NINTH CIRCUIT COURT OF APPEALS STRIKES DOWN CALIFORNIA'S BAN ON MANDATORY ARBITRATION AGREEMENTS

By Christopher R. Nepacena

On February 15, 2023, the U.S. Court of Appeals for the Ninth Circuit panel ruled that the Federal Arbitration Act ("FAA") preempts California Assembly Bill 51, codified in Labor Code Section 432.6, a 2019 measure that prohibited employers from requiring job applicants and employees to sign arbitration agreements as a condition of employment.

According to the panel majority, "Because FAA's purpose is to further Congress's policy of encouraging arbitration, and AB 51 stands as an obstacle to that purpose, AB 51 is therefore preempted." The three-judge panel had partially upheld AB 51 in a 2021 ruling but a year later it decided to withdraw its prior ruling and reconsider the legality of the law.

Labor Code Section 432.6 (California AB 51) made it an unlawful employment practice for employers to require applicants and employees to sign arbitration agreements as a condition of employment. Violations of the law could lead to civil and criminal penalties, which meant that employers would have been subject to the private right act action under the Fair Employment and Housing Act ("FEHA") set forth in Government Code Section 12960. This law exposed employers to retaliation claims associated with an applicant or employee's refusal to sign a mandatory arbitration agreement. However, the Ninth Circuit's ruling yesterday makes it abundantly clear that Labor Code Section 432.6 (AB 51) should be on its way out once and for all.

California Attorney General could still appeal the decision through an *en banc* rehearing by the Ninth Circuit or even to the U.S. Supreme Court, but for now the law is no longer effective. The chances that AB 51 will ever see the light of day should be slim after yesterday's ruling.

What does this mean for California employers?

The Ninth Circuit's ruling means that employers may require employees to sign arbitration agreements as a condition of employment, rather than litigate in civil court, including claims for unpaid wages, discrimination and many other claims covered by California's Labor Code and state laws. As a result, California employers can now continue to utilize mandatory arbitration agreements as a condition of employment, but of course subject to certain limitations.

For example, arbitration agreements cannot require employees to forego filing administrative claims with the California Civil Rights Department ("CRD") or Equal Employment Opportunity Commission ("EEOC"). Also, under rare circumstances, a California employer might not be covered by the FAA, and therefore the anti-arbitration statute would still apply.

Needless to say, while this is a huge win for California employers, it is still important to ensure that you have an up-to-date arbitration agreement and consult with competent employment counsel about potential modifications.

We will continue to monitor any legal developments and encourage employers to reach out to Donahue Fitzgerald's Employment

Attorneys with any questions regarding this important ruling.

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