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California Prohibits Employers from Requiring Out-of-State Litigation and Arbitration

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On September 25, 2016, Governor Jerry Brown of California signed into law a new state statute that, in most instances, prohibits agreements requiring California-based employees to litigate or arbitrate their California-based employment-related claims in other states. The new statute, which will apply to contracts entered into, modified, or extended on or after January 1, 2017, applies generally to agreements with employees who primarily reside or work in California.

The new statute generally prohibits employers from requiring covered employees to agree, as a condition of employment, that they must adjudicate outside of California any claim arising in California. The statute defines "adjudication" to include arbitration as well as litigation in court. The statute also generally prohibits employers from requiring, as a condition of employment, agreements that would deprive covered employees of the substantive protection of California law with respect to a dispute arising in California. Any contractual provision violating either of these prohibitions is voidable by the employee, and if a court declares the provision void, the underlying dispute must be adjudicated in California under California law. The court may award attorney's fees to an employee who successfully challenges a contractual provision under the new statute.

Although the new statute applies generally to contracts with employees who primarily reside and work in California, it does not apply to a contract with an employee who is individually represented by legal counsel in negotiating the terms of the agreement designating the location or forum in which a controversy under the agreement may be adjudicated or designating which state's laws shall apply to such a controversy.

Practical Implications

Employers based or incorporated outside of California often require all of their employees, including those in California, to sign arbitration agreements requiring employees to arbitrate employment-related disputes in the employer's home state or state of incorporation. In some instances, these arbitration agreements provide that the laws of the employer's home state or state of incorporation shall apply in resolving the dispute. The new California statute will effectively bar the use of such agreements with respect to California-based employees, except in those instances in which an employee is represented by an attorney in the negotiation of the arbitration agreement. Arbitration provisions, choice-of-venue provisions, and choice-of-law provisions also frequently appear in individual employment agreements, restrictive covenant agreements, and separation agreements. To the extent they require the adjudication of claims outside of California or the application of the laws of a state other than California, those provisions in agreements entered into, modified, or extended on or after January 1, 2017, will be enforceable with respect to California employees only if they have been negotiated with an attorney representing the employee. Employers with California-based employees should review their employment-related agreement templates to determine whether they will violate the new California statute. Employers with employees in California as well as in other states should consider adopting special arbitration and employment-related agreements for use only with California-based employees, thereby complying with

the new statute while retaining more employer-friendly venue and choice-of-law provisions in agreements with employees outside of California.

For more information about these issues, please contact the author(s) of this Legal Alert or your existing firm contact.

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