Professional Perspective

California's Prohibition Against No-Rehire Provisions

Erin A. Owen, CDF Labor Law LLP

Bloomberg Law

California's Prohibition Against No-Rehire Provisions

Contributed by Erin A. Owen, CDF Labor Law LLP

Historically, settlement agreements between California employers and their former employees often contained no-rehire provisions that prohibited a settling employee from applying for re-employment, and/or provided for immediate termination after an inadvertent or surreptitious re-employment. These no-rehire terms helped protect employers against the risk that former employees seeking re-employment, after settling legal claims, would file a subsequent lawsuit on discrimination or retaliation grounds when they weren't rehired.

No-rehire clauses protect legitimate employer interests in mitigating future litigation risks when paying settlement sums to employees who have filed claims against the employer. Nevertheless, the California legislature enacted new law prohibiting these provisions.

Pitfalls of No-Rehire Provisions

California subscribes to uniquely stringent rules against contractual restraints on competition. California public policy and the courts hold paramount an employee's right to work where they choose, unencumbered by contractual restraints on their movement between employers. *Bosley Med. Group v. Abramson*, 161 Cal. App. 3d 284, 288 (1984).

Although there are no cases holding that a no-rehire provision is unenforceable, California courts have expressed wariness of contractual restraints that, at their core, attempt to limit the open competition and employee mobility that serve as cornerstones of California competition laws. Cal. Bus. & Prof. Code § 16601; *Golden v. Cal. Emergency Physicians Med. Group*, 782 F.3d 1083, 1090-91 (9th Cir. 2015); see also *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937 (2008).

The advent of the #MeToo movement raised an additional level of awareness and concerns that no-rehire provisions stifle would-be sexual harassment and discrimination whistleblowers. And, the possibility of an employment separation that leaves an employee who asserts a sexual harassment claim permanently ineligible for re-employment, while the accused's employment remains intact, provided a call to action for proponents of Assembly Bill (AB) 749.

In October 2019, and in the flow of the #MeToo tide, no-rehire terms crossed the threshold from scrutinized to largely unenforceable when Governor Gavin Newsom signed AB 749, which was later codified as California Code of Civil Procedure section 1002.5. Assemb. Bill 749, 2019-20 Reg. Sess. (Cal. 2019). Newsom signed AB 2143, effective Jan. 1, 2021, which slightly modifies the requirements for employers and employees under the statute. Assemb. Bill 2143, 2019-20 Reg. Sess. (Cal. 2020).

California Code of Civil Procedure Section 1002.5

California Code of Civil Procedure section 1002. 5 provides that:

> An agreement to settle an employment dispute shall not contain a provision prohibiting, preventing, or otherwise restricting a settling party that is an aggrieved person from obtaining future employment with the employer against which the aggrieved person has filed a claim, or any parent company, subsidiary, division, affiliate, or contractor of the employer. A provision in an agreement entered into on or after January 1, 2020, that violates this section is void as a matter of law and against public policy.

Cal. Civ. Proc. Code § 1002.5(a).

Notwithstanding this prohibition against no-rehire provisions, subsection (b) provides important limits to the reach of section 1002.5(a), so that nothing precludes the employer and aggrieved person from making an agreement to end a current employment relationship, or prohibit or otherwise restrict the settling aggrieved person from obtaining future employment from the settling employer, if the employer has made a good faith determination that the person engaged in sexual harassment or sexual assault, or to require an employer to continue to employ or rehire a person if there is a legitimate non-discriminatory or non-retaliatory reason for terminating the employment relationship or refusing to rehire the person. Cal. Civ. Proc. Code § 1002.5(b) (emphasis added).

An "aggrieved person" under section 1002.5(b) means "a person who has filed a claim against the person's employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer's internal complaint process." Cal. Civ. Proc. Code § 1002.5(c). Consequently, at present it appears that an employer may still include a no-rehire term in a severance agreement where the departing employee has not yet filed a claim of any kind, including any kind of an internal complaint, should it see fit to do so.

Under section 1002.5(c), sexual assault means conduct that would constitute a crime undersections 243.3, 261, 262, 264.1, 286, 287, or 289 of the Penal Code, assault with the intent to commit any of those crimes, or an attempt to commit any of those crimes.

"Sexual harassment" has the same meaning as in subdivision (j) of section 12940 of the California Government Code, which sets forth unlawful employment practices, including sexual harassment, and provides for "individual liability on the part of an employee for any harassment prohibited by this section that is perpetrated by the employee." Cal. Gov't Code § 12940(j)(1)-(3).

Significantly, the exceptions to the general prohibition against no-rehire provisions are limited under the current version of Code of Civil Procedure § 1002.5 to circumstances where the employer has made a good faith determination that the aggrieved employee engaged in sexual harassment or sexual assault. In this original form, an employer can still include a no-rehire provision if it makes a good faith determination at some point that the employee engaged in such unlawful conduct.

AB 2143's Update to Code of Civil Procedure Section 1002.5

To further button up the standards affecting no-rehire provisions, Newsom signed AB 2143, effective Jan. 1, 2021. AB 2143 will amend Code of Civil Procedure § 1002.5 so that:

- The employee must file his or her claim in good faith in order for the prohibition against no-rehire provisions to apply.
- The exceptions to the no-rehire provision prohibition expand to include a good faith determination that the aggrieved person engaged in any criminal conduct (not just sexual harassment or sexual assault).
- In order for an exception to apply, before the employee filed a claim, the employer must have documented the good faith determination that the aggrieved employee engaged in sexual harassment or sexual assault, or other criminal conduct.

New 'Good Faith' and 'Documentation' Requirements

Whereas Code of Civil Procedure 1002.5(c) presently defines an "aggrieved person" as an employee who "has filed a claim against … the employer … ," AB 2143 adds the requirement that the employee filed the claim in "good faith." Conspicuously absent from AB 2143, and like the "good faith" standard that already applies to the employer in the statute, is any definition of an employee's "good faith."

Leaving this determination entirely at the hands of the courts creates the possibility that different "good faith" standards under this statute will evolve across the state and that the standards to find good faith in employee claims will differ from the standards applied to employers to make a good faith determination of unlawful conduct.

That being said, the courts are not entirely without guidance as distinctions between good and bad faith have been drawn in the FEHA context to describe when a prevailing employer can recover attorneys' fees. In deciding whether a prevailing employer is entitled to recover attorneys' fees, the line of distinction has generally been determined by whether the employee brought or continued litigating an action without an objective basis for believing a violation occurred or knew the allegations were false. Cal. Gov't. Code 12965(b); *Williams v. Chino Valley Independent Fire Dist.*, 61 Cal. 4th 97, 115 (2015)

The new requirement that an employer's good faith determination of unlawful conduct is documented before the employee files its claim on its face also leaves open the question of "what constitutes documentation?" However, absent a requirement of sufficiency, and as a practical matter, employer investigations into reports of sexual harassment, sexual

assault and/or criminal misconduct are often guided by company policy and procedure that result in what would, in plain-speak, amount to documentation.

Consequences to Employees and Employers

The good faith requirement theoretically adds to an employee's burden in an effort to invalidate a no-rehire provision. But, since there is no standard or analysis prescribed to make a finding of "good faith," it is hard to know whether this requirement has some teeth.

The documentation requirement for employers is equally amorphous, but given that questions and evidence regarding internal investigations, policies, and procedures inevitably come up in employment litigation, this is just one more reason to have a sound and consistently applied investigation procedure. It also underscores the value of timely investigations, here to ensure the good faith documentation occurs before an employee files a claim.

More broadly, tardy investigations, coaching, and consequences for employee misconduct easily send the message that they were undertaken with an eye toward creating an impeccable revisionist history, and raise suspicions that documented findings were not made in good faith.

Where the rubber meets the road, Code of Civil Procedure § 1002.5 and AB 2143 restrict the use of no-rehire provisions in a settlement agreement. Employers should review their settlement agreement templates to be sure they do not run afoul of these laws. Also, nothing in the no-rehire prohibition requires employers to rehire an employee. If there are legitimate grounds for not rehiring based upon past experience with the employee—other than the fact that the employee engaged in a protected activity and made a complaint or filed a lawsuit—an employer can still refuse to rehire the individual.