Eureka!: How to Strike Gold in California While Avoiding Its Anti-Non-Compete Agreement Policy

Client Advisories

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If you are an employer with employees in California, you should be aware of the state's aggressive efforts to curtail your ability to protect your trade secrets and proprietary information by requiring employees to sign non-compete, non-disclosure, and non-solicitation agreements. Under California law, a contract that prevents someone from "engaging in a lawful profession, trade, or business of any kind" is void. Cal. Bus. & Prof. Code § 16600. This statute grew out of California's strong public policy against noncompetition agreements. *Advanced Bionics Corp. v. Medtronic Inc.*, 59 P.3d 231, 237 (Cal. 2002).
You may think that you can avoid this problem by including a choice-of-law provision in your non-compete agreements indicating that the agreement is to be governed by the law of another state, perhaps one less hostile to such agreements. You may think that such a choice-of-law provision makes sense, particularly if your principal place of business is in the state whose law is to apply to the contract.

As sensible as the above may sound, such actions may not hold up in court. In fact, the Massachusetts Supreme Court recently addressed this very issue. In the case-*Oxford Global Res., LLC v. Hernandez*, 106 N.E.3d 556 (Mass. 2018)-Oxford, a Massachusetts company with offices in other states, required an employee in its California office to sign a confidentiality, non-solicitation, and non-competition agreement. The agreement provided that it would be governed by Massachusetts law and that any disputes arising out of it would be heard in Massachusetts court.

As is often the case, the employee resigned and took a job with a competitor. Oxford shortly learned that the employee had retained confidential, proprietary information and was attempting to solicit Oxford's customers. As a result, Oxford sued in Massachusetts court, as required by the agreement. The employee moved to dismiss the case on the ground that it should be heard in California, not Massachusetts. The trial court ruled for the employee and dismissed the case. On appeal, the Massachusetts Supreme Court agreed.

The court first found that the provision of the agreement stating that Massachusetts law applied was unenforceable. The court reached this conclusion by determining that California had the most significant relationship to the agreement and the parties (the employee was hired in California to work in California, and he allegedly breached the agreement in California). The court went on to determine that California's policy of encouraging employee mobility would be violated if Massachusetts law, which has no such policy, applied. After determining that California law applied, the Court went on to determine that California was the proper place to bring such a suit. Thus, if Oxford is to attempt to enforce its rights under the agreement, it must do so in California, under California law.

However, all is not lost. Last year, California passed section 925 of its Labor Code, which addresses choice-of-law provisions, such as the one drafted by Oxford, in employment agreements. Specifically, the law prohibits such provisions.[1] But the law also recognizes parties' fundamental right to contract and exempts from the law contracts entered into with an employee represented by legal counsel.
The Delaware Chancery Court was recently faced with a case involving this exception to section 925. In that case,[2] NuVasive, a Delaware company doing business in California, required its employee to sign a non-compete and non-solicitation agreement. NuVasive included a provision of the contract indicating that Delaware law applied to the agreement and Delaware was the proper place to bring disputes over the contract.

When the employee left NuVasive to work for a competitor and violated the agreement, NuVasive sued in Delaware. The employee countered by arguing that the agreement was unenforceable under California law. The Court rejected the employee's argument and upheld the choice-of-law provision.

In reaching this conclusion, the Court conducted a similar analysis as the court in *Oxford Global Resources*. The key difference, however, was that the employee in this case was represented by counsel in negotiating the non-compete and non-solicitation agreement. Given that important fact and the exception to section 925, the court determined that no California policy would be violated if Delaware law were to apply.

The bottom line for employers doing business in California is that it may be possible to structure non-compete agreements in a way that would allow the application of law from a state with more favorable policies than California. The decision of whether and how to draft such non-compete agreements requires employers to be circumspect and to seek legal counsel. Businesses need to weigh the desire for a choice-of-law provision against the risks associated with requiring potential employees to seek legal counsel.

Why are we telling you about California law and Massachusetts and Delaware cases? Because these issues can affect you, no matter what state you do business in. Archer's Trade Secret Protection and Non-Compete Group consists of a team of attorneys with decades of experience, and we are equipped to assist in any way needed. We stay ahead of the curve and are plugged in to developments in the law across the nation, because we represent clients who conduct business across the nation. We can help you evaluate your employments agreements and increase the odds that your non-compete agreements will stand up in court. If you have questions, feel free to call Thomas A. Muccifori, chair, at (856) 354-3056 or any member of Archer's Trade Secret Protection Group in Haddonfield, N.J., at (856) 795-2121, in Princeton, N.J., at (609) 580-3700, in Hackensack, N.J., at (201) 342-6000, in Philadelphia, Pa., at (215) 963-3300, or in Wilmington, Del., at (302) 777-4350.

[1] It is worth noting that section 925 only applies to contracts "entered into, modified, or extended on or after January 1, 2017." Cal. Labor Code § 925(f).

[2] *NuVasive Inc. v. Miles, 2018 WL 4677607 (Del. Ch. Sept. 28, 2018).*

Attachments

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