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9th Circuit Upholds Mandatory Arbitration Agreements Required by California Employers

By Rex Berry
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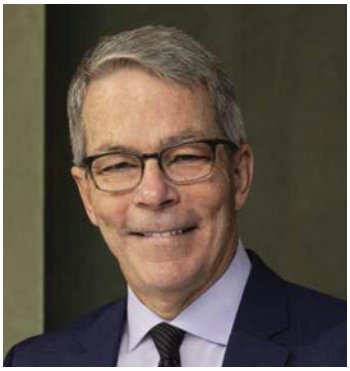
Among practitioners of employment law, the U.S. Court of Appeals for the Ninth Circuit has a general reputation for being more favorable to employees than to employers. After a recent ruling, however, that view might need some updating.

In *Chamber of Commerce v. Bonta*, the Ninth Circuit handed employers an unexpected gift when it ruled on a case involving a California statute known as AB 51. In a reconsidered panel decision, the court held that AB 51, which effectively barred most employer-mandated arbitration agreements, could not be enforced. Specifically, the court found that AB 51 was preempted by federal law in the form of the Federal Arbitration Act (FAA), which strongly encourages arbitration and restricts the ability of courts to limit the enforceability of arbitration agreements.

As a result, most California employers who engage in interstate commerce now may require employees to enter into pre-dispute arbitration agreements as a condition of employment. As courts often give a broad definition to the term "interstate commerce," the Ninth Circuit's ruling will likely impact the great majority of California employers.



Courtesy photo

Rex Darrell Berry of Signature Resolution.

The Ninth Circuit's opinion surprised many court-watchers. For several years since the mid-1990s, numerous California employers have sought to require employees to agree to pre-dispute arbitration as a condition of employment. Those employers believe that arbitration is a faster, cheaper and less disruptive alternative to lawsuits and court trials.

Many California employers also know that a well-crafted arbitration agreement can afford an employer significant protection from class action wage/hour lawsuits and collective actions under statutes like California's Private Attorneys General Act. As a practical matter, many employers also prefer arbitration over litigation because they feel arbitration reduces the chance of a "runaway" jury verdict.

Many plaintiffs employment lawyers strongly disagree with employers on these issues. They see mandatory pre-dispute arbitration agreements as unconscionable waivers of employees' substantive rights and assert that such agreements unduly favor employers as "repeat players" in arbitration.

Over time, as employer use of such agreements increased, so did litigation by plaintiffs employment counsel over the enforceability of mandatory arbitration agreements. This litigation resulted in court decisions both pro and con, running all the way the to the U.S. Supreme Court and back again. While many jurisdictions found mandatory arbitration agreements to be enforceable, California courts often were hostile to such agreements and sought to limit their enforceability. For example, many California courts sought to establish "guard rails" to prevent the enforcement of agreements they deemed to be procedurally or substantively unconscionable.

In 2020, the California legislature entered the fray by enacting AB 51 as a tool to prohibit mandatory arbitration agreements. As the FAA generally preempts state laws that interfere with arbitration, the legislature sought to avoid that preemption by not prohibiting mandatory arbitration agreements, but instead, making it a crime for employers to seek to enforce a mandatory arbitration agreement.

In the *Bonta* case, after a complicated series of procedural hurdles, the Ninth Circuit found the California legislature's actions to be an indirect assault on arbitration agreements, which the court termed to be "too clever by half." The court ruled that the FAA preempted AB 51, explaining that AB 51's criminal penalties were designed to discourage employers from entering into mandatory arbitration agreements with employees.

The court also found that AB 51 applied to arbitration agreements special rules for enforceability that did not apply to other "take it or leave it" agreements like hotel registrations, internet service agreements, iPhone updates, and rental car contracts. The court found that because the FAA requires arbitration agreements to be enforced on the same terms as other agreements, AB 51's limitations on arbitration agreements could not stand.

Thus, the *Bonta* decision now allows California employers who engage in interstate commerce to both require mandatory pre-dispute arbitration agreements as a condition of employment and seek enforcement of those agreements in court. While mandatory arbitration agreements still are subject to the same requirements applicable to other agreements (such as the need to avoid unconscionable terms, etc.), those agreements now may be enforced under the FAA. At least, that is, until the California legislature's next move.

With four decades of experience as a defense lawyer specializing in employment law, **Rex Berry** *now focuses his energy on dispute resolution in both mediation and arbitration with Signature Resolution.*

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