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California Considers Ban On Forced Arbitration By Employers

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Late last year, a bipartisan coalition in the United States Senate sponsored legislation to ban the use of mandatory arbitration agreements to settle sexual harassment and sex discrimination claims (H.R. 4734/S. 2203). While that bill—titled the "Ending Forced Arbitration of Sexual Harassment Act of 2017"—remains pending, a similar bill is also now pending before the California legislature (A.B. 3080). If enacted, A.B. 3080 would prohibit employers from requiring mandatory arbitration agreements as a condition of employment, continued employment, or the receipt of any employment-related benefit, such as a bonus.

Unlike its federal counterpart though, A.B. 3080 would prohibit *all* arbitration clauses as a condition of employment—not just those that encompass sexual harassment and sex discrimination claims. In other words, employers could no longer force employees to arbitrate labor code and civil rights claims, although employees could voluntarily choose to do so.

Supporters of the state bill, which was introduced by Assemblywoman Lorena Gonzalez Fletcher (D-San Diego), argue that because the arbitration process generally prohibits disclosure of its proceedings, arbitrations result in silencing sexual harassment allegations in the workplace. Opponents argue that the bill will result in costlier dispute resolution.

Although the bill passed in the California State Assembly in late May and is now pending in the state senate, a significant hurdle remains: convincing the Governor to sign a bill that almost certainly is preempted by the Federal Arbitration Act (FAA). The monumental United States Supreme Court decision in *Epic Systems Corp. v. Lewis* makes it abundantly clear that the FAA mandates the enforcement of arbitration agreements and was enacted "in response to a perception that courts were unduly hostile to arbitration."[1] In an attempt to proactively address preemption arguments, supporters argue that the bill "expresses no hostility to arbitration" and that the "law is replete with examples of rules to prevent injustice in the enforcement of private agreements . . . such as the strictures applied to adhesion contracts and the unconscionability doctrine that invalidates contracts too one-sided to be upheld."

In 2015, Governor Brown vetoed a similar bill that would have prohibited arbitration of claims in the employment context (A.B. 465). In his veto message, he discussed how other similar bans had "consistently [been] struck down in other states as violating the Federal Arbitration Act." For instance, in 2013, the California Supreme Court held that courts cannot impose rules that disrupt arbitral efficiency, including rules that forbid waiver of administrative procedures that delay arbitration.

Rather than wait to see what the state senate and Governor Brown do with the bill, some companies have voluntarily chosen to forego forced arbitration agreements for various reasons. Microsoft, Lyft, and several law firms are some examples. But for those employers who prefer arbitrations and intend to continue to require arbitration of employment disputes, we recommend tracking the bill's progress. If A.B. 3080 is signed by Governor Brown as written, it would only apply prospectively and would not affect existing arbitration agreements. It will then be up to the courts to weigh in on the preemption question.

[1] *Epic Systems Corp. v. Lewis*, 2018 WL 2292444, at *5 (May 21, 2018).