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Answers to 10 Questions About California's Ban on Mandatory Arbitration of Statutory Employment Claims

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California is set to become the only state to outlaw predispute mandatory arbitration of statutory employment claims. On October 10, 2019, Governor Gavin Newsom signed **California Assembly Bill (AB) 51**, which prohibits employers from requiring employees to arbitrate claims arising under the California Fair Employment and Housing Act (FEHA) and related employment statutes. The Act, codified in Government Code Section 12953 and California Labor Code Section 432.6, is scheduled to take effect January 1, 2020. Here are 10 questions and answers regarding the new law.

1. Is AB 51 preempted by the Federal Arbitration Act?

This question undoubtedly will be the subject of significant litigation in the coming months. The Act expressly states that it does not "invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act (9 U.S.C. Sec. 1 et seq.)" (Note, however, that certain categories of agreements are not enforceable under the Federal Arbitration Act [FAA], e.g., **agreements with interstate transportation workers**.) This proviso appears to have been added to address **concerns raised by former governor Jerry Brown**, who vetoed near-identical prior versions of the bill (AB 3080 and AB 465) based on the preemptive effect of the FAA. Explained Brown, "[AB 3080] is based on a theory that the [FAA] only governs the enforcement and not the initial formation of arbitration agreements and therefore California is free to prevent mandatory arbitration agreements from being formed at the outset. *The Supreme Court has made it explicit this approach is impermissible*." (Emphasis added.) It remains to be seen whether AB 51 can survive attacks based on FAA preemption.

2. Which statutory employment laws are covered by AB 51?

As drafted, AB 51 applies to claims arising under FEHA and the California Labor Code. The law does not apply to nonstatutory employment claims and/or claims arising under other statutory provisions.

3. Does AB 51 apply to the financial services industry?

The Act does not apply to arbitration involving "a person registered with a self-regulatory organization [such as the Financial Industry Regulatory Authority] as defined by the Securities Exchange Act of 1934 (15 U.S.C. Sec. 78c)."

4. Does AB 51 apply to applicants as well as employees?

Yes. The Act prohibits conditioning arbitration on "employment, continued employment, or the receipt of any employment-related benefit," and it applies to both applicants and employees.

5. Does AB 51 apply to existing arbitration agreements?

The Act applies to "contracts for employment entered into, modified, or extended *on or after January 1, 2020*." (Emphasis added.) That means that current agreements remain enforceable under existing law.

6. Under AB 51, can an employer refuse to hire an applicant who will not agree to arbitration?

No, assuming the Act applies. Until now, the law allowed an employer, prior to any dispute, to mandate arbitration of statutory claims for all individuals who accepted employment. Under the new rule, an employer may not mandate arbitration as a condition of employment. Any employer that does so may face claims of retaliation or discrimination under the Act.

7. Under AB 51, can an employer require an employee to opt out of an existing workplace arbitration program?

No, assuming the Act applies. An employer cannot require an employee to take any action to avoid arbitration. Under the Act, any agreement that requires an employee to opt out of a waiver or take any affirmative action in order to preserve his or her rights is deemed a condition of employment and is thus prohibited.

8. Does AB 51 apply to post-dispute settlement agreements or negotiated severance agreements?

No. The Act does not preclude an employer from entering into an arbitration agreement as part of a post-dispute settlement or in connection with a negotiated severance agreement, although the term "negotiated" is not defined.

9. How do the FEHA and Labor Code intersect under AB 51?

AB 51 codifies its rules in Section 432.6 of the California Labor Code. Section 12953 of the Government Code makes it "an unlawful employment practice for an employer to violate Section 432.6 of the Labor Code."

10. What are the consequences of violating AB 51?

Labor Code Section 432.6(d) provides that "[i]n addition to injunctive relief and any other remedies available [under the FEHA], a court may award a prevailing plaintiff enforcing their rights under this section reasonable attorney's fees."

Stay tuned for more information on these developments and how employers may want to respond.