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California Governor Signs Legislation Outlawing Mandatory Arbitration Agreements with Employees

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As employers with operations in California had feared, Governor Gavin Newsom has signed AB 51, which effectively outlaws mandatory arbitration agreements with employees – a new version of a bill that prior Governor Jerry Brown had vetoed repeatedly while he was in office.

The bill not only prohibits mandatory arbitration agreements, but it also outlaws arbitration agreements in which employees must take an affirmative action to escape arbitration, such as opting out.

And as the statute is written in broad terms that extend to waivers of statutory "procedures," it appears to extend not just to arbitration of an employee's claims, but also to waivers of jury trials and of class actions.

In short, effective January 1, 2020, an employer may only enter into an arbitration agreement with an employee in California (or a jury trial or class action waiver) if

that employee voluntarily and affirmatively chooses to enter into such an agreement. And the employer may not retaliate against an employee who chooses not to enter into such an agreement.

The analysis of the Senate Rules Committee demonstrates that the legislature was well aware that a bill prohibiting arbitration agreements could be challenged as being preempted by the Federal Arbitration Act ("FAA").

As the bill's author stated, "The Supreme Court has never ruled that the FAA applies in the absence of a valid agreement. AB 51 regulates employer behavior prior to an agreement being reached. Further, understanding the Courts' hostile precedence toward policies that outright ban or invalidate arbitration agreements, AB 51 does neither. Both pre-dispute and post dispute agreements remain allowable and the bill takes no steps to invalidate any arbitration agreement that would otherwise be enforceable under the FAA. The steps help ensure this bill falls outside the purview of the FAA."

Despite the attempt to draft a statute that avoids FAA preemption, only time will tell if such a preemption challenge is made and if it is successful.

If it is not enjoined, in whole or in part, the new legislation could have a great impact upon employers with operations in California, and upon pending and threatened litigation.

Thus, in California, it will be important for employers who wish to use arbitration agreements (or jury or class action waivers) to ensure that employees voluntarily and affirmatively elect to enter into such agreements. This may require some employers to revise their agreements and to implement new practices.

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