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No Future Employment Provisions In Employment Litigation Settlement Agreements May Violate California Law

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In another decision expansively interpreting California Business & Professions Code § 16600 and which could have a significant effect on employment litigation settlements, the Ninth Circuit Court of Appeals reversed the district court's enforcement of a settlement agreement and remanded the case to the district court to determine whether a no employment provision in the agreement is a "restraint of substantial character" to the Plaintiff's medical practice. *Golden v. California Emergency Physicians Medical Group; Med America; Mark Alderdice; Robert Buscho*, United States Court of Appeals for the Ninth Circuit (No. 12-16514) (April 8, 2015).

The case has an interesting procedural history. Dr. Golden is an emergency-room doctor who sued California Emergency Physicians Medical Group ("CEP"), among others, regarding his loss of staff membership at a medical facility. His lawsuit was based on various state and federal causes of action, including racial discrimination. The parties orally agreed in open court to settle the case and the settlement terms included "a substantial monetary amount," dismissal of the action, a release of CEP and a waiver of any and all rights to employment with CEP or at any facility that CEP may own or with which it may contract in the future (the "no-employment provision"). Dr. Golden refused to sign the written agreement and attempted to have it set aside. His attorney moved the court to withdraw as counsel, moved the court to intervene and further moved the court to enforce the settlement agreement so he could collect his contingency fee. In further proceedings a magistrate judge ordered Dr. Golden to sign an amended agreement, which recommendation was adopted by the district court judge who concluded the settlement agreement was not within the ambit of § 16600. Dr. Golden refused to sign the agreement and filed a notice of appeal.

The court concluded the case was ripe for review because (1) Dr. Golden argued the agreement was currently void because the no-employment term was a material term and (2) Dr. Golden's argument that the no-employment provision was void was in response to his former attorney's motion to enforce the agreement. The court concluded the issue before it concerned the present enforcement of the settlement agreement rather than the future interaction between the no-employment provision and his emergency medicine practice.

Dr. Golden argued because of CEP's emergency medicine dominance in California and its aggressive plans to expand, the agreement would substantially limit his employment opportunities because CEP not only could refuse to employ him, it could terminate him without any liability if it

subsequently acquired an interest in a facility where he would be working.

The court pointed out that § 16600's scope is not limited to covenants not to compete between employees and their employers. Rather, the court held, the text of § 16600 voids "every contract" that "restrain[s]" someone "from engaging in a lawful profession, trade, or business." The court relied on the California Supreme Court decision in *Chamberlain v. Augustine*, 156 P2nd 479 (Cal. 1916) and concluded the issue is "not whether the contract constituted a covenant not to compete, but rather whether it imposes 'a restraint of substantial character.'" The court concluded that the § 16600 prohibition extends to any restraint of a substantial character no matter its form or scope and remanded the case to the district court to determine in the first instance whether the no-employment provision constitutes a restraint of substantial character to Dr. Golden's medical practice.

Judge Kozinski dissented because the only limitation imposed by the agreement on Dr. Golden's ability to practice his profession "*at this time*" (emphasis in original) was that he could not work for CEP. Since his employment with CEP was the subject of the controversy in his lawsuit, it could not possibly violate § 16600 and it would mean few employment disputes could ever be settled. Judge Kozinski opined the only real limitation on Dr. Golden's ability to practice would be if, in the future, CEP acquired a facility at which he worked. He concluded if that scenario occurred, Dr. Golden would have the ability to raise § 16600 as a defense to his dismissal and a court could adjudicate that issue based on the concrete circumstances which existed at that time.

We will be very interested to learn how the district court resolves this issue. This case has important implications for employment law litigation in California because most settlement agreements contain a no future employment provision. The district court's decision following remand and any potential appeal should further clarify the issue. However, employment attorneys will have to be very careful in including no employment provisions in settlement agreements. Absent a provision providing that any unenforceable terms may be severed from the agreement, attorneys must be careful in deciding whether no employment provisions should be included in that, based on the *Golden* case, it might invalidate the settlement agreement if a court concludes the prohibition is a restraint of substantial character.

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