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# 9th Circuit reinstates law barring employers from conditioning employment on employee agreement to arbitrate

By **Dan Eaton**
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In 2019, Gov. Gavin Newsom signed into law AB 51, which prohibits employers from conditioning "employment, continued employment, or the receipt of any employment-related benefit," such as extra money, on an employee giving up their right to pursue a claim under the state's employment discrimination law and certain other employment laws in court or any other otherwise available forum.

The measure further prohibits an employer from threatening, or discriminating or retaliating against, any applicant or employee for refusing to sign such an agreement. The law expressly does not invalidate written arbitration agreements otherwise enforceable under the Federal Arbitration Act.

Those who violate the law are subject to civil and criminal penalties.

A U.S. district judge granted the motion of a coalition of business groups to block the law because it clashed with, and therefore was preempted by, the FAA. The FAA makes arbitration agreements enforceable, except to the extent such agreements offend principles that would invalidate any contract, such as the presence of fraud or unconscionability. State laws that directly or indirectly impair enforcement of arbitration agreements otherwise enforceable under the FAA are invalid. AB 51, ruled the judge, was such a law. The state appealed.

## 9th Circuit mostly upholds AB 51

This month, a divided three-judge panel of the 9th Circuit Court of Appeals reversed most of the judge's order. The majority ruled that AB 51 only restrains "pre-agreement employer behavior," merely seeking "to assure that entry into an arbitration agreement by an employer and employee is mutually consensual and to declare that compelling an unwilling party to arbitrate is an unfair labor practice."

AB 51 does not subject the enforcement of arbitration agreements to special treatment. Indeed, said the court, AB 51 "does not make invalid or unenforceable any agreement to arbitrate, even if such agreement is consummated in violation of the statute."

The majority further ruled, however, that the statute's civil and criminal sanctions were inconsistent with the FAA "to the extent they apply to executed arbitration agreements covered by the FAA" because those enforcement mechanisms "necessarily include punishing employers for entering into an agreement to arbitrate" when both parties have signed the agreement.

## A fiery dissent

Judge Sandra Ikuta sharply dissented from the ruling, calling AB 51 "a blatant attack on arbitration agreements" inconsistent with both the FAA and longstanding Supreme Court precedent.

Judge Ikuta rejected the majority's assertion that AB 51 merely barred "forced arbitration." "[U]nder California law, an employee 'consents,' to an employment contract by entering into it, even if the contract was a product of unequal bargaining power and even if it contains terms (such as an arbitration provision) that the employee dislikes, so long as the terms are not invalid due to unconscionability or other generally applicable contract principles. An employee's preference for litigating disputes with an employer [in court], without more, does not make an arbitration agreement nonconsensual."

Judge Ikuta colorfully suggested the ruling upholding AB 51 and its associated sanctions so long as they are not applied to conduct leading to executed arbitration agreements "means that an employer's attempt to enter into an arbitration agreement with employees is unlawful, but a completed attempt is lawful. This tortuous ruling is analogous to holding that a statute can make it unlawful for a dealer to attempt to sell illegal drugs, but if the dealer succeeds in completing the drug transaction, the dealer cannot be prosecuted. Needless to say, such a bizarre approach does not apply to any other contracts in California. As such, it is preempted by the FAA for disfavoring arbitration contracts. . . ."

## What now?

Judge Ikuta asserted that, in addition to being contrary to the "clear guidance" of Supreme Court rulings invalidating arbitration restrictions, the ruling deviated from rulings on similar issues by other circuit courts. That ups the odds a larger panel of the 9th Circuit or even the Supreme Court may eventually weigh in on the validity of AB 51.

For now, California employers must follow AB 51 and not condition prospective or continued employment on execution of an arbitration agreement. Nor should an employer fire or refuse to hire someone, or threaten to do so, because they have refused to sign an arbitration agreement. Absent these conditions, an employer may continue to ask, but not require, applicants and employees to sign pre-dispute arbitration agreements and have signed arbitration agreements enforced.

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