California Law Makes Employers' Use of Mandatory Arbitration Agreements Perilous

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California has once again passed pro-employee legislation, this time making it increasingly challenging for California employers to use mandatory arbitration agreements, including one containing a class waiver. Absent limited circumstances, AB 51 (passed earlier this month) prohibits California employers from requiring employees or applicants, as a condition of employment, to waive their right to bring in court claims under California's Fair Employment and Housing Act (FEHA) or Labor Code. While employers will almost certainly challenge the new law in the months ahead, until the dust settles, California employers presently using arbitration agreements, or considering doing so, must make important decisions with respect to their arbitration agreements or policies.

What Does the Law Do?

In the past decade, the U.S. Supreme Court has repeatedly affirmed a "liberal federal policy favoring arbitration," and just last year gave employers the green light to use class action waivers.\(^1\) AB 51's legislative history makes clear that its intent is to tackle the perceived problem of "forced arbitration," the practice by which "[w]orkers are forced to sign away their rights in order to get hired," and are ostensibly "denied the ability to go to court or a state agency for help." The new law purports to rectify this situation by:

- Prohibiting employers from, as a condition of employment, continued employment, or the receipt of any employment-related benefit, requiring employees or applicants for employment to waive any right, forum, or procedure for a violation of FEHA or the Labor Code, including the right to file and pursue a civil action or a complaint with any court. Put simply, except as explained below, the law prohibits employers from requiring employees, as a condition of employment, to agree to arbitration of FEHA or Labor Code claims. Notably, as to an employee's pursuit of such claims, this prohibition would also prohibit the use of class waivers or jury trial waivers that are increasingly common in employment arbitration agreements.
- Prohibiting employers from threatening, retaliating, or discriminating against, or terminating employees or applicants for refusing to consent to the waiver of any right, forum, or procedure for an alleged violation of FEHA or the Labor Code, e.g., refusing to agree to mandatory arbitration of all claims.
- Prohibiting employers from requiring employees to opt out of otherwise mandatory arbitration of disputes or any other waiver of rights protected by the statute, or requiring employees to take any affirmative action in order to preserve their rights, as the statute deems such an opt out provision a condition of employment.

What Are the Consequences of Violating AB 51?
Violating the law constitutes an unlawful employment practice under FEHA. Such a violation subjects an employer to a lawsuit in a manner similar to an employer being subject to suit for committing an "unlawful employment practice" by discriminating against an employee because of, for example, race or gender.

Violating the prohibitions of AB 51 constitutes a criminal misdemeanor.

In addition to any other remedies available under law (perhaps claims for unfair competition or PAGA), injunctive relief is available to remedy violations of AB 51, and a court may award attorneys' fees to a plaintiff successfully enforcing their rights under the law.

When Does the Law Become Effective?

The law applies to contracts for employment entered into, modified, or extended on or after January 1, 2020.

Are Any Employers or Agreements Exempt from AB 51?

Provided that its prohibitions are respected, AB 51 permits voluntary agreements to arbitrate FEHA and Labor Code claims.

The law exempts post-dispute settlement agreements or negotiated severance agreements.

The law does not invalidate a written arbitration agreement that is "otherwise enforceable" under the Federal Arbitration Act (FAA).

The law does not apply to a person registered with a self-regulatory organization as defined by the Securities Exchange Act of 1934 (15 U.S.C. Sec. 78c), e.g., the New York Stock Exchange.

What Should Employers Do in Response to AB 51?

AB 51's legislative history notes a study finding that "today over 55% of all workers in the private sector are bound by forced arbitration agreements." While it is uncertain what percentage of California employers currently utilize some form of arbitration, AB 51's passage presents significant questions and challenges for those California employers using, or considering the use of, arbitration agreements and class waivers to resolve employment-related disputes. While the #MeToo movement has certainly caused some employers to reconsider the use of mandatory arbitration for some or all employment-related claims, e.g., sexual harassment, to date it does not appear that California employers (or national employers) have abandoned the use of arbitration agreements.

AB 51 will become law in just two months, on January 1, 2020. While there may be a legal challenge to implementing the law before it takes effect, California employers (including those companies headquartered elsewhere, but employing workers in California subject to arbitration agreements) must nevertheless consider what, if any, steps they will take in response to AB 51's attempt to ban the mandatory arbitration of employment-related disputes. Specifically, California employers should promptly do the following:

- Review existing employment applications, offer letters, proprietary information agreements, stand-alone arbitration agreements or policies addressing arbitration, employee handbooks, equity agreements, etc., to determine whether as drafted they contain language that violates AB 51.

If not presently using arbitration agreements, consider entering into arbitration agreements with existing employees prior to January 1, 2020.

Make a decision as to whether the company wants to continue using arbitration post-January 1, 2020, in light of AB 51 and other legislative assaults on arbitration that may be on the horizon. Such a decision, including one to suspend use of arbitration agreements until the law becomes clearer, should consider the value placed on the arbitration agreement's inclusion of a class action waiver.

- As to existing arbitration agreement forms or policies, make a determination as to whether its arbitration agreement is otherwise enforceable under the FAA, and if so whether the employer will continue to use the same form "as is" following January 1, 2020. Employers should recognize, however, that the meaning of "otherwise enforceable" will likely be the subject of litigation.

- Consider the use of a narrower arbitration agreement and class waiver, including expressly carving out from arbitration agreements a requirement that the employee arbitrate FEHA and Labor Code claims.

- Consider the use of an express "opt-in" or other stand-alone voluntary arbitration agreement, and whether steps can be taken to increase the percentage of employees that would voluntarily elect arbitration.

- Pay attention to whether any agreement the employer enters into with an employee after January 1, 2020, serves to modify or extend an arbitration agreement or other employment agreement
requiring arbitration of employment disputes. While the earlier agreement may be permissible, AB 51 may prohibit the same arbitration agreement if it is deemed modified.

In considering how best to respond to AB 51, employers should consult with counsel to ensure proper consideration of the relevant legal requirements and risks associated with its decisions.

Wilson Sonsini Goodrich & Rosati is actively following developments around the country with respect to all aspects of employment and trade secrets law, including developments regarding arbitration agreements in other jurisdictions such as Washington and New York. The firm is available to assist employers in navigating this constantly changing arbitration landscape. For more information, please contact Rico Rosales, Marina Tsatalis, Jason Storck, Rebecca Stuart, or any member of the firm's employment and trade secrets litigation practices.