Ogletree Deakins

International Newsletter

Court Enjoins California's Ban on Mandatory Arbitration of Statutory Employment Claims: 10 Questions and Answers for Employers

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United States

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 makes California the first state to prohibit predispute mandatory arbitration of employment claims.

A coalition of business organizations, however, filed suit in federal court in December before the act could take effect on January 1, 2020, alleging that the law is preempted by the Federal Arbitration Act (FAA). In December, the **federal court issued a temporary restraining order** barring AB 51 from going into effect and on February 7, 2020, enjoined enforcement of the law as to arbitration agreements covered by the FAA. The State of California is now appealing this decision before the Ninth Circuit Court of Appeals. As such, the validity of this law is still being challenged. New COVID-19 realities may further delay this process. Ogletree Deakins will continue to monitor and summarize the litigation involving AB 51.

Here are 10 questions and answers regarding this unsettled law.

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

The Act expressly states that "Nothing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act (9 U.S.C. Sec. 1 et seq.)." 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. Brown explained that, "[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 California statutory employment laws are covered by AB 51?

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 brokers, dealers, and others in 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."

4. Does AB 51 apply to job 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 job applicants and employees.

5. Does AB 51 apply to arbitration agreements already in effect?

Yes. The Act applies to "contracts for employment entered into, modified, or extended *on or after January 1, 2020*." (Emphasis added.) This means current agreements should remain enforceable under existing law. Notably, as drafted, the statue does not define "extended"; therefore, we anticipate challenges to any arbitration agreement extended from 2019 until January 1, 2020.

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

No, assuming the Act is not preempted by the FAA. Until the passage of AB 51, an employer could require pre-dispute mandatory arbitration of statutory claims for all individuals who accepted employment. Under AB 51, 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, if an employer provides an employee with the option to opt out does that relieve the agreement from being covered by the statute?

No, assuming the Act applies. An employer cannot require an employee to take any action to avoid arbitration. AB 51 prohibits any agreement as a condition of employment that requires an employee to opt out of a waiver or take any affirmative action in order to preserve his or her rights.

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

No. The Act does not bar an employer from entering into an arbitration agreement as part of a post-dispute settlement or in connection with a negotiated severance agreement; however, the Act does not define the term "negotiated."

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

AB 51's rules are codified in Section 432.6 of the California Labor Code. Section 12953 of the California 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?

California 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." Under Section 433 of the Labor Code, an employer that violates AB 51 could be subject to criminal sanctions, including "imprisonment in a county jail, not exceeding six months, or . . . a fine not exceeding one thousand dollars ($1,000), or both" under Section 23 of the Labor Code. Again, this answer assumes the statute is not preempted by the FAA.

To date, California is still enjoined from enforcing AB 51. However, employers with operations in California should continue to evaluate their current arbitration agreements to ensure their continued compliance with the law.

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