COMMENTARY

Mandatory Employment Arbitration Permissible—But For How Long?

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March 02, 2023 at 12:29 PM

Employment Law

By Jonathan Andrews | March 02, 2023 at 12:29 PM

The U.S. Court of Appeals for the Ninth Circuit Court appears to have handed a gift to California businesses. In its Feb. 15 decision in *Chamber of Commerce v. Bonta* (No. 20-15291 D.C. No. 2:19-cv-02456- KJM-DB), a three-judge panel ruled that California's AB51 could not be used to bar employers from requiring employees to sign arbitration agreements as a condition of employment.

The decision upholds a federal district court's injunction against the legislation on grounds that it is preempted by the Federal Arbitration Act (FAA). Even though AB51 would criminalize the act of forming an agreement, rather than arbitration itself, it nevertheless discriminates against arbitration in violation of federal law, according to the majority opinion written by Judge Sandra S. Ikuta.

In his dissent, Tenth Circuit Judge Carlos F. Lucero, sitting by designation, argued that AB51 provided a much-needed mechanism for leveling the playing field by allowing workers to negotiate or reject arbitration terms. He went on to note that removing workers' ability to bypass arbitration could have an even more deleterious effect on the legal system:

"Moreover, courts are potentially left with an increasingly diminished role, or no role at all, in employer-employee disputes. This would effectively freeze the evolution of precedent for employment principles and law, and give employers unmitigated power to mandate the arbitration of all employer-employee disputes as a condition of employment."

The Economic Policy Institute and the Center for Popular Democracy predict that by 2024, almost 83% of the country's private, nonunionized employees will be subject to mandatory arbitration, an increase of 56% since 2017. Although arbitration is supposed to offer a streamlined process with limited motion practice and appellate review, its benefits have generally been questioned by employers and employees alike. Employee advocates, in particular, have been concerned about an uneven playing field, as a 2015 Economic Policy Institute report found that on average, employees win less often and receive far lower damages in arbitration than they do in court.

Although California may still ask for review by the full court, it is unlikely that AB51, in any form, will survive. Should the full Ninth Circuit rule in the state's favor, that decision will inevitably be appealed to a U.S. Supreme Court that has consistently upheld the FAA and ruled in favor of arbitration, including most recently in *Viking River Cruises v. Moriana*.

With the Ninth Circuit's decision, the battle over mandatory employment arbitration will likely shift back to analyzing the overall fairness of the arbitration process. California lawmakers who enacted AB51 were clearly concerned about workers' unequal bargaining power, their lack of knowledge about the arbitration process, and the perception that arbitration favors the employers who pay the arbitrators' bills.

The Ninth Circuit majority effectively dismissed the first concern, stating that "It has long been established that parties to a contract are generally deemed to have consented to all the terms of a contract they sign, even if they have not read it. … This is true even if the contract at issue is an adhesion contract, defined by California courts as 'a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.' Neal v. State Farm Ins. Cos., 188 Cal. App. 2d 690, 694 (1961)."

As for the second concern—lack of knowledge about the arbitration process—this could be addressed by the state in new legislation that requires all employers that mandate arbitration as a condition of employment to educate workers about arbitration. An arbitration training component could be added to the modules already required to be provided to all employees.

New legislation could help level the playing field by ensuring that arbitral decisions are fair, impartial and legally sustainable. California's Ethics Standards for Neutral Arbitrators in Contractual Arbitration states that "[f]or arbitration to be effective there must be broad public confidence in the integrity and fairness of the process." Standard 5, covering general duties, says that "[a]n arbitrator must act in a manner that upholds the integrity and fairness of the arbitration process. He or she must maintain impartiality toward all participants in the arbitration at all times."

The FAA provides no recourse when an arbitrator's decision is based on a flawed legal analysis, and it allows judicial review if and only if a decision was procured by fraud, the arbitrator was biased, the arbitrator refused to hear relevant evidence, or the arbitrator exceeded his or her power as set forth in the arbitration agreement.

But legislation at the state level could better ensure that the Ethics Standards are met. Such legislation could require that every arbitral decision include a reasoned, published opinion and that the legal basis for the decision be subject to outside review and judicial appeal if erroneous. It could also go so far as to require that arbitration awards be commensurate with prevailing court awards for similar cases.

Finally, state legislation could mandate more overall transparency in arbitration awards and decisions, so that (a) parties can make more informed decisions as to who they select as their arbitrator; and (b) the process could more effectively address the "evolution of precedent" concerns raised by Judge Lucero' dissent. If California were to enact legislation mandating employee training and providing recourse for parties that wish to challenge arbitrator decisions, it could support employers that rely on otherwise enforceable arbitration agreements to resolve disputes while providing more safeguards and transparency for employees who must submit their claims to arbitration.

Jonathan Andrews *is a neutral with Signature Resolution, where he mediates and arbitrates labor and employment cases throughout the state. He has an LL.M in Dispute Resolution with a concentration in mediation, as well as 24 years of trial experience advising and representing clients in state and federal court as well as before administrative agencies, such as the California Labor Commissioner, the California Department of Fair Employment and Housing and the Equal Employment Opportunity Commission.*

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