



A Fast-Approaching Valentine's Day Deadline for Employers with California Employees Subject to Non-Compete Agreements

Client Advisories

02.01.2024

By: Christopher M. Terlingo, Thomas A. Muccifori

This Valentine's Day will not be a sweet one for some employers. Indeed, February 14, 2024, is an important deadline for all employers, no matter where situated, who have employees living or working in California and have a non-compete or non-solicitation provision in their employment agreement. All employers meeting this description must send individualized, written notice by February 14 to all current, and certain former, California employees subject to a non-compete or non-solicitation provision notifying them that such provision is null and void under California law. Failure to do so could expose employers to claims for injunctive relief, damages, and attorney's fees and costs.

California has banned the enforcement of employee non-compete agreements under its state laws since 1872. The California Supreme Court expanded that policy in 2009 by interpreting the state's statutory ban to also reach client non-solicitation provisions in *Edwards v. Arthur Andersen, LLP*. Unsatisfied, the Golden State has now taken legislative efforts to export this non-enforcement policy to reach agreements entered into between out-of-state employers and California employees, even though signed or performed outside of the state's borders.

Specifically, two new sections of the California Business and Professions Code became effective on January 1, 2024, which dramatically increase the law's scope and reach. First, Section 16600.05 declares that "[a]ny contract that is void under this chapter [i.e., an employment agreement containing a non-compete or non-solicitation clause] is unenforceable **regardless of where and when the contract was signed.**" The provision continues to explain that an "employer or former employer shall not attempt to enforce a contract that is void

under this chapter **regardless of whether the contract was signed and the employment was maintained outside of California.** Any employer who enters into or attempts to enforce a non-compete or non-solicitation agreement in disregard of this provision “commits a civil violation,” and an affected employee, former employee, or “prospective employee” may bring a private action for injunctive relief and actual damages, as well as attorney’s fees and costs.

Second, and most pressingly, Section 16600.1 implements reporting requirements for any employer that has current California employees, or former California employees employed after January 1, 2022, whose employment agreements contain non-compete or non-solicitation provisions. Employers meeting this definition must provide a “written individualized communication to the employee or former employee” to “notify the employee that the non-compete clause or non-compete agreement is void.” This written notice must be delivered to the last known address and the email address of the employee or former employee. These statutory notices must be sent to all such employees by February 14, 2024, and a violation of the notification requirements of Section 16600.1 “constitutes an act of unfair competition” within the meaning of California’s unfair competition law (Section 17200 of the Business & Professions Code).

While there are certainly ambiguities that need to be fleshed out (for instance, who qualifies as a “prospective employee”), the impending notification deadline presents risks to employers who fail to provide the required notice. These include, but are not limited to, exposure to suit seeking injunctive relief, actual damages, and attorney’s fees and costs. Already, there are cases being filed by California employees seeking to invalidate non-compete agreements entered into in other states based upon these laws, and we expect these filings to increase. In light of California’s effort to export its non-compete and non-solicitation bans to the rest of the country, all employers with employees in California should familiarize themselves with these new developments.

Employers – do not let this potentially onerous and daunting task break your heart this Valentine’s Day! Archer & Greiner’s Trade Secret Protection and Non-Compete Group has been closely monitoring these seismic changes in California law which are causing ripple effects in every state, and has experience drafting the notices required by the new statutory provisions.

If you have questions about whether you or your business are impacted by California’s non-compete laws, or measures you should take to ensure compliance, please contact **Thomas Muccifori** at 856.354.3056 or tmuccifori@archerlaw.com, or **Christopher Terlingo** at 856.673.7150 or cterlingo@archerlaw.com.

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Related People



Thomas A. Muccifori

Partner

✉ tmuccifori@archerlaw.com

☎ 856.354.3056



Christopher M. Terlingo

Associate

✉ cterlingo@archerlaw.com

☎ 856.673.7150

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