The San Diego Union-Tribune

# 9th Circuit invalidates law barring mandatory employment arbitration

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February 27, 2023 | 6:00 AM PT


(San Diego Union-Tribune)

My last column focused on a California Court of Appeal ruling that confirmed it is easier for an employer to enforce a pre-dispute arbitration agreement when the employee signs the agreement in his or her own handwriting rather than with an electronic signature.

In addition to having its employees sign the arbitration agreement in their own handwriting, the employer in that case expressly gave applicants and employees the option not to sign the arbitration agreement and still obtain or retain employment. I suggested employers consider giving employees the express right to opt out until resolution of a pending challenge to California's statute prohibiting employers from requiring employees to sign pre-dispute arbitration agreements (AB 51).

On Feb. 15, a split three-judge panel of the U.S. Court of Appeals for the 9th Circuit struck down AB 51 as preempted, that is trumped, by the Federal Arbitration Act (FAA). That was a reversal of a ruling of the same panel almost a year and a half ago upholding the law.

Here's why the court ruled as it did and three reasons it still may make sense for employers to give employees the option not to sign pre-dispute arbitration agreements.

## Why the 9th Circuit invalidated AB 51

AB 51 made it unlawful for an employer to condition initial or continued employment or any employment benefit on an applicant or employee giving up their right to sue for unlawful discrimination or violations of the California Labor Code in court. The law also barred an employer from taking any action against an applicant or employee who refused to agree to give up their right to sue in court.

In other words, an employer could not require an applicant or employee to sign a pre-dispute arbitration agreement or retaliate against an employee or applicant who refused to do so. AB 51 subjected an employer that violated these provisions to civil and criminal liability.

The FAA, however, makes any written arbitration agreement enforceable unless the agreement offends general principles of substantive and procedural fairness applicable to other kinds of contracts, such as rules barring agreements limiting substantive rights. The U.S. Supreme Court has said the FAA embodies "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." A state law that frustrates the objectives of a federal law is invalidated by the supremacy clause of the U.S. Constitution.

The 9th Circuit noted that "to avoid preemption by the FAA, the California legislature included a provision [in AB 51] ensuring that if the parties did enter into an arbitration agreement, it would be enforceable." The court said "[t]his resulted in the oddity that an employer subject to criminal prosecution for requiring an employee to enter into an arbitration agreement could nevertheless enforce that agreement once it was executed."

By restricting only the conditions under which an arbitration agreement was made and not banning arbitration itself, the legislature hoped to "navigate[] around" prior Supreme Court rulings invalidating state laws making pre-dispute arbitration agreements unenforceable.

The 9th Circuit majority rejected that gambit. AB 51 plainly "disfavors the formation of agreements that have the essential terms of an arbitration agreement."

AB 51 effectively bars an employer from requiring its employees to sign an agreement that gives up the employee's right to sue the employer in court. "Because a person who agrees to arbitrate disputes must necessarily waive the right to bring civil actions regarding those disputes in any other forum, AB 51 burdens the defining feature of arbitration agreements." Discouraging an employer from entering into an arbitration agreement with its employees undermines the FAA's endorsement of arbitration agreements and therefore cannot stand.

## Three reasons it still makes sense to allow employees to opt out of arbitration agreements

First, an employee who signed an arbitration agreement after having had the option not to may be more willing to submit to arbitration without the employer spending time and money going to court for an order compelling arbitration.

Second, allowing employees to decline to sign an arbitration agreement will make it harder for employees resisting arbitration to meet their burden of demonstrating the agreement was procedurally and substantively unfair.

Third, a larger panel of the 9th Circuit may agree to review this split ruling. That may result in AB 51 again being upheld.

For now, though, employers may require applicants and employees to sign arbitration agreements and reject applicants or fire employees who refuse.

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