CARLTON FIELDS

Ninth Circuit Rejects California Ban on Mandatory Arbitration as a Condition of Employment

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California's attempt to limit mandatory arbitration agreements as a condition of employment has been held to violate Federal law, according to the Ninth Circuit Court of Appeals.

This means employers can require new employees to agree to arbitrate all disputes if they want to be hired and employers can avoid the expense, delay, and unpredictability of jury trials for employment disputes.

In a majority opinion this week, the Ninth Circuit held that California's AB 51, a law banning mandatory arbitration agreements as a condition of employment, is preempted by the Federal Arbitration Act (FAA).

AB 51, which was signed into law on October 10, 2019, imposed both civil and criminal penalties for California employers that required an existing employee or an applicant for employment to consent to arbitrate specified claims as a condition of employment. Notably, AB 51 attempted to sidestep FAA preemption because it only imposed penalties on the employer, but did not *invalidate* an agreement to arbitrate claims entered between the employer and the employee. Therefore, California employers were left to wrestle with the decision of whether to implement mandatory arbitration policies based on the various risks involved.

Now, the Ninth Circuit helped employers make that decision. "Because the FAA's purpose is to further Congress' policy of encouraging arbitration, and AB 51 stands as an obstacle to that purpose, AB 51 is therefore preempted," the panel majority said.

The decision comes on the heels of a long-fought battle over AB 51 between various business organizations, such as the U.S. Chamber of Commerce, and the state of California. AB 51 was

originally enjoined from being enforced in 2020 due to FAA preemption, but, in 2021, a divided Ninth Circuit panel held that the FAA did not completely preempt AB 51 because it only regulated *conduct* of employers. Following this decision, the Chamber of Commerce filed a petition for rehearing *en banc*, which the Ninth Circuit deferred pending the U.S. Supreme Court's decision in *Viking River Cruises v. Moriana*, which came down in June 15, 2022. Following *Viking River*, in a surprising move, the Ninth Circuit withdrew its opinion pending a panel review, which resulted in this week's decision.

The burden imposed by AB 51 on the formation of arbitration agreements is "severe," the majority panel stated, and is "antithetical to the FAA's liberal federal policy favoring arbitration agreements."

As a result of this decision, California employers with workers covered by the FAA may require employees to enter into arbitration agreements as a condition of employment without fear of facing penalties imposed by AB 51. California employers should consider implementing or updating their arbitration policies and procedures in light of this opinion.

U.S. Chamber of Commerce v. Bonta, 9th Cir., No. 20-15291, (E.D.C.A. Feb.15, 2023).

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