

Not So Fast: 'No-Rehire' Clauses Could Be A Restraint On Trade

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It is common practice that most employers settling with former employees include a clause in said settlement or separation agreements saying that the employee would never reapply to the company and was also not eligible for rehire. However, there is not clear authority saying those actual clauses are legally permissible. A divided Ninth Circuit panel has recently held that such clauses may constitute an unlawful restraint of trade under California law. As such, employers should give serious consideration and thought to including a *pro forma* “no re-hire” provision in separation or settlement agreements as a standard practice. In [Golden v. California Emergency Physicians Medical Group, et al.](#), 2015 U.S. App. LEXIS 5642 (April 8, 2015), a physician challenged enforcement of a settlement agreement containing a “no re-hire” provision. He argued that his former employer was a key participant in his field with plans to grow by acquiring other practices. As written, the no-hire provision would not only preclude him from applying to practices affiliated with his former employer, but *also* waived his right to employment with any facility his former employer may contract with in the future. The district court enforced the “no re-hire” provision, and the physician appealed arguing the “no re-hire” clause was a material term of the settlement, and that finding it void would make the entire agreement unenforceable. The Ninth Circuit panel considered the arguments under California Business and Professions Code section 16600, which provides that every contract which restrains a person from engaging in a lawful profession, trade or business of any kind is void. Section 16600 is usually interpreted to apply to contracts that prohibit competition with a former employer, while this case is the converse. The “no re-hire” clause allows employment at competitors and non-affiliated facilities, but prohibits future employment with the employer or any of its affiliates. The panel determined that the district court erred in applying an exclusion of “no re-hire” provisions to Section 16600, finding that Section 16600 should be interpreted broadly and should not be restricted to only non-compete agreements. Two judges on the panel concluded that the settlement agreement was a contract restraining plaintiff from engaging in a lawful profession, trade, or business. They decided to send the case back to the district court to decide if the restraint was “substantial.” Until the courts resolve this issue, employers should tread carefully when considering whether a “no re-hire” clause should be included in settlement agreement. As some departing employees may never actually strive to be rehired, employers seeking to use a “no re-hire” clause in a settlement agreement should carefully consider whether there is any practical need or advantage to forbid rehiring the employee and the potential restraint on trade.

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