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California Broadens Restrictions on Noncompete Agreements, Imposes Civil Liability

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Effective January 1, 2024, California will impose civil liability for employers who (1) enter into a contract that includes a noncompete agreement, and (2) attempt to enforce a noncompete agreement — regardless of where and when the agreement was signed. Employees may also bring a private action to enforce this new provision and potentially recover both injunctive relief and actual damages, plus their attorney's fees and costs. This law imposes civil liability for attempting to impose or enforce a noncompete agreement under the laws of another state that would allow a noncompete agreement.

California has long prohibited (with limited exceptions) post-employment noncompete and customer nonsolicitation provisions as unlawful restraints on trade, profession, or business in violation of California Business and Professions Code Section 16600. More recently, California courts have also relied on Section 16600 to void certain post-employment employee nonsolicitation agreements — although these provisions are arguably still valid under California law.

On September 1, Governor Newsom signed SB699 into law, which adds Section 16600.5 to the California Business and Professions Code, effective January 1, 2024. This newly added section:

- Prohibits employers from entering into or seeking to enforce a contract that is void under Section 16600 (*e.g.*, post-employment noncompete or customer and client nonsolicitation provisions), regardless of whether the more permissive laws of another state applied when the contract was signed;
- Imposes civil liability on employers who violate this newly added section; and,
- Creates a private right of action allowing employees to enforce this section with the potential to recover injunctive relief and actual damages, plus attorneys' fees and costs.

This new law adds to California's efforts to foreclose employer workarounds to Section 16600's prohibition on post-employment restrictive covenants, ranging from Labor Code Section 925's restriction on choice of law clauses to Labor Code Section 432.5's ban on requiring employees to agree to knowingly unlawful provisions. Nevertheless, some California employers have chosen to take the gamble by still including post-employment noncompete and nonsolicitation provisions without the intent of enforcement. Going forward, California employers should think twice about this strategy, or risk civil liability under the newly added Section 16600.5. Another outstanding question is whether Section 16600.5 would also extend to employee nonsolicitation provisions, which

have been invalidated under Section 16600 under certain circumstances.

California employers must also consider potential conflicts that may arise when hiring an employee bound by an otherwise valid noncompete provision under another state's laws, such as an employee who relocates to California. Under these circumstances, Section 16600.5 prohibits enforcement of the noncompete provision under California law, yet the provision otherwise remains enforceable in other jurisdictions.

At a minimum, California employers should revisit any policies or agreements that may contain noncompete and customer and client nonsolicitation provisions to ensure compliance with Section 16600.5. For any other issues that may arise with respect to enforcement of these provisions, our Troutman Pepper Labor + Employment attorneys are available to assist.

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