

# Important Upcoming Deadline under New California Noncompete Legislation

## January 2, 2024

Employers with employees in California should take note of a looming deadline included as part of new 2023 California noncompete legislation: no later than **February 14, 2024**, California employers must notify current and former employees who were employed after January 1, 2022 and who are parties to noncompete clauses that the noncompete clauses are void. The statute, Assembly Bill (AB) 1076, enacted on October 13, 2023, requires that notice be provided by both email and regular mail.

As an initial matter, California employers should identify individuals to whom notice must be sent.

- For some employers—for example, employers that have few or no employees in California or that do not use noncompete clauses widely—this exercise may be straightforward.
- For other employers, this exercise may present more of a burden and may require a number of judgments. For example:
  - Will a “savings clause” that generally provides that the noncompete is not effective in a state in which it is prohibited result in no need for notice to California employees?
  - Under what circumstances should a customer nonsolicit/noninterference clause be treated as a *de facto* noncompete that triggers the notice requirement?
  - Does a provision in an equity agreement, LTIP or bonus plan that results in the forfeiture of earned or vested benefits, but that is not an outright prohibition of future service, trigger the notice requirement?
  - Can agreements with employees who are individually represented by counsel in negotiating an alternative choice of law under Section 925 of the California Labor Code be excluded from the notice requirement?

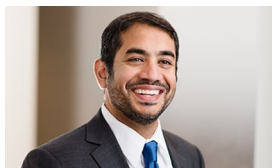
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- How should the law be applied to agreements governing a mobile or remote workforce?
  - How much diligence should be done as to the current residence of former employees? Can an employer rely on the former employees' last known addresses?

Unfortunately, the answers to these questions are not clear from the text of the statute, and employers will therefore need to make risk-based judgments in the face of uncertainty. Failure to provide notice could result in civil penalties for unfair competition of up to \$2,500 per violation under California Business & Professions Code § 17206.

Moreover, in deciding these questions of interpretation, the stakes are now raised because of another piece of 2023 California noncompete legislation, Senate Bill (SB) 699, which creates a private right of action for employees to challenge noncompete clauses, and shifts the employees' attorneys' fees and legal costs to the employer in the event that the employee prevails in the challenge. We expect that the creation of a private right of action, combined with the potential for recovering attorney fees, will incentivize some current and former California employees and their counsel to file suits challenging contract provisions as unenforceable (and based on any failure to comply with the new notice requirement). Even where a noncompete clause is ultimately enforceable, these suits will be a time-consuming nuisance to employers.

Separate and apart from the California notice requirement, which is only one example of a multistate trend of limiting noncompete enforceability, employers should generally be assessing whether the "old ways" of dealing with the workforce on these matters needs a fresh approach. In particular, employers that use a broad "one-size-fits-all" noncompete across multiple states (both for ease of administration as well as for a deterrent effect) should begin the task of deciding whether a more tailored approach is now, or in the near future will be, unavoidable.

Please feel free to contact any of the undersigned or your regular Debevoise contact to discuss the notice requirement or any of the foregoing matters in more detail.



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