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# *Employers Take Note: A Third California Court Invalidates Employee Non-Solicitation Agreement*

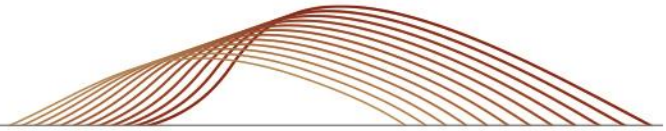
By Brad Newman

On April 1, 2019, the United Stated District Court for the Northern District of California decided the latest case in a recent trend of California courts invalidating employee post-termination, non-solicitation provisions. *See WeRide Corp. v. Huang*, 2019 WL 143934 (N.D. Cal. April 1, 2019). WeRide is a "smart mobility" company founded in the Silicon Valley that is developing autonomous vehicles for the Chinese market. WeRide employees are required to sign a one-year post-termination employee non-solicitation provision. After WeRide's former Director of Hardware departed for a competitor and allegedly solicited other WeRide employees to join him, WeRide filed suit for trade secret misappropriation and a host of other state law claims, including breach of contract based on the non-solicitation provision.

In denying WeRide's motion for preliminary injunction despite allegations that the former Director breached the employee non-solicitation provision, the California federal court explicitly relied on *Barker v. Insight Global*, 2019 U.S. Dist. LEXIS 6523 (N.D. Cal. Jan. 11, 2019) and *AMN Healthcare v. Aya Healthcare*, 28 Cal. App. 5th 923 (2018) to conclude that "the clause...is void under California law." *Id.*

### Business and Professions Code § 16600

California has traditionally favored employee mobility, and generally treats all restrictive covenants—such as non-compete agreements—as unenforceable under California Business and Professions Code § 16600 ("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"). Until recently, California courts have held that, although customer non-competition agreements run afoul of this statute, employee non-solicitation agreements do not. *See Loral Corp. v. Moyes*, 174 Cal. App. 3d 268, 278–79 (1985) (applying reasonableness standard to employee non-solicitation agreement: "Defendant is restrained from disrupting, damaging, impairing or interfering with his former employer by raiding [the former employer's] employees under his termination agreement. This does not appear to be any more of a significant restraint on his engaging in his profession, trade or business than a restraint on solicitation of customers or on disclosure of confidential information.").



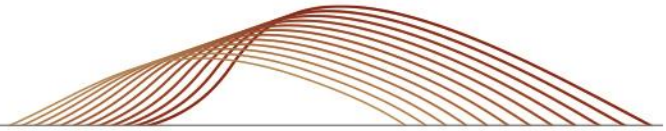
## A New Trend

The *WeRide* decision marks the third time in the last six months that California state and federal courts have determined that *Loral* was wrongly decided.

- **November 1, 2018: *AMN Healthcare, Inc. v. Aya Healthcare Servs.*, Inc., 28 Cal. App. 5th 923 (2018)**. The California Court of Appeal for the Fourth District affirmed a lower court judgment holding that an employer's non-solicitation agreement was unenforceable. In making its ruling, the *AMN* court emphasized that the employees in *AMN Healthcare*, unlike those in *Loral*, "were in the business of recruiting … medical professionals … in medical facilities throughout the country," such that the employee non-solicitation agreement at issue "restrained individual defendants from engaging in their chosen profession." *AMN Healthcare*, 28 Cal. App. 5th at 939. However, while *AMN* was decided in the context of employees whose job function implicitly required soliciting other workers, the court did not limit its opinion to the recruiting context—it broadly questioned the "continuing viability" of *Loral* in light of the California Supreme Court's opinion in *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937, 946 (2008). *Id.* at 939.

- **January 11, 2019: *Barker v. Insight Glob., LLC*, No. 16-cv-07186-BLF, 2019 U.S. Dist. LEXIS 6523 (N.D. Cal. Jan. 11, 2019)**. The District Court for the Northern District of California granted a motion for reconsideration based on the *AMN* decision, and allowed the plaintiff to pursue a previously dismissed claim under California's Unfair Competition Law based on allegations the defendant-employer required its employees to sign unlawful non-solicitation provisions. The *Barker* Court stated it was "convinced by the reasoning in *AMN* that California law is properly interpreted post-*Edwards* to invalidate employee non-solicitation provisions." 2019 U.S. Dist. LEXIS 6523, at *8-9. *Barker* thus rejected the idea that *AMN Healthcare* is limited to the particular facts of that case, and instead suggests employee non-solicitation clauses may be unenforceable under California law. The Court was "not persuaded that the secondary ruling in *AMN* finding the non-solicitation provision invalid under *Loral* based upon those employees' particular job duties abrogates or limits the primary holding." *Id.*

- **April 1, 2019: *WeRide Corp. v. Huang*, 2019 WL 143934 (N.D. Cal. April 1, 2019)**. The District Court for the Northern District of California declined to grant an injunction on behalf of the employer based on a former employee's alleged breach of a non-solicit agreement, upon finding the employer "cannot show it is likely to succeed on its claim for breach of [the non-solicitation provision] because the clause is void under California law. Cal. Bus. & Prof. Code § 16600." *Id*. at *10. Like the *Barker* Court, the *WeRide* Court found the plain language of § 16600 clearly prohibits restrictions on trade "of any kind"—including post-employment contractual employee non-solicitation agreements like the one at issue. *Id.* The *WeRide* court likewise rejected the employer's attempt to distinguish *AMN*. *See id.* at *11. Despite *AMN*'s secondary holding that the particular job duties of the defendant employees (recruiters) made the non-solicitation provision there especially restrictive, like in *Barker*, the *WeRide* court rejected the idea that *AMN Healthcare* is limited to its facts, and instead pointed to *AMN*'s "primary holding," i.e., that non-solicitation of employee provisions violate Business and Professions Code § 16600. *Id.*



## What Employers Should Do in Light of Trend

Since *AMN Healthcare*, California state and federal courts have evinced a clear trend towards invalidating non-solicitation of employees provisions. Employers doing business in California should conduct a careful review of the wording of their employee non-solicitation provisions and the business rationale for these clauses in light of the growing legal risks. Paul Hastings' Employee Mobility and Trade Secrets Practice Group has particular expertise in this area and is here to assist.

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*If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:*

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