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Why Business Lawyers Should Understand Opportunity Zones

by Phillip L. Jelsma

What if your client could sell stock of a publicly traded or closely held business, defer paying tax on that gain until December 31, 2026, potentially have 15 percent of the gain forgiven, invest the proceeds in a business located in a low-income community called an "opportunity zone," and not pay federal income tax on the sale of that business after 10 years, even if the sale was an asset sale of the underlying business? Too good to be true? Phillip L. Jelsma discusses the requirements and benefits of opportunity zones in this timely article. >> See article on *Page 72*

Our Picks for Top Recent Business Law Cases

We do the work for you: Here are the significant recent business law cases, with expert commentary on the most important ones.

- **Being required to teach weekly religion classes, to incorporate religious themes into her daily lessons, and to accompany her students to monthly Mass did not transform a 5th grade teacher into a "minister" for purposes of the Americans with Disabilities Act.**
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- **Travel time for Pacific Bell technicians between their homes and customer residences did not constitute hours worked and thus was not compensable.**
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- **Claims rooted in a plaintiff's rights as a minority shareholder existed independently of any employment relationship, so were not subject to arbitration agreements tied to his employment.**
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- **A custodian of records' status as the sole corporate shareholder did not give him a Fifth Amendment privilege against producing corporate records.**
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- **Restrictive terms in a law firm's partnership arbitration agreement rendered it unenforceable.**
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EXPERT'S TAKE

Tyler M. Paetkau

AMN Healthcare, Inc. v Aya Healthcare Servs., Inc. **significantly changes the California legal landscape for employers who use nonsolicitation provisions. Specifically, employers should immediately consider deleting such provisions from existing employment or nondisclosure agreements. Tyler M. Paetkau explains why.** >> See *Page 79*

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relief in Egypt. Egyptian law predicates any award of injunctive relief on the author's payment of "fair compensation to the person authorised to exercise the economic rights of exploitation." Thus, even in Egypt, Fahmy's moral rights would be insufficient to win anything but an injunction. And before that can happen, Fahmy would have to compensate Jay-Z fairly for limiting what would otherwise be an unencumbered economic right to exploit *Khosara,* a right for which Jay-Z had already paid $100,000.

CROSS-REFERENCE: For further discussion of copyright infringement claims, see California Business Litigation §§7.56–7.71B (Cal CEB).

Employers and Employees

Tyler M. Paetkau

Covenants Not to Compete

Post-termination nonsolicitation agreement unlawfully restrained former employees from engaging in chosen profession.

AMN Healthcare, Inc. v Aya Healthcare Servs., Inc. (2018) 28 CA5th 923

Kylie Stein and others worked as recruiters for AMN Healthcare, Inc., which provided short-term healthcare professionals, including "travel nurses," to healthcare facilities throughout the country. (A travel nurse was considered to be an employee of AMN while on temporary assignment through AMN.) Stein and the other nurse recruiters eventually left AMN to work for its competitor, Aya Healthcare Services, Inc. AMN sued Aya and the recruiters, alleging the recruiters had violated a confidentiality and nondisclosure agreement that barred them from soliciting any AMN employee to leave for at least a 1-year period. AMN also asserted misappropriation of confidential information, including trade secrets protected by the Uniform Trade Secrets Act (CC §§3426–3426.11). Aya and the recruiters moved for summary judgment, arguing that the nonsolicitation provision was an improper restraint on the recruiters' ability to engage in their profession in violation of Bus & P C §16600. The trial court granted summary judgment in favor of the defendants and enjoined AMN from enforcing the nonsolicitation provision in the agreement as to any former AMN employee.

The court of appeal affirmed, holding that the nonsolicitation provision was void. Business and Professions Code §16600 provides, with certain enumerated exceptions not applicable here, 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." The provision at issue here prevents AMN's former recruiters, for a period of at least 1 year after termination of employment with AMN, from either "directly or indirectly" soliciting or recruiting, or causing others to solicit or induce, any employee of AMN. This provision clearly restrained the recruiters from practicing their chosen profession with Aya. Indeed, the undisputed evidence showed that, if a former AMN recruiter was barred for at least 1 year from soliciting or recruiting any travel nurse listed in AMN's database, that would restrict the number of nurses with whom the recruiter could work while employed by his or her new staffing agency. The undisputed evidence also showed that travel nurses typically were assigned by AMN for 13-week periods. AMN's 1-year post-termination restriction thus prevented former AMN recruiters from contacting and recruiting any individual travel nurse for a period of four 13-week assignments, with a resultant significant and adverse impact on the amount of compensation a recruiter could receive with his or her new agency after leaving AMN.

The finding that the nonsolicitation provision was void under Bus & P C §16600 defeated the plaintiff's claims for breach of contract, breach of the duty of loyalty, and interference with prospective economic advantage. The court also expressed doubt as to the continuing viability of the *Loral Corp. v Moyes* (1985) 174 CA3d 268 reasonableness standard after *Edwards v Arthur Andersen LLP* (2008) 44 C4th 937.

The misappropriation of trade secrets claim failed because undisputed evidence showed that the traveling nurses' identity and contact information that AMN claimed to be secret were already known to Aya before any of the recruiters left AMN and went to work for Aya. Attorney fees were properly awarded to defendants under CCP §1021.5.

COMMENT: This decision significantly changes the California legal landscape for employers who use nonsolicitation provisions. Specifically, employers should immediately consider deleting such provisions from existing employment or nondisclosure agreements.

The *AMN* court of appeal decision is the first published decision rejecting *Loral Corp. v Moyes* (1985) 174 CA3d 268, on which many California employers have long relied. *Loral* endorsed an "anti-raiding" contractual restraint on the theory that the restraint only "narrowly" and "reasonably" affected competition and mobility by former employees. Invoking the "settled public policy in favor of open competition" articulated by the California Supreme Court in *Edwards v Arthur Andersen, LLP* (2008) 44 C4th 937, 945, the *AMN* court repudiated the *Loral* decision.

Although some employers may attempt to distinguish *AMN* on the ground that the former employees were in the business of recruiting, meaning that enforcement of the nonsolicitation provision actually restrained their ability to earn a living, the court of appeal's decision strongly suggests that all such employee nonsolicitation clauses may be void and unenforceable under California law. Accordingly, employers who continue to use them risk exposure to individual and class action liability for unfair competition and injunctive relief under Bus & P C §17200.

It is possible that the California Supreme Court will grant review of the *AMN* decision to determine whether to overrule *Loral* expressly, since the *AMN* court of appeal could not overrule a sister court of appeal's holding in *Loral*. It is also

possible for California employers to attempt to distinguish *AMN* on the ground that the former employers in *AMN* were in the business of recruiting. The bottom line, however, is that the *AMN* decision casts considerable doubt regarding the enforceability of employee nonsolicitation clauses.

California employers should immediately consider deleting all such provisions involving California employees, given the substantial risks of liability for unfair competition, injunctive relief, and attorney fees. Employers who choose to assume the risk of using such provisions should work closely with counsel to modify such nonsolicitation provisions to bolster their enforceability in light of the anticipated legal challenges. For example, employers that are not in the business of recruiting who decide to use nonsolicitation provisions could include an express acknowledgment that their enforcement will not restrain the employee's future ability to earn a living. At a minimum, employers who continue to use such nonsolicitation provisions after the *AMN* decision should also include a "severability" provision in the hope that a court would sever (delete) an invalid nonsolicitation provision from an otherwise enforceable agreement.—*T.M.P.* ❖

CROSS-REFERENCES: For further discussion of nonsolicitation covenants, see Paetkau, *The Slow But Almost Certain Demise of Nonsolicitation of Employees Covenants Under California Law (Part 2),* 39 Cal Bus L Rep 117 (May 2018) and Advising California Employers and Employees §§11.51–11.87 (Cal CEB).

Arbitration and Mediation

Restrictive terms in law firm's partnership arbitration agreement rendered it unenforceable.

Ramos v Superior Court (2018) 28 CA5th 1042

Attorney Constance Ramos sued former employer Winston & Strawn, LLP for sex discrimination, retaliation, wrongful termination, and anti-fair-pay practices. Winston moved to compel arbitration, citing an agreement executed by Ramos shortly after joining the firm. In opposing the motion, Ramos argued she was an employee of Winston, not a partner, and therefore *Armendariz v Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83 applied to the arbitration agreement. Ramos further argued that the arbitration provision in the partnership agreement failed to meet the minimum requirements set forth in *Armendariz* for arbitration of unwaivable statutory claims. The trial court disagreed, finding Ramos was "in a partnership relationship" for purposes of the motion to compel. The trial court severed provisions of the arbitration agreement related to venue and cost-sharing, and granted Winston's motion. Ramos sought a writ of mandate challenging that ruling.

The court of appeal granted Ramos's petition, finding that the parties' arbitration agreement, as applied to Ramos's claims to vindicate her statutory rights and for wrongful termination, was procedurally and substantively unconscionable under *Armendariz*. Further, because the court could not remove the taint of illegality by severing the unlawful provisions without altering the nature of the parties' agreement, the court voided the entire agreement to arbitrate. Accordingly, the court granted the petition for writ of mandate to allow Ramos to proceed with her claims in superior court.

After concluding that Ramos's claims fell within the broad scope of the parties' arbitration agreement, the court turned to enforceability. The court found it unnecessary to resolve the question of whether Ramos was an employee in deciding whether the parties' arbitration agreement was enforceable. The court nonetheless concluded *Armendariz* should guide the arbitrability determination for two reasons: first, Ramos's claims encompass the statutory rights *Armendariz* held unwaivable; and second, regardless of whether Ramos is an employee under a *Clackamas Gastroenterology Assocs., P. C. v Wells* (2003) 538 US 440, 123 S Ct 1673, analysis, the record demonstrated that Winston was in a superior bargaining position vis-à-vis Ramos akin to that of an employer-employee relationship, and no evidence in the record suggested that Ramos had an opportunity to negotiate the arbitration provision.

Four provisions in the agreement rendered it unconscionable:

First, the last sentence of the arbitration clause restricting the arbitration panel's ability to "override" or "substitute its judgment" for that of the partnership was unenforceable. Because the alleged adverse employment actions and decisions by Winston did not violate the partnership agreement, the arbitrators' authority to provide remedies available in a court of law, including backpay, front pay, reinstatement, or punitive damages, would be constrained by this sentence. Thus, the express language of the agreement prevented Ramos from obtaining remedies available under her statutory claims.

Second, under FEHA, a prevailing plaintiff is ordinarily entitled to an award of attorney fees, another statutorily authorized remedy. Govt C §12965(b). Here, the parties' arbitration clause impermissibly provided each party would cover its own attorney fees.

Third, the requirement that Ramos pay half the costs of arbitration required her to pay arbitration fees and costs that she would not have to pay if she litigated her statutory claims in court. Under *Armendariz,* this provision could not stand.

Finally, the strict confidentiality clause requiring Ramos to keep "all aspects of the arbitration" secret was found to impair her ability to engage in informal discovery in pursuit of her litigation claims. Ramos would be in violation if she attempted to informally contact or interview any witnesses outside the formal discovery process. Further, such a limitation would not only increase Ramos's costs unnecessarily by requiring her to conduct depositions rather than informal interviews, it defeats the purpose of using arbitration as a simpler, more time-effective forum for resolving disputes. In addition, requiring discrimination cases be kept secret unreasonably favors the employer to the detriment of employees seeking to vindicate unwaivable statutory rights and may discourage potential plaintiffs from filing discrimination cases. The court found this provision substantively

unconscionable. These four provisions resulted in an unconscionability that could not be remedied simply by severance. Because the agreement would have to be reformed to be enforced, it was void as a matter of law.

COMMENT: This decision is significant for several reasons.

First, the court rejected Winston & Strawn's argument that the U.S. Supreme Court's decision in *AT&T Mobility LLC v Concepcion* (2011) 563 US 333, 131 S Ct 1740 (*Concepcion*), means that *Armendariz v Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83 "is no longer good law." In particular, the court explained that "to the extent Winston is trying to argue that the Federal Arbitration Act (FAA) [ ] preempts rules established in *Armendariz*, it has not shown the FAA applies here." 28 CA5th at 1055 n3. The court noted that "[s]ince *Concepcion* was decided, the California Supreme Court has reaffirmed the validity of *Armendariz* multiple times." 28 CA5th at 1055 (citing *McGill v Citibank, N.A.* (2017) 2 C5th 945, 962; *Sanchez v Valencia Holding Co.* (2015) 61 C4th 899, 910; *Sonic-Calabasas A, Inc. v Moreno* (2013) 57 C4th 1109, 1169). Winston also relied on the U.S. Supreme Court's decision last year in *Epic Sys. Corp. v Lewis* (2018) 584 US ___, 138 S Ct 1612, "but that case concerned whether class and collective action waivers in arbitration agreements violated the National Labor Relations Act, and it did not mention *Armendariz*." 28 CA5th at 1055. "Indeed," the court noted, "*Epic Systems* explicitly reaffirmed, like *Concepcion* before it, that the FAA does not preempt the invalidation of arbitration agreements by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" 28 CA5th at 1055; see *Samaniego v Empire Today, LLC* (2012) 205 CA4th 1138, 1150 ("unconscionability" analysis remains applicable to arbitration clauses in employment contracts after *Concepcion*). Employers seeking application of the FAA should therefore establish in their arbitration agreements that the employee's employment affects interstate commerce, so the FAA governs and preempts contrary state arbitration case law.

Second, the court found it unnecessary to determine whether Ramos was properly treated as a "partner" or an "employee" for purposes of applying *Armendariz's* unconscionability analysis. Ramos relied on the U.S. Supreme Court's opinion in *Clackamas Gastroenterology Assocs., P.C. v Wells* (2003) 538 US 440, 123 S Ct 1673, to argue that she was an employee who lacked the requisite control to be an employer. Instead, the court "conclude[d that] *Armendariz* should guide our arbitrability determination for two reasons: first, because the claims Ramos asserts in this lawsuit encompass the statutory rights *Armendariz* held are unwaivable; and second, because regardless of whether Ramos is an employee under a *Clackamas* analysis, the record demonstrates Winston was in a superior bargaining position vis-à-vis Ramos akin to that of an employer-employee relationship, and there is no evidence in this record that Ramos had an opportunity to negotiate the arbitration provision." 28 CA5th at 1056. Thus, employers should comply with the *Armendariz* "fairness factors" even with respect to arbitration of unwaivable statutory claims asserted by so-called "partners," and particularly those in an inferior bargaining position.

The court also cited two published decisions in which the court applied the *Armendariz* "fairness factors" outside of the employment context, in both cases due to the disparity in bargaining power. See *Wherry v Award, Inc.* (2011) 192 CA4th 1242, 1249 (arbitration agreement between salespersons engaged as independent contractors and real estate brokerage firm was substantively unconscionable; fact "[t]hat plaintiffs are independent contractors and not employees makes no difference in this context" because "contract by which they were to work for defendants contained a mandatory arbitration provision"); *Penilla v Westmont Corp.* (2016) 3 CA5th 205, 221 (applying *Armendariz* to arbitration agreement between mobilehome renters and landowners where renters asserted two FEHA claims for racial discrimination and sexual harassment in housing).

Finally, regarding the *Armendariz* unconscionability analysis, the court rejected Ramos's novel argument that the arbitrators were not neutral, based on the requirement that each of the arbitrators be a partner in a law firm with no less than 500 lawyers, because those are "are precisely the demographic characteristics of the individuals accused of wrongdoing in this case." The court agreed with Winston's argument that "those are also characteristics that described Ramos herself," and also observed that the "'ability to choose expert adjudicators to resolve specialized disputes' is one of the fundamental benefits of arbitration." 28 CA5th at 1059, citing *Concepcion,* 563 US at 348. However, the court agreed with Ramos's argument that the arbitration agreement's "limitation of remedies," and in particular its prohibition of the selected arbitrator(s)' "substituting" or "overriding" their judgment for that of the Winston equity partners, was substantively unconscionable and rendered the arbitration agreement void and unenforceable in its entirety. The court reasoned that the restrictions on the arbitrators' right to grant full relief to Ramos "preclude[d] the arbitrators from providing remedies that would otherwise be available in a court of law." 28 CA5th at 1060. The court also found substantively unconscionable the parties' arbitration clause, which "impermissibly provides each party shall recover its own attorney fees"; the court found that this provision conflicts with FEHA's fee-shifting provisions. 28 CA5th at 1061. The court also found the provision requiring Ramos to pay for the costs of the arbitration substantively unconscionable under *Armendariz*. The court found the following confidentiality requirement substantively unconscionable because it prevents Ramos from engaging in informal discovery: "Except to the extent necessary to enter judgment on any arbitral award, all aspects of the arbitration shall be maintained by the parties and the arbitrators in strict confidence." Employers and practitioners should note and correct these defects in any existing arbitration agreements.—*T.M.P.* ❖

CROSS-REFERENCES: For more on unconscionability and the enforcement of arbitration agreements, see Advising California Employers and Employees §20.31 (Cal CEB) and California Law of Contracts §§5.77, 5.79, 9.42–9.44 (Cal CEB).

Adverse Employment Action

Railroad employee's good faith belief that federal law mandated certain conduct sufficed to render that conduct "protected activity," even if it is not actually required under federal law.

Rookaird v BNSF Ry. Co. (9th Cir 2018) 908 F3d 451

BNSF Railway Company employee Rookaird and his crew were tasked with moving a 42-car freight train. Before moving the train, Rookaird performed a 20- to 45-minute air-brake test. During the test, Rookaird's supervisor told