

## CALIFORNIA EMPLOYERS MAY REQUIRE EMPLOYEE ARBITRATION AGREEMENTS AFTER NINTH CIRCUIT UPHOLDS INJUNCTION AGAINST AB 51

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California's 2020 anti-arbitration law, AB 51, seeks to prohibit employers from requiring employees to sign – as a condition of employment or eligibility for employment-related benefits – arbitration agreements concerning disputes arising under the California Fair Employment and Housing Act or California Labor Code. Since taking effect three years ago, an injunction by a federal district court has precluded enforcement of AB 51 with respect to arbitration agreements governed by the FAA. California appealed that injunction to the U.S. Court of Appeals for the Ninth Circuit.

In 2021, a divided panel of the Ninth Circuit initially held the FAA does not completely preempt AB 51. After procedural wrangling, however, the Ninth Circuit withdrew its initial opinion and granted a rehearing. The panel recently issued a new decision – this time affirming the district court's injunction on the grounds that the FAA does completely preempt AB 51.

The panel focused on robust U.S. Supreme Court precedent that state laws that burden the formation of arbitration agreements are an obstacle to the legislative intent of, and thus are preempted by, the FAA. The panel also noted the First and Fourth Circuits reached similar conclusions when confronted with state laws that attempted to prevent parties from entering arbitration agreements.

The panel rejected arguments from the State of California that it should sever clauses that were deemed preempted by the FAA and leave the remainder of the law intact. The panel explained that AB 51 could not be severed and saved because the statute's provisions all work together to burden the formation of arbitration agreements.

With this ruling, the injunction barring enforcement of AB 51 will remain in effect for the time being. California could request a rehearing by the Ninth Circuit *en banc* or appeal to the U.S. Supreme Court. In either event, the injunction would remain in effect until a further decision in the matter.

If California does not pursue a further appeal, the case will return to the district court for a final determination on the legality of AB 51. However, given that the district court already enjoined enforcement of the law, and the injunction survived an appeal, it's likely (although nothing is certain) that the district court will ultimately deem the law unenforceable. That, of course, could trigger a new round of appeals.

We will keep you posted. For now, California employers are free to adopt mandatory arbitration agreements with their employees so long as the agreements are not procedurally or substantively unconscionable and comply with requirements previously set forth by the California Supreme Court.

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