



State of California
Office of the Attorney General

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ATTORNEY GENERAL

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Submitted via Online Portal

The State Bar Standing Committee on
Professional Responsibility and Conduct

RE: Proposed Formal Opinion Interim No. 19-0003 (Advising Client on Illegal Contract Provisions)

To the Committee on Professional Responsibility and Conduct:

I write to express my firm support for Proposed Formal Opinion Interim No. 19-0003, “Advising Client on Illegal Contract Provisions” (herein “Proposed Opinion”). If adopted, the Proposed Opinion will help ensure that California attorneys continue to be held to rigorous ethical standards that safeguard California consumers and workers and promote fair and lawful business practices.

The Proposed Opinion seeks to reinforce the ethical obligations an attorney may have when advising a client “regarding the use of a contract provision in a transaction with a third party that is illegal under the law of the jurisdiction applicable to the transaction.” The proposed rule would rightfully cover advice attorneys provide regarding contract provisions in all types of contracts. However, in furtherance of my duty as California Attorney General, to protect the welfare of California workers and maintain a level playing field for legitimate businesses operating in the State, I would like to focus the Committee’s attention on the particular harm caused by the inclusion of non-compete provisions in employment contracts, and similar contractual provisions that act to limit worker mobility.

In particular, there are two points that warrant emphasis. First, California’s longtime public policy favors the freedom of workers to seek any lawful employment they choose, and therefore prohibits non-compete agreements or other arrangements that seek to undercut that mobility. Second, because unenforceable non-compete provisions remain widespread in employment contracts in California, we need clear ethical guidance to prohibit the participation of attorneys in formulating or promoting any such unlawful contract provisions.

California’s Longtime Public Policy Favoring Employee Mobility and the Prohibition and Unenforceability of Non-compete Agreements

With limited exceptions, non-compete agreements – i.e., agreements to restrain former employees from working for competitors or beginning their own competing businesses – are unenforceable in California. This has long been the law. California Business & Professions Code section 16600 expressly states that, “[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.” (Cal. Bus. & Prof. Code § 16600.) In harmony with section 16600, California Labor Code section 432.5 provides that “[n]o employer shall require any employee or applicant for employment to agree, in writing, to any term or condition which is known by such employer to be prohibited by law.” (Cal. Lab. Code § 432.5.)

In interpreting and enforcing these statutory provisions, California courts have consistently underlined the longstanding public policy of a free labor market in California. In the seminal case of *Edwards v. Arthur Andersen LLP*, the California Supreme Court stated that “[i]n the years since its original enactment as Civil Code section 1673, our courts have consistently affirmed that section 16600 evinces a settled legislative policy in favor of open competition and employee mobility.” (*Arthur Andersen* (2008) 44 Cal.4th 937, 946.) The court underscored this point by continuing, “[t]he law protects Californians and ensures ‘that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice[,]’” and “[i]t protects ‘the important legal right of persons to engage in businesses and occupations of their choosing’” (*Id.* (internal citations omitted).)

In accord with this public policy of protecting the right of workers to engage in the work of their choosing, this office entered into a series of stipulated judgments with various fast food restaurants to eliminate the inclusion of so-called “no-poach” provisions in franchise agreements.¹ While distinct from non-compete provisions, the no-poach franchise agreement clauses at issue operated to effect a similar result: limited worker mobility. The ability of California workers to freely seek economic opportunities in the job market remains an important policy goal for the State.

The Proposed Opinion Is Necessary to Address the Ongoing Inclusion of Non-compete Provisions in Employment Contracts

The Proposed Opinion addresses an urgent and ongoing issue affecting California workers. Despite the unenforceability of non-compete agreements in California, a December 2019, Economic Policy Institute report found that “45.1% of establishments in California,”

¹ See e.g. “Attorney General Becerra Announce Multistate Settlements Targeting ‘No-Poach’ Policies that Harm Workers,” (Mar. 12, 2019), available at <https://bit.ly/3ovllny>.

include non-compete clauses or provisions in employment contracts.² And while the inclusion of non-compete provisions is more common in contracts for more-educated or higher-wage workers, the same Economic Policy Institute report found that over a quarter of businesses where the average wage rate was less than \$13 per hour nevertheless imposed contractual non-compete provisions on all workers.³ Similarly, non-competes were used for all workers in over a quarter of businesses where the typical worker had only a high school diploma.⁴

Despite their general unenforceability, a growing body of research suggests that some employers take advantage of a worker's unfamiliarity with non-compete agreements by including them in employment contracts.⁵ A recent report by the U.S. Department of Treasury's Office of Economic Policy opined that, "workers are often poorly informed about the existence and details of their non-competes, as well as the relevant legal implications. Some employers appear to be exploiting this lack of understanding in ways that harm workers without producing corresponding benefits to society."⁶ The Proposed Opinion is vital to ensure that attorneys uphold their ethical obligations not to contribute to the proliferation of such unlawful provisions.

In sum, I reiterate my support for the Committee's Proposed Opinion. The Proposed Opinion is consistent with longstanding California law and public policy, my office's mission to protect the rights of workers and law-abiding businesses, and a commitment to addressing an ongoing issue impacting California workers.

Sincerely,



ROB BONTA
Attorney General

² Alexander J.S. Colvin & Heidi Shierholz, Econ. Policy Inst., "Non-compete agreements: Ubiquitous, harmful to wages and to competition, and part of a growing trend of employers requiring workers to sign away their rights," at 5 (Dec. 10, 2019), available at <https://files.epi.org/pdf/179414.pdf>.

³ Colvin & Shierholz at 6-7.

⁴ Colvin & Shierholz at 7-8.

⁵ Jane Flanagan, American Const. Society, "No Exit: Understanding Employee Non-Competes and Identifying Best Practices to Limit Their Overuse," at 7 (Nov. 2019), available at <https://bit.ly/30FJnDh> ("This very real effect on behavior makes employers more likely to 'overreach under the radar' based on the logical assumption that doing so 'might have the benefit of keeping employees from leaving and moving to competitors [even] when they are [legally] entitled to do so.'") (alterations in original).

⁶ U.S. Dept. of the Treasury Office of Econ. Policy, "Non-compete Contracts: Economic Effects and Policy Implications," at 24 (Mar. 2016), available at <https://bit.ly/3pAAi70>.