

Important Changes to California Non-Compete Laws to Take Effect in January 2024

Employers should take stock of restrictive covenant agreements that their current and former workforce have signed and which remain in effect.

California recently passed two laws amending Section 16600 of the California Business and Professions Code — [SB 699](#) and [AB 1076](#) — which will impact non-compete and possibly other restrictive covenant agreements. Both laws will take effect on January 1, 2024. This Client Alert provides a summary of each law, followed by our key takeaways and considerations for employers.

Background

Section 16600 provides that, subject to certain exceptions, “every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.” Though the Section does not specifically refer to any type of restrictive covenant, California courts have interpreted Section 16600 to prohibit post-employment non-compete agreements, as well as post-employment customer non-solicitation agreements. More recently, one California appellate court and a few federal courts have interpreted Section 16600 to also prohibit post-employment employee non-solicitation agreements.

Against this backdrop, historically, California courts might have enforced restrictive covenants that would otherwise be void under Section 16600 if, for example, the agreement was entered into by an employee who worked out of state and the agreement was governed by, and enforceable under, another state’s law. The two new California laws change that landscape.

Summary of the New Laws

SB 699

SB 699 amends Section 16600 to add a new Section 16600.5, which states that “[a]ny contract that is void under this chapter is unenforceable regardless of where and when the contract was signed” (emphasis added). More specifically, under this amendment:

- An employer or former employer is prohibited from attempting to enforce a contract that is void under Section 16600 “regardless of whether the contract was signed and the employment was maintained outside of California” (emphasis added).
- An employer shall not enter into a contract with an employee or prospective employee that includes a provision that is void under Section 16600.
- An employer who violates these provisions commits a civil violation, and current, former, and prospective employees can bring a private action to enforce the Section for injunctive relief, to recover actual damages, or both. If the current, former, or prospective employee prevails, the amendment provides that the individual will be entitled to recover reasonable attorney’s fees and costs.

AB 1076

AB 1076 also amends Section 16600 in two ways. First, it purports to codify the California Supreme Court’s decision in *Edwards v. Arthur Andersen LLP*,¹ which interpreted Section 16600 “to void noncompete agreements in an employment context and noncompete clauses within employment contracts, even if that agreement is narrowly tailored, unless a [statutory] exception applies.” The amendment instructs that the law “shall be read broadly” in accordance with the *Edwards* decision, but “does not constitute a change in, but is declaratory of, existing law.”

Second, the amendment imposes on employers certain notification requirements with respect to agreements that are void under Section 16600. Specifically:

- The amendment again confirms that “[i]t shall be unlawful to include a noncompete clause in an employment contract, or to require an employee to enter a noncompete agreement, that does not satisfy an exception in [Section 16600].”
- Employers must notify both (1) current employees and (2) former employees who were employed after January 1, 2022, who were parties to unlawful non-compete clauses or agreements that the noncompete clause or agreement is void. The notice must be provided no later than February 14, 2024.
- The form of notice must be a written individualized communication, delivered to the last known address and the email address of the current or former employee.
- Violation of the notification requirement constitutes “an act of unfair competition” under Section 17206 of the California Business and Professions Code, which could result in a penalty of \$2,500 per violation (though it is unclear how the penalty would be calculated, e.g., per employee, per void clause or agreement, or per overall failure to notify an employee population).

Key Takeaways and Considerations

The new laws raise a number of unanswered questions. We will closely monitor any developments, including litigation, which we expect to see in 2024. In the meantime, our observations include the following:

- The limited exceptions under Section 16600 remain unchanged, i.e., restrictive covenants in the sale or dissolution of corporations, partnerships, and limited liability companies are enforceable.²

- The new laws do not address Labor Code section 925 and its exception, which permits employees who are “in fact individually represented by legal counsel in negotiating the terms of an agreement to designate the choice of law to be applied,” i.e., to enter into agreements governed by another state’s law that may be more permissive towards restrictive covenants. Whether the exception under Section 925 will be applicable to “noncompete” agreements or clauses in light of the amendments to Section 16600 is unclear.
- The new laws do not specifically address covenants not to solicit employees; thus, it is unclear whether the new laws intend to “void” covenants not to solicit employees “regardless of whether the contract was signed and the employment was maintained outside of California.” In addition, while SB 699 refers to agreements “void under this chapter,” and may presumably incorporate prior case law holding that covenants not to solicit customers are void, it is unclear whether AB 1076’s notification requirements apply to covenants not to solicit customers or employees. Notably, AB 1076 references “noncompete” agreements — not agreements “void under this chapter”— though it also states that “[t]his section shall be read broadly.”
- The new laws do not articulate what, if any, connection to California is required to void an agreement and trigger notification. It remains to be seen how broadly the laws will apply in practice, and whether jurisdictional challenges may limit their effect within and outside of California. This determination may come down to which state’s court is asked to interpret an agreement in conjunction with the new laws, which could lead to a race to the courthouse.

While we wait for any further guidance, we recommend that employers take stock of restrictive covenant agreements that their current and former workforce have signed and which remain in effect, and evaluate their existing templates.

- For employers using California-compliant forms with their California workforce, there should be nothing further to do.
- Employers that have a presence in California may want to exercise caution when asking an employee outside of California, particularly a remote employee tied to a California location, to sign a non-compete.
- Employers may consider adding a disclaimer about the application and enforcement of non-competes or other restrictive covenants in California, regardless of whether they have a current presence in California.
- Employers will likely need to review the facts and circumstances on a case-by-case basis to determine whether existing non-compete or other restrictive covenant agreements may trigger notification under the new laws.

If you have questions about this Client Alert, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Nineveh Alkhas

nineveh.alkhas@lw.com
+1.312.876.7724
Chicago

Oswald Cousins

oswald.cousins@lw.com
+1.415.395.8887
San Francisco / Silicon Valley

Joseph B. Farrell

joe.farrell@lw.com
+1.213.891.7944
Los Angeles

Sandra Benjamin

sandra.benjamin@lw.com
+1.212.906.1885
New York

Laura D. Waller

laura.waller@lw.com
+1.312.876.7629
Chicago

Laura Zabele

laura.zabele@lw.com
+1.213.891.8251
Los Angeles

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Endnotes

¹ 44 Cal.4th 937 (2008).

² See Cal. Bus. & Prof. Code sections 16601, 16602, and 16602.5.