

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2023-2024 Regular Session**

AB 1076 (Bauer-Kahan)  
Version: April 12, 2023  
Hearing Date: July 6, 2023  
Fiscal: Yes  
Urgency: No  
ME

**SUBJECT**

Contracts in restraint of trade: noncompete agreements

**DIGEST**

This bill strengthens the law that voids contracts which restrain anyone from engaging in a lawful profession, trade, or business of any kind.

**EXECUTIVE SUMMARY**

California has long codified that contracts are void if they restrain anyone from engaging in a lawful profession, trade, or business of any kind. Noncompete agreements in employment contracts are void under this law. Legal scholars who wrote in support of SB 699 (Caballero, 2023) noted that studies “show that noncompetes stifle economic development, limit firms’ ability to hire and depress innovation and growth.”<sup>1</sup> The scholars assert that noncompetes are associated with “reduced entrepreneurship, job growth, firm entry, and innovation.” They explained that “research further shows that the harms of noncompetes extend not only to employees but to also companies and regional innovation.” Despite California’s strong public policy against noncompete agreements, companies that do business in California continue to attempt to enforce noncompete agreements against California residents. The author seeks to stop this practice by strengthening restraint of trade law and requiring specified employees and former employees whose contracts include a noncompete clause, or who were required to enter a noncompete agreement, to be given notice by February 14, 2024, by the employer, that the noncompete clause or noncompete agreement is void. A violation constitutes an act of unfair competition within the meaning of Chapter 5 (commencing with Section 17200 of the Business and Professions Code). The bill is author sponsored and is supported by Attorney General Rob Bonta, The California Employment Lawyers Association, the California Nurses

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<sup>1</sup> See Senate Judiciary Committee analysis of SB 699 (Caballero, 2023).

Association/National Nurses United, and the California Teamsters. There is no known opposition.

### PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Specifies 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, except as provided in Business and Professions Code sections 16601 through 16607. (Bus. & Prof. § 16600).
- 2) Provides that section 16600 prohibits employee noncompetition agreements unless the agreement falls within a statutory exception. (*Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4<sup>th</sup> 937, 942.)

This bill:

- 1) Amends the provisions of law that provide that contracts are void if they restrain anyone from engaging in a lawful profession, trade, or business of any kind by specifying that these provisions of law shall be read broadly, in accordance with the California Supreme Court decision of *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4<sup>th</sup> 937.
- 2) Provides that this law shall be read broadly in accordance with the *Edwards* decision to void the application of any noncompete agreement in an employment context, or any noncompete clause in an employment contract, no matter how narrowly tailored, that does not satisfy an exception in the chapter regarding restraints of trade (Business and Professions Code sections 16601 through 16607).
- 3) Provides that the above does not constitute a change in, but is declaratory of, existing law.
- 4) Provides that this section shall not be limited to contracts where the person being restrained from engaging in a lawful profession, trade, or business is a party to the contract.
- 5) Provides that it shall be unlawful to include a noncompete clause in an employment contract, or to require an employee to enter a noncompete agreement, that does not satisfy an exception in this chapter.
- 6) For current employees, and for former employees who were employed after January 1, 2022, whose contracts include a noncompete clause, or who were required to enter a noncompete agreement, that does not satisfy an exception to this chapter, the

employer shall, by February 14, 2024, notify the employee that the noncompete clause or noncompete agreement is void.

- 7) Requires the above notice to be in the form of a written individualized communication to the employee or former employee.
- 8) Provides that a violation of 5), 6), and 7), above constitute an act of unfair competition within the meaning of Chapter 5 (commencing with Section 17200).

### COMMENTS

#### 1. California's settled public policy in favor of open competition

As explained by the California Supreme Court<sup>2</sup>:

Under the common law, as is still true in many states today, contractual restraints on the practice of a profession, business, or trade, were considered valid, as long as they were reasonably imposed. [citations omitted] This was true even in California. [...] However, in 1872 California settled public policy in favor of open competition, and rejected the common law "rule of reasonableness," when the Legislature enacted the Civil Code. [...]

Section 16600 states: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." The chapter excepts noncompetition agreements in the sale or dissolution of corporations ( § 16601), partnerships (*ibid.*; § 16602), and limited liability corporations (§ 16602.5). [...]

Under the statute's plain meaning, therefore, an employer cannot by contract restrain a former employee from engaging in his or her profession, trade, or business unless the agreement falls within one of the exceptions to the rule (§ 16600.)

The author explains the following:

AB 1076 protects employees by prohibiting the inclusion of noncompete agreements in an employee's contract. Although noncompete agreements are not enforceable in California, employers continue to include them in contracts which misleads employees and threatens their job prospects. These noncompete agreements were originally meant to protect businesses' trade secrets, but they have disproportionately harmed women and people of color. The exploitative practice of including noncompete agreements deprives workers of fair

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<sup>2</sup> *Edwards II, v. Arthur Andersen LLP* (2008), 44 Cal. 4<sup>th</sup> 937, 945-46.

compensation, stifles innovation, and deters entrepreneurship. This bill ensures that no employee is faced with signing away their rights as a condition of employment.

The California Employment Lawyers Association, in support of AB 1076, explains that “although noncompete clauses have been unlawful in California since 1872, our attorneys routinely see these clauses included in employment agreements with California employees. These clauses restrict workers from freely switching jobs, which lowers overall wages, and undermines fair competition. These clauses can have a significant chilling effect on workers who may not understand that such agreements are void under California law.”

## 2. Strengthening California’s law in order to stop the use of noncompete clauses

Attorney General Rob Bonta notes that “approximately 45% of businesses still include noncompete clauses in employment contracts in the state.” The Attorney General explains that these “agreements generally require workers to refrain from accepting new employment opportunities in a similar line of work or establishing a competing business, usually for a specified period of time and within a geographic area.” The Attorney General further explains that while “*Edwards* confirmed that such clauses are unenforceable, putting an unenforceable term in a contract is not necessarily unlawful.”

The bill strengthens California’s restraint of trade prohibitions by making it unlawful to include a noncompete clause in an employment contract, or to require an employee to enter a noncompete agreement, that does not satisfy a statutory exception. Additionally, the bill requires employers or former employers to provide written individualized notice to current employees, and former employees who were employed after January 1, 2022, whose contracts include a noncompete clause, or who were required to enter a noncompete agreement, that does not satisfy a statutory exception, to notify the employee that the noncompete clause or noncompete agreement is void. Further, the bill provides that violations constitute an act of unfair competition within the meaning of Chapter 5 (commencing with Section 17200 of the Business and Professions Code).

The California Nurses Association/National Nurses United, writes in support that the “use of noncompete agreements is an exploitative practice that deprives workers of fair compensation, stifles innovation, and deters entrepreneurship. No employee should be faced with signing away their rights as a condition of employment.”

### Amendment regarding the written individualized notice

The bill is not clear regarding what steps the employer or former employer needs to take to effectuate their obligation to provide their employee or former employee with written individualized notice. The author has agreed to amend the bill to make it clear that the employer and former employer must send the written individualized notice to

their employee or former employee at their last known mailing address and to their e-mail address.

Amendment

Amend the Bus. & Prof. § 16600.1 (b)(2) provision in the bill as follows:

(2) Notice made under this subdivision shall be in the form of a written individualized communication to the employee or former ~~employee~~. employee, and shall be delivered to the last known address and the email address of the employee or former employee.

SUPPORT

Attorney General Rob Bonta  
California Employment Lawyers Association  
California Nurses Association  
California Teamsters Public Affairs Council  
Economic Security Project Action

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation:

SB 699 (Caballero, 2023) strengthens the law that voids contracts which restrain anyone from engaging in a lawful profession, trade, or business of any kind. SB 699 is set to be heard in the Assembly Judiciary Committee on July 5, 2023.

AB 747 (McCarty, 2023) provides, among other things, that an employer shall not enter into, present an employee or prospective employee as a term of employment, or attempt to enforce any contract in restraint of trade that is void under the chapter regarding contracts in restraint to trade, which is Sections 16600 through 16607 of the Business and Professions Code. AB 747 is on the inactive file on the Assembly floor.

Prior Legislation: None known.

PRIOR VOTES:

Assembly Floor (Ayes 80, Noes 0)  
Assembly Appropriations Committee (Ayes 15, Noes 0)  
Assembly Labor and Employment Committee (Ayes 7, Noes 0)

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