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Hotel California Checks Out Of State Forum Selection Clauses

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Multistate employers know that the state of California is hostile to restrictive covenants and generally regard non-compete agreements as unenforceable. Over time, some multistate employers have developed a two-step process (one of which has been scrapped by a newly adopted law) to protect their interests in California and sidestep the state's roadblocks:

1. Require employees to sign confidentiality or non-disclosure agreements so that even if unfaithful employees subsequently leave to work for a competitor, the employer still has some recourse to limit the damage they can cause.

2. Identify the employer's home state (not California) as the place where any disputes would be resolved – a provision known as a "forum selection clause." For similar reasons, many employers who have mandatory arbitration provisions in their employment agreements select their home jurisdictions – outside of California – as the place to fight about those claims.

As of Jan. 1, however, the second tool has been taken away from employers. Under the new California law, the state no longer recognizes foreign choice of forum language in employment contracts. The new law prohibits an employer from requiring an employee who primarily resides and works in California to agree, as a condition of employment, to adjudicate claims that arise in California in another jurisdiction or that would deprive the employee of the substantive protections of California law. Employers that ignore the law by suing in another state run the risk of having to pay the employee's attorney's fees for having done so. For example, if an employer has a boilerplate agreement that points to filing claims in another state (say, Nevada), and then files suit in Nevada, the employee can contest it and get his attorney paid for having to file a motion to dismiss. The provision technically is "voidable," so theoretically, the employee could voluntarily agree to litigate a claim in another jurisdiction. But, if an employer sues outside of California to take advantage of home-field jurisdiction, the chances that the employee – and his or her lawyer – will simply roll over and agree to give up a ready-made motion to dismiss are pretty slim. Businesses with employees in California should consult their lawyers and make sure their employment agreements are up-to-date and compliant with the new law.

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