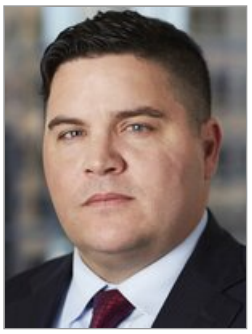
Calif. High Court Must Clarify Employee Nonsolicitation Policy

By **Jason Russell, Hillary Hamilton and Adam Lloyd** (February 11, 2021, 5:19 PM EST)



Jason Russell

Hillary Hamilton

Adam Lloyd

California policy on post-termination solicitation of employees has been hotly debated for some time, and those who hoped the decision in AMN Healthcare Inc. v. Aya Healthcare Services Inc. would bring clarity have been sorely disappointed.

In November 2018, the California Court of Appeal for the Fourth District held in AMN that a broadly worded nonsolicitation provision preventing employees "from either 'directly or indirectly' soliciting or recruiting, or causing others to solicit or induce, any employee of AMN" post-termination was void under the California Business and Professions Code, and expressed doubt as to the continuing viability of prior authority permitting such clauses.[1]

The decision sparked a flurry of commentary regarding the enforceability of past and future nonsolicitation provisions under California law, and above all, the need for guidance from the California Supreme Court, given the split created by AMN.

Yet in the two years since the decision, the split has become more entrenched, resulting in conflicting rulings within California federal courts and beyond California's borders.

Indeed, some non-California courts determining whether to apply California law to nonsolicitation provisions are refusing to do so, citing this conflict as evidence that California has no fundamental public policy on this issue — a conclusion arguably at odds with California's "settled legislative policy in favor of open competition and employee mobility" protected by Section 16600.[2]

The California Supreme Court should resolve this issue and provide certainty to courts, employers, and employees both inside and outside the state.

AMN and Its Progeny

Section 16000 states that, save for certain statutory 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."[3]

The AMN court based its decision on the California Supreme Court's 2008 decision in Edwards v. Arthur Andersen LLP,[4] noting "California courts 'have consistently affirmed that section 16600 evinces a settled legislative policy in favor of open competition and employee mobility."[5]

It rejected the plaintiff's reliance on Loral Corp. v. Moyes,[6] explaining that when the California Sixth District Court of Appeal in the 1985 Loral case found a nonsolicitation clause prohibiting the recruitment of former employees "does not appear to be any more of a significant restraint on [the employee's] engaging in his profession ... than a restraint on solicitation of customers," its "use of a

reasonableness standard ... appears to conflict with" Edwards — which was decided later.[7]

Observing that Edwards found the section "unambiguous," "refus[ed] to adopt the 'limited' or 'narrow-restraint' exception created by the Ninth Circuit," and "noted that 'if the Legislature intended the statute to apply only to restraints that were unreasonable or overbroad, it could have included language to that effect,'" the AMN court concluded "[w]e thus doubt the continuing viability of [Loral] post-Edwards."[8]

AMN further held that "[e]ven if [Loral's] reasonableness standard survived Edwards," independent grounds existed to find the nonsolicitation clause void, because the "individual defendants were in the business of recruiting ... medical professionals," which meant the nonsolicitation clause "restrained individual defendants from engaging in their chosen profession, even in a 'narrow' manner or a 'limited' way."[9]

Soon after AMN was decided, the U.S. District Court for the Northern District of California weighed in. The court in Barker v. Insight Global LLC in 2019 granted reconsideration of an order dismissing a former employee's claims: "Having considered the AMN decision and reviewed Loral and Edwards, the Court is convinced by the reasoning in AMN that California law is properly interpreted post-Edwards to invalidate employee nonsolicitation provisions."[10]

The Barker court specifically found "the analysis in AMN to be persuasive" and rejected as "not persuas[ive]" the defendant's argument "that the secondary ruling in AMN finding the nonsolicitation provision invalid under Loral based upon those employees' particular job duties abrogates or limits the primary holding."[11]

In considering a motion for preliminary injunction in WeRide Corp. v. Kun Huang, the Northern District of California found the plaintiff was unlikely to succeed on the merits of its claim against a former employee for breach of a nonsolicitation provision "because the clause is void under California law."[12]

In April 2019, the court found "the reasoning of Barker and AMN, including their application of Edwards, to be persuasive," and rejected the plaintiff's efforts to distinguish AMN as "based on different factual circumstances," because AMN "stated that those factual differences were a separate basis for its holding" and Barker "recognized this nuance."[13]

Other California federal courts followed suit.

In Conversion Logic Inc. v. Measured Inc., the U.S. District Court for the Central District of California observed "[t]he provisions at issue here mirror the provision discussed in AMN," and "restrain [defendant employees] from engaging in their profession by restricting who may work alongside them," and rejected the plaintiff's reliance on Loral, citing AMN, WeRide and Barker.[14]

"[G]iven the strong California public policy to permit lawful employment and enterprise of choice," the nonsolicitation provisions were void, warranting dismissal of breach of contract claims premised on the defendants' purported violation of nonsolicitation clauses without leave to amend.[15]

The U.S. District Court for the Southern District of California in Power Integrations Inc. v. De Lara likewise dismissed breach claims against former employees predicated on similar nonsolicitation clauses, because the clauses "are unenforceable under Section 16600 and overly broad."[16]

Diverging Interpretations in California State and Federal Courts

However, at least two California federal courts have interpreted AMN's holding more narrowly. Most recently, in Hamilton v. Juul Labs Inc., the Northern District of California, in September 2020, distinguished AMN in dismissing an employee's claim of a Labor Code violation premised on Juul's requiring the employee "to enter into a contract ... containing a term or condition that it knew was prohibited by law."[17]

Because AMN was decided after the employee agreed to the post-termination nonsolicitation provision, "even if [AMN] stands for the proposition that restrictive covenants are categorically unlawful under Section 16600, Juul could not have known at the time the parties entered into the

[contract]."[18]

But the Hamilton court went on to distinguish AMN on its facts because the plaintiff "does not allege that the [contract] prevents her from engaging in her profession like the plaintiffs in AMN who were recruiters — i.e., their entire profession was completely based on solicitation," while the plaintiff "was a Director of Program Management, and she does not allege that a prohibition on solicitation has any effect on her chosen post-Juul career."[19]

Similarly, in 2019's Solutionz Videoconferencing Inc. v. Davidson, the Central District of California denied the defendant employee's motion to dismiss his former employer's claim for breach of a nonsolicitation clause, because "[t]here are some unique facts in the AMN case, and the present law in California is not as clear as [the] defendant claims."[20]

In focusing on the "unique facts" of AMN, these two federal decisions appear at odds with Barker, WeRide and their progeny, which rejected arguments emphasizing "factual differences" as a basis to enforce similarly broad nonsolicitation provisions — creating intradistrict conflicts within the Northern and Central Districts, not to mention interdistrict conflicts on this issue. Moreover, the Fourth District's decision in AMN has created a split of authority in California appellate courts with the Sixth District's decision in Loral.

This confusion has led courts outside California to refrain from applying California law in choice-of-law disputes.

For example, in General Electric Co. v. Uptake Techs Inc.,[21] the U.S. District Court for Northern District of Illinois court considered whether the enforceability of a nonsolicitation provision was governed by New York law, as specified in the contractual choice-of-law provision, or California, where the defendant employees lived and worked when they signed the agreements.[22]

In 2019, the court found "AMN, Barker and WeRide persuasive," and thus the nonsolicitation agreements are "void under California law," but nonetheless applied New York law to the question of enforceability, because "[g]iven that California courts disagree whether employee nonsolicitation provisions are prohibited post-Edwards, this court cannot conclude that applying New York law is clearly contrary to fundamental California public policy."[23]

And in W.R. Berkley Corp. v. Niemela in 2019, the U.S. District Court for the District of Delaware, in analyzing whether California law applied to a dispute over enforcement of nonsolicitation clause, held "California does not have a clear public policy against enforcement of anti-recruitment covenants," because regardless of whether "AMN was rightly decided or whether Loral is still good law ... there is a split in California authority addressing the validity of anti-recruitment covenants."[24]

Conclusion

The as-yet-unresolved question of enforceability of employee nonsolicitation provisions continues to generate confusion for courts seeking to interpret California law.

This uncertainty extends to California employers, who must decide whether to include such provisions in new contracts, and, perhaps more importantly, how best to enforce existing provisions against former employees.

Given the disparate outcomes outlined above, that decision could depend in large part on where in California the employer or employee is located, which state or federal court would have jurisdiction over the claims, or even the judge assigned to the case.

More troubling is the extraterritorial impact of the conflict. As shown, courts outside California are refusing to apply California law in choice-of-law disputes governing nonsolicitation agreements, citing this conflict as evidence that there is no clear or fundamental California public policy as to this issue.

These holdings are difficult to square with the admonition in Edwards that "California courts 'have been clear in their expression that section 16600 represents a strong public policy of the state which should not be diluted by judicial fiat.'"[25] The Supreme Court may order review "[w]hen necessary to secure uniformity of decision or to settle an important question of law"— precisely the situation

here.[26]

Unfortunately, until the California Supreme Court takes up this issue, the confusion will likely persist.

Jason D. Russell is a partner, and Hillary A. Hamilton and Adam K. Lloyd are associates, at Skadden Arps Slate Meagher & Flom LLP.

[1] Calif. Bus. & Prof. Code § 16600, 28 Cal.App.5th 923, 936, 939 (2018).

[2] Edwards v. Arthur Andersen LLP , 44 Cal.4th 937, 946 (2008).

[3] Cal. Bus. & Prof. Code § 16600.

[4] 44 Cal.4th 937 (2008).

[5] AMN, 28 Cal.App.5th at 935 (quoting Edwards, 44 Cal.4th at 946).

[6] 174 Cal.App.3d 268 (1985).

[7] AMN, 28 Cal.App.5th at 937-38 (quoting Loral, 174 Cal.App.3d at 279).

[8] AMN, 28 Cal.App.5th at 938-39 (quoting Edwards).

[9] Id. at 939 (emphasis omitted).

[10] 16-cv-07186-BLF, 2019 WL 176260, at *3 (N.D. Cal. Jan. 11, 2019).

[11] Id.

[12] 379 F.Supp.3d 834, 851 (N.D. Cal. 2019) (citing Cal. Bus. & Prof. Code § 16600).

[13] Id. at 852.

[14] 2:19-cv-05546-ODW (FFMx), 2019 WL 6828283, at *3–4 (C.D. Cal. Dec. 13, 2019).

[15] Id. at *4.

[16] Power Integrations, Inc. v. De Lara , 20-cv-410-MMA (MSB), 2020 WL 1467406, at *12–14 (S.D. Cal. Mar. 26, 2020).

[17] 20-cv-03710-EMC, 2020 WL 5500377, at *7 (N.D. Cal. Sept. 11, 2020).

[18] Id.

[19] Id. In so holding, the Hamilton court quoted Western Air Charter, Inc. v. Schembari for the proposition that "courts have distinguished between 'no hire' provision[s] and 'non-solicitation agreements,' finding that the latter may be permissible under Section 16600 so long as it is 'does not have an overall negative impact on trade or business.'" Id. (quoting W. Air Charter, Inc. v. Schembari, No. EDCV 17420JGBKSx, 2018 WL 10157139, at *14 (C.D. Cal. Nov. 21, 2018) (alteration in original). Western Air Charter was decided three weeks after — and does not mention — AMN; rather, the court relied on Loral to deny defendants' motion for summary judgment on a claim of breach for a nonsolicitation provision because "contractual provisions which restrain former employees from contacting a company's current employees to induce them to leave that company are not prohibited by Section 16600 so long as they do not restrain those employees from leaving the company and seeking employment with a third party." 2018 WL 10157139, at *14 (citing Loral, 174 Cal.App.3d at

279).

[20] SACV 19-01132 AG (DFMx), 2019 WL 6872904, at *2 (C.D. Cal. Aug. 22, 2019) (citing Loral).

[21] 394 F.Supp.3d 815 (N.D. Ill. 2019).

[22] Id. at 825.

[23] Id. at 827-28.

[24] W.R. Berkley Corp. v. Niemela , C.A. No. 17-32 (MN), 2019 WL 5457689, at *2-3 (D. Del. Oct. 24, 2019).

[25] Edwards, 44 Cal.4th at 949-50 (citation omitted).

[26] Cal. Rules of Court, rule 8.500(b)(1).