EMPLOYMENT LAW UPDATE

By Tanya Schierling, Jing Li and Andrew Myers

As 2019 begins, it's time to think about new employment laws that took effect Jan. 1, 2019, and a key employment case on non-solicitation agreements that may affect your client's business. This is, of course, not an exhaustive list of new law or landmark employment law cases, thus we encourage you to fully review employment law matters with your clients.

Responding to certain realities brought to the forefront through awareness generated through the "Me Too" movement, the California legislature passed several pieces of legislation addressing sexual harassment in the workplace and an employer's attempts to limit disclosure of such allegations:

AB 3109 — Prohibiting Limitations on Disclosure of Sexual Harassment Allegations

AB 3109 adds section 1670.11 to the California Civil Code and makes unenforceable any provision in a contract or settlement, entered into after Jan. 1, 2019, that prevents a party to the contract from testifying in an administrative, legislative or judicial proceeding about alleged criminal conduct or sexual harassment by the other party to the contract or its employees/agents.

SB 820 — Settlement of Sexual Harassment Claims

Similar to AB 3109, SB 820 adds section 1001 to the California Code of Civil Procedure and invalidates any provision of a settlement agreement, entered into after Jan. 1, 2019, that prevents the disclosure of factual information pertaining to claims of sexual assault, sexual harassment, gender discrimination or related retaliation filed in court or before an administrative agency. The new law does not prevent the parties to the agreement from, at the claimant's request, including a provision that limits the disclosure of the claimant's identity or of facts that would lead to the discovery of the claimant's identity. This new law expressly does not prohibit a settlement agreement provision that precludes the disclosure of the settlement amount.

SB 1343 — New Sexual Harassment Prevention Training Requirements

Existing law requires employers with 50 or more employees to provide supervisors with sexual harassment prevention training. SB 1341 expands that requirement. Now, employers with five or more employees must comply with the training requirement. The law requires employers to provide at least two hours of training to supervisory employees and at least one hour of training to non-supervisory employees by Jan. 1, 2020, and once every two years thereafter. It also requires the DFEH to develop and publish training materials for employers to use for these purposes.

SB 1300 — Amendments to the Fair Employment and Housing Act (FEHA)

Under existing law, an employer may be responsible for the acts of nonemployees in a sexual harassment claim, if the employer knew or should have known about the conduct and failed to act. Nonemployees include persons such as applicants, unpaid interns or volunteers, or persons providing services under a contract. One aspect of this new law expands employers' potential liability for the acts of nonemployees to any form of harassment prohibited under FEHA, not just sexual harassment. It applies the same standard — if the employer knew or should have known of the nonemployee's conduct, and failed to take immediate and appropriate corrective action, the employer may be liable. Another aspect of this new law prohibits an employer, in exchange for a raise or bonus, or as a

EMPLOYMENT LAW UPDATE Continued

condition of employment or continued employment, from (i) requiring the execution of a release of a claim or right under FEHA, or (ii) requiring an employee to sign a non-disparagement agreement that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment. It is important to note that the new law does not apply to negotiated settlement agreements to resolve a claim filed by an employee in court, before an administrative agency, alternative dispute resolution forum, or through an employer's internal complaint process. Another aspect of the new law expressly provides that a prevailing employer shall not recover attorney's fees and costs unless the court finds the employee's action was frivolous, unreasonable or groundless when brought or that the plaintiff continued to litigate after the action clearly became such.

In another turn at addressing gender discrimination and inequality, the Legislature passed SB 826 addressing gender composition on corporate boards of directors. Under this new law, section 301.3 is added to the California Corporations Code and provides that by the end of 2019, any publicly held domestic or foreign corporation with principal executive offices in California must have at least one female director on its board. By the end of 2021, these corporations must comply with the following: (1) If its number of directors is six or more, the corporation shall have at least three female directors; (2) If its number of directors is five, the corporation shall have at least two female directors; (3) If its number of directors is four or fewer, the corporation shall have at least one female director.

Turning now to developments in case law, the Court of Appeal published several significant rulings in 2018, but few more significant than the decision of the Fourth Appellate District in *AMN Healthcare, Inc. v. AYA Healthcare Services, Inc.*, in which the authors' firm, Solomon Ward Seidenwurm & Smith, LLP, represented AYA Healthcare Services, Inc., and its nurse recruiters. The *AMN v. AYA* decision clarifies California's rules limiting the validity of non-solicitation agreements.

AMN and AYA are competitors in the business of providing temporary nurses to health care facilities, in particular "travel nurses." The individual defendants were former employees of AMN who left AMN and went to work for AYA as travel nurse recruiters. Each had signed an agreement with AMN not to solicit AMN employees for at least one year post-employment. Travel nurses were deemed to be employees of AMN while on temporary assignment for AMN.

AMN sued AYA and the individual defendants for various claims, including breach of contract and misappropriation of confidential information, including trade secrets. Defendants moved for summary judgment on the grounds that the non-solicitation agreement was void and unenforceable under California law, specifically, Business & Professions Code section 16600. The trial court granted summary judgment in favor of defendants and enjoined AMN from enforcing the non-solicitation agreement against any former AMN employee. The Court of Appeal affirmed.

The Court focused on California's broad public policy in favor of allowing individuals to seek employment. The Court noted that AMN's non-solicitation agreement clearly prevented the nurse recruiters from practicing their chosen profession with AYA, i.e., recruiting travel nurses. The Court distinguished the nurse recruiter's job from the facts in *Loral Corp v. Moyes* (1985) 174 Cal.App.3d, a case where the Court enforced a non-solicitation agreement against a former executive who was recruiting employees from his former employer. In essence, the Court found that, unlike the AYA nurse recruiters, the executive's profession in *Loral* was not the recruitment of employees. Thus, enforcing the non-solicitation agreement did not prevent the executive from engaging in his chosen profession. But the Court also questioned the continued viability of the *Loral* decision, and observed that the later-published decision in *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th, 937, rejected the "reasonableness" standard that the *Loral* court applied to evaluating the non-solicitation agreement.

Also rejecting the misappropriation claim, the Court ruled that the nurses' names and contact information were not AMN's trade secrets. The nurses' identity and contact information were known to AYA before any of the individual defendants left AMN. Several nurses that AYA recruited had applied to work for AYA before working for AMN. Moreover, the Court noted that the Gypsy Nurse Group, a public social media group, maintained the names and profiles of over 30,000 members; thus, many of the travel nurses' contact information was public information.

In light of the Court's ruling, employers should carefully review their non-solicitation and trade secret agreements with their employment counsel. The scope of enforceable non-solicitation agreements is now more clearly defined and the Court reminded us that not everything is a trade secret.

The information provided in this article is for informational purposes only and not for the purpose of providing legal advice. You should contact your attorney to obtain advice regarding any particular issue or problem.

Tanya M. Schierling is Partner & Litigation Department Chair at Solomon Ward Seidenwurm & Smith LLP.

Jing Li and Andrew Myers are Associate Attorneys at Solomon Ward Seidenwurm & Smith LLP.