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California Employers in Limbo Again on Mandatory Arbitration

Ninth Circuit Upholds AB 51, More Litigation Anticipated

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For years, California has looked for ways to preclude employers from requiring that employment disputes be resolved through arbitration and/or placed obstacles to the enforcement of arbitration agreements. In yet another effort to do so, in 2019 the California Legislature enacted AB 51, which makes it unlawful for employers to require that, as a condition of employment, continued employment, or receipt of an employment-related benefit, any applicant or an employee waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act or the California Labor Code, "*including the right to file and pursue a civil action* or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation." AB 51 also makes it unlawful to threaten, retaliate, terminate, or discriminate against an applicant or employee because they refuse to consent to such a waiver. Prevailing plaintiffs can obtain injunctive relief, other remedies, and attorney's fees.

According to its terms, AB 51 applies to contracts entered into, modified, or extended on or after January 1, 2020. It does not apply to post-dispute settlement agreements or negotiated severance agreements. Interestingly, despite its not-so-subtle hostility towards arbitration, AB 51 also provides: "Nothing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act." According to the bill's terms, violations of AB 51 are misdemeanors, punishable by up to 6 months imprisonment and/or by a fine not exceeding $1,000. (And, of course, AB 51 adds sections to the Labor Code, which means it could lead to liability under the Private Attorney General Act).

Unsurprisingly, a number of business groups filed a lawsuit to enjoin AB 51's enforcement as violating the Federal Arbitration Act (FAA). A California federal district court initially issued a temporary restraining order and, later, a preliminary injunction, halting the bill's enforcement. The injunction was appealed to the United States Court of Appeals for the Ninth Circuit where it remained for over a year and a half. However, on September 15, 2021, a divided Ninth Circuit panel issued a 2-1 opinion, holding that AB 51 was wrongfully enjoined. The panel majority essentially concluded that the FAA only protects consensual agreements to arbitrate, and because AB 51 supposedly aims to ensure that employees voluntarily enter into arbitration agreements, the two are not in conflict. The panel majority held, however, that the civil and criminal sanctions attached to AB 51 were preempted by the FAA because they punished an employer for entering into an arbitration agreement (as opposed to the other parts of AB

51, which are “solely concerned with pre-agreement employer behavior”).

Judge Sandra Ikuta, the minority voice on the panel, issued a spirited dissent, with a beginning that says it all:

> 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 time, California has enacted AB 51, which has a disproportionate impact on arbitration agreements by making it a crime for employers to require arbitration provisions in employment contracts. Cal. Lab. Code §§ 432.6(a)–(c), 433; Cal. Gov't Code § 12953. And today the majority abets California's attempt to evade the FAA and the Supreme Court's caselaw by upholding this anti-arbitration law on the pretext that it bars only nonconsensual agreements. The majority's ruling conflicts with the Supreme Court's clear guidance in *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421, 1428–29 (2017), and creates a circuit split with the First and Fourth Circuits. Because AB 51 is a blatant attack on arbitration agreements, contrary to both the FAA and longstanding Supreme Court precedent, I dissent.

The Ninth Circuit panel remanded the case back to the district court for further proceedings. It is expected that the business groups will seek review by the full Ninth Circuit (as this decision was issued by a 3-judge panel) and/or eventually pursue review by the United States Supreme Court.

Meanwhile, however, California employers are left wondering what AB 51 means for the future of employment arbitration in California. While we know that AB 51 does not affect arbitration agreements that pre-date January 1, 2020, many other questions remain. Notably, AB 51 does not alter any of the already existing California requirements for valid arbitration agreements (e.g., that the employer bear costs unique to arbitration, that the agreement must allow for all remedies an employee can recover in court and reasonable discovery, that the agreement provide for a neutral arbitrator and the issuance of a written reasoned award, etc.). Accordingly, these requirements remain in effect and should be carefully considered if an employer wishes to pursue arbitration agreements.

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depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.