
THIRD READING

Bill No: AB 51
Author: Gonzalez (D)
Amended: 3/26/19 in Assembly
Vote: 21

SENATE LABOR, PUB. EMP. & RET. COMMITTEE: 4-1, 6/19/19
AYES: Hill, Jackson, Mitchell, Pan
NOES: Morrell

SENATE JUDICIARY COMMITTEE: 7-1, 7/9/19
AYES: Jackson, Durazo, Lena Gonzalez, Monning, Stern, Umberg, Wieckowski
NOES: Jones
NO VOTE RECORDED: Borgeas

SENATE APPROPRIATIONS COMMITTEE: 5-2, 8/30/19
AYES: Portantino, Bradford, Durazo, Hill, Wieckowski
NOES: Bates, Jones

ASSEMBLY FLOOR: 47-20, 5/22/19 - See last page for vote

SUBJECT: Employment discrimination: enforcement

SOURCE: California Labor Federation
Consumer Attorneys of California

DIGEST: This bill prohibits requiring applicants for employment or employees to waive their right to a judicial forum as a condition of employment or continued employment.

ANALYSIS:

Existing law:

- 1) Prohibits setting aside or contravening a broad category of labor rights, which includes the minimum wage, timely payment of wages, wage stubs, and overtime pay, through a written or oral contract. (Labor Code §§ 219, 1197.1)

- 2) Prohibits an employer from:
 - a) Requiring, as a condition of employment, that an employee refrain from disclosing information about the employer's working conditions.
 - b) Requiring an employee to sign a waiver or other document that purports to deny the employee the right to disclose information about the employer's working conditions.
 - c) Discharging, formally disciplining, or otherwise discriminating against an employee who discloses information about the employer's working conditions.

(Labor Code § 232.5)
- 3) Provides that it is an unlawful employment practice to discriminate, refuse to hire, or employ any person on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status. (Government Code §12940)
- 4) Authorizes a court, if it finds as a matter of law that the contract or any clause of the contract was unconscionable at the time it was made, to refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. (Civil Code §1670.5)
- 5) Establishes the California Arbitration Act, which provides that agreements to arbitrate shall be valid, irrevocable, and enforceable, except on such grounds as exist at law or in equity for the revocation of any contract. (Code of Civil Procedure §§1280-1294.4)
- 6) Provides, pursuant to the Federal Arbitration Act (FAA), that agreements to arbitrate shall be valid, irrevocable, and enforceable, except on such grounds as exist at law or in equity for the revocation of any contract. (9 U.S.C. Sec. 2.)

This bill:

- 1) Finds and declares that it is the policy of the state to ensure that all persons have the full benefit of the rights, forums, and procedures established in the California Fair Employment and Housing Act (FEHA) and the Labor Code.
- 2) Declares that the purpose of this bill is to ensure that individuals are not retaliated against for refusing to consent to waive their rights and the procedures under FEHA and the Labor Code as well as to ensure that any

contract relating to those rights and procedures be executed as a matter of voluntary consent.

- 3) Prohibits an employer from requiring any applicant for employment or prospective employment, or any employee to waive any right, forum, or procedure for a violation of any provision of FEHA or the Labor Code, as a condition of employment, continued employment, or the receipt of any employment-related benefit.
- 4) Provides that an employer shall not threaten, retaliate, or discriminate against, or terminate any applicant for employment or prospective employment or any employee because of the refusal to consent to the waiver of any right, forum, or procedure for a violation of FEHA or the Labor Code.
- 5) Provides that an employee may seek injunctive relief to enforce the provisions of this bill. This bill would provide that its terms do not apply to specified self-regulatory organizations, as defined by the Securities Exchange Act of 1934.
- 6) Provides that nothing in this bill is intended to invalidate a written arbitration agreement that is otherwise enforceable under the FAA, and also that this bill does not apply to postdispute settlement agreements or negotiated severance agreements.
- 7) Provides that this bill only applies to contracts for employment entered into, modified, or extended on or after January 1, 2020.

Comments

- 1) *Need for this bill?* The author states the following:

“Forced arbitration is among the most harmful practices that have enabled widespread abuse to go undetected for decades. Workers are forced to sign away their rights in order to get hired. When they seek to report violations, they are denied the ability to go to court or a state agency for help. Instead they are trapped in the employer’s handpicked arbitration system.

...

“Arbitration is a highly effective dispute resolution method when both parties chose it freely. It is far less successful when the more powerful party forces the other to accept the terms. Unfortunately, forced arbitration has increased dramatically in recent years. In 2012, the number of workers bound by forced arbitration agreements was 16 percent. That figure rose to 43 percent in 2014. A new study by Economic Policy Institute found that more than 55 percent of all

workers in the private sector today are bound by forced arbitration agreements. That figure goes up to 65 percent when looking at employees of large companies.

“The real impact of forced arbitration is not alternative dispute resolution, but claim suppression. A February 2018 report by Cynthia Estlund at New York University School of law, titled “The Black Hole of Mandatory Arbitration,” concludes that the vast majority of employment disputes subject to mandatory arbitration agreements “simply evaporate before they are ever filed.

...

“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.”

2) *Arbitration and the Challenge of Extrajudicial Justice*

Arbitration is a dispute resolution process where, instead of using the court system, disputing parties select an impartial arbiter to hear the facts of the case and develop a binding solution for the dispute. Unlike the court system, arbitration can be flexible, allowing both sides to decide rules of evidence and pursue a more informal process. This can both lower dispute resolution costs and speed up the resolution timeline.

Arbitration is most commonly used in commercial disputes. In these cases, two independent businesses attempt to resolve a dispute as equals. Presumably, both businesses are well-positioned to arbitrate the dispute, and both businesses may frequently utilize arbitration to resolve contractual disputes. In these cases, arbitration may greatly assist in quickly resolving a contractual issue that might be complex, involve sensitive competitive issues, or the like.

Concerns about arbitration generally pop up around a growing arena in the use of arbitration: labor law disputes. In these cases, workers are required to sign arbitration agreements as a condition of employment, and then required to arbitrate disputes around labor law. According to the Economic Policy Institute (EPI), only 2% of workers were covered by an arbitration agreement. After some arbitration-friendly U.S. Supreme Court decisions in the early 2000s, this

number grew dramatically. Today, according to EPI, *67.4% of all California employers mandate arbitration of employment disputes.*

For the employer, many of the benefits of arbitration remain. For the worker, however, similar benefits are difficult to see. Unlike a business in a commercial dispute, the worker is unlikely to have experience with an arbitration process. The worker would lack an attorney to assist with his or her case. The worker would likely not have a social network to draw from to suggest a different arbiter. If discovery was limited, the worker may not be able to fully pursue his or her case.

And then there's the potential conflict of interest: if an arbiter secured a significant proportion of his or her income from arbitrating disputes from an employer or group of employers, the arbiter might not be truly impartial. Moreover, as the worker is not going to be utilizing the services of an arbiter or securing arbitration agreements in his or her normal course of business, this would be a one-sided conflict of interest. Taken together, the issues discussed above raise the specter of mandatory labor law arbitration serving employer-funded extrajudicial system that undermines California's labor law protections and places the aggrieved worker at a fundamental and inherent disadvantage.

3) *AB 51 and Constitutional Preemption*

However, the Legislature is limited in the restrictions that it can place on arbitration. This is because the FAA has been construed by the Supreme Court to limit the applicability of state law (*Southland Corp. v. Keating*, (1984) 465 U.S. 1; *AT&T Mobility v. Concepcion*, (2011) 563 U.S. 333; *Epic Systems Corp. v. Lewis*, (2018) 584 U.S. ____).

However, AB 51 seeks to sidestep the preemption issue by not prohibiting, discouraging, or restricting the use of arbitration agreements by employers or workers, but rather requiring applying prior case law that stressed the need for consent in arbitration agreements. For the sake of clarity, this analysis will excerpt a discussion on the issue of federal preemption and state action from the Senate Judiciary Committee's analysis on AB 3080 of 2018, which was very similar to this bill:

This structure arguably succeeds in steering clear of preemption under the Federal Arbitration Act. Under this theory, the bill does not prohibit, restrict, or discourage anyone from entering into a mandatory arbitration agreement, if they wish to consent to do so freely and voluntarily. It does not interfere with enforcement of arbitration agreements. In fact, once a

mandatory arbitration agreement has been signed, this bill has nothing more to say about the situation. All the bill does is say that an employee cannot be forced to sign an arbitration agreement, and if the employee elects not to, the employee cannot be retaliated against. Finally, the bill does not just apply to arbitration agreements: its edicts would apply equally to waiver of any dispute resolution forum or procedure. In short, nothing in the bill discriminates against arbitration and nothing in the bill interferes with the enforcement of an agreement to arbitrate once executed.

...

[T]he opponents of this bill are correct that there is a lengthy and extensive history favoring enforcement of arbitration agreements, striking down state laws that discriminate against arbitration agreements, and voiding state laws that interfere with the enforcement of arbitration agreements once executed. With that in mind, there is no doubt that, if enacted, this bill would be challenged in court and there is a chance, under the current composition of the U.S. Supreme Court, that it would be found preempted. At the same time, there is a reasoned case to be made that the author and sponsor of this bill have carefully crafted a statute that responds to preemption doctrine by taking the U.S. Supreme Court's admonition seriously: that consent is the touchstone of arbitration agreements. (Stolt-Nielsen S. A. v. Animal Feeds Int'l Corp. (2010) 559 U.S. 662, 681.) In this way, this bill would ensure employees may choose to waive their rights in order to get or keep a job, but they are never forced to.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: Yes

According to the Senate Appropriations Committee, the Department of Industrial Relations indicates that it would incur a first-year cost of \$427,000, and \$404,000 annually thereafter, to implement the provisions of this bill (Labor Enforcement and Compliance Fund).

SUPPORT: (Verified 8/29/19)

California Labor Federation (co-source)
Consumer Attorneys of California (co-source)
ACLU California
AFSCME, AFL-CIO
American Association of University Women
American Federation of State, County and Municipal Employees
California NOW
California Conference Board of the Amalgamated Transit Union

California Conference of Machinists
California Employment Lawyers Association
California Faculty Association
California IATSE Council
California Nurses Association
California Professional Firefighters
California Rural Legal Assistance Foundation
California School Employees Association
California Teachers Association
California Teamsters Public Affairs Council
California Voices for Progress
Courage Campaign
Ella Baker Center for Human Rights
Engineers and Scientists of California, Local 20
Entertainment Union Coalition
Equal Rights Advocates
Fund Her
Inlandboatmen's Union of the Pacific
Los Angeles Alliance for a New Economy
Los Angeles County Professional Peace Officers Association
Lutheran Office of Public Policy
National Association of Social Workers, California Chapter
National Employment Law Project
Professional and Technical Engineers, Local 21
Screen Actors Guild - American Federation of Television and Radio Artists
San Diego County Court Employees Association
SEIU California
SMUD Employees
State Building & Construction Trades Council
Stronger California Advocates Network
United Auto Workers
United Auto Workers, Local 2865
United Auto Workers, Local 5810
United Food and Commercial Workers, Western States Council
United Public Employees
United Steelworkers District 12
UNITE-HERE
University Professional and Technical Employees, CWA Local 9119
Utility Workers of America
Voices for Progress

Western Center on Law and Poverty
Writers Guild of America West

OPPOSITION: (Verified 8/29/19)

American Property Casualty Insurance Association
California Ambulance Association
California Apartment Association
California Association for Health Services at Home
California Association of Joint Powers Authorities
California Association of Winegrape Growers
California Attractions and Parks Association
California Beer and Beverage Distributors
California Building Industry Association
California Cable and Telecommunications Association
California Chamber of Commerce
California Dispute Resolution Council
California Employment Law Council
California Farm Bureau Federation
California Hospital Association
California Hotel and Lodging Association
California League of Food Producers
California Manufacturers and Technology Association
California New Car Dealers Association
California Professional Association of Specialty Contractors
California Restaurant Association
California Retailers Association
California State Council of Shrm (Society for Human Resource Management)
California Trucking Association
Citizens Against Lawsuit Abuse
Civil Justice Association of California
CSAC – Excess Insurance Authority
El Centro Chamber of Commerce
El Dorado County Chamber of Commerce
Elk Grove Chamber of Commerce
Family Business Association of California
Family Winemakers of California
Folsom Chamber of Commerce
Fresno Chamber of Commerce
Garden Grove Chamber of Commerce
Greater Coachella Valley Chamber of Commerce

Greater Conejo Valley Chamber of Commerce
Greater Riverside Chambers of Commerce
Job Creators for Workplace Fairness
Kern County Hispanic Chamber of Commerce
League of California Cities
National Federation of Independent Business
Official Police Garages of Los Angeles
Orange County Business Council
Oxnard Chamber of Commerce
Palm Desert Area Chamber of Commerce
Pleasanton Chamber of Commerce
Rancho Cordova Chamber of Commerce
Redondo Beach Chamber of Commerce
Roseville Chamber of Commerce
San Gabriel Valley Economic Partnership
Santa Ana Chamber of Commerce
South Bay Association of Chambers of Commerce
Southwest California Legislative Council
Tulare Chamber of Commerce
Western Carwash Association
Western Growers Association
Wine Institute

ARGUMENTS IN SUPPORT: The California Labor Federation, writing in support, argues the following:

“Recent revelations of widespread sexual harassment have focused policy makers on the need to ensure that victims have access to justice and that violators are held accountable. They have also demonstrated the harm that comes from keeping these cases confidential and exposing countless other women to the same treatment.

...

“Under forced arbitration, these same rules apply to workers who seek to remedy pay equity violations, outright discrimination, and all types of wage theft. They lose access to the state agency charged with worker protection, where staff can help with language or cultural barriers and can protect them from retaliation. They lose access to court, effectively denying them access to counsel who can assist a low-wage worker in navigating a case against a wealthier and more sophisticated employer. They are on their own in an arbitration process they did not choose and do not understand, often against a large corporation that established the rules and paid for the arbitrator.

“Arbitration can be a highly effective dispute resolution method when both parties chose it freely. It is far less successful when the more powerful party forces the other to accept the terms. Unfortunately, the use of forced arbitration has increased dramatically in recent years. In 2012, the number of workers bound by forced arbitration agreements was 16%. That figure rose to 43% in 2014. A new study from the Economic Policy Institute found that today over 55% of all workers in the private sector are bound by forced arbitration agreements.

...

“The disappearance of workplace claims cannot be an acceptable outcome. California has passed a plethora of worker laws and protections and those protections must be enforced to be meaningful. No employer should be able to escape accountability by forcing workers to waive rights.

“AB 51 (Gonzalez) does not prohibit employers from using arbitration agreements to resolve workplace disputes. Instead, it merely requires that employees chose to sign such agreements without the threat of job loss or other retaliatory actions. AB 51 does not seek to render such agreements unenforceable, it simply provides for injunctive relief when employers are forcing workers to waive rights in order to apply, maintain, or keep a job.

“AB 51 (Gonzalez) follows the dictates of the Supreme Court that arbitration under the FAA is a matter of ‘consent and not coercion’ and protects employees from retaliation for not consenting to waive their rights. It is consistent with the bi-partisan legislation introduced in Congress, and moving in numerous other states, that would ensure victims of sexual assault and harassment are not forced into arbitration agreements.

“While the FAA has been interpreted to preempt many state regulations of arbitration, it does not apply here. This bill does not seek to invalidate any arbitration agreement that would be valid under the FAA. It does not make any category of claim arbitrable. It does not shift the burden of proof onto the party seeking to validate the agreement. Instead, it simply ensures that workplace arbitration agreements are entered into willingly and not through coercion.”

ARGUMENTS IN OPPOSITION: A coalition of employer groups, including the California Chamber of Commerce, writing in opposition, argues the following:

“The Federal Arbitration Act prohibits any state statute that seeks to interfere with, limit, or discriminate against arbitration. See *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984); *AT&T Mobility LLC v. Concepcion*, 562 U.S. 333 (2011)... Accordingly, AB 51 will undoubtedly be challenged as

preempted under the FAA, creating more litigation, but not actually providing any benefit to employees as intended.

“AB 51 interferes with and will basically eliminate settlement agreements as it prohibits an employer from requiring an applicant or employee to waive any right, forum, or procedure, or the right to pursue any claim in court under FEHA or the Labor Code as a condition of any ‘contractual agreement.’ A settlement agreement in the most basic terms is a contractual agreement to provide something of value to a party who agrees to dismiss a pending complaint in court and/or waive their rights to pursue any claim the individual may have, including those under the Labor Code or FEHA. Precluding the informal resolution of civil claims would eliminate the opportunity for early and expedited resolution of employee claims, overwhelm California’s judiciary system by forcing all claims to be tried by a jury or judge, and thereby create significant delays that would harm individuals who have suffered a wrong.

...

“By banning arbitration and settlement agreements, the only option left for employees to resolve many labor and employment claims is litigation.... Accordingly, eliminating settlement agreements and arbitration as proposed by AB 51 will flood the already crowded dockets of the civil courts with new lawsuits that will significantly delay resolution of all civil claims.”

ASSEMBLY FLOOR: 47-20, 5/22/19

AYES: Aguiar-Curry, Arambula, Bauer-Kahan, Berman, Bloom, Boerner Horvath, Bonta, Burke, Calderon, Carrillo, Chau, Chiu, Chu, Cooper, Eggman, Friedman, Gabriel, Cristina Garcia, Gipson, Gloria, Gonzalez, Holden, Jones-Sawyer, Kalra, Kamlager-Dove, Levine, Limón, Low, Maienschein, McCarty, Medina, Mullin, Muratsuchi, Nazarian, Petrie-Norris, Quirk, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Santiago, Mark Stone, Ting, Weber, Wicks, Wood, Rendon

NOES: Bigelow, Brough, Chen, Choi, Cunningham, Dahle, Diep, Flora, Fong, Gallagher, Irwin, Kiley, Lackey, Mathis, Melendez, Obernolte, Quirk-Silva, Salas, Voepel, Waldron

NO VOTE RECORDED: Cervantes, Cooley, Daly, Frazier, Eduardo Garcia, Gray, Grayson, Mayes, O'Donnell, Patterson, Ramos, Blanca Rubio, Smith

Prepared by: Gideon L. Baum / L., P.E. & R. / (916) 651-1556
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**** END ****