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PERSPECTIVE

Another warning shot on nonsolicits

By Fred Alvarez and Laura Seegal

It's time to take another hard look at whether it's worth it for employers to ask their departing employees not to recruit anyone away after they leave. Nobody wants their former employees to raid the ranks of their current employees, but they don't want to be forced to defend an unfair competition lawsuit in California either. By the same token, nobody tempted to recruit their former colleagues wants to be sued for breach of contract or to have their new employer sued for inference with contractual relations. The need to balance those risks is becoming ever more acute.

Up until the 2008 California Supreme Court decision in *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937, California employers routinely and comfortably relied on the 1985 Court of Appeal decision in *Loral Corp v. Moyes*, 174 Cal. App. 3d 268, to justify including employee nonsolicitation clauses in employment and severance agreements. (Applying a rule of reason analysis, the *Loral* court enforced an employee nonsolicitation covenant because it did not significantly restrain trade so as to run afoul of California Business and Professions Code Section 16600.) Those provisions typically prevent employees who have left their employment from recruiting current employees of their former employer to work elsewhere.

In *Edwards*, the court invalidated a noncompetition agreement that contained both noncompete and customer nonsolicitation clauses on the basis that Business and Professions Code Section 16600 unambiguously prohibits all restraints on trade, without regard to reasonableness. Though the agreement at issue in *Edwards* also contained an employee noncompetition clause, the plaintiff had not specifically challenged it. Therefore, despite the California Supreme Court's sweeping rationale in *Edwards*, many employer-side attorneys continued to "whistle past the graveyard" on employee nonsolicitation clauses. Similarly, many employee-side attorneys had to urge caution to their clients who had signed nonsolicits but were anxious to bring former colleagues to their new ventures. Moreover, until recently no definitive Court of Appeal decision existed to compete with *Loral*. For these reasons, many employers routinely continue to include employee nonsolicitation clauses, just as they did before *Edwards*. Two recent developments have made reliance on *Edwards*' silence as to employee nonsolicits a little more treacherous for employers — and a little less scary for ex-employees.

At least one Court of Appeal case, and some commentators, have assumed or even suggested that the *Edwards* rationale would logically encompass employee nonsolicitation clauses. Yet, the decision of the 4th District Court of Appeal in *AMN Healthcare, Inc. v. Aya Healthcare Servs., Inc.*, 28 Cal. App. 5th 923 (2018), brought the fight directly to *Loral*. In *AMN*, the Court of Appeal ruled that an employer could not enforce its employee nonsolicit against former company recruiters, after finding that the clause would effectively prevent the recruiters from performing their jobs in violation of Section 16600. The *AMN* court went to some lengths to illustrate that the analysis and rationale in *Loral* was not compatible with the Supreme Court's approach to Section 16600 in *Edwards*. It then boldly concluded that, "We thus doubt the continuing viability of [*Loral*] post-*Edwards*."

Employer attorneys looking to continue relying on *Loral* have harbored some hope that the particular facts in *AMN* — recruiters who could no longer practice their profession of recruiting — would help keep *Loral* on some solid ground despite its negative treatment in *AMN*. That hope was confronted with a dose of harsh reality in the recent decision of *Barker v. Insight Glob., LLC*, No. 16-CV-07186-BLF (N.D. Cal. Jan. 11, 2019). In *Barker*, Northern District Judge Beth Freeman, applying California law, reversed a decision she had made several months earlier in which she relied on *Loral* to dismiss a frontal attack on an employee nonsolicit. According to Judge Freeman, *AMN* was "a change in law warranting a fresh look and changed outcome" that now justified her denial of summary judgment in favor of an employer who sought to enforce an employee nonsolicit. In reaching this decision, Judge Freeman made two key points: (1) The particular facts in *AMN* — recruiters who could no longer recruit — did not limit AMN's holding that *Loral* was no longer viable, and (2) the analysis in *AMN* was more persuasive than that in *Loral*.

There is no doubt that the *AMN* decision arose from facts that placed the employee nonsolicit in a particularly harsh light, and that *Barker* is merely one federal judge's opinion about a long-standing proposition in California nonsolicit law. Yet, employers who continue to use employee nonsolicits would be well-advised to take heed. Of course, it is also true that until the California Supreme Court definitively overrules *Loral*, a good faith basis will continue to exist to support the routine usage of employee nonsolicits. On the other hand, with two courts now clearly rejecting the approach and making explicit the contention that *Loral*'s rationale does not survive *Edwards*, the risks of business as usual are more tangible than ever.

Employers should now anticipate that more employee-side attorneys will look critically at routinely imposed employee nonsolicits and that they will make litigation calculations about whether they are willing to undertake a direct challenge to those clauses based on California's Unfair Competition law and other theories under California law. Indeed, the challenge in *Barker* was brought as a purported class action on behalf of all employees who had ever signed or been presented with an employee nonsolicit. Correspondingly, employers will need to assess whether these clauses are truly worth the risk that more courts will follow what could become an anti-employee nonsolicit parade following the *AMN* and *Barker* cases.

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