Thursday, March 21, 2019

There they go again! As we predicted last November, the California legislature is once again trying to outlaw arbitration agreements between employers and employees. Former Gov. Jerry Brown routinely vetoed similar bills that sought to prohibit arbitration of employment disputes on the anodyne ground that such legislation unquestionably conflicts with and is preempted by federal law. (Gov. Brown’s veto message.) However, with a new governor at the helm, apparently, the legislature thinks it may get a different outcome with Gavin Newsom. In other words, “If at first you don’t succeed….”

As everyone knows, plaintiffs’ lawyers really, really hate arbitration agreements – and, therefore, so do their many allies in the California legislature. The lawyers usually say it’s because of the confidentiality associated with such proceedings or because of the so-called “repeat-player phenomenon” in which arbitrators allegedly tend to favor institutional parties more than individuals or because of a half dozen other reasons…but the actual reason that they really, really hate arbitration is because arbitrators tend to make reasonable monetary awards – and juries can’t always be counted on to do that.

In a 2011 Cornell University ILR School study comparing employment arbitration with jury trial outcomes, the overall median damage award in arbitration cases was between 85 and 90 percent lower than the median damage award in jury trials. That is why plaintiffs’ lawyers (who share often 50-50 in their clients’ recovery) really, really hate arbitration.

The California Chamber of Commerce has identified this bill, AB 51, as a “2019 Job Killer” on the ground that the bill will only increase litigation costs and will delay the resolution of most claims because the bill will almost assuredly be struck down in the federal courts as being preempted by the Federal Arbitration Act.

AB 51 was heard in the Assembly Judiciary Committee on Tuesday, March 19th and was sent to the Committee on Appropriations with the instruction to pass as amended.

We’ll continue to monitor developments on this front as the news breaks...

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