

Insights, News & Events

## **NEW CALIFORNIA LAW PROHIBITS MOST MANDATORY ARBITRATION AGREEMENTS—FOR NOW**

Insights  
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- **Under a new law just signed into effect by the California Governor and set to take effect on January 1, 2020, employers will no longer be able to compel workers into arbitration for state discrimination claims or those brought under the Labor Code.**
- **However, the law could very well be blocked by a court before it ever takes effect. Similar recent attempts at restricting arbitration have been struck down as conflicting with a strong federal law favoring it.**
- **Employers need to make a choice before January 1: play it safe and strike all mandatory arbitration agreements, or keep the status quo until the inevitable litigation plays out. There are pros and cons to both paths, so work with your employment counsel to figure out which is right for you.**

Despite his predecessor vetoing two similar proposals, California Governor Gavin Newsom signed a bill into law on October 10, 2019 that will prohibit employers from entering into mandatory arbitration agreements for nearly all types of employment law claims in California. The new law could have significant impacts on California employers across all industries – if it ever goes into effect. There are significant questions around whether the new statute is invalid. We could see it scaled back or completely tossed out before ever being enforced based on an argument that it is preempted by federal law. Legal challenges are inevitable, and will likely require years of litigation before a final

### Related People



**Benjamin M. Ebbink**

Partner

916.210.0400



**James J. McDonald, Jr.**

Partner

949.798.2131

resolution. In the meantime, what do California employers need to know about this development?

## **FAR-REACHING BAN ON MANDATORY ARBITRATION OF EMPLOYMENT CLAIMS**

One of the biggest targets of the #MeToo movement has been the use of [pre-dispute mandatory arbitration agreements](#). And one of the most closely-watched bills across the nation has been [Assembly Bill 51](#) by Assemblywoman Lorena Gonzalez (D-San Diego), which takes direct aim at such arbitration agreements. While AB 51 was pitched as a “sexual harassment” bill and was inextricably linked by supporters to the #MeToo movement, the new law is actually much broader and covers much more than just sexual harassment.

The bill adds 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, 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) and the entire Labor Code. In sum, AB 51 prohibits mandatory arbitration agreements for *any* discrimination claims covered under FEHA (not just sexual harassment) and for *any* claims under the Labor Code (including wage and hour and other protections).

Moreover, while AB 51 seemingly only applies to mandatory arbitration clauses, language in the bill also prohibits employers from using voluntary opt-out clauses to avoid the reach of the bill. New 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.”

## **THE ELEPHANT IN THE ROOM: IS AB 51 PREEMPTED BY FEDERAL LAW?**

The signing of AB 51 sets up an almost-certain collision course between the new state law and the 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. State laws attempting to interfere with (or “standing as an obstacle to”)

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arbitration have been repeatedly and consistently struck down by the U.S. Supreme Court as preempted by the FAA.

Proponents of AB 51 argue that it is not preempted by the FAA because it only impacts “mandatory” arbitration agreements and does 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 substantive fairness criteria. Moreover, the bill language cited above that purports to prohibit “opt-out” or other affirmative actions by employees makes it clear that the new law will also impact “voluntary” agreements.

There are several reasons to think AB 51 will be struck down before ever being enforced. Several years ago, a state appeals court blocked a similar bill on preemption grounds. [Assembly Bill 2617](#), which purported to prohibit mandatory arbitration of certain civil rights claims in contracts for goods or services, was killed by a 2018 decision from the Second District Court of Appeal. In *Saheli v. White Memorial Medical Center*, the court ruled that AB 2617 was preempted by the FAA because its “restrictions discourage arbitration by invalidating otherwise valid arbitration agreements. It is precisely this sort of hostility to arbitration that the FAA prohibits.”

In addition, the U.S. Supreme Court recently relied on the FAA to reject an argument that class action waivers contained in arbitration agreements violate the National Labor Relations Act in the [Epic Systems v. Lewis](#) case. Also, a federal court [held earlier this year](#) that a New York law that aimed to prohibit the use of mandatory arbitration agreements in sexual harassment cases was inconsistent with the FAA.

In fact, just last year, Governor Jerry Brown vetoed two similar legislative efforts, including a bill crafted by AB 51’s author (AB 3080). In his veto message, he stated: “This bill plainly violates federal law.” Therefore, AB 51 will likely immediately be challenged as preempted by the FAA. Based on these precedents, proponents will have an uphill battle convincing courts to hold otherwise.

## **AB 51 CREATES A NEW PRIVATE RIGHT OF ACTION UNDER FEHA**

In addition to the provisions discussed above, new Section 12953 of Government Code states that any violation of the various provisions in AB 51 will be an “unlawful employment practice.” This means that violations will be subject to the private right of action under FEHA set forth in Government Code Section 12960. Although this will presumably require an employee to exhaust the administrative remedy under FEHA, this provision will nevertheless expose California employers to another layer of costly litigation related to arbitration agreements.

## **NEXT STEPS**

AB 51 applies to contracts entered into, modified, or extended on or after January 1, 2020. You should immediately consult with legal counsel to discuss whether to continue to include mandatory arbitration agreements in employment contracts, and whether existing contracts need to be modified.

There will almost certainly be immediate efforts to challenge the law, including requests to block the law from going into effect well before its effective date. That will likely lead to years of litigation over whether the measure is preempted by federal law—and there stands a good chance that this issue will need to be ultimately resolved by the U.S. Supreme Court. Some employers may wish to continue to include these provisions in employment contracts while the anticipated litigation is pending. The thought process behind this strategy is that, even if AB 51 is upheld, any unlawful contract provisions will simply be void and unenforceable.

However, you should be aware that, under AB 51, an employee who successfully challenges an alleged violation of the new law may be entitled to their attorneys’ fees. And many employers likely do not want to be the “test case” to challenge the new law all the way to the U.S. Supreme Court. Therefore, you should soon have a conversation with competent employment counsel to discuss these nuanced issues.

We’ll keep you posted on any legal developments in the inevitable fight over the new law, and you can stay updated on the latest news at our [California Employers Blog](#). For more information, contact your Fisher Phillips attorney or one of the attorneys in any of our California offices:

Irvine: 949.851.2424

Los Angeles: 213.330.4500

Sacramento: 916.210.0400

San Diego: 858.597.9600

San Francisco: 415.490.9000

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*This alert provides an overview of a specific state law change. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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