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Management Alert

California Appellate Panel Affirms Injunction Blocking Use of Employee Non-Solicitation Provision in Dispute Between Travel Nurse Providers

By Robert B. Milligan and Sierra J. Chinn-Liu

On November 1, 2018, the California Court of Appeal, Fourth Appellate District affirmed a trial court's ruling in *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc. et al.*, No. D071924, 2018 WL 5669154 (Cal. App. 2018), which (1) invalidated the plaintiff's non-solicitation of employees provision in its Confidentiality and Non-Disclosure Agreements (CNDAs), (2) enjoined AMN from enforcing or attempting to enforce the employee non-solicitation provision in its CNDA with any of its former employees, and (3) awarded $169,000 in reasonable attorneys' fees to defendants for plaintiff's use of the provision.

The case is a significant decision which may impact some employers' continued use of employee non-solicitation provisions with their California employees, at least in certain industries. There is now a split in California authorities and the issue is likely ripe for California Supreme Court guidance.

AMN and Aya are competitors in the business of staffing temporary healthcare professionals, namely providing "travel nurses" to medical care facilities across the country. When former employees, named as individual defendants in the action and who worked as travel nurse recruiters in California, left AMN for Aya, AMN brought suit against Aya and the former employees, asserting 11 causes of action, including for breach of contract and trade secret misappropriation.

The Trial Court Ruling

The trial court granted defendants' motion for summary judgment on all plaintiff's claims, as well as summary judgment for defendants on their causes of action for declaratory relief and unfair competition asserted in their cross-complaint. The trial court held that under California law, the non-solicitation of employees provision was an unlawful restraint of trade in violation of Business and Professions Code section 16600 because it prevented the individual defendants from engaging in their lawful trade or profession—soliciting and recruiting travel nurses on temporary assignment with AMN—for at least one year post-termination. The trial court found no evidence of misappropriation of trade secrets, reasoning that the customer list of names and identities and other information at issue did not qualify as trade secrets, and any disclosure or use did not cause harm to plaintiff. The trial court awarded defendants their fees under Code of Civil Procedure section 1021.5 and Civil Code section 3426. AMN appealed.

The Court of Appeal Decision

AMN required the defendant former employees to sign the CNDAs as a condition of their employment with AMN. Section 3.2 of the CNDAs, the non-solicitation of employees provision, states in pertinent part:

> Employee covenants and agrees that during Employee's employment with the Company and for a period of [one year] or eighteen months after [termination], Employee shall not directly or indirectly solicit or induce, or cause others to solicit or induce, any employee of the Company . . . to leave the service of the Company . . .

Analyzing Section 3.2 of the CNDAs, the Court of Appeal independently arrived at the same conclusion of the trial court, that the employee non-solicitation provision was void as an unlawful restraint of trade in violation of section 16600, which provides "[e]xcept 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." Looking to the history of section 16600 and its broad language, as well as California case law evidencing a strong public policy in favor of employee mobility, the Court concluded that the non-solicitation provision "clearly restrained [the] individual defendants from practicing with Aya their chosen profession – recruiting travel nurses on 13-week assignments." Writing for the three-judge panel, Judge Benke stated that the trial court was within its discretion to invalidate the provision because "unless a contractual restraint falls into one of section 16600's three statutory exceptions . . . it ostensibly is void."

Analysis of the Non-Solicitation Provision

In reaching its conclusion, the Court cited California case law rejecting employee non-competes and "overbroad" customer non-solicitation provisions. "Indeed," the Court observed, "the undisputed evidence in the record shows that, if a former AMN recruiter . . . was barred for at least one year from 'soliciting or recruiting any travel nurse listed in AMN's database,' that would restrict the number of nurses with whom a recruiter could work . . . while employed by his or her new staffing agency" *and* "[n]ot being permitted to contact travel nurses who currently work for AMN could limit the amount of compensation a recruiter would receive with his or her new agency after leaving AMN."

A crucial detail to note is the nature of the profession at issue in the case. The Court's extensive discussion of the non-solicitation provision emphasized the fact that the job at issue is recruiting and soliciting. Defendant former employees were AMN "travel nurse recruiters" who all, for various reasons, left to join Aya as travel nurse recruiters. The ability of these particular defendants to engage in their profession, then, was directly affected by the covenant not to solicit employee traveling nurses. Based on that fact, the court rejected AMN's attempt to analogize to *Loral Corp. v. Moyes*, which ultimately determined that the employee non-solicitation provision at issue was not an invalid agreement not to compete, but a non-solicitation agreement prohibiting the defendant from "raiding" the plaintiff's employees. 174 Cal. App. 3d 268, 279 (1985). The *Moyes* court reasoned that the "restriction only slightly affects employees. They are not hampered from seeking employment with [the defendant's new employer] nor from contacting [the defendant]. All they lose is the option of being contacted by him first." The Court also distinguished AMN's former employees' recruiting role from the role of the former executive officer in *Moyes*, who was not similarly burdened by the restrictions set forth in the non-solicitation provision.

In its discussion of *Moyes*, the Court challenged the *Moyes* court's "reasonableness" or "slight affect" approach to employee non-solicitation provisions and contrasted it with the plain language of section 16600 and the California Supreme Court's decision in *Edwards v. Arthur Anderson LLP*, 44 Cal. 4th 937 (2008). The Court concluded that it "doubt[s] the continuing viability" of *Moyes*, and took the opportunity to further illustrate California's uniquely strict policy against restraints of trade, even restraints subject to the "narrow-restraint exception" adopted by the Ninth Circuit in *Campbell v. Trustees of Leland Stanford Jr. Univ.*, 817 F.2d 499 (9th Cir. 1987), which was explicitly rejected by the California Supreme Court in *Edwards*. The Court reasoned that while it doubted the continuing viability of *Moyes* post-*Edwards*, "the instant case does not rest on that analysis alone." The Court determined that notwithstanding the survival of the reasonableness standard after *Edwards*, *Moyes* was factually distinguishable because the non-solicitation provision here, if enforced, would restrain individual defendants from engaging in their chosen profession, even if the provision was "narrow" or "limited."

Analysis of the Trade Secret Claims

The Court also rejected AMN's trade secret misappropriation claims. The nature of individual defendants' profession also played a role in the court's conclusion that there was no evidence of trade secret misappropriation. The Court was unpersuaded by AMN's argument that the information at stake (the names, addresses, and identities of its "Travelers" or traveling nurses) was "secret" for purposes of AMN's trade secret claims. In light of the evidence, the Court explained that

in the industry of *temporary* healthcare professional staffing, "some travel nurses work with many different healthcare recruitment firms in order to increase the likelihood that they will be placed in assignments which fit their needs." AMN even conceded that some of the information was accessible to Aya through independent means, for example, a social media group page for traveling nurses.

Furthermore, the Court noted that some of the traveling nurses at issue had applied for employment with Aya *before* they were recruited for AMN by individual defendants, or least before individual defendants joined Aya. The Court found that a list of names and email addresses of nurses that one individual defendant took was never actually used to take, or attempt to take, AMN's business. Thus, while it may have been "wrong" for that individual defendant to send the information to her personal email, the court found "no evidence she or Aya ever used or relied on such information to recruit, or attempt to recruit, any of the travel nurses on that [list of Travelers and their information]." The Court concluded that plaintiff was neither harmed by any such disclosure nor was such a disclosure a "substantial factor" in causing plaintiff any harm. Additionally, the Court found that plaintiff had not demonstrated the competitive information that one of the individual defendants had taken qualified as trade secret information because it was very general and there was no evidence that Aya obtained any economic value from its disclosure.

Analysis of the Trade Secret "Exception" to Section 16600

Moreover, in rejecting plaintiff's tort claims for breach of duty of loyalty and intentional and negligent interference with prospective economic advantage, the Court rejected the argument that the employee non-solicitation provision could be justified under a trade secret exception to section 16600. The Court reasoned that because the allegedly confidential information was not "secret," AMN's agreements fell outside the common law "trade secrets exception" to section 16600. The Court cited *The Retirement Group v. Galante* to reiterate that contractually preventing the misappropriation of trade secrets is not so much an "exception" to section 16600, but instead enjoining tortious conduct that is "enjoinable because it is wrongful independent of any contractual undertaking." 176 Cal. App. 4th 1226, 1238 (2009). The Court reasoned under the *Retirement Group* decision that while a plaintiff may seek an injunction to prevent actual or threatened misappropriation of trade secrets, it cannot obtain an injunction to enforce a non-compete or non-solicitation provision on the grounds that the provision is designed to protect trade secrets. The Court held that the tort claims failed because section 16600 precludes an employer from restraining an employee from engaging in his or her "profession, trade, or business," even if that employee uses information that is confidential but not a secret.

Upholding the Injunction and Award of Fees

The Court concluded by affirming the trial court's grant of summary judgment on defendants' declaratory relief and unfair competition claims, and upholding the injunction entered against AMN. In its review of the injunction prohibiting enforcement of the non-solicitation provision against any former employees, the Court examined evidence that AMN had brought a similar suit against an employee who left for a competitor and that AMN was continuing in its efforts to enforce section 3.2 by sending cease and desist letters to former employees upon their acceptances of employment with competitors. The Court rejected plaintiff's contention that the injunction was overbroad or imprudently granted.

With respect to the award of fees under section 1021.5 of the California Code of Civil Procedure, the Court upheld the award, noting that this was an important issue affecting the public interest, and conferred a significant benefit on many people, i.e., all current and former AMN California employees who had signed a CNDA containing a similar non-solicitation provision.

It is unclear whether the plaintiff will seek California Supreme Court review or whether employer groups will mobilize to challenge the decision through legislation or amicus briefing.

Steps Forward

In sum, while many California courts have followed the reasoning in *Moyes* over the years, there is now likely a split in authority in California concerning the continued viability of employee non-solicitation provisions, at least in certain industries

and positions, like recruiting and staffing. Going forward, plaintiff employers may argue that this case is limited to its facts and the unique industry involved and point to *Moyes* and its progeny to defend such provisions. California Supreme Court review is likely needed to resolve these important issues. In any event, this decision serves as further confirmation of California's aggressive pro-employee mobility policy and judicial hostility toward restrictive covenants and protection of company information. Employers should conduct a careful review of their employee non-solicitation provisions with California employees to address the uncertainty created by this decision. Employers should use extra care in specialized industries and positions where a non-solicitation covenant may prevent former employees from engaging in their chosen profession.

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