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Employers with Operations in California Must Revise Policies and Practices to Comply with New Law Outlawing Mandatory Arbitration Agreements with Employees

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By Michael S. Kun and Kevin Sullivan

As employers with operations in California had feared, Governor Gavin Newsom has signed AB 51, which effectively outlaws mandatory arbitration agreements with employees—a new version of a bill that prior Governor Jerry Brown had vetoed repeatedly while he was in office.

The new law, which goes into effect on January 1, 2020, not only prohibits mandatory arbitration agreements (with limited exceptions), but also outlaws arbitration agreements in which employees must take an affirmative action to escape arbitration, such as opting out. Further, as the statute is written in broad terms that extend to waivers of statutory "procedures," it appears to extend not just to arbitration of an employee's claims, but also to waivers of jury trials and of class actions.

Among the limited exceptions, the statute does not apply to post-dispute settlement agreements or "negotiated severance agreements," nor does it apply to persons registered with a "self-regulatory organization," as defined by the Securities Exchange Act of 1934.

In short, unless one of these exceptions applies, an employer may only enter into an arbitration agreement (or a jury trial or class action waiver) with an employee in California if that employee voluntarily and affirmatively chooses to enter into such an agreement. And the employer may not retaliate against an employee who chooses not to enter into such an agreement.

The Senate Rules Committee's analysis demonstrates that the legislature was well aware that a statute prohibiting arbitration agreements could be challenged as being preempted by the Federal Arbitration Act ("FAA"), and it attempted to take this bill out of ambit of the FAA. As the author of AB 51 stated, "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."

Despite the attempt to draft a statute that avoids FAA preemption, only time will tell if such a preemption challenge is made and if it is successful. If it is not enjoined, in whole or in part, the new law could have a great impact upon employers with operations in California, and upon pending and threatened litigation.

What Employers Should Do Now

Unless the statute is enjoined, it will be important for employers that wish to use arbitration agreements (or jury trial or class action waivers) in California to ensure that employees voluntarily and affirmatively elect to enter into such agreements. This may require some employers to revise their agreements and to implement new practices, particularly for employers with policies and practices that do not require employee signatures or require employees to affirmatively opt out of arbitration. Arbitration agreements that are included in employee handbooks, or those that do not explain that employees need not sign them, will be subject to great scrutiny.

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