Employment litigation settlement agreements often include a mutually negotiated “no-rehire” provision by which the departing employee agrees not to seek employment with the company in the future. A recently enacted California law will require companies to refrain from including such provisions in most instances.

On October 12, 2019, California Governor Gavin Newsom signed Assembly Bill (AB) 749 titled “Settlement agreements: restraints in trade.” The core provision of AB 749 specifically prohibits “an agreement to settle an employment dispute” from containing “a provision prohibiting, preventing, or otherwise restricting a settling party that is an aggrieved person from obtaining future employment with the employer against which the aggrieved person has filed a claim, or any parent company, subsidiary, division, affiliate, or contractor of the employer.” An “aggrieved person” is “a person who has filed a claim against the person’s employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer’s internal complaint process.”

AB 749 is scheduled to become effective on January 1, 2020, and will apply only to settlement agreements entered into on or after January 1, 2020. California courts have previously held that overly broad no-rehire provisions are void under California Business and Professions Code Section 16600. Opponents of AB 749 argued that the legislation was unnecessary given such previous holdings.

Three important carve-outs limit the scope and impact of AB 749:

1. **Severance agreement exclusion.** An employer and an “aggrieved person” are expressly allowed under the law to enter into a settlement agreement “to end a current employment relationship” given AB 749’s reference to “agreement to settle.” This law does not appear to apply to a severance agreement in which an employer seeks to prohibit an employee from returning to that employer if the employee has simply received severance in consideration for a waiver and release of potential claims.

2. **Harassment exception.** An employer and an “aggrieved person” are allowed to enter into a settlement agreement “restrict[ing] the aggrieved person from obtaining future employment with the employer, if the employer has made a good faith determination that the person engaged in sexual harassment or sexual assault.” Sexual harassment” and “sexual assault,” for purposes of AB 749, follow the definitions established by existing California law. What constitutes a “good faith determination,” however, is not defined in AB 749. How and when those determinations should or must be made are also not addressed.
3. **Rehire not obligatory.** Nothing in AB 749 requires an employer “to continue to employ or rehire a person if there is a legitimate nondiscriminatory or nonretaliatory reason for terminating [the employment relationship] or refusing to rehire the person.” It does not provide any parameters for what constitutes a “legitimate nondiscriminatory or nonretaliatory reason.”

With this legislation, California joins Vermont, which passed a similar measure in 2018. The Equal Employment Opportunity Commission (EEOC) also takes the position that including no-rehire provisions in settlement agreements may be considered unlawful retaliation, including for filing discrimination or harassment claims with the EEOC. Its Regional Attorneys’ Manual contains a section on **Settlement Standards and Procedures** that states that “no individual can be required as a condition of obtaining relief on a Commission claim to agree to refrain from seeking future employment with the defendant or to keep the terms of his or her recovery confidential.”

In light of this new legislation, employers may want to update their settlement agreement forms and review their rehiring standards.