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E-Alert: Mandatory Employment Arbitration Agreements
A Risky Proposition After Ninth Circuit Ruling – At Least For The Moment

September 2021

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On September 15, 2021, the Ninth Circuit Court of Appeals revived a California law, Assembly Bill 51 ("AB 51"), which effectively bans mandatory employment arbitration agreements for employment-related claims.

In its decision in *Chamber of Commerce v. Bonta*, the Ninth Circuit disagreed with the federal District Court, which had issued a preliminary injunction against enforcement of AB 51 on the ground that it was preempted by the Federal Arbitration Act (FAA). The Ninth Circuit vacated (*i.e.*, set aside) the preliminary injunction, which means that AB 51 is now the law and employers act at their own risk if they continue to make the signing of an arbitration agreement a condition of employment.

AB 51 = An Attack on Mandatory Arbitration Agreements in the Employment Context

Two years ago, AB 5 was signed into law adding section 432.6 to the California Labor Code and section 12953 to the California Government Code. Together, these two code sections – which had become effective on January 1, 2020, before being enjoined in March 2020 – effectively ban mandatory employment arbitration agreements for employment-related claims. Under AB 51, employers may ***not*** require employees to enter into arbitration agreements as a condition of employment, continued employment, or receipt of employment-related benefits. Instead, arbitration agreements must be entered into voluntarily.

Other provisions of AB 51 (Labor Code § 433 and Government Code § 12953) make violations of the law a misdemeanor offense and subject employers to potential civil sanctions.

The Ninth Circuit's Decision – Setting Up The Next Round of the Fight?

In a 2-1 decision, the Ninth Circuit concluded that AB 51's prohibition against mandatory arbitration provisions is not preempted by the FAA because the law simply seeks to ensure that arbitration agreements are consensual. According to the majority opinion, Labor Code section 432.6 does nothing more than "codify what the enactors of the FAA took as a given: that arbitration is a matter of contract and agreements to arbitrate must be voluntary and consensual."

One of the judges issued a sharp dissent, faulting the majority decision for rubberstamping California's "too-clever-by-half workaround" to avoid FAA preemption. The dissent explained that the decision not only is contrary to holdings from other circuit courts (First and Fourth Circuits), but also that the United States Supreme Court repeatedly has had to reign in California's attempt to sidestep the FAA: "Like a classic clown bop bag, no matter how many times California is smacked down for violating the Federal Arbitration Act (FAA), the state bounces back with even more creative methods to sidestep the FAA."

This case could end up before the United States Supreme Court, particularly since the Ninth Circuit created a split of authority with other circuit courts. We expect that the Chamber of Commerce and other plaintiffs in this case will almost immediately seek *en banc* review from the full Ninth Circuit and/or *certiorari* from the United States Supreme Court.

What Should Employers Do Now?

At least for the moment, AB 51 is the law in California. Employers should review their current arbitration agreements and the process for implementing their arbitration agreements.

If an employer currently has a voluntary arbitration agreement, then AB 51 likely requires no changes. (Arbitration agreements with opt-out procedures are not considered voluntary under AB 51.) However, if an employer currently makes the signing of an arbitration a condition of employment (or continuing employment), the employer should consider changing this practice and switching to a voluntary arbitration agreement. While an employer could choose to take a wait-and-see approach and hope that the Ninth Circuit's decision is reversed by the full Ninth Circuit or the United States Supreme Court, the employer would be doing so at its own risk, especially with California plaintiffs' attorney wasting no opportunity to file PAGA lawsuits.

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