Doing Business In California – When Can an Out-of-State Employer's Non-Compete Provision Stand?

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Most companies doing business in California are aware of California's long-standing public policy in favor of employee mobility over an employer's ability to impose a provision prohibiting an employee from going to work for a competitor post-termination, which is embedded in California Business & Professions Code Section 16600. Particularly where the employer is headquartered outside of California, in a state where non-competes are enforceable under the appropriate circumstances, some employers have attempted to implement choice-of-law clauses in employment agreements with California employees that purport to require any dispute between the parties to be governed not by California law, but rather by the law of a state more favorable to the enforcement of non-competes. As a general rule, California courts steadfastly refuse to enforce such clauses, stating that the strong public policy and statutory prohibition against non-competes in California overrides any contractual provision designating another state's law as controlling as to the validity of a non-compete clause. That said, if the employment agreement also includes a forum selection clause requiring any dispute to be heard in another state, some California courts do permit the action to be transferred to another state, leaving the employee to rely on the courts of that state to apply California choice-of-law principles to find the non-compete provision invalid.

The complexities described above often lead to conflicting outcomes in different states, and unseemly "races to the courthouse" as litigants vie to find the forum most favorable to them. In response, the California legislature enacted Labor Code Section 925, which governs contracts entered into after January 1, 2017. It states that a provision in any contract that requires an employee to litigate or arbitrate outside of California a claim that arose in California, or depriving an employee of the substantive protection of California law for a claim that arose in California, may be voided at the request of the employee. However, the section contains an exception to this that applies where the employee is "in fact individually represented by legal counsel in negotiating" the forum selection or choice-of-law clause. The recent case of *NuVasive, Inc. v. Miles*, brought in the Court of Chancery in Delaware (C.A. No. 2017-0720-SG, September 28, 2018), involved this exception in Section 925.

In *NuVasive,* the employee, Mr. Miles, worked for the plaintiff, NuVasive, a Delaware corporation. Mr. Miles was a California resident and worked for NuVasive in California. Mr. Miles' employment agreement included a covenant not to compete post-termination, and it included both a Delaware choice-of-law and Delaware venue provision. Under California law, the non-compete would have been unenforceable, but if Delaware law applied, it was potentially enforceable. The issue therefore was whether the Delaware court should honor the Delaware choice-of-law provision in the employment agreement, or if it should instead apply California law, with the outcome of doing so being a finding of unenforceability.

Importantly, Mr. Miles was represented by counsel in the negotiation of his employment agreement, including the non-compete provision in that agreement. The Delaware court found that Section 925 "if anything, strengthens an analysis of California's interest in preventing contractual end-runs around its public policy." However, the court held that in enacting Section 925, the California legislature also "made a policy decision that when contracting parties' rights are protected by representation, freedom of contract trumps this interest." Thus, in the "narrow circumstances" where an employee has legal representation during negotiations, and as a result, the parties' bargaining power is equalized, the court held that applying Delaware law was appropriate, and thus refused to find the non-compete unenforceable under California law.

For companies with high-level executives in California where a non-compete provision might prove very useful, this case highlights the benefits of ensuring that the executive has his or her own independent counsel, even if the company pays the bill, in order to negotiate an enforceable non-compete.

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