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CLIENT ALERT: Passage of Expansion of California Noncompetition Ban Requires Employers to Provide Notices to Employees and Former Employees by February 14, 2024

As states continue to legislate the enforceability of post-employment restrictive covenants, employers with employees scattered throughout the country must be mindful of how state law impacts drafting and enforcement of agreements purporting to restrict what a former employer can do after an employee leaves. Massachusetts employers must ensure they comply with the laws of the state in which employees – and now former employees – live and work.

In California, Section 16600 of the Business and Professions Code of California (Section 16600) provides that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void" unless it falls into a narrow statutory exception. Courts have consistently found that Section 16600 acts as a ban on noncompetes, and in general, most employers and employees understand that to be the case. Recently, however, California has expanded on its pronouncement of policy through two notable laws – one of which requires employers, including non-California employers, to take action by February 14, 2024.

First, SB 699 creates a new Section 16600.5 and expands on California's noncompetition agreement ban by prohibiting employers from entering into or enforcing noncompetition agreements with California employees that are void under state law, even if the contract was signed outside of California while working for a non-California employer. SB 699 contains a private right of action, meaning that an "employee, former employee, or prospective employee" may bring a lawsuit to enforce the chapter and, if successful, will be entitled to payment of their attorneys' fees, among other remedies.

Second, AB 1076 creates a new Section 16600.1 and makes it unlawful to include a noncompetition clause in violation of state law in an employment contract, or to require an employee to enter a noncompetition clause that does not satisfy one of the limited exceptions to California law. Importantly, AB 1076 requires employers to provide a written notice to "current employees" and "former employees who were employed after January 1, 2022" whose contracts include a noncompete clause that violates California law. Notice must be made through an individualized, written communication to the employee or former employee, delivered to the last known address and the email address of the employee or former employee no later than February 14, 2024. Failure to send the notice constitutes an act of unfair competition under California law.

There remain a number of unanswered questions concerning these attempts by the California legislature to expand its policy against noncompetition agreements, ostensibly outside the boundaries of California, and this summary certainly is not a comprehensive analysis of California law. At a minimum, employers outside of California should identify individuals in California (or who were in

California) who may require notice if they entered into agreements that violate California's ban on noncompetes, and provide the required communication no later than February 14, 2024. In addition, employers looking to hire remote employees may find that an individualized inquiry into noncompetition obligations for those who have some relation to California may open up opportunities for hire which were not there before the passage of these new laws.

Employers should consult with their MBJ attorney with questions about restrictive covenants in Massachusetts, the efforts by various federal agencies such as the National Labor Relations Board and Federal Trade Commission to regulate restrictive covenants, and the patchwork of state laws and their range of approaches to post-employment restrictive covenants.

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