Will He or Won't He? Employment Arbitration Ban Proposal Heads to Governor Brown

Insights
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The #MeToo movement and the national focus on sexual harassment have sparked significant legislative activity at the state level designed to address these issues. Here in California, lawmakers introduced over two dozen bills to tackle such issues.

The most significant of these bills, which recently passed the legislature and is now on the governor's desk, is Assembly Bill 3080 by Assemblywoman Lorena Gonzalez Fletcher (D-San Diego). Among other things, AB 3080 would prohibit mandatory arbitration agreements for nearly all types of employment law claims in California.

Proponents of AB 3080 have linked it to the #MeToo movement by claiming that mandatory arbitration agreements keep sexual harassment claims "secret" and thereby allow perpetrators to continue harassing victims. They've even coined a new hashtag for AB 3080 - #ShatterTheSilence. Proponents also brought out the "star power" to advocate for AB 3080 – both actress Jane Fonda and former Fox News reporter Gretchen Carlson visited Sacramento to urge legislators to pass the bill.

AB 3080 is the most closely watched employment bill on the governor's desk and, if signed into law, will potentially have significant and widespread impacts on California employers across all industries. The lingering question: will Governor Brown sign the bill or won't he? We'll soon have our answer.

Far-Reaching Ban on Mandatory Arbitration of Employment Claims
While AB 3080 is pitched as a "sexual harassment" bill and has been inextricably linked by supporters to the #MeToo movement, the bill is actually much broader and would cover much more than just sexual harassment.

The bill would add a new Section 432.6 to the Labor Code, prohibiting any person (including employers) from requiring an applicant or employee (as a condition of employment) from entering into any contractual agreement to "waive any right, forum, or procedure" for alleged violations of the entire Fair Employment and Housing Act (FEHA) and the entire Labor Code. In sum, AB 3080 would prohibit mandatory arbitration agreements for *any* discrimination claims covered under FEHA (not just sexual harassment) and for *any* claims under the Labor Code (wage and hour and other protections).

Moreover, while AB 3080 seemingly only applies to mandatory arbitration clauses, language in the bill would also prohibit employers from using voluntary opt-out clauses to avoid the reach of the bill. Proposed Labor Code Section 432.6(c) states 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."

Ban on Settlement Agreements Too?

Opponents of AB 3080, including the California Chamber of Commerce, have argued that the bill threatens to interfere with the ability of an employer to settle claims.

The language in AB 3080 would prohibit any person from requiring an employee or applicant to "waive any right, forum or procedure" as a condition of entering into a "contractual agreement." Opponents have argued that this would potentially outlaw settlements agreements because, by their very nature, settlement agreements with general release provisions are "contractual agreements" whereby an employee agrees to waive a "right, forum or procedure." Precluding settlement of employment claims and forcing every dispute to go to court would have disastrous results on the entire California judicial system, and not simply on employers.

Ban on Confidentiality Agreements

AB 3080 would also prohibit confidentiality or nondisclosure agreements related to sexual harassment claims. Specifically, the bill would add Section 432.4 to the Labor Code to prohibit a person from barring an employee or applicant from "disclosing to any person an instance of sexual harassment that the [individual] suffers, witnesses, or discovers in the workplace."

In other words, AB 3080 would prohibit an employer from insisting on a confidentiality or nondisclosure clause (even as part of a settlement agreement) regarding claims of sexual harassment.

A separate measure, Senate Bill 820 by Senator Connie Leyva, would similarly prohibit nondisclosure agreements in settlements involving sexual harassment, sexual assault, or sex discrimination or retaliation, unless the plaintiff requests confidentiality.

Opponents to these provisions have expressed concern that employers will face a public presumption of guilt even when they settle claims that have no merit, as businesses sometimes do purely for financial reasons. To avoid this public presumption of guilt, employers have cautioned that they will be forced to fight more cases in court instead of working to resolve claims early in the litigation process.

The Elephant in the Room – Is AB 3080 Preempted by Federal Law?

The legislature's passage of AB 3080 sets up a potential collision course between the proposed state law and federal law known as the Federal Arbitration Act (FAA). The FAA was enacted in 1925 by Congress to ensure the validity and enforcement of arbitration agreements.

While early cases limited the FAA to commercial disputes, in recent decades the courts have extended the application of the FAA to arbitration of employment claims. In particular, state laws attempting to interfere with (or "standing as an obstacle to") arbitration have been repeatedly and consistently struck down by the U.S. Supreme Court as preempted by the FAA.

Proponents of AB 3080 argue that it is not preempted by the FAA because it would only impact "mandatory" arbitration agreements and would not affect "voluntary" agreements. However, this argument ignores a long line of federal cases that rely upon the FAA to uphold arbitration agreements that are imposed on a "take-it-or-leave-it" basis, so long as they meet certain and substantive fairness. Moreover, the bill language cited above that purports to prohibit "opt-out" or other affirmative actions by employees makes it clear that the bill would also impact "voluntary" agreements.

In addition, the litigation history of recent California legislation does not bode well for the legality of AB 3080. Back in 2014, the legislature enacted Assembly Bill 2617, which purported to prohibit mandatory arbitration of certain civil rights claims in contracts for goods or services. However, on March 14, 2018, the Second District Court of Appeal held in *Saheli v. White Memorial Medical Center* that AB 2617 was preempted under the FAA. The court stated:

The above legislative history clearly shows the motivating force behind the enactment of AB 2617 was a belief that arbitration is inherently inferior to the courts for the adjudication of [civil rights] claims. In accordance with this dim view of arbitration, the Legislature placed special restrictions on waivers of judicial forums and procedures in connection with such claims. In practice, such restrictions discourage arbitration by invalidating otherwise valid arbitration agreements. It is precisely this sort of hostility to arbitration that the FAA prohibits.

And most recently, the U.S. Supreme Court in *Epic Systems v. Lewis* (and two other consolidated cases) relied on the FAA and rejected an argument that class action waivers contained in arbitration agreements violate the National Labor Relations Act.

Therefore, were it enacted into law, AB 3080 would be immediately challenged as preempted by the FAA and, based on prior court precedents, proponents would have an uphill battle convincing courts to hold otherwise.

This Isn't Our First Rodeo on Arbitration

Despite arguments that this issue is all about sexual harassment and the #MeToo movement, the fight over arbitration agreements in nothing new in California.

For many years now, organized labor and plaintiff attorney groups have targeted arbitration agreements with legislative proposals designed to curtail the mandatory use of such agreements in the employment context. Every four or five years or so, there is another salvo in this long-running fight over the use of arbitration agreements.

Most recently, Governor Brown vetoed a similar measure in 2015 – Assembly Bill 465 by Assemblyman Roger Hernández. In his veto message, Governor Brown stated the following:

I have reviewed in depth the arguments from both sides about the fairness and utility of mandatory arbitration agreements. While most evidence shows that arbitration is quicker and more cost-effective than litigation, there is significant debate about whether arbitration is less fair to employees. The evidence on actual outcomes in arbitration versus litigation is conflicting and unclear, with some studies showing employees receive more in arbitration while other studies show the opposite.

While I am concerned about ensuring fairness in employment disputes, I am not prepared to take the far-reaching step proposed by this bill for a number of reasons.

California courts have addressed the issue of unfairness by insisting that employment arbitration agreements must include numerous protections to be enforceable, including neutrality of the arbitrator, adequate discovery, no limitation on damages or remedies, a written decision that permits some judicial review, and limitations on the costs of arbitration. See, e.g., *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000). If abuses remain, they should be specified and solved by targeted legislation, not a blanket prohibition.

In addition, a blanket ban on mandatory arbitration agreements is a far-reaching approach that has been consistently struck down in other states as violating the Federal Arbitration Act ("FAA"). Recent decisions by both the California and United States Supreme Courts have found that state policies which unduly impede arbitration are invalid. Indeed, the U.S. Supreme Court is currently considering two more cases arising out of California courts involving preemption of state arbitration policies under the FAA. Before enacting a law as broad as this, and one that will surely result in years of costly litigation and legal uncertainty, I would prefer to see the outcome of those cases."

One of the cases cited by Governor Brown came down in favor of the FAA preempting state law (DirecTV v. Imburgia), while the other was dismissed. Moreover, the U.S. Supreme Court has only gotten more conservative since 2015 with President Trump's appointment of Neil Gorsuch to the bench, making it more likely that the Court would rule that AB 3080 is preempted by federal law.

Thus, the preemption argument against a statewide proposal such as AB 3080 has only gotten stronger since the governor last vetoed AB 465 in 2015. If he were to sign AB 3080 into law, there would likely be years of litigation over whether the measure was preempted by federal law, likely ultimately being resolved by the high court.

Why Governor Brown Might Sign AB 3080

For all of the reasons discussed above, the employer community waits with bated breath to see whether Governor Brown will sign or veto AB 3080. Here are some reasons why the Governor might *sign* AB 3080 into law.

- **Politics and the #MeToo Movement** – As discussed above, Governor Brown vetoed legislation back in 2015 that was very similar to AB 3080 – and the legal arguments against the bill have only gotten stronger. However, what's different is that the prior legislative effort to ban mandatory arbitration predated the #MeToo movement and the media frenzy over sexual harassment across many industries. Politicians are extremely cautious to be seen as sufficiently responsive to this issue and proponents of AB 3080 have been adept at linking the bill to the broader political issues at play (even though the bill is much broader than just sexual harassment). If the political pressure is strong enough, it could push Governor Brown to change course and sign the bill this time around.
- **The Governor is On His Way Out** – Governor Brown is nearing the end of his (second) tenure as California's governor, and this will be his final series of actions on legislation before he leaves office. There is some speculation that, therefore, he might be more apt to sign a bill such as this one, and leave it to a future governor and attorney general to litigate the legality of the law. Governor Brown can be retired on his ranch while this plays out in the courts over the next five to 10 years.
- **Labor's Revenge Over *Janus*** - It's no secret that labor is stinging after the U.S. Supreme Court decision in *Janus v. AFSCME* that will likely greatly diminish their ability to collect union dues from non-members. And labor feels that they have been under continual assault by the Trump Administration. Therefore, labor is desperate for a big win to help stem the tide and to "resist" their perceived losses at the federal level. AB 3080 would be a significant win for labor and their friends in the plaintiffs' bar – no doubt this is part of their internal discussions with the governor to convince him to sign the bill.

Why Governor Brown Might *Not* Sign AB 3080

On the other hand, there are some powerful reasons why the Governor might *veto* AB 3080. These include:

- **He Hates Litigation** – While Governor Brown may be progressive on many issues, it's no secret in the capitol community that he disfavors litigation in general. For most labor and employment bills that reach his desk, the first question often asked is, "Will this bill result in more litigation against businesses?" And the governor is no fan of the Private Attorney General Act (PAGA) and has advocated (with modest success) for some reforms to that law in recent years. Some of the governor's antipathy towards litigation may also be influenced by the fact that First Lady Anne Gust Brown previously served as general counsel (among other titles) for The Gap, where she likely experienced California's litigation environment first-hand. Therefore, as AB 3080 would open up the floodgates to litigation for California employers, the governor's natural antipathy to lawsuits argues against his signing the bill into law.
- **It's Probably Preempted by Federal Law** – As discussed above, on its face AB 3080 is susceptible to very strong arguments that it is preempted by the Federal Arbitration Act. Governor Brown vetoed a similar bill in 2015 largely over preemption concerns, and the legal case for preemption of a state law such as AB 3080 has only gotten stronger since that time.

Therefore, just looking at the legal merits of this bill, this should be a slam dunk and AB 3080 should be vetoed.

- **Business's Revenge Over *Dynamex*** - While labor will advocate for a signature on AB 3080 to help alleviate their big loss in the *Janus* case, California businesses have a judicial horror story of their own – the May 2018 decision by the California Supreme Court in *Dynamex*, which overturned decades of precedent and adopted an "ABC test" for determining whether workers are employees or independent contractors. This decision fell like a bomb in the employer community, with potential huge liability for employers, and threatens to disrupt the economy, business model, and livelihoods of millions of Californians. Were the governor to sign AB 3080 into law, it would be like pouring salt on the wounds of the still-reeling employer community. Therefore, employer groups are likely urging the governor to do no further harm and veto AB 3080.
- **Proponents Were Too Greedy and AB 3080 Is Too Broad** – Had the proponents of AB 3080 limited the bill to sexual harassment claims, it almost certainly would be signed into law. However, they didn't do that. Instead, they went for the whole enchilada and drafted a bill that would prohibit mandatory arbitration of virtually all employment law claims in California – all claims arising under FEHA and all claims arising under the entire Labor Code. Moreover, the "poison pill" in AB 3080 that would potentially prohibit settlement agreements may be the death knell for this bill. Proponents may have bitten off more than the governor can chew with this one.

Next Steps and Predictions

AB 3080 was sent to the governor's desk on August 27 and he has until September 30 to sign or veto it. If it is signed into law, it will apply to any contract entered into, modified, or extended on or after January 1, 2019.

While I vowed to stop making political predictions after the 2016 presidential election, I'll break my own rule and hazard a guess here.

This will be a close one, and I anticipate it will be one of the last bills acted upon by Governor Brown. I think it is 50/50 at this point whether he signs or vetoes AB 3080, but if I have to choose, I will say this one leans towards a veto. The preemption argument is strong (virtually insurmountable) and the governor has a natural antipathy towards litigation. Most importantly, the *Dynamex* decision (and the legislature's unwillingness to weigh in to possibly help the business community) have created some significant concerns in the employer community about their future viability. I predict they will be successful in convincing the governor that adding this bill on the backs of the *Dynamex* decision will be bad for business and bad for California.

But then again, what do I know? As Yogi Berra once said, "It's tough to make predictions – especially about the future!" Either way, we'll keep you updated on the outcome of this closely watched bill.

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