

Multistate Non-solicitation Agreements: Does One Size Fit All?

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Many employers have offices in multiple states, but want to have one form of employee agreement prohibiting solicitation of employees and customers. Since some state laws, namely California, may be too different to reconcile with other states, **what sort of non-solicitation agreements work in California?**

In California, non-solicitation agreements are reviewed as contracts which prevent a person from engaging in a profession, trade or occupation which, with limited exceptions, are void under Business and Professions Code section 16600. Thus, recent cases have held that an agreement between an employer and employee prohibiting the solicitation of customers is not enforceable unless tied to the employee's use of trade secrets or some other legal duty owed by the employee.

Employers have tried to draft enforceable non-solicitation clauses by characterizing customer and employee information as trade secrets. In late 2018, in *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.* the Court of Appeal upheld summary judgment in favor of the former employee defendants and their new employer. The former and new employer were competitors providing temporary travel nurses to medical facilities across the U.S.

The employee defendants were recruiters who signed agreements that "during employee's employment with the Company and for a period of one year after the termination employee shall not directly or indirectly solicit or induce, or cause others to solicit or induce, any employee of the Company . . . to leave the service of the Company." AMN claimed that the travel nurses names and contact information were trade secrets. The court concluded that the nurses had applied to AMN years before and that the information was already in AMN's possession or could have been obtained from other sources such as a public media group network, the Gypsy Nurse Group. For this reason, and because the employee's profession was the recruitment of other employees, the Court found the non-solicitation agreement unenforceable.

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Employers in California must therefore normally tailor any non-solicitation agreements and carefully consider if the employee truly possesses confidential/trade secret information that could be used to solicit customers. To the extent the information the employee would use to solicit is a trade secret, courts have considered the agreement to be valid. Other states may allow broader non-solicitation agreements, therefore you should use different forms to receive the maximum protection in those states.