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New California Noncompete Law Impacts Out-of-State Employers With California Employees

Prohibits Non-California Choice of Law and Forum Selection Clauses

California law has long prohibited the enforcement of employee noncompetes. However, a new California law, "Section 925," which applies to contracts between employers and employees who primarily reside and work in California, goes even further. Section 925, which applies only to contracts that are entered into, modified, or extended on or after January 1, 2017, prohibits employers from requiring that their California employees agree as a condition of employment to noncompetes that mandate application of non-California law or litigation outside of California. Under Section 925, these non-California choice of law and forum selection clauses are "voidable by the employee" and the law permits a court to award reasonable attorney's fees to an employee who successfully voids a non-California forum selection clause or non-California choice of law provision.

The potential impact of Section 925 is dramatic. Consider the case of a California-based employee of a Massachusetts company who signs a noncompete with provisions requiring application of Massachusetts law and litigation in a Massachusetts court. If the noncompete is not subject to Section 925, and the employee violates the agreement by working for a competitor, any

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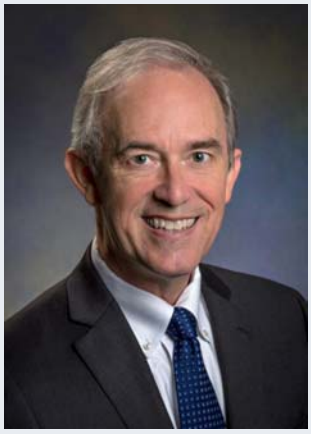

lawsuit over the agreement must go forward in Massachusetts, where a judge is likely to apply Massachusetts law, which permits enforcement of noncompetes. The former employee has no recourse to California courts, which do not enforce employee noncompetes.

However, if the California-based employee's noncompete is subject to Section 925, the employee may beat the employer in a race to the courthouse and sue the out-of-state employer in a California court. There, the California judge almost certainly will void the Massachusetts forum selection and choice of law provisions. The judge will then apply California law to the noncompete and almost certainly find the noncompete is unenforceable. Moreover, under Section 925, and perhaps even the terms of the noncompete, the California judge may then order the employer to pay the former employee's attorney's fees.

There are exceptions to Section 925 that employers may utilize to avoid its impact. The new law does not apply to a contract with an employee who was represented by counsel in negotiating the forum selection of choice of law provisions. Employees rarely negotiate their noncompetes and even more rarely are they represented by counsel in negotiations over their noncompetes. Accordingly, the exception is not likely to have much impact. However, to avoid Section 925, employers may require that prospective employees engage counsel to negotiate noncompetes on their behalf. Employers also may provide employees or prospective employees with some benefit other than employment in exchange for signing a noncompete. Doing so likely would avoid Section 925 which applies only to contracts entered into as a "condition of employment."

If you or your company will be impacted by Section 925, we look forward to advising you about the law and how courts inside and outside California are implementing the law.

***John R. Bauer, a partner with Lawson & Weitzen, LLP, prepared this alert. John regularly litigates cases involving noncompetition agreements, trade secrets and other business matters. If you have questions concerning California "Section 925" or any issue relating to noncompetition agreements, trade secrets, or similar topics, do not hesitate to contact him at (617) 439-4990 or* jbauer@lawson-weitzen.com.**