

Key Employee Mobility Issue Survives California Supreme Court Review

*He who fights and runs away / May live to fight another day;
But he who is battle slain / Can never rise to fight again.¹*

I. Overview

In late July 2025, the California Supreme Court issued its long-awaited decision in *EpicentRx, Inc. v. Superior Court of San Diego County*. The case ostensibly addressed whether California’s traditional public policy in favor of a right to a jury trial rendered unenforceable a forum selection clause in a certificate of incorporation, which chose Delaware Chancery Court (a court of equity) as the situs for stockholder disputes. The Court’s holding that the clause at issue was enforceable was typically viewed as a “major win for Delaware forum-selection clauses,” as it seemed to deliver “a measure of commercial certainty for Delaware corporations with stockholders residing in California.”²

But the conclusion of many observers that “[t]he Court embraced a pro-business, pro-contractual certainty approach”³ does not necessarily apply outside the corporate law and shareholder litigation context. The Court’s ultimate holding was narrow, and it rejected the opportunity to standardize California’s treatment of forum selection clauses with the approach utilized by federal courts. Instead, the Court largely maintained decades of California common law, in which courts have held that such clauses are unenforceable in California to the extent that they act to diminish a strong or fundamental public policy of the state. While the Court punted several issues for later resolution, its ruling will have profound consequences for litigation involving the interaction between post-employment restrictive covenants and employee mobility rights—an area in which forum selection clauses play an outsized role and, as some have argued, can lead to the circumvention of worker protections. This Note looks at those implications, as *EpicentRx* means that California’s liberal freedom of employment regime lives to fight another day.

II. The Relevant Legal Framework Leading Up to *EpicentRx*

a. The Nationwide State of Post-Employment Restrictive Covenants

The enforceability of post-employment restrictive covenants has been a highly contested legal battleground in recent years. Companies are increasingly influencing competition and shaping

¹ Ancient Greek aphorism popularized by Oliver Goldsmith, 2 THE ART OF POETRY ON A NEW PLAN 147 (1761).

² See, e.g., Alert, Goodwin Procter LLP, *California Supreme Court Delivers Major Win for Delaware Forum-Selection Clauses* (July 22, 2025), available at <https://www.goodwinlaw.com/en/insights/publications/2025/07/alerts-practices-cldr-california-supreme-court-delivers-major-win>; Securities Litigation + Enforcement, Cooley LLP, *California Supreme Court Saves Delaware Forum Selection Clauses in Corporate Certificates of Incorporation* (Aug. 7, 2025), available at <https://sle.cooley.com/2025/08/07/california-supreme-court-saves-delaware-forum-selection-clauses-in-corporate-certificates-of-incorporation/>.

³ Jessica Lewis, Michael Bongiorno & Timothy Perla, *Delaware Forum Selection Clause Binds California Shareholders*, BLOOMBERG LAW (Aug. 6, 2025).

the lives of their employees for years after the termination of the employment relationship through the use of confidentiality and non-disclosure agreements (which prohibit the sharing of confidential or proprietary information with third parties), non-solicitation agreements (which forbid employees leaving for a competitor from recruiting their former co-workers), and non-compete agreements (which restrict the ability of departing employees to work in a business area that directly competes with their former employer). Approximately one in five American workers is currently subject to an employment contract with restrictive covenants, and over two-thirds of all U.S.-based executives now work under a non-compete agreement—a decidedly “upward trend.”⁴ Proponents of post-employment restrictive covenants argue that they are needed to ensure the protection of proprietary information and trade secrets and to incentivize companies to invest in employee development, while opponents contend that such restrictions have a chilling effect on employee mobility, wages, competition, and entrepreneurship.

Efforts to create a uniform national rule regarding post-employment restrictive covenants have floundered. The Federal Trade Commission’s (“FTC”) proposed Non-Compete Clause Rule was enjoined by the United States District Court for the Northern District of Texas in August 2024,⁵ and, following the ensuing change in presidential administrations, the FTC announced on September 5, 2025, that it would dismiss its appeal, accede to the vacatur of its proposed rule, and proceed only through individual, case-by-case enforcement actions with respect to non-compete agreements.⁶ With any Congressional action exceedingly unlikely, state law will continue to play the dominant role in employee mobility litigation for the foreseeable future.

States take decidedly disparate views of restrictive covenants. For instance, Florida, already a friendly jurisdiction for non-competes, reinforced employer control over post-employment restrictions with its April 24, 2025 passage of the Contracts Honoring Opportunity, Investment, Confidentiality, and Economic Growth (CHOICE) Act.⁷ The CHOICE Act permits non-compete agreements or garden leave to extend for a duration of up to four years and, absent narrow exceptions, requires courts to preliminarily enjoin a covered employee from providing services to any business, entity, or individual that offers services “similar to” those offered by the former employer during the past three years. By contrast, California, which revised and expanded its traditional protections to current and prospective California employees in January 2024, now voids the application of virtually any non-compete or non-solicitation agreement in an employment context, regardless of where and when the contract was signed, and renders any attempt to enforce such restraints a civil violation and an act of unfair competition that entitles the employee to injunctive relief, actual damages, and attorneys’ fees.⁸

b. The Forum-Selection Clause Issue and Its Impact on the Ability of Companies to Contract Around California’s Pro-Mobility Laws

However, in late 2023, the California Supreme Court granted certiorari on a case that potentially threatened to upend the state’s robust pro-mobility regime—*EpicentRx, Inc. v. Superior*

⁴ Non-Compete Clause Rule, 89 Fed. Reg. 38342-01, 38346 (proposed May 7, 2024).

⁵ See *Ryan, LLC v. Fed. Trade Comm’n*, 746 F. Supp. 3d 369 (N.D. Tex. 2024).

⁶ Press Release, Federal Trade Commission, *Federal Trade Commission Files to Accede to Vacatur of Non-Compete Clause Rule* (Sept. 5, 2025), available at <https://www.ftc.gov/news-events/news/press-releases/2025/09/federal-trade-commission-files-accede-vacatur-non-compete-clause-rule>.

⁷ See Fla. Stat. Ann. § 542.335; 2025 Florida House Bill No. 1219.

⁸ See, e.g., Cal. Bus. & Prof. Code §§ 16600, 16600.1, 16600.5.

*Court of San Diego County.*⁹ During the lengthy year-and-a-half period in which *EpicentRx* was pending before it, the California Supreme Court grabbed-and-held a handful of similar cases involving forum selection clauses, including some that involved post-employment restrictive covenants, which led many to question whether a material change was imminent.

In practice, the enforcement of a forum selection clause is often outcome determinative in employment litigation. Employers that utilize employment contracts with restrictive covenants will almost never willingly select California as the applicable forum or law, and, when faced with a case involving conflict of law issues, foreign states are decidedly less likely to choose the application of California law over the law specified in an employment agreement—typically, their own law or the law of a similarly pro-restrictive covenant jurisdiction. This raises the specter that companies may “contract around” the protections that would otherwise apply under California law, thereby rendering the state’s various efforts to encourage employee mobility a practical nullity.¹⁰

Current California employees—*i.e.*, those who primarily reside and work in California—are protected in part by California Labor Code § 925. Section 925 allows California employees whose contracts have been entered into, modified, or extended after January 1, 2017, the right to void any provision imposed as a condition of employment that requires them to “adjudicate outside of California a claim arising in California” or deprives them “of the substantive protection of California law with respect to a controversy arising in California.”¹¹ In 2022, the Ninth Circuit held that state law determines the threshold “upstream question of whether the contract sought to be enforced includes a viable forum selection clause,” and thus California employees can effectively invoke Section 925 to excise an unfavorable forum selection clause from their employment agreements.¹² Accordingly, current California employees have a vehicle that, even in the face of an unfavorable foreign forum-selection or choice-of-law provision, substantially assists them in arguing that “California law shall govern the dispute.”¹³

But at least two categories of California employees fall outside the protections of Labor Code § 925: (1) current California residents who recently migrated to the state as new hires or in search of work, but who remain subject to post-employment restrictive covenants they executed in a foreign jurisdiction while working for a foreign employer; and (2) residents of foreign states who have been hired by a California-based employer or seek employment in California, but have not yet moved to California, and who are likewise subject to employment contracts with post-employment restrictive covenants executed in a foreign jurisdiction while working for a foreign employer. Along with California employers, these are the two classes of persons the California Legislature explicitly intended to protect from post-employment restrictive covenants when it enacted California Business

⁹ No. S282521.

¹⁰ See, e.g., *DraftKings v. Hermalyn*, 732 F. Supp. 3d 84 (D. Mass. 2024).

¹¹ Cal. Labor Code §§ 925(a)(1)–(2), 925(b).

¹² See *DePuy Synthes Sales, Inc. v. Howmedica Osteonics Corp.*, 28 F.4th 956, 964–66 (9th Cir. 2022).

¹³ Cal. Labor Code § 925(b). However, despite the statute’s language, some “district courts outside California considering choice of law provisions and forum selection clauses have refused to apply § 925 when another state’s law has been chosen by the parties,” *Westrock Servs., LLC v. Roberts*, 2022 WL 1715964, at *3 n.6 (N.D. Ga. May 4, 2022) (collecting cases), or have “respectfully disagree[d] with the Ninth Circuit’s analysis” in *DePuy. Ameri-Fab, LLC v. Vanguard Energy Partners, LLC*, 646 F. Supp. 3d 795, 803 n.4 (W.D. Tex. 2022). Accordingly, not even current California employees covered by Labor Code § 925 can guarantee that post-employment restrictive covenants against them will not be enforced when proceeding in a foreign jurisdiction.

& Professions Code § 16600.5 in January 2024.¹⁴ Unlike current California employees, these classes of persons do not have a statutory right under California law to void a foreign forum-selection provision that, as a practical matter, may lead to the imposition of contrary foreign law.

Nevertheless, for over 40 years, California trial and intermediate appellate courts have recognized a common-law “public policy exception” to the enforcement of a forum selection clause.¹⁵ Where the enforcement of a forum selection clause would “substantially diminish the rights of California residents in a way that violates our state’s policy,” California courts have typically concluded that forum selection clauses were both “unreasonable” and unenforceable.¹⁶ Not only that, many of these courts “reversed” the burden “when the claims at issue are based on unwaivable rights created by California statutes”; in that situation, “the party seeking to enforce the forum selection clause” was to bear “the burden of showing that litigating the claims in the contractually designed forum” would not diminish the substantive rights afforded by California law.¹⁷

But, outside of *Smith, Valentino & Smith, Inc. v. Superior Court*, a 1976 decision that established a general presumption that forum selection clauses were enforceable but recognized that “the result” might be “different in cases that ‘rest upon public policy considerations’” not at issue in that litigation,¹⁸ the California Supreme Court had not provided real guidance in this area. It had not demarcated the parameters of the supposed “public policy exception.” Nor had it definitively weighed in on whether, as some courts subsequently held, the choice-of-law and forum-selection issues are “inextricably bound up” such that the determination of what rights the plaintiff would enjoy in a foreign jurisdiction is a “prerequisite to a determination of whether the forum selection clause should be enforced.”¹⁹

c. *EpicientRx* Creates the Opportunity for the California Supreme Court to Weigh in on the Forum-Selection Clause Issue

EpicientRx represented a vehicle for the California Supreme Court to weigh in on the relationship between forum selection clauses and California public policy. In that case, both the trial court and the Court of Appeal, Fourth District, concluded that the enforcement of forum selection clauses in *EpicientRx*’s corporate documents, which chose the Delaware Court of Chancery as the exclusive forum to resolve shareholder disputes, would operate as an implied waiver of the plaintiff-shareholder’s right to a jury trial under California law (as the Delaware Court of Chancery sits exclusively as a court of equity).²⁰ Reasoning that *EpicientRx* could not meet its burden of showing that the enforcement of the forum selection clause would not “contravene a fundamental California policy,” one which involved “zealously guarding the inviolate right to a jury trial,”²¹ the lower courts

¹⁴ See 2023 Cal. Legis. Serv. Ch. 157 § 1 (S.B. 699). Section 16600.5 is aimed at rendering unenforceable post-employment restrictive covenants “regardless of whether the contract was signed and the employment was maintained outside of California.” Cal. Bus. & Prof. Code § 16600.5(b).

¹⁵ See *Hall v. Super. Ct.*, 150 Cal. App. 3d 411, 418 (1983).

¹⁶ See, e.g., *Am. Online, Inc. v. Super. Ct.*, 90 Cal. App. 4th 1, 5, 12 (2001); *G. Cos. Mgmt., LLC v. LREP Ariz., LLC*, 88 Cal. App. 5th 890, 898 (2023); *Verdugo v. Alliantgroup, L.P.*, 237 Cal. App. 4th 141, 147 (2015); *Wimsatt v. Beverly Hills Weight Clinics Int’l, Inc.*, 32 Cal. App. 4th 1511, 1520–24 (1995).

¹⁷ *Verdugo*, 237 Cal. App. 4th at 147.

¹⁸ *Hall*, 150 Cal. App. 3d at 416 (quoting *Smith, Valentino & Smith, Inc. v. Super. Ct.*, 17 Cal. 3d 491, 496 (1976)).

¹⁹ *Hall*, 150 Cal. App. 3d at 416.

²⁰ See *EpicientRx v. Super. Ct.*, 95 Cal. App. 5th 890, 904 (2023).

²¹ *EpicientRx*, 95 Cal. App. 5th at 905 (quoting *Handoush*, 41 Cal. App. 5th at 739).

declined to enforce the Delaware forum selection clause in the company's certificate of incorporation.

Once before the California Supreme Court, both the appellants and several *amici curiae* saw the case as an opportunity for the Court to conduct a wholesale reversal of decades of California precedent. They argued that the governing California state-law analytical framework concerning forum selection clauses should be rejected. While *EpicentRx* itself did not involve employee mobility issues, the arguments proffered on appeal had the potential to drastically impact the protections from post-employment restrictive covenants recently established by the California Legislature for new residents and prospective hires in California Business & Professions Code § 16600.5, and possibly even for longstanding California-based employees otherwise covered by Business & Professions Code §§ 16600 and 16600.1 and Labor Code § 925. If a California court could not consider the ultimate impact of a forum selection clause on the fundamental right to employee mobility under California law, in-state and foreign employers could have more confidence in their ability to avoid California's protections, compel the proceeding to a foreign court, and achieve the imposition of foreign law favoring post-employment restrictive covenants.

The *EpicentRx* appellants and various *amici curiae* made the following four arguments in challenging California's traditional evaluation of forum selection clauses. *First*, conditioning the forum selection clause's enforceability on predictions about which state's law will apply, or what substantive result might be reached, in the designated forum mixes up the forum-selection analysis with the choice-of-law analysis. As federal courts typically conclude, only whether the forum selection clause itself violates public policy (or whether it was the product of fraud or undue influence) should be considered, not its ultimate effects.²² *Second*, while California law can stand apart from federal and other states' law, in this specific area—where parties are (allegedly) freely negotiating a contractual bargain—uniformity, certainty, and predictability are so important that California should not break from the pack. *Third*, enforcing a forum selection clause does not undermine California public policy or substantive rights. Foreign courts still need to apply a choice-of-law analysis in which the “substantial relationship” of the parties to the chosen law is assessed. Litigants before foreign courts can make the same arguments about California's important rights, and those courts may apply California law, if warranted. *Fourth*, if California law adopts an approach by which it holds onto cases irrespective of foreign forum selection clauses, other jurisdictions will think twice before they enforce California forum selection clauses for California residents.

III. Summary of the *EpicentRx* Decision

While it did not resolve all outstanding questions concerning California's treatment of forum selection clauses, the California Supreme Court's decision in *EpicentRx*, announced on July 21, 2025,²³ was a significant—if incomplete—step towards clarifying the operative landscape. Various aspects of the Court's analysis and ultimate holding, described below, have particular importance to

²² See, e.g., *Balducci v. Congo, Ltd.*, 2017 WL 4176464, at *6 & n.3 (N.D. Cal. Sept. 21, 2017) (identifying California's practice of analyzing the forum selection and choice-of-law provisions together with a view to how they may “diminish unwaivable California statutory rights” as “contrary to federal law,” which generally holds that “the choice-of-law analysis is irrelevant to determining if the enforcement of a forum selection clause contravenes a strong public policy”).

²³ 18 Cal. 5th 58 (2025).

employment litigation.

- The Court reaffirmed the general rule, which it expressed nearly 50 years ago in *Smith*, that forum selection clauses are presumptively valid in California, such that “[e]ven a California resident will normally be bound by a forum selection clause.” The Court noted that its view is consistent with “the ‘modern trend’ favoring enforceability” because forum selection clauses are “bargained for by the parties” and there is a need to protect “their legitimate expectations” expressed in a contract.²⁴
- To the extent that some appellate and trial court decisions following *Smith* required the proponent of a forum selection clause to show that its application would not diminish the fundamental rights of a California resident, those decisions were incorrect and are now disapproved. The unambiguous burden is on the party opposing the application of a forum selection clause “to show that its enforcement would be in violation of the settled public policy of this state, or injurious to the morals of its people.”²⁵
- Notwithstanding the general rule that forum selection clauses are enforceable, it remains the case that “a court may refuse to enforce a contractual forum selection clause on public policy grounds, just as it may refuse to enforce other contractual provisions that violate a fundamental public policy of California.” Thus, “courts should refuse to enforce a forum selection clause if its enforcement would be contrary to a strong or fundamental public policy of this state.”²⁶
- The Court noted that the California Legislature “has identified a number of circumstances in which enforcement of a forum selection clause would violate public policy.” These include its laws prohibiting forum selection clauses in California franchise agreements, consumer personal property lease agreements, construction subcontracts, goods and services under small claims jurisdiction, and structured settlement transfer agreements. Most importantly, for employment litigation purposes, these also include California’s Labor Code, including Section 925 (which protects current California employees from forum selection clauses requiring them to adjudicate outside of California claims arising in California).²⁷
- Through the examples it cited, the California Supreme Court appeared to indicate that the fundamental nature of a policy may be revealed by the California Legislature’s inclusion of an anti-waiver provision in a statute. For instance, California’s Labor Code provides that “no provision of this article can in any way be contravened or set aside by a private agreement, whether written, oral, or implied.”²⁸

²⁴ *Id.* at 74, 76–77.

²⁵ *Id.* at 76 & 84 n.7.

²⁶ *Id.* at 75.

²⁷ *Id.* at 77–78.

²⁸ *Id.*; see also Cal. Labor Code § 219(a).

- However, other language employed by the Court indicates that the presence of an express anti-waiver provision is not a condition precedent to finding a “strong public policy” sufficient to render unenforceable a forum-selection clause. For instance, the Court noted that the statutes it cited “explicitly *or implicitly* void[] a private agreement that waives a statutory right.”²⁹
- The Court articulated a “substantive v. procedural right” distinction relevant to the enforcement of forum selection clauses. It concluded that the clause at issue was enforceable, notwithstanding the appellee’s arguments that, as a practical matter, its choice of the Delaware Chancery Court as the relevant forum would result in a pre-dispute waiver of a right to a jury trial. The Court differentiated the “California right to a jury trial” from “the substantive rights at issue” in other intermediate appellate decisions that remain good law (including cases involving the California Labor Code) because “the civil jury trial right is a procedural right, not a substantive one.” The Court’s conclusion that the pertinent clause was enforceable was bolstered by the fact that language in California’s statutes and rules regarding the right to a jury trial did “not announce a public policy against predispute jury waivers writ large, untethered to their enforcement in a California forum,” and California law contains important exceptions that allow the right to a jury trial to be waived in certain contexts.³⁰ The Court thus concluded that a jury trial waiver, standing alone, is insufficient to void a forum selection clause.

IV. The Aftermath of the *EpicentRx* Decision

While *EpicentRx* provided greater clarity concerning the interaction between California law and forum selection clauses than previously existed, it left open several important questions—some of which may be resolved via other appeals now pending. On September 3, 2025, the California Supreme Court ordered that *Lathrop v. Thor Motor Coach*,³¹ a case previously deferred pending the consideration of *EpicentRx*, be considered the new lead case, with other matters previously held with *EpicentRx* to be further deferred pending *Lathrop*’s disposition. Other deferred cases were transferred back to the Court of Appeal “with directions to vacate its decision[.]”³²

The Court further directed that the litigants in *Lathrop* submit new briefing that addresses, *inter alia*: (1) “Where a party alleges that enforcement of a forum selection clause would result in a waiver of the party’s unwaivable statutory rights, what is the showing required to enforce (or to avoid enforcement) of such a clause, and which party bears the burden of proof of the issue?”; and (2) “If enforcement of a choice of law clause would result in a waiver of a party’s unwaivable statutory rights, is the choice of law clause severable from the remainder of the agreement?”.

As noted above, while the *EpicentRx* decision made clear that a pre-dispute jury waiver does not preclude the enforcement of a forum selection clause, it did not definitively resolve whether an express anti-waiver provision was required for a California law to be considered sufficiently strong

²⁹ *Id.* at 83 (emphasis added).

³⁰ *Id.* at 82–83.

³¹ *Lathrop v. Thor Motor Coach* (No. S287893).

³² *Comedy Store v. Adams*, No. S288469, 2025 WL 2536171 (Cal. Sept. 3, 2025).

or fundamental that its diminishment would support a public policy exception to the enforcement of a forum selection clause. This distinction is potentially significant in the employment litigation context. California's Labor Code contains an explicit anti-waiver provision, while its Business & Professions Code does not.³³ Accordingly, litigants may continue to debate whether the rights to freedom of employment afforded under Business & Professions Code §§ 16600, 16600.1, and 16600.5 are sufficiently "unwaivable" or "fundamental" as to override a foreign forum selection clause. Because these statutes protect a broader class of persons than Labor Code § 925 and directly invalidate post-employment restrictive covenants, this will remain a hot-button issue until further clarity is afforded by California's courts.

Ultimately, *EpicentRx's* conclusion that fundamental California policy is relevant to, and may override, foreign forum selection clauses will ensure that California continues to be a jurisdiction of choice for employees and new employers seeking to avoid the enforcement of post-employment restrictive covenants. Parallel litigation is increasingly common in this area, as former employers typically seek immediate relief to enforce restrictive covenants in foreign jurisdictions pursuant to forum selection clauses, while employees (often in conjunction with their new employer) seek immediate relief to void those covenants in California state court. While "potentially conflicting judgments naturally result from parallel proceedings," dueling cases in separate jurisdictions may proceed "until one or the other reaches final judgment and becomes *res judicata*."³⁴ Thus, rather than eliminate the race to a final judgment, as some advocates desired, *EpicentRx* will perpetuate the need for skilled counsel, fluent in California law, who are able to swiftly pursue or defend employee mobility cases with little advance notice.

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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³³ Intermediate California appellate courts have previously concluded that the right to "freedom of employment" is so strong that it cannot be waived by private agreement. See *Weber, Lipshie & Co. v. Christian*, 52 Cal. App. 4th 645, 659 (1997). Moreover, in enacting Section 16600.5, the California Legislature stated that the right to employee mobility is "paramount to competitive business interests." 2023 Cal. Legis. Serv. Ch. 157 § 1(f) (S.B. 699).

³⁴ *Advanced Bionics Corp. v. Medtronic, Inc.*, 29 Cal. 4th 697, 708 (2002); *Fowler v. Ross*, 142 Cal. App. 3d 472, 477 (1983).

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