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Featured News

ALERT

EMPLOYMENT ARBITRATION PROVISIONS (STILL) LEGAL IN CALIFORNIA

It is undisputed that arbitration of employment related claims is more efficient and more economical than litigating these claims in court. The impact on employee awards is controversial. Some (the majority of) studies conclude that, compared to litigation, employees win fewer arbitrations and the awards they obtain are smaller than awards in litigation[1]. There are also, however, studies finding the opposite, *i.e.*, that employees win more often in arbitration and win larger awards[2]. Either way, arbitration clearly results in reduced attorney fee awards for employee side attorneys.

The plaintiffs' bar has repeatedly persuaded the California Legislature to enact statutes banning arbitration of employment disputes, notwithstanding the Federal Arbitration Act. Governor Brown vetoed the prior attempts in 2015 and 2018. After Brown left office, the Legislature passed Assembly Bill 51, which prohibited employers from requiring employees to sign arbitration agreements as a condition of employment. The statute as written also made violation of the law a misdemeanor. The California Chamber of Commerce immediately filed suit, challenging the statute on the grounds that it violated federal law. In a written opinion filed February 15, 2023, the Ninth Circuit agreed, holding that federal law preempts AB 51 and precludes its enforcement. The case is *Chamber of Commerce v. Bonta,* 2023 U.S. App. LEXIS 3586 (9th Cir. February 15, 2023). The Court held that the FAA furthers Congress' policy of encouraging arbitration, and that under the FAA, arbitration agreements must be interpreted in the same manner as other contracts. Therefore, state legislatures may not place restrictions and limitations on arbitration agreements that do not apply to other contracts. Because AB 51 inhibits the formation of arbitration agreements, it conflicts with congressional intent, and therefore it is preempted.

The takeaway is that arbitration agreements are still legal and valid in California. The applicability of such provisions to certain claims, particularly claims under the Private Attorney General Act (PAGA), remains a live issue. In *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. ___, 142 S.Ct. 1906, the Supreme Court held that arbitration agreements can prevent an employee from

bringing a PAGA claim on behalf of other employees, but an employee retains the right to bring his/her/their own claim under PAGA for the harm that he/she/they allegedly suffered. But in *Galarsa v. Dolgen Cal., LLC* (2023) 2023 Cal.App. LEXIS 129 (Cal.App.5 th District Feb. 2, 2023), the California Court of Appeal disagreed with the Supreme Court's interpretation of the FAA, holding that employees who sign arbitration agreements can still bring a PAGA claim on behalf of other employees. [We expect this decision to be appealed.]

In any event, we continue to recommend that employers consider including mandatory arbitration agreements as a condition of commencing or continuing employment. Care must be taken to draft such provisions in a fair manner to prevent a reviewing court from finding the agreement to be unconscionable. Employers should in all cases employ counsel to assist and advise regarding drafting of such agreements.

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[1] *See generally* Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes* (2011), http://digitalcommons.ilr.cornell.edu/articles/577 (last visited Dec. 20, 2019).

[2] Mary Donovan & Nam D. Pham, *Fairer, Faster, Better: An Empirical Assessment of Employment Arbitration* (2019), https://www.instituteforlegalreform.com/uploads/sites/1/Empirical-Assessment-Employment-Arbitration.pdf (last visited Dec. 20, 2019)

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