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Governor Newsom signs controversial AB 51 Anti-Arbitration Law, Eliminating Most Mandatory Arbitrations in Employment and Labor Law Settings

Employers must keep watch over challenges to law set to take effect on January 1, 2020 as it may be pre-empted by Federal Law.

California employers can no longer compel employees to sign arbitration agreements under AB 51.

The bill adds a new Section 432.6 to the Labor Code that prohibits employers from requiring an applicant or existing employee, as a condition of employment, continued employment, or the receipt of any employment-related benefit, to "waive any right, forum, or procedure" for alleged violations of the entire Fair Employment and Housing Act (FEHA) or other Labor Code rights.

The law reaches discrimination, sexual harassment, and wage and hour claims of all sorts. The bill further addresses the use of 'opt-out' clauses, stating that "an agreement that requires an employee to opt-out of a waiver or take any affirmative action in order to preserve their rights is deemed a condition of employment (which are prohibited under the Act)."

In effect, except for the securities industry and other minor exceptions, **the Act wipes out mandatory arbitration agreements in employer-employee relationships.** Furthermore, the bill creates a new private right of action through a new Section 12953 of Government Code. This new code holds that violations of the Act's prohibitions constitute "unlawful employment practices," thus allowing private rights of action under Fair Employment and Housing Act, Government Code Section 12960. Employees enforcing their rights will also be entitled to attorneys' fees.

Similar, prior legislation was vetoed in the past, and the current new law seems to be the product of the politics of the #MeToo Movement. The secrecy under which severe employment issues including sexual harassment have been handled in certain high profile cases prompted legislators to look for ways to create a deterrent to such behavior in the future. Eliminating private, mandatory arbitration of such claims is believed to give employees leverage and would serve as a deterrent to bad behavior if the public revelation was assured through court processes.

However salutary the intent behind the new bill is, there are serious questions regarding its future. California courts have found similar legislation pre-empted by the Federal Arbitration Act, 9 USC Sec. 1 et seq. For instance, 2014's AB 2617, curbing mandatory arbitration of certain civil rights claims, was struck down by the Second District Court of Appeal, *Saheli v. White Memorial Medical Center,* 21 Cal.App5th 308 (2018), ruling that AB 2617 was preempted by the FAA because it invalidated otherwise valid arbitration agreements. The court found that the FAA itself and the policies behind it encouraged arbitration and attempts to cut arbitration back were inconsistent with overriding federal policy and statute.

Also, a federal court earlier this year struck down a New York law very similar to California's AB 51, ruling that the New York law prohibiting mandatory arbitration agreements in sexual harassment cases was inconsistent with the FAA. *Latif v. Morgan Stanley & Co.*, No. 1:2018cv11528 – Document 52 (S.D.N.Y. 2019).

What can providers/health systems do?

We advise employers to examine their current practices with respect to mandatory arbitration agreements and clauses and prepare a plan to modify or eliminate the practices before the AB 51 effective date. We would urge continued monitoring of the Act's viability as challenges are expected. We at Nelson Hardiman are happy to assist and advise you on the best next steps in your individual situation.

If you have questions regarding this client alert, please contact:

Rob Fuller
310.203.2800
rfuller@nelsonhardiman.com

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