
New Laws in California Strengthen and Amend Restraint of Trade and Enforceability of Non-Competition Agreements

As discussed in our prior client alert [here](#), there are several new laws taking effect in California in 2024 that impact employers. On January 1, 2024, Senate Bill 699 and Assembly Bill 1076 became effective, strengthening and amending California's Bus. & Prof. Code 16600 regarding restraint of trade and the enforceability of non-competition agreements in California.

As most employers doing business in California already know, there are very few circumstances where non-competition agreements remain enforceable in California, and those are limited to the sale, dissolution, or disassociation of a business or partnership. California courts have also upheld agreements that prohibit *current* employees from competing with their employers during their ongoing period of employment. Conversely, California courts have rejected agreements that prohibit employees from soliciting colleagues, customers and/or clients, which devices are generally viewed as other means of limiting post-employment competition.

The new California enactments, however, go beyond making non-competition agreements generally unenforceable; they permit current and former employees, *including prospective employees*, to commence litigation seeking injunctive relief and damages, as well as reasonable attorneys' fees and costs, if their employer proffers to them a proposed contract, or attempts to enforce a contract, that includes impermissible provisions limiting or prohibiting competition.

Under the new law, employers should refrain from proposing contract provisions which specify that the provisions of the agreement in question are severable or subject to "blue penciling" if found unlawful, as these potential attempts to preserve other lawful provisions will not save an otherwise unenforceable agreement under California law. While it is not uncommon for employers to proffer agreements to employees merely as a deterrent against competitive activity where there is no intention of enforcing such contracts, they may, under the new law, face potential lawsuits and liability for even including such non-competition clauses. In other words, the rationale for including such post-employment restrictions to deter employees from competing is no longer an option without substantial risk.

These new laws also impact employers outside California's borders because they may render unenforceable non-competition agreements executed in others states. For example, an employee who worked for an employer in New York, and executed a valid non-competition agreement in connection with such employment, and who thereafter relocated to California, might well be able to work for a competitor in California under the new law, notwithstanding that the same competitive employment would have been precluded in New York. Employers will thus need to rethink their use of non-competition restrictions with those employees who have ties to California, regardless of whether the initial employment and agreement governing that employment occurred outside of California. At the least, such agreements might require modification to comport with California law.

Employers will also now want to review and consider updating employment offer letters and agreements containing restrictive covenants, to properly address updated California law. Employers should thus avoid using "one-size-fits-all" employment agreements for all members of a nationwide workforce, and take care to examine agreement templates used in jurisdictions other than California to ensure compliance with the new California law, in order to avoid potential liability.

Perhaps most time sensitive in updating employer procedures is the new statutory requirements regarding formal, express notice. Thus, for current and former California-based employees who were employed as of or following January 1, 2022 and who have existing non-competition agreements limiting their post-employment activities, employers must send individualized notification to an employee's last known address and email address informing such employees that the restrictions contained in their agreements are now void and no longer valid. Such notices are required to be sent on or before February 14, 2024.

There remain several open questions, which our Labor & Employment and Executive Compensation & Benefits teams will continue to monitor, with respect to these new non-competition laws and notice requirements. As but two such areas, (i) it remains unclear whether employees who are represented by counsel can still negotiate employment terms, including a choice of law provision for another state's laws under Cal. Labor Code § 925, or (ii) whether courts will find a non-competition agreement enforceable where an employee has agreed to forfeit some discretionary, non-wage benefit, such as equity, should they engage in competition post-employment.

Key Contacts

Our Labor & Employment and Executive Compensation & Benefits teams can assist in reviewing proposed offer letters, restrictive covenants agreements and other contracts, identifying provisions that might contain impermissible language, revising those agreements and preparing compliant notification to employees, as may be required, under California law or other jurisdictions.

Jeffrey P. Englander
Partner & Co-Chair
Labor & Employment

D 212.735.8720
jenglander@morrisoncohen.com

John B. Fulfree
Partner
Labor & Employment

D 212.735.8850
jfulfree@morrisoncohen.com

Alana Mildner Smolow
Associate
Labor & Employment

D 212.735.8784
amildner@morrisoncohen.com

Alina Grinman
Partner & Vice-Chair
Executive Compensation & Employee Benefits

D 212.735.8818
agrinman@morrisoncohen.com

Keith A. Markel
Partner & Co-Chair
Labor & Employment

D 212.735.8736
kmarkel@morrisoncohen.com

Cassandra N. Branch
Associate
Labor & Employment

D 212.735.8838
cbranch@morrisoncohen.com

Kayla West
Associate
Labor & Employment

D 212.735.8760
kwest@morrisoncohen.com

Michael M. Oppenheimer
Senior Counsel
Executive Compensation & Employee Benefits

D 212.735.8719
moppenheimer@morrisoncohen.com



This document is attorney advertising and is provided for informational purposes only as a service to clients and other friends. This document does not constitute legal advice. Reading or receiving this document does not create an attorney-client relationship, nor should the information in the document be deemed to be provided to you confidentially. Please contact one of our attorneys should you wish to engage Morrison Cohen LLP to represent you, so that an attorney-client relationship may be established between our Firm and you. Prior results do not guarantee a similar outcome.