Alert

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Ninth Circuit Nixes California's AB 51, Reopening the Door for Mandatory Employment Arbitration

Earlier this week, a Ninth Circuit panel ruled, in the case of *Chamber of Commerce of the United States of America v. Bonta*, that California's Assembly Bill (AB) 51, which had forbidden California employers from requiring employees enter into mandatory arbitration agreements, was preempted by the Federal Arbitration Act (FAA) and is unenforceable.

AB 51 was the California Legislature's attempt to protect employees from forced arbitration by making it a criminal offense for an employer to mandate arbitration of specified claims as a condition of employment. Rather than invalidating agreements to arbitrate certain types of claims, the law sought to ensure that any employment arbitration agreement was consensual by prohibiting employers from requiring employees to sign them. Interestingly, AB 51 criminalized only the contract formation and specified that an arbitration agreement that was executed in violation of AB 51 was nonetheless enforceable. The legislature took this approach to try to avoid conflict with federal precedent, which holds that state rules which discriminate against arbitration are preempted by the FAA.

The Ninth Circuit found that the FAA preempts state laws limiting the ability of parties to form arbitration agreements, including AB 51. "Because the FAA's purpose is to further Congress's policy of encouraging arbitration, and AB 51 stands as an obstacle to that purpose, AB 51 is therefore preempted," the panel majority said. However, it did recognize that mandatory arbitration provisions may still be invalidated if they are "procedurally and substantively unconscionable, or otherwise unenforceable under generally applicable contract rules."

It is important to note that this decision does not affect the federal Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, which went into effect last year. That law provides employees the option to invalidate arbitration agreements and class or collective action waivers with respect to sexual assault and sexual harassment claims.

AB 51 was enacted in 2019, and its enforceability has always been in doubt. Just weeks after the law went into effect, the U.S. Chamber of Commerce and other business groups filed suit seeking to block it from taking effect. The lower court issued a preliminary injunction prohibiting its enforcement. That injunction was subsequently reversed in 2021, when the same three-judge panel that issued this week's ruling partially upheld AB 51, finding that the FAA did not completely preempt AB 51. Then, in August 2022, the Ninth Circuit panel elected to withdraw its prior opinion and reconsider the law's legality.

California could attempt to revive AB 51 by asking the full Ninth Circuit or the U.S. Supreme Court to review the decision. However, observers believe, in line with the strong pro-arbitration position taken by the U.S. Supreme Court in 2022's *Viking River Cruises, Inc. v. Moriana* decision, that a revival of AB 51 before a higher court would be unlikely.

The experienced Labor and Employment attorneys at Cozen O'Connor are available to assist with arbitration agreements in light of this decision, as well as all other employment issues facing California employers.

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