Senate Bill 699 Bolsters California Non-Compete Ban

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Background

On January 1, 2024, a new law, SB 699, became effective, strengthening California's Bus. & Prof. Code Section 16600, the state's long standing non-compete ban. Under Section 16600, "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind" is void. SB 699 expands the existing law to encompass certain out-of-state agreements as well and creates a private right of action for employees with agreements containing unlawful restrictive covenants, resulting in potential uncertainty for employers based outside of California but who have employees who may eventually find themselves based in California or working for a California company.

Out-of-State Reach

SB 699 adds Section 16600.5 to the existing statute. Section 16600.5 contains the following provisions relevant to out-of-state contracts:

(a) Any contract that is void under this chapter is unenforceable **regardless of where and when the contract was signed**.

(b) 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**.

Courts have yet to interpret how the provisions of SB 699 will be applied to out-of-state companies and agreements entered into out-of-state with their employees. The legislative history of SB 699 states, "as the market for talent has become national and remote work has grown, California employers increasingly face the challenge of employers outside of California attempting to prevent the hiring of former employees." This statement about employers outside of California coupled with the broad language of Section 16600.5 means that this statute could have an expansive reach on employers outside of California, even if their workforce is predominantly outside of California as well.

Employers should take caution particularly in light of the prevalence of remote and mobile workforces. In that vein, some common scenarios will pose new challenges for employers. For example, if an employee was not a California resident when the employee signed a non-compete or non-solicitation agreement but later moves to California, SB 699 likely means both are unenforceable. Likewise, where an employee located outside of California works for an employer outside of California, and is bound by a non-compete, but the employee seeks employment with a competitor in California, SB 699 may be implicated. In that instance, the former employer may not

be able to enforce the non-compete against the former employee. California courts, as well as those courts outside of California engaging in a choice of law analysis are now tasked with defining the contours of the national implications of SB 699, which is likely to face challenges due to its uniquely broad reach.

Private Right of Action

Section 16600.5 also strengthens California's already robust non-compete ban by allowing employees (including prospective employees) to bring suits based on a current, former, or prospective employer's violation of the statute. The potential for lawsuits against employers is particularly significant given the expanded scope of the non-compete ban beyond California's borders. Specifically, SB 699 adds the following provisions:

(e)(1) An employee, former employee, or prospective employee may bring a private action to enforce this chapter for injunctive relief or the recovery of actual damages, or both.

(2) In addition to the remedies described in paragraph (1), a prevailing employee, former employee, or prospective employee in an action based on a violation of this chapter shall be entitled to recover reasonable attorney's fees and costs.

Accordingly, as employees may now bring litigation pursuant to California's non-compete ban, which encompasses the right to seek damages, injunctive relief, and attorneys' fees, if successful, compliance with SB 699 is essential to avoiding liability. Moreover, an employer may find itself liable for such relief simply because its employee relocates to California. Since employees have not previously had a private right of action under the statute, it is not yet known what their damages and recovery will look like in this new frontier of litigation.

Going forward, companies should review their existing employment agreements in light of SB 699. Employers should consider alternative solutions to protect their businesses such as confidentiality and trade secret protections in employment agreements. These alternatives are particularly crucial if a non-compete provision later becomes unenforceable under California law. Employers using non-compete provisions outside of California may also consider adding an explicit disclaimer in employment agreements that such provisions are not enforceable against their employees should they become California residents in the future.

Attorneys at Kelley Drye are available to assist you in navigating SB 699.