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California Employers Should Think Twice Before Inserting No Rehire Language in Settlement Agreements

California has just passed Assembly Bill (AB) 749 resolving an ambiguity under current case law by generally prohibiting an employer from requiring, in settling an employment dispute, that a current or former employee agree not to obtain future employment with that employer.

A similar issue arose last year in Golden v. Cal. Emergency Physicians Med. Grp., in which the Ninth Circuit Court of Appeals ruled that the no hire provision contained in a settlement agreement between a physician and his former employer, a physician medical group, constituted a "restraint of a substantial character" on the physician's medical practice and therefore violated California's non-compete law, Business and Professions Code section 16600. Specifically, the Ninth Circuit found that the agreement's preclusion of the physician from working at "any facility owned or managed by" the employer was lawful but that it violated Section 16600 to the extent that it permitted the employer to terminate the physician from employment with any medical facility where the employer contracts or may later contract for services.

AB 749 expands on this Ninth Circuit ruling by barring any agreement to settle an employment dispute from containing a provision "prohibiting, preventing or otherwise restricting" the employee from obtaining employment with the employer or "any parent company, subsidiary, division, affiliate or contractor of the employer." Significantly, the law only applies in circumstances where the current or former employee has *filed a claim* against the employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer's internal complaint process.

Yet, AB 749 clarifies that the law does not preclude any agreement to end a current employment relationship, or prohibit or restrict the current or former employee from obtaining future employment where the employer has made a good faith determination that the individual engaged in sexual harassment or sexual assault. The law further clarifies that it does not require an employer to continue to employ or rehire a person if there is a "legitimate, non-discriminatory or non-retaliatory reason" for terminating the employment relationship or refusing to rehire the person.

Bottom Line

AB 749 does not apply to separation agreements where the current or former employee has *not* previously filed

a claim against the employer, under any of the circumstances described above. However, where the employee has filed such a claim, the separation or settlement agreement must not contain any provision restricting the employee from obtaining future employment with the employer, or any of its business affiliates or contractors.

While AB 749 generally bars no rehire clauses in settlement agreements, employers may, nonetheless, deem an individual ineligible for rehire. That determination should be based on documented poor performance or other legitimate reasons, and not the fact that the individual filed a claim against the employer or previously engaged in whistle blowing or other protected activity. Because AB 749 takes effect on January 1, 2020, it is advisable that employers now review their template separation and settlement agreements for compliance.

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