

NIESAR & VESTAL LLP

## Law Alert

May 1, 2019

### California Appellate Court Rules Contractual Restrictions on Solicitation of Employees Violate Public Policy

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The California Court of Appeal issued a noteworthy new decision voiding contractual restrictions on former employees' right to solicit their colleagues. *AMN Healthcare, Inc. v. Aya Healthcare Servs., Inc.* (2018) 28 Cal. App. 5<sup>th</sup> 923.

AMN recruited nurses for placement in 13-week assignments at medical facilities nationwide. During each temporary assignment, a nurse was considered to be an AMN employee. AMN sued several of its former recruiters who had left to work for a competitor, Aya. Each recruiter had executed a written agreement not to "directly or indirectly solicit or induce" any employee to leave AMN "for a period of [one year or] eighteen months after the termination" of the recruiter's AMN employment.

The defendant recruiters argued that, due to the nurses' status as AMN employees during their temporary assignments, the non-solicitation provision violated California's public policy favoring free competition. Specifically, they asserted that the restriction ran afoul of California Business and Professions Code section 16600, which provides that, with certain limited exceptions, "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." The trial and appellate courts agreed, concluding that restriction of the recruiters' right to solicit AMN's temporary nurses impermissibly restrained the recruiters' ability to engage in their business.

In holding that contractual restrictions on solicitation of former colleagues violate section 16600, the *AMN* court has created a split of authority in the California Court of Appeal. An earlier appellate court had ruled that section 16600 does *not* preclude a company from challenging a former executive officer's efforts to "raid" the company by soliciting two other executives to follow him to a competing business.

It remains unclear whether *all* contractual limits on solicitation of former colleagues run afoul of section 16600. In the earlier appellate decision, the competitors were in the electronics business, not the staffing business. The *AMN* court found it "significant" that the defendant former employees were *in the business of* recruiting nurses, who were considered AMN employees during their temporary assignments. Nevertheless, California employers should be aware of the risk that a court may declare all contractual restrictions on solicitation of fellow employees to be void, regardless of the nature of the former employer's business.

If you have questions concerning the *AMN* decision or the continuing viability of non-solicitation provisions in employment agreements, please feel free to contact Gerald Niesar ([gniesar@nvlawllp.com](mailto:gniesar@nvlawllp.com)), Peter Vestal ([pvestal@nvlawllp.com](mailto:pvestal@nvlawllp.com)), John Kelley ([jkelly@nvlawllp.com](mailto:jkelly@nvlawllp.com)), or any other attorney at the firm.

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