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Labor & Employment ADVISORY ■

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Ninth Circuit Green-Lights Employers' Continued Use of Mandatory Arbitration Agreements in California

In its recent decision in *U.S. Chamber of Commerce v. Bonta*, the Ninth Circuit held that the Federal Arbitration Act (FAA) preempts California's Assembly Bill 51 (AB 51) because it discourages the formation of arbitration agreements between employers and employees. As a result of this employer-friendly decision, California employers can continue to mandate arbitration agreements as a condition of employment without fear of civil and criminal liability (at least for the time being).

California enacted AB 51, with an effective date of January 1, 2020, to protect employees from the perceived horrors of "forced arbitration." The law broadly prohibited employers from requiring applicants and employees to enter arbitration agreements as a condition of employment or continued employment. Employers that violated AB 51 could be subjected to both civil and criminal sanctions. In an effort to avoid FAA preemption concerns, the bill was drafted to only penalize the formation of arbitration agreements, not the enforceability of these agreements. In other words, employers could be subjected to criminal and civil penalties for requiring an employee to enter an arbitration agreement, even though the agreement itself could still be enforced.

The U.S. Chamber of Commerce quickly filed a lawsuit challenging the law, and in early 2020, a California district court enjoined the enforcement of AB 51. The State of California appealed and, in 2021, the Ninth Circuit reversed the district court and held that the FAA did *not* preempt AB 51. However, the Ninth Circuit subsequently withdrew this opinion and has now issued a new opinion affirming the district court and holding that the FAA *does* preempt AB 51 entirely.

In the opinion issued on February 15, 2023, the Ninth Circuit explained that, in addition to preempting state laws affecting the enforceability of arbitration agreements, the FAA also preempts state laws that discriminate against the formation of arbitration agreements. Applying this reasoning to AB 51, the Ninth Circuit held that the law's imposition of civil and criminal penalties for forming an arbitration agreement imposes severe burdens on arbitration agreements that do not apply to contracts generally. As a result, the Ninth Circuit held the FAA preempts AB 51 in its entirety because the law's "deterrence of an employer's willingness to enter into an arbitration agreement is antithetical to the FAA's 'liberal federal policy favoring arbitration agreements.'"

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The Ninth Circuit's complete abrogation of AB 51 clears the path for Golden State employers to continue issuing mandatory arbitration agreements to their workforce. However, employers should keep abreast of subsequent developments because this case could be reviewed again if the State of California requests review of the decision by the full Ninth Circuit or seeks review of this decision by the U.S. Supreme Court.

In the meantime, employers should consider consulting with counsel to review existing arbitration agreements to confirm that they: (1) are not vulnerable to challenges based on unconscionability or other generally applicable contract defenses; (2) include class action waivers; (3) require employees to arbitrate their individual California Private Attorneys General Act claims; and (4) include carve outs for sexual harassment and sexual assault claims.

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