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California Limits Choice of Venue and Choice of Law Provisions in Employment Contracts

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Client Advisory
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Beginning on January 1, 2017, California will limit employers' ability to require employees based in California to adjudicate disputes outside of California or pursuant to the law of a jurisdiction other than California. Newly enacted California Labor Code § 925 provides that an employer shall not require an employee who "primarily resides and works in California" to agree to a contract provision that (1) requires the employee to "adjudicate outside of California a claim arising in California" or (2) "deprives the employee of the substantive protection of California law with respect to a controversy arising in California." Unless one of the exceptions or limitations discussed below applies, an employee who resides and works in California likely will be able to have employment disputes adjudicated in California under California law even if the employee signed a contract agreeing to adjudicate disputes in another jurisdiction or to have disputes governed by a different law.

While California Labor Code § 925 is quite broad, it contains some important limitations and exceptions. First, the statute applies to new employment agreements entered into on or after January 1, 2017. Existing agreements will not be impacted unless they are "modified or extended" after January 1, 2017. The statute does not define what constitutes a modification or extension that will trigger the protections of the statute. While a written amendment to an employment agreement likely would be a modification that triggers the statute, there are some situations that are not as clear. For example, it is unclear if an employment agreement that automatically renews for an additional term unless terminated by one of the parties is "extended" if the term automatically renews after January 1. Similarly, employers will need to consider whether changing an employee's title, duties or compensation will be treated as a modification of an existing contract that brings it within the ambit of the statute.

Second, the statute only applies to employees who "primarily" reside and work in California. Employers should understand which of their employees both reside and work in California and should be sensitive to how much time employees — particularly employees who travel frequently or split time between several offices — spend working in California.

Third, the statute only applies to claims or controversies "arising in California." While many employment disputes with employees based in California will "arise" in California, there may be some disputes (even with employees who primarily reside and work in California) that do not arise in California and thus would not be governed by California Labor Code § 925.

Fourth, the statute only applies to agreements that are required as "a condition of employment." If an employee can work for the employer without signing the agreement, then the parties should be free to choose a different forum or applicable law to govern that agreement. There are many types of agreements that are ancillary to employment agreements that could fall within this category, including restrictive covenants, stock option or other agreements relating to discretionary benefits plans, confidentiality agreements, and intellectual property rights agreements. Employers, however, should not assume that these types of ancillary agreements automatically fall outside the statute. Whether

any particular agreement is a "condition of employment" is likely to be a fact question focused on whether the employer would have permitted the employee to work if the employee refused to sign the agreement.

Fifth, the statute does not apply to contracts with an employee who is "represented by legal counsel in negotiating the terms of an agreement" to designate a forum or law other than California. To fall within this exception, the individual employee must have counsel who is involved in negotiating the agreement. If the agreement is a "take it or leave it" proposition, it is unlikely this exception will apply. It is less clear whether the exception will apply if the employee's lawyer reviews and approves the agreement, but does not actively negotiate any specific terms. Employers should consider advising an employee to retain counsel to review and negotiate a proposed agreement and offering to pay the employee's legal fees if it is important that the agreement falls within this exception to the statute.

If an agreement covered by California Labor Code § 925 chooses a forum or law other than California, then that choice of forum or law provision is "voidable by the employee." If the employee requests that the provision be voided, then the dispute will be adjudicated in California under California law. The statute does not specify when the employee may elect to void the offending provision or what type of notice must be given. This leaves a number of open issues, including whether an employee can affirmatively agree in the contract not to void (or to waive the right to void) choice of forum and law provisions in the contract, whether an employer can impose limitations on when or how an employee may void an offending provision, and whether an employee can void a choice of forum or law provision while (or even after) a litigation is underway in another forum or pursuant to another jurisdiction's law.

Finally, the statute provides that if an employee enforces his or her rights under California Labor Code § 925, then the court may award the employee reasonable attorneys' fees.

California Labor Code § 925 will present new challenges to employers with employees in California, particularly if the employer is based outside of California. There are some initial steps that employers can take to prepare for the implementation of California Labor Code § 925:

- Act before January 1, 2017 to modify or extend existing contracts with employees in California that contain choice of law or forum provisions.
- Identify existing contracts with employees that have choice of forum or law clauses selecting a jurisdiction other than California that could be deemed to be modified or extended after January 1, 2017 even if no specific action is taken by the employer and consider how to address the potential application of the statute.
- Add carve out or savings clauses — or limit or omit choice of forum or law provisions entirely — in employment or other agreements entered into, extended or modified after January 1, 2017 with employees who live and work in California that are a condition of employment unless they are negotiated by the employee's counsel.
- Consider whether ancillary agreements that have choice of forum or law provisions are "conditions of employment" governed by the statute.
- If a contract provides that another forum or law will apply, ensure that the employee retains counsel who negotiates the agreement, and memorialize that retention and negotiation in the agreement itself.
- Although California Labor Code § 925 specifically applies to arbitration as well as litigation, employers should consider arbitration of disputes with employees in California since Federal arbitration law allows parties to select their forum or governing law and the employer could take the position that Federal, not California, law governs the issue.

For more information concerning the matters discussed in this publication, please contact the author, **Jeffrey S. Boxer** (212-238-8626, boxer@clm.com) or your regular Carter Ledyard attorney.

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