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Another Shot Fired in California's Employee Poaching War—Are There Legal Solutions to the Golden State's Employee Mobility Dilemma?

By Jen Rubin

The perpetual search for a work-around to California's prohibition on employee non-competes was stymied again when a California Superior Court refused to dismiss outright an intentional interference with contract claim based upon an allegedly illegal long-term employment contract.

The latest case to test the contours of California's post-employment legal restrictions—*Viacom v. Netflix*—features two media giants warring for tech talent. Viacom claimed that Netflix had illegally poached a Viacom executive by wooing her into an early termination of her multi-year employment contract, a solicitation that Viacom claimed was a broader effort by Netflix to systematically raid and recruit talent from Viacom and others.

Employers are undoubtedly playing for high stakes in the talent war as the entertainment industry's focus elevates tech experience to the level of artistic talent. But the case is not only a fascinating commentary on employee solicitation and the competitive talent pool in the Golden State. It also raises questions about what methods remain—if any—to bind an individual to a particular employer for a fixed employment term, a question relevant not just to tech talent, but to all employers competing for California skilled labor.

Viacom did not sue the former employee who resigned before her contract expired. Viacom instead sued Netflix, her new employer, alleging two claims—intentional interference with contractual relations and statutory unfair competition. Netflix fought back, claiming that the employee's fixed-term employment agreement violated the Labor Code's seven-year limit which, Netflix asserted, also carried an inherently illegal prohibition on post-employment competition. The court denied Netflix's request to dismiss the case outright, finding that it was premature to assess at the initial pleading stage whether the employment agreement at issue was sufficiently enforceable to support an interference claim.

Jen Rubin, with Mintz, Levin, Cohn, Ferris, Glovsky and Popeo.

This latest legal development in the media tech talent war highlights the difficulties employers face in retaining talent in California—as well as the justifiable fear when hiring someone contractually bound to another. Despite these concerns, some mechanisms do

lawfully support employee retention and non-competition in California:

Term Employment Agreements and Garden Leave. Term personal service contracts are allowed under Labor Code 2855(a) for a maximum seven-year term (a statute meant to address the old Hollywood era of talent bondage). The remedy for breach of a fixed term employment contract is the cost to replace the breaching employee. Other damages associated with an employee's refusal to perform and the impact on a business are a bit more speculative. But an injunction preventing an employee from working for others for the balance of the employment term may be just as effective; it is certainly more coercive.

California Civil Code 3423 conditions the use of an injunction to enforce Labor Code 2855(a) on minimum compensation, at a floor that is not relevant to today's talent pool (the floor is inarguably insufficient to attract and retain any talent let alone new media talent). But, taken together, these code provisions permit a court to enjoin an employee who prematurely terminates an employment agreement from working for any other employer (whether competitive or not), provided the employer pays the minimum compensation. The concept of garden leave in this context is both familiar and market—the name derives from the common law practice of paying an employee to "stay home and garden"—in other words, to stay out of the industry in which the person was working. But paying an individual to sit on the sidelines, while permissible (and expensive if the employee is paid at their market rate), is impractical for most people. Today's economy, so dependent on rapidly evolving technology, requires most individuals to maintain industry contact to stay relevant.

Signing Bonuses/Loan Repayments. Another approach to coerce employee retention is the use of signing or other incentive bonuses paid at the onset of employment that trigger repayment if the employee leaves before a specified employment term. The same mechanism is sometimes packaged as a loan with forgiveness provisions that are triggered only if the employee remains for a set time (but accelerates if the employee leaves). These mechanisms are both market and legally permissible, but are typically used for sophisticated professionals, and not rank and file employees.

Equity Vesting and Forfeitures. Conditioning the vesting of equity on continued employment is, of course, key to most equity incentive plans and is an important feature of our economy. Problems arise when requiring individuals to forfeit vested interests; in fact, requiring the forfeiture of equity that was earned for past services as a consequence for post-employment competition likely violates California's non-compete ban. The question remains, however, whether such forfeiture would be similarly illegal for prospective benefits that are not conditioned on past service. Draft with caution here.

Anti-Poaching (Antitrust) and Non-Solicitation. The Viacom-Netflix dispute features two giants battling each other over talent. On the other side of that coin are antitrust laws that prevent competing employers from conspiring about potential hires. These "no poach" agreements, which have garnered attention from regulating authorities, culminated in the Antitrust Guidance for Human Resources Professionals that the Department of Justice and

Federal Trade Commission jointly published in October of 2016. In that guidance, the DOJ indicated that it would criminally prosecute employers who enter into no-poach agreements. More recently a California appellate court refused to enforce a post-employment covenant restricting employee non-solicitation, finding that such post-employment restrictions—in that case between an employer and an employee—violated California's non-compete statute. While the decision informs drafting of these provisions (because including illegal employment terms could be the death knell of any employment agreement in California), in fact employee non-solicitation clauses are notoriously difficult to police, let alone enforce, given that individuals mobilize so swiftly in our economy.

Importing Another State's Law. The California legislature closed off another avenue of non-compete work-arounds when Labor Code 925 became effective in January 2017. This provision generally prohibits the use of choice of law provisions to deprive Californians of the benefits of both California law and California courts (except in certain circumstances inapplicable to most employee arrangements). Employers are therefore generally prohibited from importing another state's law to apply to a purely California employment relationship (yes, even if the employer's headquarters are located elsewhere).

Trade Secrets/Tortious Interference. Californians are still entitled to protect against the theft of their trade secrets. While employers remain obligated to prove appropriate steps were taken to protect against the disclosure and use of their trade secrets (typically in a written agreement), it is generally unnecessary to require an employee to agree to such protection in writing because the law provides that protection as a matter of course. Tortious interference with contract also remains a viable method to prevent a third party from meddling in an individual's employment agreement, provided of course the agreement itself is enforceable. That is the precise route that Viacom took in its recent dispute with Netflix.

So the question for California employers is whether, if at all, to coerce an employee into remaining employed—and if the mechanism the employer chooses is culturally prudent. But an equally important question is whether any employer wishes to choose a path of mutually assured destruction. Demanding extremely coercive employment terms may cause a candidate to reject a job offer. But more importantly, at the end of every lost candidate is an employer's job interview for the employee's replacement. And that interview will lead—invariably—to the necessary question—what litigation risk does this candidate propose to my enterprise? Whatever approach an employer decides to take, it is always prudent to not only take a business-minded approach, but a pragmatic one as well.

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