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Ninth Circuit Jeopardizes Broad "No Re-Hire" Clauses

By Robert Milligan and Carrie Price

In *Golden v. California Emergency Physicians Medical Group*, a divided Ninth Circuit panel held that a "no re-hire" provision in a settlement agreement could, under certain circumstances, constitute an unlawful restraint of trade under California law.

The Facts

Dr. Golden, a physician, agreed to settle his discrimination claim against his employer, California Emergency Physicians Medical Group ("CEP"). Their oral settlement agreement, later reduced to writing, had Dr. Golden "waive any and all rights to employment with CEP or at any facility that CEP may own or with which it may contract in the future." The district court enforced the parties' settlement agreement over Dr. Golden's objection that this "no-rehire" clause violated Section 16600 of California's Business & Professions Code, which provides that a contract is void if it restrains anyone from engaging in a lawful profession.

The Appellate Court Decision

On appeal, Dr. Golden argued that the "no re-hire" clause was unlawful and that, because it constituted a material term of the settlement, the entire agreement was void, thereby permitting Dr. Golden to pursue his discrimination lawsuit.

The Ninth Circuit panel determined that Dr. Golden might prevail on this argument, and remanded the case to the district court for further proceedings. The panel first found that the validity of the "no re-hire" clause was ripe for determination. The dispute was ripe, not because CEP was currently seeking to enforce the "no re-hire" clause against Dr. Golden (it was not) but, because Dr. Golden sought to have the settlement agreement voided after his former attorney attempted to enforce the agreement in order to collect attorney's fees. The panel reasoned that "when a litigant resists his adversary's attempt to enforce a contract against him, the dispute has already completely materialized."

The Ninth Circuit panel next addressed the validity of the "no re-hire" clause. Historically, this type of clause, which commonly appears in settlement agreements, has not been viewed as a non-compete clause, in that a "no re-hire" clause does not keep a former employee from working for a competitor—just the former employer. The *Golden* court, however, took a wider view of Section 16600, reasoning that it applies to any contractual provision that "'restrain[s anyone] from engaging in a lawful profession, trade, or business of any kind' ... extend[ing] to any 'restraint of a substantial character,' no matter its form or scope."

To support this broad interpretation, the Ninth Circuit panel majority cited Section 16600's language, statutory context, and case law to reason that Section 16600 applies to any contractual limitation that restricts the ability to practice a vocation. *See, e.g., Edwards v. Arthur Andersen LLP, 189 P.3d 285* (Cal. 2008); *City of Oakland v. Hassey*, 163 Cal. App. 4th 1447 (2008). The panel majority noted that both *Edwards* and *Hassey* focused on the text of the law—whether the contested clause restrained someone from engaging in a trade, business, or profession—and not specifically whether the clause prevented competition with the former employer. The panel majority concluded that a clause creating a restraint of "substantial character" that could limit an employee's opportunity to engage in a chosen line of work would fall under Section 16600's "considerable breadth."

Of significance is the fact that the Ninth Circuit panel did not rule that the *Golden* clause was actually void. Instead, the panel majority concluded that the district court would need to do more fact-finding to see if the clause actually created a restraint of a "substantial character" on Dr. Golden's pursuit of his profession.

It also is significant that the Ninth Circuit panel majority—mindful that the California Supreme Court itself has not ruled on whether Section 16600 extends beyond traditional non-compete clauses in employment agreements—was merely predicting how it thought the California Supreme Court would rule.

A sharp dissent by Judge Kozinski expressed skepticism that the California Supreme Court would reach the same result as the panel majority, and argued that the settlement agreement should be enforced because the provision put no limits on Dr. Golden's current ability to pursue his profession.

What Is the *Golden* Rule for California Employers?

Golden furnishes no clear guidance as to the continued viability of "no re-hire" clauses in California settlement agreements, for it is unclear how courts will apply the "substantial character" standard. However, it can be expected that plaintiffs' lawyers will closely scrutinize "no-rehire" clauses and that this is even more likely if a clause applies beyond the employee's prior employer to, for example, subsidiaries and affiliates of the employer, or if the employer commands a substantial share of the relevant labor market. But more limited "no re-hire" clauses, for most employers, would not seem to create any restraint that one could reasonably consider to be of "substantial character." And most cases, unlike *Golden*, would not raise the validity of a "no re-hire" clause until there actually is an issue of re-hire—an issue that often never arises as a practical matter. Nonetheless, until the California Supreme Court weighs in, California employers should consider the Ninth's Circuit's decision when drafting settlement agreements that contain "no re-hire" clauses.

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