Ogletree Deakins

Does the "No-Rehire" Provision in Your Settlement Agreement Restrain the Lawful Practice of a Profession?

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When resolving an employment dispute, employers often wish to include a "no-rehire" provision in the settlement agreement. In a typical no-rehire clause, the parties agree that they wish to resolve their dispute and sever any relationship they may have now or in the future. The employee agrees that his employment has ended and promises not to seek reemployment with the company. Further, if the employee obtains reemployment with the company or any related entity, the employee agrees that his or her employment may be terminated immediately without any legal recourse.

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The rationale for a no-rehire clause is simple: the last thing an employer wants is to rehire the same person and find itself in litigation again. A no-rehire provision can also protect an employer from a former employee who submits a job application and claims he or she was not rehired because of discrimination.

However, a recent Ninth Circuit Court of Appeals decision suggests that in certain circumstances overly broad language in a no-rehire provision may violate California law (namely, section 16600 of California's Business and Professions Code) as a contract restraining the lawful practice of a profession.

In *Golden v. California Emergency Physicians Medical Group*, (published, April 8, 2015), the Ninth Circuit Court of Appeals considered the scope of section 16600 of California's Business and Professions Code, which states that subject to a few, narrow exceptions: "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Specifically, a divided panel of the Ninth Circuit concluded that section 16600 prohibits more than just "covenants not to compete." Rather, the Ninth Circuit stated, the prohibition on professional restraints extends to any "restraint of a substantial character," no matter its form or scope. This proscription on professional restraints, the court noted, reflects California's "settled legislative policy in favor of open competition and employee mobility."

Background

Donald Golden was an emergency medicine physician who was formerly affiliated with California Emergency Physicians Medical Group (CEP). CEP is a large consortium of over 1,000 physicians that manages or staffs many emergency rooms, inpatient clinics, and other facilities in California and other, mostly Western, states. Dr. Golden sued CEP over the loss of his staff membership at Seton Coastside Medical Facility. He alleged various state and federal causes of action, including racial discrimination.

Prior to the scheduled trial date, the parties orally agreed in open court to settle the case. Dr. Golden agreed to dismiss his lawsuit, release CEP from all other possible claims, and, importantly, "to 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." Under this no-rehire provision, CEP would not only refuse to employ Dr. Golden, but would also terminate him from any emergency room work "without any liability whatsoever" if it subsequently acquires an interest in or contracts to provide services to a facility where he would be working. The no-rehire provision did not prohibit Dr. Golden from seeking employment with competitors of CEP.

The terms of this agreement were subsequently reduced to writing. Dr. Golden then refused to sign the written agreement and attempted to have it set aside. He argued that the no-rehire provision violates California law as a contract restraining the lawful practice of a profession. "Given CEP's dominance of

emergency medicine" in California and its "aggressive" expansion plans, Dr. Golden asserted that this agreement "will substantially limit his opportunities to practice."

During oral argument, CEP's counsel conceded that the no-rehire provision was a material term, and that CEP would not have consented to an agreement without the provision. Therefore, the Ninth Circuit stated that CEP cannot dispute "the fate of the entire agreement should we find such provision void."

The Court's Decision

The district court had concluded that because the no-rehire provision did not prohibit Dr. Golden from working for competitors of CEP, Business and Professions Code section 16600 did not void the settlement agreement. However, the Ninth Circuit held that the district court had erred in mischaracterizing the appropriate legal rule.

Based on its interpretation of the statutory language and earlier cases, the Ninth Circuit clarified that Business and Professions Code section 16600 does not simply prohibit covenants not to compete. Rather, the Ninth Circuit concluded that section 16600 extends "to a considerable breadth," and also includes "other contractual restraints on professional practice." The Ninth Circuit remanded the case to the district court to determine whether the no-rehire provision constitutes a "restraint of a substantial character" on Dr. Golden's medical practice.

Key Takeaways

While the California Supreme Court has not clearly indicated the boundaries of section 16600's prohibitions on professional restraints, the Ninth Circuit believes that they extend "to a considerable breadth." In light of this decision, it would be a mistake for employers to assume that section 16600 simply prohibits "covenants not to compete" and not other restraints on professional practice.

Because there is a risk that a no-rehire provision may be unenforceable and undermine the enforceability of settlement agreements, employers should consider whether to include a no-rehire provision in their agreements with California employees. In addition to deciding whether the no re-hire provision is needed under the particular circumstances, the employer should also consider its relative market share in the industry, its plans for expansion, whether the employee's profession is highly specialized, and the extent to which the employee's opportunities to practice would be limited.

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