New California Law Prevents Employers from Imposing Non-California Forum Selection or Choice of Law Provisions upon California Employees

October 28, 2016

As part of our efforts to update employers regarding the newly-enacted statutes that will affect employers in the coming year, this post addresses a bill recently signed into by California Governor Jerry Brown that prohibits employers from requiring most employees who live and work in California to agree to a forum selection or choice of law clause that would designate a forum or substantive law of a jurisdiction outside California.

The bill, designated as Senate Bill 1241, is straightforward on its face adding section 925 to the California Labor Code. It prohibits any employer from requiring an employee who "primarily resides and works in California" to adjudicate outside of California a claim arising in California, or to deprive California-based employees of "the substantive protection of California law" with respect to such a claim. "Adjudication" is defined to include litigation and arbitration. The statute becomes effective on January 1, 2017, with respect to contracts entered into after that date.

The law provides that any contract that violates these provisions can be voided by the affected employee, and that in addition to injunctive relief and "other remedies available," attorneys' fees can be awarded to employees who enforce their rights under the statute.

This statute codifies into law what has already been the frequent approach of California courts when faced with forum selection and choice of law provisions that attempted to avoid the application of California law to employment disputes. California courts have long regarded such clauses with suspicion, and rejected contractual forum selection or choice of law clauses that have interfered with the full application of California public policy. This is especially true in the case of restrictive covenants. At least now California employers will have a section of the Labor Code that expressly identifies the limitations on forum selection and choice of law provisions.

While the statute is mercifully brief and rather straightforward, it does raise a number of questions. First, while the law does not address the issue, it is probably safe to assume that it applies to all employers, whether they are based in California and conduct a substantial amount of business in the State, or not.

In addition, the statute applies to employees who "primarily reside[] and work[] in California," but does not define this term. In other contexts, the concept of "primarily" engaged in work under California law has been interpreted to signify more than 50% of an employee's work time. Therefore, it may be reasonable to assume that the same standard will apply with respect to this requirement.

Another question regarding the statute involves the clause specifying that an employer is prohibited from requiring an employee to a forum selection clause or choice of law provision "as a condition of employment." This provision presumably leaves open the prospect of forum selection clauses or choice of law provisions if they are presented to employees with the opportunity to revoke them, such that they are not imposed as a condition of employment. Severance agreements also plainly do not appear to be encompassed by the statute.

Finally, one significant exception exists to the limitation on forum selection and choice of law provisions: The restriction does not apply to a contract with an employee "who is in fact individually represented by legal counsel in negotiating the terms of an agreement . . ." Therefore, the statute may be inapplicable to many employment agreements with executive-level employees, to the extent that they engage counsel to review the agreement. It is clearly insufficient to provide that an agreement *may* be reviewed by an employee's attorney – the provision explicitly notes that the exception only applies if the employee is "in fact individually represented by legal counsel."