

# Employment Law Alert: California Passes Law Prohibiting Choice of Law and Venue in Employment Agreements

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The State of California recently signed into law a new code provision that prohibits employment agreements that require employees within California to agree to application of another state's law or to resolve disputes in another state. Since the new law - Section 925 - only applies to employment agreements entered into or modified starting January 1, 2017, employers should promptly begin assessing their employment agreements to ensure they are prepared for its rollout.

## What does the California law prohibit?

California law is notoriously unfavorable to employers. One critical example of this is California's broad prohibition of noncompete agreements with California employees. Selecting another state's law to apply to an agreement has been one way to potentially get around this prohibition, even though out-of-state employers have long faced difficulties in seeking to enforce such choice-of-law forum-selection clauses in California courts. The new California code, however, greatly increases this difficulty. Section 925 explicitly prohibits an employer from requiring an employee who **resides and works** in California to sign an agreement as a condition of employment that would either:

- **Require** the employee to **litigate or arbitrate a claim** outside of California; or
- **Deprive** the employee **of the substantive protections** of California law (including the prohibition "protecting" employees from noncompete agreements).

Under Section 925 any such choice of law or forum selection clause may be voided at the request of the employee, after which California law would apply to the agreement and the underlying legal matter would have to be litigated or arbitrated in California.

Penalties for employer violations of the California code include an injunction prohibiting enforcement of the agreement and reasonable attorney's fees for the employee, among other things.

Significantly, Section 925 **will not apply retroactively**, so agreements entered into before the effective date of January 1, 2017, are not subject to the new code. Furthermore, it does not apply to an agreement in



which the employee was represented by legal counsel throughout the negotiation process.

### **What choices do employers have to comply?**

Although the constitutionality of Section 925 is likely to be challenged in the courts, employers with California employees should begin preparing for the new law's January 1, 2017, effective date. In doing so, employers might consider the following strategies:

- Employers wishing to avail themselves of choice-of-law and forum-selection clauses should ensure that California employees sign employment agreements with such provisions before January 1, 2017. Employers should also ensure that these employment agreements do not need to be extended or otherwise modified, since any such change could make the new code applicable.
- Review all agreements planned for use in 2017 with California employees to determine whether the agreements need to be revised.
- For employment agreements entered into, modified, or extended on or after January 1, 2017, employers may consider keeping their standard employment agreements for employees in other states and drafting state-specific agreements for California employees. These California employment agreements could be modified to either remove the choice-of-law and forum-selection provisions or otherwise modify them to comply with California law.
- Employers could also consider making employment agreements optional for California employees. Since the new code only applies to required employment agreements, agreements may contain choice-of-law and forum-section clauses if employees may opt out.

These are just some of the options multi-state employers have in considering how to comply with California's Section 925 while still maintaining consistency and predictability in employment agreements. Companies with California employees should consult with legal counsel to ensure compliance with this new law.

Please also visit Gray Plant Mooty's labor and employment blog, the Modern Workplace, for continued analysis of Section 925 and other employment topics.