

Employment and Labor Insight: Navigating California's New Non-Compete Laws: Next Steps for Employers

Insights

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On January 1, 2024, California will begin enforcing two new laws that expand the state's already-stringent restrictions on non-compete clauses in employment agreements. California Senate Bill 699 (SB 699) and Assembly Bill 1076 (AB 1076) codify and clarify California's ban on non-competes, extend the ban to out-of-state contracts, and impose a notification requirement (with a February 14, 2024 deadline) on companies with current and former employees in California who signed employment agreements containing invalid non-compete provisions. The new laws create private rights of action by employees, accentuating the need for employers to take immediate steps to comply with these new laws.

Understanding the Changes

CBPC Section 16600

Under current California Business & Professional Code (CBPC) Section 16600, "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Statutory exceptions to CBPC Section 16600 include restrictive covenants in the sale or dissolution of corporations, partnerships, and limited liability companies (the "Exceptions"). SB 699 and AB 1076 amend and expand CBPC Section 16600.

SB 699's Expansion:

SB 699 creates CBPC Section 16600.5, which:

1. voids non-compete provisions and agreements – including any provision that is arguably akin to a non-compete, such as a client non-solicitation provision – “regardless of where and when the contract was signed,” even if the employee, employer, and work in question all took place outside of California. The statute would permit, for example, a California company to hire an out-of-state employee to work in California (or remotely to support a company in California), even if the employee signed a non-compete that was valid in the state in which the employee previously resided and worked;
2. prohibits employers from enforcing a non-compete provision that is void under CBPC Section 16600, no matter where or when the agreement was executed;
3. prohibits employers from entering into a contract with an employee or prospective employee that includes a provision that is void under CBPC Section 16600;
4. provides that an employer commits a civil violation when it enters into, or attempts to enforce, a void non-compete provision; and
5. allows current, former and prospective employees to sue employers for violations of CBPC Section 16600.5, with possible remedies that include monetary damages, injunctive relief, and attorney fees.

California’s legislature claims that SB 699 will (a) discourage employers from intimidating workers with non-compete provisions that the employer knows it cannot enforce and (b) strengthen the state’s economy and job market by making it easier for remote workers and California residents to find jobs.

California’s attempt to invalidate contracts executed in other states by residents of other states raises Constitutional issues, and legal challenges are expected.

AB 1076 Codification and Notification Requirements:

AB 1076 amends CBPC Section 16600 and creates a new CBPC Section 16600.1. In so doing, AB 1076:

1. codifies California Supreme Court case law holding any non-compete provision, no matter how narrowly tailored, is void unless it meets an Exception;
2. expands CBPC Section 16600 to cover contracts that include third parties, where the person being restrained is not one of the parties to the contract (which

may be an attempt to target no-poaching and no-hiring agreements between companies);

3. requires companies whose employment contracts include non-compete provisions to:

a. identify current and former employees who were employed any time after January 1, 2022, and now live in California; and

b. notify each of those current or former employees, in writing by February 14, 2024, delivered to the employee's last known physical and email addresses, that their employment agreement contains an invalid non-compete provision, and that the company will never attempt to enforce these provisions; and

4. warns that failure to deliver notices on time constitutes a violation of the Unfair Competition Law under CBPC Section 17200.

Companies that do not comply with the AB 1076 written notification requirement may be sued for injunctive relief and civil penalties (not to exceed \$2,500 for each violation), including California's class action-like Private Attorneys General Act (PAGA) suits.

Key Takeaways and Next Steps

To comply with SB 699 and AB 1076, employers should take certain steps summarized below.

1. Review and Update Employment Agreements and Materials: Review all employment agreements and materials that will be used for hiring new employees in California and remove all non-compete provisions, including client and customer non-solicitation provisions.

2. Employee Identification and Notification: Determine all current employees and former employees who were on the payroll at any time after January 1, 2022, and identify anyone who resides in California (each such person a "Covered Employee").

a. With respect to each Covered Employee, review any employment agreement and other materials that such Covered Employee has executed to determine if any such agreement or materials contain any non-compete provisions.

b. If a Covered Employee's employment agreement contains a non-compete provision that does not meet any Exception, then the employer must send the

Covered Employee an AB 1076 written notification no later than February 14, 2024 by mail to the Covered Employee's last known address and by e-mail to the Covered Employee's last known e-mail address. The AB 1076 written notification should:

- i. advise the Covered Employee that the company will not attempt to enforce the non-compete provision in California;
- ii. advise the Covered Employee that the provision is unenforceable under California law; and
- iii. identify the specific non-compete provision.

3. New Agreements for Relocating Employees: Employers should advise all employees that they must inform the company in advance if they plan to move to a new state. If any current employee has moved to California, in addition to sending an AB 1076 written notification, the company should ask the employee to sign a new employment agreement and Proprietary Information and Inventions Agreement (PIIA) that complies with California's laws. Gunderson Dettmer clients can generate their own California compliant PIAs using the Gunderson Dettmer contract generator tool.

4. New Provisions Requiring Employee to Notify: Employment agreements for any employee that is not a resident of California should include an obligation to notify the employer if the employee moves to California or intends to do so, during or after employment.

5. Deliberations Before Confrontations: Companies with employees or former employees in California should speak with a Gunderson Dettmer employment lawyer before threatening or attempting to enforce any non-compete provisions.

SB 699 and AB 1076 create significant new obligations for employers, but leave many important questions unanswered. If you have questions or concerns regarding these new laws, contact your Gunderson Dettmer employment lawyer.

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