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PERSPECTIVE

# Does Section 925 reinforce or weaken policy against noncompetes?

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Last September, the Delaware Court of Chancery ruled that a Delaware choice-of-law provision and covenant not to compete in an employment agreement between a California resident, Patrick Miles, and his former Delaware-based employer, Nuvasive, Inc., were enforceable. *Nuvasive, Inc. v. Patrick Miles*, C.A. No. 2017-0720-SG (Del. Ch. Sept. 28, 2018). The court previously held in a seminal 2015 ruling, in the matter of *Ascension Insurance Holdings, LLC v. Underwood*, C.A. No. 9897-VCG (Del. Ch. Jan. 28, 2015), that Delaware's public policy in favor of freedom of contract was trumped by California's public policy in favor of freedom of employment and refused to enforce a Delaware choice-of-law provision and covenant to not compete against a California resident.

What caused the Court of Chancery to rule differently in the *Nuvasive* matter? In large part, its interpretation of California Labor Code Section 925, enacted after the *Ascension* decision.

*Nuvasive* had sued Miles for breach of his covenant not to compete, and Miles moved for partial summary judgment. He argued that the covenant not to compete violated California Business and Professions Code Section 16600 and that the Delaware choice-of-law provision was unenforceable as violative of California fundamental public policy, consistent with the court's ruling in *Ascension*.

After conducting a conflict-of-laws analysis, the court determined that California law would govern absent the choice-of-law provision, but that enforcement of the Delaware choice-of-law provision and covenant not to compete would not violate California fundamental public policy given the passage of California Labor Code Section 925. Although the employment agreement at issue was executed prior to the enactment of Section 925, which is not retroactive, for purposes of the conflict-of-laws analysis the court determined that Section 925 expressly permits parties to a contract to choose law that allows for noncompete provisions if the individual employee is represented by counsel (the court specifically held that, through Section 925, California "passed a law that recognizes the validity of choice-of-law provisions in the narrow circumstance where an employee has legal representation during negotiations.") The court in turn held that California's current public policy no longer prohibits the enforcement of non-California choice-of-law provisions governing covenants not to compete where the employee is represented by counsel during negotiations, such that the Delaware choice-of-law provision — and in turn, the covenant not to compete — were enforceable. The court concluded: "In Section 925 … the California legislature has stated strongly its general view that the prohibition of covenants not to compete (as well as other requirements of its labor law) cannot be evaded by choice of law provisions, but has made a policy decision that when contracting parties' rights are protected by representation, freedom of contract trumps this interest."

**It is not at all clear that the California Legislature, by enacting Section 925, intended to authorize choice-of-law and forum-selection provisions that would operate to undermine a near-150-year fundamental public policy in favor of free competition and employment.**

Did the Court of Chancery correctly interpret Section 925 as weakening California's fundamental public policy against noncompete provisions and expressly authorizing choice of law provisions where an employee is represented by counsel? No California appellate court has addressed this issue, but Labor Code Section 925 does not anywhere state that it is an exception to Business and Professions Code Section 16600, which prohibits covenants not to compete except under certain limited circumstances provided for in Business and Professions Code Sections 16601-16602.5. Not only does Section 16600 prohibit noncompete provisions, but it goes further and proclaims that, except for the statutory exceptions, "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Section 16600, by its own language, therefore invalidates any contract containing a noncompete provision combined with a choice of law provision that would operate to restrain a California resident's livelihood, regardless of whether it was negotiated by counsel.

Further, the language of Labor Code Section 925 simply declares that employers cannot require employees to agree to non-California choice-of-law/forum-selection provisions unless the employees are represented by counsel in negotiating those terms and that such provisions are automatically voidable at the request of the employee when not negotiated by the employee's counsel, but does not in the inverse declare that such provisions are automatically enforceable just because they were negotiated by counsel. Moreover, there is nothing in the legislative history of Section 925 that shows it was intended to weaken California's fundamental public policy prohibiting noncompete provisions or expressly authorize choice-of-law provisions in the noncompete context. Rather, according to the legislative history, the authors of Section 925 were, among other things, concerned about non-California employers imposing choice-of-venue and choice-of-law provisions on Californians in order to evade California law and obtain an advantage over in-state employers. Based on the legislative

history, the purpose of Section 925 was to strengthen existing policy by making certain choice-of-law/ forum-selection provisions automatically unenforceable at the request of the employees so that employees do not have to incur the expense and burden of litigation to vindicate their California rights.

While Section 925 does not apply to employees who are represented by counsel in negotiating such provisions, in that circumstance, it appears to merely prevent such provisions from being automatically unenforceable; nothing in the statute or legislative history renders them automatically enforceable or supports the Court of Chancery's view that California public policy is now trumped by freedom of contract, or that a lawyer representing an employee has the power to waive such fundamental rights of his or her client. As the Court of Chancery acknowledged, it must still do a traditional conflict-of-laws analysis for choice-of-law provisions and reasonableness analysis for forum-selection provisions. Under the conflict-of-laws analysis (like the one done by the court in *Ascension*), if a court determines that California law would apply absent the choice-of-law provision and that enforcement of the provision would violate California fundamental public policy, such as employee mobility and freedom from noncompete provisions, presumably it should not be enforced, regardless of whether the employee was represented by counsel.

It does not appear that all of the above arguments were raised with or considered by the *Nuvasive* court. Given that no California appellate court has analyzed this issue and that attempting to impose a noncompete provision on a California employee can constitute a violation of California Business and Professions Code Section 16600, a violation of California Labor Code 432.5, and unfair competition in violation of California Business and Professions Code Section 17200, employers around the country should be wary about relying on the *Nuvasive* opinion to justify noncompete provisions in agreements with California employees by using non-California choice-of-law and choice-of-venue provisions. It is not at all clear that the California Legislature, by enacting Section 925, intended to authorize choice-of-law and forum-selection provisions that would operate to undermine a near-150-year fundamental public policy in favor of free competition and employment — which has been a driving force behind California's economy — simply because the employee agreeing to the provisions had a lawyer.

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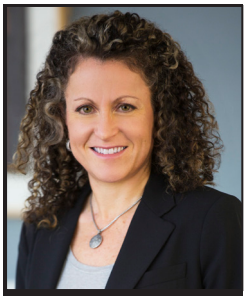
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