

# California Doubles Down on its Noncompete Prohibition: Employers May Need to Provide Notice by Feb. 14

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Effective Jan. 1, Senate Bill (SB) 699 and Assembly Bill (AB) 1076 restate California's prohibition on employee non-competition provisions but also create new obligations, including the obligation to inform current and former employees of any void noncompete provision in any existing agreements.

## **California Public Policy Prohibits Non-Competes**

California has long prohibited contractual non-competition restrictions. Section 16600 of the California Business and Professions Code ("Section 16600") provides that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Noncompete agreements are enforceable only if one of three exceptions applies: (1) sale of a business, (2) dissolution of a partnership, or (3) dissolution or termination of interests in a limited liability company.

These new pair of laws were intended to give more teeth to California's long-standing prohibition, and are part of a broader trend of states passing laws banning non-competition agreements (e.g., Colorado, Illinois, Massachusetts).<sup>1</sup> The Legislative findings on worker mobility include that "one in five workers are currently subject to a noncompete clause" and note that "California employers continue to have their employees sign noncompete clauses that are clearly void and unenforceable." The Legislative findings further note that "California employers increasingly face the challenge of employers outside of California attempting to prevent the hiring of former employees" and that the purpose is to "[fuel] competition, entrepreneurship, innovation, job and wage growth, equality, and economic development."

Neither of the new laws expressly defines what is meant by "noncompete" agreements, but instead state that that term should be construed broadly. California courts have found provisions restricting employees from working for a competitor, as well as provisions soliciting customers and employees, to run afoul of Section 16600. We expect more courts will weigh in on the scope of California's non-competition prohibition on the heels of SB 699 and AB 1076. In the meantime, employers should consult with legal counsel with any questions about whether an agreement is a "noncompete" agreement for purposes of these new laws.

## **SB 699**

SB 699 creates California Business and Professions Code Section 16600.5, which (1) establishes that any non-competition agreement void under California law is unenforceable **regardless of where and when the contract was signed**; (2) prohibits an employer or former employer from attempting to enforce any such non-competition agreement **regardless of whether the contract was signed and the employment was maintained outside of California**; and (3) prohibits an employer from entering into a contract with an employee or prospective employee that includes a non-competition provision void under California law.

The extent of SB 699's reach across interstate borders is an open question -- it purports to void contracts in violation of the Code "regardless of where and when the contract was signed" and prohibits "an employer or former employer from attempting to enforce a contract that is void regardless of whether the contract was signed, and the employment was maintained outside of California." It remains to be seen whether a court would interpret this provision to prevent a California employer from implementing and enforcing a non-competition clause as to a non-California employee.

The bill also expressly creates a private right of action in which an employee or former employee may bring an action for injunctive relief or damages as well as seek attorney's fees and costs if he or she prevails in voiding an unlawful non-competition agreement. A prevailing employer, however, cannot recover its attorney's fees or costs.

## **AB 1076**

AB 1076 amends Section 16600 and creates Section 16600.1. Not only does AB 1076 specify that California's ban on non-competition agreements is to be interpreted broadly, such that any non-compete is void "no matter how narrowly tailored" (unless a statutory exception applies), but it also requires employers (of any size) to notify current **and former** employees employed as of Jan. 1, 2022 in writing **by Feb. 14**, that any noncompete clause or agreement the employee may have been subject to during his or her employment that does not fall within an exception is void.

The notification must be in the form of a "written individualized communication," and delivered to the current or former employee's last known address and email address. All notifications must be made by **Feb. 14**.

Under these new laws, an employee may bring an action against the employer for injunctive relief or damages, as well as attorney's fees and costs. Additionally, violation of these provisions – including failure to timely provide notice of a void-noncompete agreement – is considered unfair competition under California's Unfair Competition Law and exposes an employer to a civil penalty of up to \$2,500 for each violation.

## **Next Steps**

SB 699 and AB 1076 strengthen California's long-held adverse view of noncompete clauses. Employers need to revise any agreements or policies affecting California employees to (1) remove noncompete agreements clauses that do not fall within one of the three exceptions; and (2) identify any employees who have signed a void non-competition provision and notify them that such provision is void by Feb. 14.

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<sup>1</sup> Similarly, on the federal level, the Federal Trade Commission has proposed a rule banning noncompetes nationwide.