Fenwick Employment Brief

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NINTH CIRCUIT REVIEWS ENFORCEABILITY OF WAIVER OF RIGHT TO REEMPLOYMENT

Does California Business and Professions Code § 16600 prohibit employees from waiving their right to reemployment with prior employers? The answer is maybe, according to the Ninth Circuit's recent decision in *Golden v. Calif. Emergency Phys. Med. Gp.*, where the court held that Section 16600 prohibits more than just post-employment non-competition agreements and may potentially extend to reemployment waivers.

Plaintiff Golden was an emergency room ("ER") physician and formerly affiliated with California Emergency Physicians Medical Group ("CEP"), a physician's consortium that staffs ERs and other medical facilities throughout California and other Western states. Golden sued CEP for racial discrimination and other state and federal claims. Before trial, the parties reached an oral settlement in court, which included, as a material term, that Golden waive his right to reemployment with CEP or any facility that CEP may own or contract with in the future. Further, it gave CEP the right to terminate Golden, without any liability, if CEP contracted to provide services or acquired rights in an ER at which Golden was employed or to which he was rendering services. The settlement agreement was later memorialized in a draft written agreement, which Golden refused to sign and sought to set aside. A lower district court upheld the agreement, and Golden appealed.

Golden argued that the no-employment clause violated Section 16600 because it restrained his ability to practice medicine. Thus, he claimed that the entire settlement agreement was void and his lawsuit should be reinstated. Section 16600 prohibits contracts that restrain individuals from engaging in a profession, trade, or business. Golden maintained that since CEP had a large presence in the medical profession in California and surrounding areas, with an expanding presence, the no-employment clause would significantly impede his ability to work as an ER doctor. CEP argued that Section 16600 did not apply since the no-employment clause was not a non-compete and that, historically, courts had only applied this section to non-compete provisions.

The Court sympathized with Golden, particularly noting CEP's "dominance of emergency medicine" in California, its "aggressive plans to expand," and Golden's duty under the agreement to preemptively surrender a future position if certain circumstances "completely outside of his control" occurred. Further, it noted that the text of Section 16600 does not include the words "compete" or "competition" and that if the Legislature had wished to limit its application as such, it would have explicitly stated so in the statute.

Although the Court did not render a definitive decision on the matter, it remanded the case to the lower court to issue a decision not inconsistent with its opinion, which was peppered with references to the "considerable breadth" and expansiveness of the statute and a statement that the lower court mischaracterized the appropriate legal rule.

In light of this decision, employers should consult counsel before including such clauses in settlement and other agreements with careful consideration of the scope of the clauses and the breadth of the employer's business, amongst other factors.

NEW CFRA REGULATIONS PROVIDE CLARIFICATION ON LEAVES OF ABSENCE

New California Family Rights Act ("CFRA") regulations become effective on July 1, 2015. The regulations provide needed clarification and bring the CFRA more closely in line with the federal Family and Medical Leave Act ("FMLA"). The changes include:

- The length of service requirement for eligible employees will be changed from employed for "more than" twelve months to "at least" twelve months.

- The worksite for employees with no fixed worksite – often remote workers who work from home – is the site that they are assigned to as their home base, from which their work is assigned, or to which they report. For jointly employed employees, the worksite is the primary employer's office from which the employee is assigned or reports, unless the employee has physically worked at least one year at the facility of a second employer, in which case the employee's worksite is that of the secondary employer. The location of the employee's worksite is important in determining whether he/she is eligible for FMLA or CFRA leave, since he/she must be employed at a worksite with 50 or more employees or within 75 miles of a worksite with at least 50 employees.
- If an employee is not eligible for CFRA at the beginning of leave because he/she has not been employed for at least twelve months, the employee may meet this requirement on leave because leave to which he/she is otherwise entitled counts towards length of service.
- "Key employee," for purposes of assessing which employees may be denied reinstatement upon return from leave, is clearly defined and there is more detail around reinstatement of such key and non-key employees.
- "Serious health condition" is expanded to cover treatment for substance abuse.
- "Spouse" is expanded to cover registered domestic partners and employees in same-sex marriages.
- Employers have five business days to respond to CFRA leave requests.
- Provides for electronic posting of CFRA notices.
- Provision of a new medical certification form.

Employers should celebrate the detail and clarification provided for in the regulations, which should help simplify the leave process and harmonize the CFRA and FMLA, although differences between the statutes still exist.

News Bites

Terminating Employee for Calling Boss a "Nasty Mother Fker" Violated NLRA**

In *Pier Sixty, LLC and Hernan Perez and Evelyn Gonzalez*, the National Labor Relations Board (the "NLRB" or the "Board") held that an employee's offensive Facebook post about his boss constituted protected concerted activity under the National Labor Relations Act (the "NLRA").

Pier Sixty LLC ("Pier Sixty") employee Perez was upset with his supervisor, Bob McSweeney, who he believed treated both he and his coworkers unfairly and in a demeaning manner. Immediately following a negative interaction with McSweeney, Perez posted the following on his personal Facebook account:

> Bob is such a NASTY MOTHER FUCKER don't know how to talk to people!!!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!

Both current and former coworkers made comments on the post. Although a coworker showed the posting to management before a scheduled union election, management at Pier Sixty did not confront him about the posting until after the election. The day after the election, Perez removed the post and all accompanying comments. Shortly thereafter, management met with Perez to discuss the post. Perez denied that the "Bob" referenced in his post was his supervisor and he made other false statements regarding the post and what provoked him to draft it. Pier Sixty suspended Perez pending an investigation and ultimately terminated him for harassment of McSweeney under its anti-harassment policy.

The NLRB held that the portion of his post addressing the union election was clearly protected activity; it then analyzed various factors to determine whether the remainder lost NLRA protection due to its obscene nature. The NLRB acknowledged that statements containing profanity do not lose NLRA protection and noted that the Pier Sixty workplace was permeated with a culture of swearing, including supervisor use of the same profanity used by Perez in his post. In holding that the post constituted protected activity under the NLRA, the Board focused on the fact that the post was in response to perceived mistreatment

by Perez's manager and that mistreatment by management was one of the reasons behind the union organizing campaign and election. Perez's mention of the union election in his post only bolstered this finding. Thus, the Board held that Perez's termination was unlawful.

This is the latest in a series of NLRB decisions involving negative social media posts where terminations and other discipline for such posts were found to be unlawful. Employers must proceed with extreme caution when reacting to online rants and other negative behavior.

San Francisco Minimum Wage Increase

On May 1, 2015, the San Francisco minimum wage will increase to $12.25 per hour. An employer must pay the new minimum wage rate to any employee who performs at least two hours of work per week within San Francisco, regardless of the location of the employer's business.

H-1B Cap Reached for Fiscal Year 2016

Earlier this month, United States Citizenship and Immigration announced that it will no longer accept H-1B petitions under the fiscal year 2016 cap or the advanced degree exemption. Some exceptions apply, including for individuals from particular countries and those who have previously held such status within the last six years.

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