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Not Everything the California Legislature Enacts is Bad for All Employers All the Time

Article By:

James Nelson

The title should not be read to suggest some tectonic shift in the moods and values of the California Legislature or the Governor; far from it. However, every once in a while something a bit useful does emerge. This time it is some certainty in executive level employment contracts.

AB 1241 adds yet another section to the California Labor Code. New Section 925 provides that:

> An employer shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would do either of the following:
>
> (1) Require the employee to adjudicate outside of California a claim arising in California.
>
> (2) Deprive the employee of the substantive protection of California law with respect to a controversy arising in California.

Labor Code Section 925 goes on to provide that any contract violating these two requirements is voidable and any employee who pursues an action for violation of the new rule can obtain an injunction and his or her reasonable attorney's fees. This all becomes effective Jan. 1, 2017.

By now you may be feeling a bit misled by the title, but keep the faith a line or two longer. Tucked away in Labor Code Section 925(e) is the following provision:

> This section shall not apply to a contract with an employee who is in fact individually represented by legal counsel in negotiating the terms of an agreement to designate either the venue or forum in which a controversy arising from the employment contract may be adjudicated or the choice of law to be applied.

Not quite feeling better? Envision a sale or other merger and acquisitions event with an executive team that will be subject to employment agreements where everyone is represented by counsel. You might be able to have those agreements governed by Delaware law or the law of the parent company headquarters, provided it was negotiated with advice of counsel to the employee. Consider the need or desirability to transfer a key executive from out of state with a noncompete agreement into California. You may be able to hang on to that existing provision. Even if you could not come to terms, a fair amount of uncertainty can be eliminated and hence priced into the deal.

Having built this up a bit, we close with a word of caution. Employers inclined to move forward with this opportunity should consider treading lightly and in a measured way. Section 925(e) has a number of disjunctive “or” provisions that creative counsel could use to address perceived over reach. It is possible a court or arbitrator may one day find that the contractual provision has limits imposed by California public policy. Thus, when drafting an executive agreement, an employer should consult with counsel in order to keep an eye on California law as it evolves.

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