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# Employment Settlement "Don't Reapply" Clauses Threatened by Ninth Circuit Expansion of California's Business and Professions Code Section 16600

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Settlements of most employment claims include the employee's promise not to reapply to the settling employer. The reason is if the employee reapplies after getting the settlement money and is then denied new employment, the employee can argue it is retaliation for the first claim. The "no reapply" provision could eliminate that risk—until this week. Now that clause may be against public policy—at least in California. And multi-state employers need to heed this new development. Most employers are familiar with California's Business and Professions Code section 16600, which is usually triggered to invalidate covenants not to compete. But the Ninth Circuit pointed out the statute goes far further. It went on to invalidate a settlement agreement of an employment dispute on the grounds that the typical "do not reapply" clause violated Section 16600's broad language. In *Golden v. California Emergency Physicians Medical Group*, D.C. No.2:11-cv-01928-JCM-RJJ, Dr. Golden filed a lawsuit asserting claims of racial discrimination, among other things, against his employer, CEP. At a pre-trial court hearing, the parties agreed to a settlement in open court: in exchange for a monetary payment, Dr. Golden agreed to dismiss his lawsuit, release all claims against CEP and also agreed –"extremely reluctantly" – to give up any rights of employment with CEP or at any facility CEP owned or might contract with in the future. After the written settlement document was drawn up, however, Dr. Golden refused to sign it. His, by now former, attorney intervened in the case and sought to enforce the settlement so he could collect his contingency fee. Dr. Golden objected on the grounds that the provision prohibiting him from working for CEP in the future was barred by Section 16600 and, because it was a material term, rendered the entire agreement void. The district court found the settlement agreement enforceable because the provision was not a covenant not to compete and did not limit Dr. Golden's ability to work for CEP's competitors. Two of the three judges on the Ninth Circuit panel disagreed, however, and overturned the lower court's

judgment. The Ninth Circuit emphasized the very broad language of Section 16600 and California's policy of fostering employee mobility and open competition. In short, the key question is whether there is a limitation on the ability to practice one's profession, not merely whether an employee can compete with his or her former employer. Thus, "any 'restraint of a substantial character,' no matter its form or scope," is prohibited by Section 16600. The Ninth Circuit remanded the case so that the district court could determine (with the aid of additional fact-finding and analysis) whether the no-employment provision was a "restraint of a substantial character." ***What does this mean for employers?*** In many terminations and lawsuits, an employee who receives a severance payment in exchange for a release of claims against the employer is also asked to agree not to reapply for employment. There are good reasons for this – in particular, to prevent the employee from claiming that the company's refusal to rehire him or her down the line was in retaliation for claims the employee previously alleged. Now, however, the validity of this approach is in doubt, since it could be viewed as a substantial restraint on the employee's ability to engage in his or her profession. ***What should employers do?***

- First, for employees located in California, proceed cautiously if implementing a similar provision. The facts are important. On the slim factual record in *Golden*, it appeared that CEP was a dominant player in the industry and owned or contracted with so many facilities that it would make it difficult for Dr. Golden to find a job. But if you include a no-rehire provision, you run the risk of your entire settlement being invalidated.
- Second, for employees outside California or nationwide employers, consider using a forum selection clause in the settlement agreement to try to ensure that, if the employee relocates to California, any issues over the no re-hire provision will be litigated in a friendlier state.
- For all employees, consider whether an agreement to arbitrate in a non-California forum makes sense – again, this could help place the case in a more favorable venue.

Regularly review standard settlement agreements to ensure they keep pace with evolving legal requirements.

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