

California Restricts Choice of Law and Venue Selection Clauses in Employment Agreements

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Overview

On September 25, 2016, Governor Jerry Brown signed Senate Bill 1241 into law, adding Section 925 to the California Labor Code. This new California law prohibits an employer from requiring California employees to agree to non-California choice of law and venue provisions in their employment contracts, unless the employee is individually represented by legal counsel in connection with negotiating the employment contract. The new law takes effect on January 1, 2017. Any employment contract entered into, modified or extended on or after January 1, 2017 will be subject to the new provisions.

Scope and Effect of New Law

If an employer requires an employee who primarily resides and works in California to agree, as a condition of employment, to a provision that (1) requires the employee to adjudicate outside of California claims arising in California; or (2) deprives the employee of substantive protections of California law with respect to a controversy arising in California, then the employee may void these provisions in his or her discretion, unless the employee is individually represented by legal counsel in negotiating the terms of the employment agreement relating to venue or choice of law. 'Adjudication' of a claim includes both litigation and arbitration. If the employee chooses to void the offending provisions, a dispute under the employment contract must be adjudicated in California, under California law. In addition to injunctive relief and other remedies, a court may award reasonable attorney fees to an employee who enforces his or her rights under the new law.

The law is broadly worded and does not define the scope of certain critical terms. For instance, the law does not define or set forth a test for when an employee may be considered to be 'primarily' residing and working in California, or what constitutes a 'condition of employment.' It is also unclear whether the new law will apply to an existing agreement that automatically renews pursuant to its terms on or after January 1, 2017.

Individually Represented Exception

As noted, the new requirements do not apply when employees are *individually* represented by legal counsel. However, the law does not define the term 'individually represented,' leaving it unclear whether an acquiring company may rely on this exception in the M&A context, where counsel retained by the target company also represents senior executives in negotiation of their employment contracts. As a possible resolution, buyers may request that any newly entered into employment agreements contain a specific representation that the

executive was represented on an individual basis in the negotiation of their employment agreement, with such representation to include the name of the executive's attorney.

The statute does not address whether a California court must automatically permit non-California choice of law or venue whenever the individual is represented by legal counsel, and does not by its terms abrogate existing California case law which restricts the enforceability of non-California choice of law and/or venue provisions. A conservative interpretation of the new statute is that an employee's individual representation by counsel is a necessary, but probably not sufficient, condition for a California court to permit enforcement of a non-California choice of law or venue provision. In any event, California courts will likely continue to be hostile to non-competition or customer non-solicitation provisions in employment agreements for California-based employees, even if the individual employees are represented by counsel and the agreements provide for the application of the law of, or require venue to be in, a state other than California.

Going Forward

It will no longer be possible to designate an employer's non-California state of incorporation or headquarters as the choice of law or venue in employment contracts of California-based employees who are not individually represented by counsel. California employers should review the types of agreements required as a condition of employment to determine whether any modifications are necessary to comply with this new law. New market practices, such as including a representation that an employee was individually represented, as well as judicial interpretation of the many ambiguities in the new law, are expected.

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