**From:** Damien Leonard
**Sent:** Tuesday, January 25, 2022 12:10 PM
**To:** HOUSE_GENERAL_HOUSING
**Subject:** Requested research on "do not darken my door" provisions

As the Committee requested, I researched case law and other legal references on the enforceability of “do not darken my door” provisions, which are also commonly called “no-rehire”, “no-reapply”, and “never darken our door” provisions. Many of the cases that I found were not directly on point and there are several cases that I have not had time to review yet. However, some general themes have emerged from the cases that I have reviewed and in the interest of time I am sharing that information with you.

Before I get to that, it is important to note that due to the time constraints on this research and the challenge of conducting a 50-state survey of case law, there are likely cases on this issue that I missed. Some of the advocates may be able to share information related to those cases with the Committee.

While most of the cases that I reviewed did not directly address the validity and enforceability of no-rehire provisions, I found two cases from other jurisdictions that directly address those provisions.

A 2018 case in the 9th Circuit Court of Appeals applied Section 16600 of the California Business and Professions Code, which provides 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”, to determine that a no-rehire provision in a settlement agreement was void and unenforceable. The agreement in question prohibited the former employee (a doctor) from (1) working or being reinstated at a facility owned or managed by the former employer; (2) from working at any facility that the former employer contracts with; and (3) from working at any facility that the former employer provides services to or acquires rights in. The court found that the first provision was a minimal restraint on the former employee that did not violate the statute, but that the second and third provisions were substantial restraints that would interfere with the former employee’s ability to seek and maintain employment with third parties in violation of California law. In other words, the restraint on future employment with the former employer was permissible but the provisions that potentially interfered with the former employee’s ability to work for third-parties were not. *Golden v. California Emergency Physicians Medical Group*, 896 F.3d 1018 (9th Cir. 2018).

A 2007 case in the 10th Circuit concerned an employee whose settlement agreement waived the right to reemployment or reinstatement with her former employer. In that case, the former employee applied for a position as a independent contractor selling insurance for her former employer. The court found that the former employer’s reliance on the terms of the no-rehire provision in the settlement agreement was a “legitimate nondiscriminatory reason” for rejecting her application for the independent contractor provision that overcame her claim that she was denied the position in retaliation for her previous complaint of discrimination. The court went on to find that the former employee failed to point to facts that would indicate that the reliance on the settlement was a pretext for discriminatory retaliation for her prior claim. *Jencks v. Modern Woodmen of America*, 479 F.3d 1261 (10th Cir. 2007).

Finally, I found at least one case in which our Second Circuit Court of Appeals upheld an in-court settlement agreement that contained a no-rehire provision, although the court did not consider the enforceability of that particular provision. *Powell v. Omnicom*, 497 F.3d 124 (2d Cir. 2007).

I was unable to find any Vermont case law that was directly on point.

The general take away from my case law research is that courts have found these provisions to be generally valid and enforceable, provided that the underlying settlement agreement satisfies the legal requirements for an enforceable contract. No-rehire provisions can, as in the *Golden* case, run into problems if they are so broad that they potentially harm a former employee's ability to seek and maintain future employment. In other cases, such as the *Jenks* case cited above, the provisions have protected employers against claims that their failure to rehire an individual was in retaliation for the individual's prior claim of discrimination. However, its worth noting that the *Jenks* decision indicated that a different fact pattern in which the plaintiff could show bias among the decision makers on her application might have led the court to determine that the employer's reliance on the no-rehire provision was a pretext for discrimination.

In contrast to the case law cited above, one or more attorneys for the EEOC have, since about 2008, indicated that the EEOC will not include "do not darken my door" provisions in consent decrees that it enters into in relation to federal discrimination cases. In one of several articles that he has written discussing the EEOC settlement process, John Hendrikson, an attorney at the EEOC's office in Chicago, explained:

> "Consent decrees are intended and designed to remedy past discrimination and to prevent future discrimination. Including penalties in the form of restrictions upon the future conduct of statutorily protected participants in our processes is antithetical to all that."

His article includes a lengthy discussion of reasons why the EEOC opposes the provisions and why he believes that they are unnecessary. Many of those arguments echo Bor Yang's testimony on this bill and the testimony in favor of including the ban on "do not darken my door" provisions in Act 183 in 2018. While I am not summarizing those arguments in this email, I am happy to provide a copy of the article to anyone who is interested in reading it.

One final thing to note is that California adopted a provision similar to H.320 in 2019. That bill is available here.

Please let me know if you have any questions or if you would like a copy of any of the cases I cited or of the article by the EEOC attorney.

Best,
Damien

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