AB 749 (Stone)
Settlements: No Rehire Provisions

Summary

AB 749 would prohibit the use of "no rehire" clauses in settlement agreements that broadly restrict future employment opportunities for workers settling a sexual harassment or other employment dispute.

Background

When employees settle an employment claim against their employers, it is increasingly common for the settlement agreement to contain a "no rehire" provision. Often, this bars workers from not only returning to their same employer, but from working at any workplace that is owned, operated, affiliated, or that contracts with the employer.

In many cases, especially with a large employer, such provisions impose a very substantial burden on the employee's ability to practice a chosen occupation or career. For example, the settlement of a claim by a police officer who alleged sexual harassment by her supervisor at CSU Fresno required her to agree never to seek employment at *any* CSU campus. Likewise, a hospital's settlement agreement with an emergency room doctor who filed a racial discrimination claim prevented him from seeking employment in any emergency room that the employer owned or contracted with, including any that it might own or contract with in the future. More recently, the California Department of Justice's (DOJ) settlement with a woman who filed a sexual harassment claim against a supervisor prohibited her from ever again working for the DOJ.

Such provisions are especially egregious when they require the *victim* of discrimination or sexual harassment to forgo continuing employment, while the *offender* remains in the job. Such clauses can therefore also dissuade employees from reporting workplace misconduct in the first place for fear of lasting repercussions on their careers.

Limits of Existing Law

The only law that currently addresses restrictions on future employment is Business & Professions Code Section 16600, which voids any contract that prohibits a person from engaging in a lawful profession, trade, or business. The California Supreme Court finds that this statute "evinces settled legislative policy in favor of open competition and employee mobility," [*Edwards v. Arthur Anderson LLP* (2008).] Recently, an appellate court held that this section prohibits enforcement of any settlement agreement that imposes a "substantial restriction" on a person's ability to practice a lawful occupation. [*Golden v. CEP Medical Group* (2018)].

However, this pro-competition law is not specific to no rehire clauses in settlement agreements and the appellate courts have been inconsistent in determining what constitutes a "substantial" restriction on a person's right to pursue a lawful calling. [*Cf. Golden,* supra, striking down a no-rehire provision, *with Brown v. State Personnel Board* (2012), upholding an equally sweeping restriction.]

Last year Vermont banned "no rehire" clauses in sexual harassment settlements, recognizing that this practice punishes victims of discrimination and harassment and limits their job opportunities.

In addition, the Equal Employment Opportunity Commission's (EEOC's) settlement standards and procedures state that a worker cannot be required as a condition of settlement to agree to refrain from seeking future employment with the employer.

Solution

AB 749 will bring greater fairness and clarity to existing law by voiding any settlement provision arising from an employment dispute if the provision restricts the ability of an "aggrieved" employee to work for the employer. The bill defines an "aggrieved" employee as one who has filed a claim against the employer, whether the employee filed the claim in court, with an administrative agency, in an alternative dispute resolution forum, or through an internal grievance procedure. In short, it will only protect employees who are victims of alleged discrimination, harassment, or other labor or employment law violations. It will not protect the perpetrators of wrongful acts that give rise to an employment dispute.

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