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# Reporter

## Employment Law

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### **Recent California Court Decisions Offer Insight into Enforceability of Non-Solicitation, Non-Compete and Forfeiture Provisions**

#### ***Dowell v. Biosense Webster, Inc.*— Non-Solicitation and Non-Compete Clause in Employment Contract Held Unenforceable**

The future enforceability of non-solicitation and non-compete clauses in employment contracts remains in doubt after a recent decision in which an appellate court refused to enforce the non-compete and non-solicitation clauses in contracts signed by California employees. In *Dowell v. Biosense Webster, Inc.*, plaintiffs sued defendant to enjoin it from enforcing non-compete and non-solicitation clauses. The court affirmed a finding that non-compete and non-solicitation agreements not narrowly constructed only to protect trade secrets are void under California law. Additionally, the court expressed doubts as to whether even more narrow non-compete agreements are authorized under California law.

The employees at issue here worked in various capacities for the biotech company, Biosense Webster, Inc. (“Biosense”). As a condition of employment, Biosense required that employees sign agreements that provided that, for 18 months after termination of employment, they could not render services for a competitor if such service could assist the competitor in competition by application of “confidential information” the employee had access

to during employment. The agreement broadly defined “confidential information” to include any information “not generally known to the trade or industry” concerning Biosense’s business or products. In addition, the agreement contained a non-solicitation clause which precluded the employee from soliciting any customers with whom the employee had contact with in the 12 months before termination.

The trial court granted summary judgment for plaintiffs, finding that the agreements violated California Business and Professions Code §16600, which voids most agreements “by which anyone is restrained from engaging in a lawful profession, trade, or business” as a matter of public policy. The appellate court affirmed the trial court’s ruling. In doing so, the court specifically rejected the employer’s arguments that the clauses were enforceable because they were tied to protection of trade secrets and confidential information, and stated that it doubts “the continued viability of the common law trade secret exceptions to covenants not to compete.” However, the court added that regardless of whether any trade secret exception still exists, because the agreement broadly defined “Confidential Information” to cover information well beyond what the employees could access, the Biosense agreements were broader than necessary to protect any Biosense trade secrets. The court also held that the non-solicitation clause did not appear to be limited to protecting any confidential

information since it precluded work even for customers who contacted the former employees.

In light of California's continued trend to refuse to enforce these agreements, employers should be careful when utilizing confidentiality and non-solicitation clauses in their employment agreements. Further, employers should contact legal counsel to update outdated confidentiality agreements that might run afoul of the *Dowell* decision.

### **Schachter v. Citigroup, Inc.—Forfeiture Provision in Incentive Compensation Agreement Held Lawful**

A recent decision by the California Supreme Court provides guidance to California employers regarding the structuring of incentive compensation plans. In *Schachter v. Citigroup*, the California Supreme Court unanimously held that the forfeiture provision contained in Citigroup's stock purchase plan did not violate California Labor Code wage payment requirements. The incentive compensation plan at issue in *Schachter* provided eligible employees with the opportunity to purchase shares of restricted company stock at a reduced price in lieu of receiving a portion of the employees' cash compensation. The stock would only vest if the employee was still employed by Citigroup after two years.

In this case, Schachter, a stockbroker for Citigroup, elected to take some of his compensation in the form of stock, but quit before the vesting date and never received the stock. Schachter argued the arrangement violated the California Labor Code because it required him to "forfeit" compensation he had already earned. The Supreme Court rejected the theory that this restricted stock deal was an illegal forfeiture and construed this type of arrangement as equivalent to a "stay bonus" or "longevity bonus." The Court concluded that, having not elected to remain employed for two years from the date he received the restricted stock, Schachter did not *earn*, and had no right to

receive, either the restricted stock or the funds that were used to purchase it.

The Court also reiterated various principles that have emerged from earlier cases on the issue:

- 1) Eligibility to receive incentive compensation is determined by general contract principles and the terms of the plan in question;
- 2) An employee who resigns or is terminated for cause prior to satisfying a condition precedent to receipt of incentive compensation has not earned the incentive compensation and the employer in such circumstances need not pay the compensation upon the employee's separation from employment;
- 3) Employers and employees may freely agree to alter terms of future employment;
- 4) The presumption of at-will employment, which permits employers to terminate or demote an employee with or without notice and/or cause, also permits employers to unilaterally alter the terms of employment, as long as the alteration does not violate a statute or breach an implied or express contract; and
- 5) An employee who remains employed after receiving notice from his or her employer of a change in terms or conditions of employment will be deemed to have accepted the new terms and conditions.

The Court also cautioned employers against overreaching. While the Court concluded that employers may lawfully condition bonus payments on an employee's voluntary decision to quit, the decision in *Schachter* makes clear that employers generally cannot condition payment on matters solely within their own unilateral control, such as a decision to fire an employee without cause before he or she can perform all of the contractual conditions.

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