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# Hughes Hubbard & Reed

## Employers: Tell California Employees by February 14th That They May Compete

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**January 8, 2024** - California Lovin': February 14 is Valentine's Day – it is also the day by which employers must tell their employees that they are permitted to compete.

Long known as the state that prohibits non-competes (including covenants that are tantamount to non-competes, such as customer non-solicits), California seems to be jealous of all the love and attention that other states and the Federal Trade Commission are getting for furthering the anti-noncompete cause. To woo back affection, California put two new laws into effect at the outset of this year that shower love on employees:

- SB 699<sup>1</sup> expands the prohibition on non-compete agreements by (1) expressly prohibiting them in the employment context unless certain narrow exceptions apply (principally in the contexts of the sale of a business and the dissolution of a partnership or a limited liability company), and (2) prohibiting employers from seeking to enforce any such non-compete regardless of when it was signed and “whether the contract was signed and employment was maintained outside of California.”<sup>2</sup> This law reinforces California’s ban on non-competes with respect to employees who move to California after having signed a non-compete in a state that permits them. However, plaintiffs’ lawyers will likely argue that employers also may not enter into, nor enforce, a non-compete agreement with an employee who works remotely from a state where non-compete agreements are otherwise enforceable.
- SB 699 also gives employees a private cause of action against employers who enter into or enforce non-compete agreements in contravention of this new law.<sup>3</sup> Therefore, even if an employer does not try to enforce a non-compete agreement, a current, former or prospective employee may recover damages and attorneys’ fees and costs from an employer just for putting a non-compete in an agreement. Furthermore, because non-compete agreements are now “prohibited by law” under SB 699, requiring employees to sign such agreements or enforcing such agreements could constitute a violation of Labor Code 432.5, which in turn, could trigger “PAGA” or Private Attorneys General Act claims. Because PAGA claims authorize aggrieved employees (as well as the State) to file lawsuits on behalf of themselves and other employees, the penalties in such lawsuits can be steep.
- Another law, AB 1076<sup>4</sup>, requires employers to send written, individualized notices to all employees with non-compete clauses or agreements who were employed after January 1, 2022 (including individuals who have since

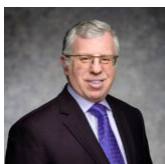
become former employees), advising those employees that any such non-compete clauses or agreements previously entered into are void. **Employers must send these notices by February 14, 2024 (Valentine's Day).** An employer's failure to comply with this requirement would be a violation of Cal. Bus. & Prof. Code 17200, California's unfair competition law, **and subject the employer to a penalty of up to \$2,500 for each failure.** The notice requirement does not apply to the narrow set of permissible non-competes discussed above. <sup>5</sup>

In light of these new laws, employers should:

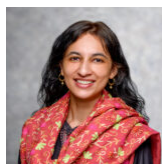
1. Review their form contracts to ensure they do not contain impermissible non-competes.
2. In the next few weeks, determine which current and former employees need to receive the required notice, and no later than February 14, 2024, send the notices to the employees' last known email and regular mail addresses. Both new laws leave many unanswered questions. For example, they do not address whether they extend to employee non-solicit clauses, nor whether they trump Labor Code 925 (which permits choice of law provisions under certain circumstances); and they are vague as to the extent of their out-of-state reach. We recommend that employers (regardless of whether incorporated or based in California) give the notice to at least the following current and former employees with non-compete agreements with the employer: (1) each current employee that works in California or is *assigned* to a California location, regardless of where the employee is actually located, and (2) each former employee, who was employed after January 1, 2022, and who worked in or was *assigned* to a California location.

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1. <https://leginfo.legislature.ca...> ↵
  2. CA Bus. & Prof. Code § 16600.5(a)-(c). ↵
  3. CA Bus. & Prof. Code § 16600.5(e). ↵
  4. <https://legiscan.com/CA/text/A...> ↵
  5. CA Bus. & Prof. Code § 16600.1. ↵

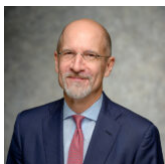
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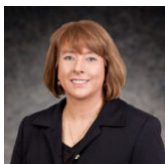
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