Shook, Hardy & Bacon L.L.P.

national employment PERSPECTIVE

September 7, 2010

A PUBLICATION OF SHOOK, HARDY & BACON L.L.P

FOCUS ON CALIFORNIA NONCOMPETE AGREEMENTS

SHB's National Employment & Policy Practice Represents Corporate Employers Exclusively

CALIFORNIA COURT ACKNOWLEDGES WRONGFUL TERMINATION CLAIM BASED ON EMPLOYER'S ENFORCEMENT OF PREVIOUS EMPLOYER'S NONCOMPETE AGREEMENT

This Newsletter is prepared by Shook, Hardy & Bacon's National Employment Litigation & Policy Practice[sm]. Contributors to this issue: Bill Martucci, Brian Baggott and Thérèse Miller

Contact us by e-mail to request additional documentation or unsubscribe.

Attorneys in the Employment Litigation & Policy Practice represent corporate employers throughout the United States in all types of employment matters. To learn more, please visit SHB.com.

For decades, employers have relied on noncompetition and nonsolicitation agreements to protect their legitimate business interests, including customer lists, trade secrets and good will. Those agreements, however, have come under attack in recent years and, in some states, are essentially void and considered to be against public policy. Until recently, it appeared that this trend would affect the contracting employer only, making it more and more difficult for that employer to protect its business interests through the use of such agreements.

A recent California Court of Appeals decision makes it clear, however, that this trend will also affect subsequent employers who chose to respect the agreements signed by an employee and his prior employer. According to the court, such a decision may lead to liability for wrongful discharge.

California was one of the first states to reconsider the enforceability of noncompetition and nonsolicitation agreements. By statute, California's legislature has expressed a "settled legislative policy in favor of open competition and employee mobility." Noncompetition and nonsolicitation agreements are, therefore, considered void, subject to several narrow exceptions. And, like most states, California recognizes certain exceptions to the at-will employment doctrine, including a cause of action for wrongful termination in violation of public policy.

In *Silgueros v. Creteguard, Inc.*, ___ Cal. Rptr. 3d ___ , 2010 WL 2978222, *1 (Cal. Ct. App. 2d Dist. July 30, 2010), the court of appeals addressed the intersection of the public policy against noncompetition agreements and an employee's right to sue for wrongful termination. Silguero was employed as a sales employee for several years with Floor Seal Technology, Inc. (FST). Shortly before her termination, she entered into a confidentiality agreement that prohibited her from engaging in any sales activities for 18 months following her termination.

When Silguero subsequently became employed with Creteguard, Inc., FST contacted Creteguard, notified it of Silguero's confidentiality agreement and asked for Creteguard's cooperation in enforcing the agreement. Although Creteguard believed that the agreement was unenforceable, it terminated Silguero's employment, stating that it "would like to keep the same respect and understanding with colleagues in the same industry." Following her

termination, Silguero filed suit against Creteguard claiming, among other things, wrongful termination in violation of public policy based on Creteguard's decision to respect the otherwise unenforceable noncompetition agreement with FST.

Reversing the trial court's dismissal of Silguero's claim, the court of appeals acknowledged that public policy, for purposes of wrongful-termination claims, must be "delineated in constitutional or statutory provisions." The court found that California law clearly expressed a public policy against noncompetition and nonsolicitation agreements. In light of this policy, the court held that Creteguard's termination of Silguero, based on an "understanding" of FST's interests under the noncompetition agreement, ratified the illegal agreement and was analogous to an illegal no-hire agreement between Creteguard and FST. That Creteguard was not a party to the illegal agreement did not matter.

According to the court, recognizing Silguero's claim "furthers the interest of employees in their own mobility and betterment, 'deemed paramount to the competitive business interests of the employers, where neither the employee nor his new employer has committed any illegal act accompanying the employment change.'"

For employers, *Silguero* represents an unforeseen consequence of the growing hostility—sometimes stated expressly in statutes like California's—toward noncompetition and nonsolitication agreements. On learning of an employee's noncompetition agreement with a prior employer, subsequent employers likely did not consider the possibility that they might face a wrongful termination claim for violation of public policy if they decided to let the employee go. That will certainly have to change in California.

But employers nationwide must now, at the very least, consider (1) whether the states they operate in contain a well-established public policy against noncompetition agreements; and (2) whether an employee's prior agreement is enforceable in light of any public policy. The second part of this inquiry is particularly difficult because the enforceability of noncompetition agreements is often a fact-intensive and industry-specific question.
