employees "shall not directly or indirectly solicit or induce, or cause others to solicit or induce, any employee of [AMN] to leave the service of [AMN]." AMN sought to enforce the nonsolicitation provision against four former AMN employees — recruiters — who left AMN to work for Aya Healthcare Services, also as recruiters. AMN alleged that once at Aya, the recruiters solicited various travel nurses to leave AMN and work for Aya in violation of the employee nonsolicitation provision.

The recruiters countersued alleging that the employee nonsolicitation provision was invalid under Section 16600 of California's Business and Professions Code, which provides that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."[3] The recruiters moved for summary judgment, which was granted and affirmed by the court of appeal.

The court of appeal held that the employee nonsolicitation clause violated the plain language of Section 16600. It departed from the reasoning of Loral Corp. v. Moyes,[4] a 1985 decision by the Court of Appeal for the Sixth Appellate District which upheld an agreement that restrained a former executive officer from "raiding" the plaintiff's employees. Moyes held that such a provision was lawful because it was reasonable, and "reasonably limited restrictions which tend more to promote than restrain trade and business do not violate [Section 16600]."

AMN is factually distinguishable from Moyes because, as the AMN court noted, the "individual defendants were in the business of recruiting and placing on a temporary basis medical professionals." Because the individual defendants in AMN were recruiters, a restraint on their ability to solicit and recruit was necessarily a restraint on their lawful profession and trade. The AMN court could have rested on this factual distinction to harmonize its decision with Moyes and existing precedent. Nevertheless, the court of appeal in AMN went much further, and called into question the continued validity of the Moyes reasonableness standard.

AMN notes that "Moyes was decided several years before Edwards," referring to Edwards v. Arthur Andersen LLP,[5] where the California Supreme Court described the history of California's intolerance for restraints on trade:

> Under the common law, as is still true in many states today, contractual restraints on the practice of a profession, business, or trade, were considered valid, as long as they were reasonably imposed … However, in 1872 California settled public policy in favor of open competition, and *rejected the common law 'rule of reasonableness,'* when the Legislature enacted the Civil Code. (Emphasis supplied.)

Edwards rejected arguments that Section 16600 does not apply to noncompete agreements that are reasonable or narrowly tailored: "Section 16600 is unambiguous, and if the Legislature intended the statute to apply only to restraints that were unreasonable or overbroad, it could have included language to that effect." In other words, under Edwards, even if a covenant not to compete is reasonable and narrowly tailored, it is void under Section 16600 unless it falls within a statutory exception.

Edwards addressed the enforceability of customer nonsolicitation clauses, and did not address the viability of employee nonsolicitation clauses. As a result, the applicability of Moyes' "reasonableness standard" as applied to employee nonsolicitation clauses after Edwards was unclear. That is, of course, until the court of appeal's decision in AMN.

AMN explicitly questions the continued validity of the Moyes reasonableness standard as applied to employee nonsolicitation clauses, noting that "Moyes use of a reasonableness standard in analyzing the nonsolicitation clause there at issue thus appears to conflict with Edwards's interpretation of section 16600, which under the plain language of the statute, prevents a former employer from restraining a former employee from engaging in his or her 'lawful profession, trade, or business *of any kind*,' absent statutory exceptions not applicable here." (Emphasis in original.)

In the wake of AMN, we expect to see more decisions expressly departing from Moyes and invalidating employee nonsolicitation clauses, even if they are reasonable and narrowly tailored. Courts will move away from a reasonableness analysis, and focus instead on whether the clause violates the plain language of Section 16600 by imposing a restraint on one's ability to "engag[e] in a lawful profession, trade, or business of any kind …"[6]

We also expect that further litigation will test the reach and limits of AMN. Because the defendants in AMN were recruiters, employers in other industries will attempt to distinguish AMN on its facts. AMN strongly criticized Moyes, so we remain doubtful that the holding in AMN is limited to the recruiting industry.

Likewise, AMN does not appear to impact a tort claim for intentional interference with at-will relationships for what is commonly referred to as "employee raiding."[7] If a plaintiff can show that the raiding also involved "independently wrongful conduct," a tort claim for raiding seems intact following AMN, even if a contract claim now is rendered defective.

We recommend that employers promptly revisit their current employment and confidentiality agreements to remove employee nonsolicitation terms.

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[1] AMN Healthcare Inc. v. Aya Healthcare Services Inc., No. D071924 (Cal. Ct. App. Nov. 1, 2018).

[2] The three statutory exceptions are found in the Business and Professions Code §§ 16601 (sale of goodwill or interest in a business), 16602 (dissolution of a partnership), and 16602.5 (dissolution or sale of limited liability company).

[3] Bus. & Prof. Code § 16600.

[4] Loral Corp. v. Moyes, (1985) 174 Cal. App. 3d 269.

[5] Edwards v. Arthur Andersen LLP (2008) 44 Cal.4th 937.

[6] Bus. & Prof. Code § 16600.

[7] Reeves v. Hanlon (2004) 33 Cal.4th 1140, 1149.