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PERSPECTIVE

New decision questions legitimacy of 'no hire' clauses

By Michael N. Hirota

Employers and employees routinely enter into settlement agreements with "no-hire" clauses, which provide that the employee shall never reapply for a position with the employer and is not eligible for rehire. These clauses provide peace of mind to employers who, after being confronted with and struggling through litigation, often want to simply sever all ties with the employee and avoid repeating the experience. However, the legitimacy of these clauses was thrown into question by the 9th *U.S. Circuit Court of Appeals in Golden v. California Emergency Physicians Medical Group*, 2015 DJDAR 3911 (April 8, 2015), which found these clauses may violate California's ban on contracts that substantially restrain a party's ability to practice their profession.

Dr. Donald Golden, an emergency-room doctor, was previously associated with the California Emergency Physicians Medical Group (CEP), a large consortium of physicians that manages emergency rooms, inpatient clinics, and other facilities throughout the Western United States. In May 2008, Golden sued CEP, alleging various state and federal causes of action including racial discrimination. CEP removed the suit to federal court in January 2010.

The parties orally agreed in open court to settle. The terms of the settlement agreement contained, among other things, a "non-employment provision" by which Golden agreed to waive all rights to employment with CEP or at any facility that CEP may own or with which it may contract in the future. However, following the hearing, Golden refused to execute the agreement and attempted to have it set aside. The agreement was instead entered into on Golden's behalf by his attorney, who sought enforcement of the settlement agreement so he might collect his contingency fee.

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To determine whether it may enforce the settlement agreement, the district court referred the matter to a magistrate judge, who ruled that Golden be compelled to sign the settlement agreement. Golden's former counsel moved the district court to intervene and to enforce the settlement agreement, which the district court ultimately granted. Golden appealed, arguing the non-employment provision constituted an unlawful restraint on the practice of a profession, in violation of Business and Professions Code Section 16600. Specifically, Golden argued that because of CEP's plans to expand its operations in the emergency medicine field, the settlement agreement restrained him from practicing his medical specialty by limiting his opportunities to practice and forcing him to preemptively surrender his position.

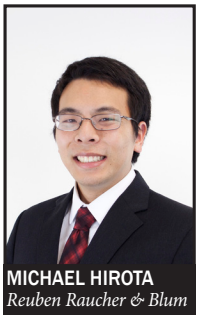
The 9th Circuit reversed and remanded. Judge Diarmuid O'Scannlain, writing for the majority, examined the statutory language of Section 16600 and determined it governs contracts far beyond covenants not to compete between employees and their employers. The court noted the statute does not specifically identify "compete" or "competition" — rather, Section 16600 voids "every contract" that "restrain[s] someone from engaging in a lawful profession, trade, or business." "[T]he statutory context lends little support to construing section 16600 much more narrowly — as a prohibition of agreements between employers and employees not to compete — than its plain language would otherwise suggest."

According to the majority, any restraint of a substantial character, "no matter its form or scope," is covered by Section 16600. However, the court declined to address whether the "non-employment provision" constituted such a restraint. Instead, the court simply remanded the question to the district court, asking it to determine whether the speculative possibility of Golden being terminated as a result of CEP acquiring one of his future employers constitutes a restraint of a "substantial character" to Golden's medical practice.

Writing for the dissent, Judge Alex Kozinski pointed out that Golden was paid a substantial sum of money in exchange for the right to continue working for CEP, and that Golden's continuing employment with CEP was "the very subject in controversy" in this case. The dissent further argued that any additional "fact-finding" to be done at remand is wholly speculative, as there is no way of knowing whether the non-employment provision would ever come into play. Indeed, argues the dissent, if at any future time Golden is working for an entity later acquired by CEP, he may raise Section 16600 as a defense to his dismissal at that time.

The *Golden* decision harms both employees and employers by effectively removing a valuable settlement mechanism from the table. By throwing into question no-hire provisions, *Golden* opens the door for retaliation claims against settling employers. It is easy to envision a nightmare scenario where a particularly litigious employee settles their lawsuit, then immediately reapplies for employment and claims retaliation when they are inevitably denied. At the same time, the *Golden* court has offered no guidance on how the substantial character standard will be applied to these clauses. How large does a settling employer's market share need to be for a no-hire clause to constitute a "substantial" restraint? Are large, national employers categorically barred from drafting such clauses? What about small employers contemplating long-term plans for expansion? *Golden* raises several difficult questions, and for employers, the answers may be particularly frightening.

At the end of the day, parties to a settlement agreement desire a sense of finality and assurances that the controversy is truly over between the parties. *Golden* eliminates such assurances, and could dramatically impact the way that employment disputes are approached and resolved. In drafting settlement agreements, employers and their attorneys should carefully consider this new "*Golden* rule" and be mindful of its future developments and applications.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