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Nipped In The Bud: Federal Court Enjoins California's New Arbitration Statute

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California's brand-new anti-arbitration statute likely is unconstitutional and cannot be enforced against agreements governed by the Federal Arbitration Act,[1] given a ruling Friday by the United States District Court in Sacramento. In *Chamber of Commerce v. Becerra*,[2] U.S. District Judge Kimberly Mueller issued a preliminary injunction that effectively permits employers to continue to enter into arbitration agreements covered by the FAA, apparently concluding that the FAA likely preempts newly enacted California Assembly Bill 51.[3]

I. **The Court's Ru**ling

The court issued a short minute order Friday granting in full the Chamber of Commerce's motion for a preliminary injunction. The court promised a detailed, written order "in the coming days" that would fully explain the reasoning behind her order. As of Friday's ruling, however, the court formally enjoined the State and its officials from:

- Enforcing the sections of the California Labor Code that purported to preclude an employer from requiring any applicant or employee to enter into an arbitration agreement, or from refusing to hire or discharging any applicant or employee for refusing to consent to an arbitration agreement, where the arbitration agreement is covered by the FAA;
- Enforcing section 12953 of the California Government Code to the extent it makes entering into an arbitration agreement covered by the FAA an unlawful employment practice under the Fair Employment and Housing Act.

The court concluded that there was no realistic likelihood of harm to the State from preliminarily enjoining enforcement of AB 51.

Judge Mueller's order followed her December 30 order temporarily prohibiting enforcement of the statute, but the preliminary injunction is far more significant. First, the new order lasts until the lawsuit ends in a final judgment. Second, the earlier order said only that the Chamber of Commerce had raised "serious questions" of federal preemption; the new order, entered following a much-more-robust defense of the law by the State, suggests the court has concluded that the Chamber of Commerce is likely to prevail on those questions.

AB 51 purported to prohibit a person from requiring a job applicant or employee to enter into an arbitration agreement, and from refusing to hire or discharging persons who refuse to enter into such

agreements. The U.S. Supreme Court, however, in cases written by justices across the ideological spectrum, consistently have held that the FAA preempts state laws that "stand as an obstacle" to "enforc[ing arbitration agreements] according to their terms."[4] Justice Ruth Bader Ginsburg, for example, wrote for an 8-1 majority enforcing an arbitration agreement that a California statute purported to displace. "When parties agree to arbitrate," she wrote, "the FAA supersedes state laws."[5]

In *Chamber of Commerce v. Becerra*, the State of California primarily contended that AB 51 does not prohibit the *enforcement* of an arbitration agreement — something that the FAA protects — but rather the *formation* of the agreement in the first place. Judge Mueller apparently rejected that as a distinction without a difference. Indeed, the Supreme Court previously has held that the FAA "cares not only about the 'enforce[ment]' of arbitration agreements, but also about their initial 'valid[ity]' — that is, about what it takes to enter into them."[6]

II. Next Steps

The State may appeal Judge Mueller's injunction ruling to the U.S. Court of Appeals for the Ninth Circuit. The State may choose to await a final decision in the case on a complete factual record, and (if Judge Mueller adheres to the views suggested by her order Friday) appeal that final judgment. Or the State may do both.

III. What Employers Should Do Now

FAA-covered employers are well advised to take advantage of Judge Mueller's injunction and continue to obtain arbitration agreements unless and until that injunction is overturned. An important reason is to obtain lawful waivers of class actions. A class waiver can be made expressly,[7] but it also is implicit in an arbitration agreement silent or ambiguous on the issue.[8]

Employers who wish to obtain new arbitration agreements, either for new hires or for incumbents, first should ensure that the FAA applies, because only by reason of FAA preemption is AB 51 preempted and unenforceable. The FAA does not apply:

1. to exceptionally small employers, where no nexus to interstate commerce exists;[9]
2. to certain transportation workers, to whom the FAA by its terms does not apply;[10] and
3. to arbitration agreements that lawfully (but unwisely) invoke state arbitration law instead of the FAA.[11]

If the FAA applies, employers interested in commencing an arbitration program should consider whom to cover, and how to do it. New hires can be required to enter into arbitration contracts as a condition of hire. Incumbent employees also can be covered, either on a "quit, or you're bound" basis,[12] or in a voluntary ("opt out") program.[13] Because the parties' mutual promises to arbitrate disputes supply legal consideration for each other, the employer has no obligation to confer any other benefit at the time an arbitration contract is formed.[14] Nevertheless, because arbitration programs can be assailed if not put into place carefully, employers should consult with legal counsel before proceeding.

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[1] 9 U.S.C. § 1 et seq.

[2] No. 2:19-cv-02456-KJM-DB (E.D. Cal., filed Dec. 9, 2019).

[3] AB51, among other statutory additions, added Section 432.6 to the California Labor Code.

[4] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343-44 (2011).

[5] *Preston v. Ferrer*, 552 U.S. 346, 359 (2008).

[6] *See, e.g.*, *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1424, 1428 (2017) (the FAA preempted a state-law rule prohibiting an individual holding a power of attorney from forming an agreement to arbitrate, since the prohibition singled out arbitration provisions and left the holder of the power of attorney free to form other kinds of contracts).

[7] *See, e.g.*, *Concepcion*, 533 U.S. at 336 (express class waiver).

[8] *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415, 1419 (2019) (an agreement silent or ambiguous on the availability of a class action cannot be construed to allow it).

[9] The FAA's test for interstate commerce normally is easily met. For example, the Supreme Court found that the FAA applies to a contract for termite-eradication services in a single dwelling. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-75 (1995).

[10] 9 U.S.C § 1; *see Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 119 (2001) (construing narrowly the transportation-worker exception).

[11] *See Volt Info. Scis. v. Trustees of Stanford University*, 489 U.S. 468, 470, 477-79 (1989) (contracts lawfully may opt out of FAA coverage).

[12] *See Diaz v. Sohnen Enters.*, 34 Cal. App. 5th 126, 130 (2019) ("California law in this area is settled: When an employee continues his or her employment after notification that an agreement to arbitration is a condition of continued employment, that employee has impliedly consented to the arbitration agreement."); *Craig v. Brown & Root, Inc.*, 84 Cal. App. 4th 416, 422 (2002) (employee gave her assent by "continu[ing] to work for Brown & Root" after being told that doing so created an arbitration agreement).

[13] *See, e.g.*, *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1210 (9th Cir. 2016) ("the existence of a meaningful right to opt-out" produces an enforceable agreement, without the party's signature) (citation and internal quotation marks omitted); *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1074 (9th Cir. 2014) ("By not opting out within the 30-day period, [plaintiff] became bound by the terms of the arbitration agreement."); *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1199 (9th Cir. 2002) (employee accepted arbitration by failing to opt out after receipt of program materials); *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1109 (9th Cir. 2002) (same).

[14] *See Strotz v. Dean Witter Reynolds*, 223 Cal. App. 3d 208, 216 (1990) ("[T]he parties' mutual promises to forego a judicial determination and to arbitrate their disputes provide consideration for each other."), *overruled on other grounds*; *Najd*, 294 F.3d at 1108 (the employer's promise to be bound by the arbitration process supplied adequate consideration).