EMPLOYEE ARBITRATION UPDATE: THE NINTH CIRCUIT REVERSES DISTRICT COURT'S CONCLUSION THAT CALIFORNIA ASSEMBLY BILL 51 IS PREEMPTED BY THE FEDERAL ARBITRATION ACT (FAA)

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U.S. Labor, Employment, and Workplace Safety Alert

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California employers may no longer require employees to sign arbitration agreements covering claims under the Fair Employment and Housing Act (FEHA), the state's discrimination, harassment, and retaliation law, or the California Labor Code—which covers wages, hours, and other terms and conditions of employment.

In a decision issued on 15 September 2021, *Chamber of Commerce v. Bonta*, the Ninth Circuit Court of Appeals overturned a U.S. District Court decision that previously enjoined enforcement of California Assembly Bill 51 (AB 51).[1] AB 51 prohibits employers from requiring applicants or employees—as a condition of employment, continued employment, or receipt of any employment benefit—to agree to arbitrate claims brought under the FEHA or the California Labor Code. It applies to any agreement to "waive any right, forum, or procedure" for a violation of any provision of the FEHA or the Labor Code, which could potentially include non-disparagement clauses and non-disclosure agreements. AB 51 notes that any agreement requiring an employee to opt out of an agreement or take any other affirmative action to preserve their rights violates the statute. AB 51 also prohibits employers from retaliating against any applicant or employee who refuses to sign an arbitration agreement or other agreement covered by the statute. The law applies to all agreements entered into, modified, or extended on or after 1 January 2020. AB 51 *does not* apply to post-dispute settlement agreements or negotiated severance agreements.

The U.S. District Court for the Eastern District of California previously determined that AB 51 was preempted by the FAA. The Ninth Circuit disagreed, concluding that AB 51 merely prohibits employers from forcing employees to sign mandatory arbitration agreements and does not prohibit arbitration agreements that are voluntary and consensual. The circuit court reasoned that the FAA does not require any party to arbitrate a dispute if they do not agree to do so.

Although the Ninth Circuit concluded that AB 51's restrictions are enforceable, it upheld the District Court's decision that the statute's provisions for civil and criminal penalties are preempted by the FAA, to the extent they apply to *executed* arbitration agreements covered by the FAA. The court reasoned that these provisions "stand as an obstacle to the purposes of the FAA" and "necessarily include punishing employers for entering into an agreement to arbitrate." As a result, employers will not be subject to civil or criminal penalties under the statute for

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arbitration agreements with employees that have already been executed. Prevailing employees enforcing their rights under AB 51 will, however, be entitled to attorneys' fees.

The U.S. Chamber of Commerce, a party to the lawsuit to enjoin AB 51, is currently reviewing the Ninth Circuit's decision. It is possible the Chamber may seek review by the U.S. Supreme Court because, as noted in the strongly-worded dissent, the majority's ruling creates a circuit split with the First and Fourth Circuits and may conflict with U.S. Supreme Court precedent. If the case is appealed to the U.S. Supreme Court, the party petitioning for certiorari will need to file a motion to stay the Ninth Circuit's ruling. The ruling will not be stayed automatically simply because a petition for certiorari is filed. If the stay is granted, it will continue until the Supreme Court's final disposition on the case.

For now, California employers should review their arbitration agreements and policies to ensure they are in compliance with AB 51 and the Ninth Circuit's decision and revise them as necessary. Employers may not require employees to sign an agreement or policy providing for arbitration of claims under the FEHA or the Labor Code, even if the agreement contains a voluntary opt-out clause. Employers may ask employees to voluntarily agree to arbitrate, but they will need to pay close attention to the process by which arbitration agreements are executed, as the Ninth Circuit has stressed the importance of mutually agreeable and voluntary agreements. Employers must also refrain from taking adverse action against any applicant or employee who declines to sign an arbitration agreement.

As the Ninth Circuit's decision notes, AB 51 may also apply to non-disparagement and non-disclosure agreements to the extent they waive any “right, forum or procedure” under the FEHA or the Labor Code. It is not clear how this broadly worded provision will be applied. California law already prohibits employers from requiring employees to sign a release of claims under the FEHA as a condition of employment or any agreement prohibiting disclosure of information related to unlawful acts in the workplace. In sum, California employers should consider reviewing their agreements to ensure compliance with AB 51 and the Ninth Circuit's ruling.

FOOTNOTES

[1] AB 51 added a new Section 12953 to the California Government Code and a new Section 432.6 to the California Labor Code.

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