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PERSPECTIVE

Options for bypassing employment arbitration are changing

By Jonathan Andrews

When it upheld a lower court's injunction against a California law banning mandatory employment arbitration, the Ninth Circuit made it clear that the Federal Arbitration Act (FAA) was difficult to circumvent. No state law, according to a divided panel of the court, could usurp the right of employers to mandate arbitration in their employment agreements, provided the arbitration agreement is governed by the FAA.

AB51, signed into law by Gov. Gavin Newsom in 2019, made it a criminal offense for employers to require agreement to arbitration as a condition of employment. Labor rights advocates had tried for years to ban such mandates, citing data suggesting arbitration outcomes strongly favoring defendants. "The Arbitration Epidemic," a 2015 Economic Policy Institute report, found that "On average, employees and consumers win less often and receive much lower damages in arbitration than they do in court."

Earlier bills had been vetoed by Gov. Jerry Brown because of preemption concerns, but this newest effort was drafted in a way that its authors hoped would withstand objections. Instead of outlawing arbitration, AB51 focused on the formation of arbitration agreements. In essence, the supporters of AB51 argued they had no issue with enforcing legally permissible arbitration agreements; but in doing so, they urged that mandatory arbitration agreements should not be legally permissible. Nevertheless, when challenged by the U.S. and California Chambers of Commerce, as well as other business groups, the law was found to be a violation of federal law.

In December 2019, the U.S. District Court for the Eastern District of California stayed the California law, and in 2020, in keeping with a history of federal court rulings on FAA preemption, the court granted the request for a preliminary injunction.

The FAA was enacted in 1925 to support business contracts that called for alternative dispute resolution. It required courts to stay litigation, upon motion, when a dispute involved a contract with a written arbitration clause. The law may have presupposed that parties to the contract would understand its terms and would be in a position to negotiate them, but for opponents of mandatory arbitration of employment claims it is a stretch to believe that today's employees are in any position to negotiate – let alone understand – these agreements.

Regardless, the Ninth Circuit majority – Judges William A. Fletcher and Sandra S. Ikuta – found that arbitration agreements are valid even if non-negotiable: "Contrary to the arguments made by California and the dissent, a contract may be 'consensual,' as that term is used in contract law, even if one party accepts unfavorable terms due to some degree of unequal bargaining power. …This is true even if the contract at issue is an adhesion contract."

The court further held that AB51 unduly infringed on employers' right to invoke arbitration for employee grievances. "Because a person who agrees to arbitrate disputes must necessarily waive the right to bring civil actions regarding those disputes in any other forum, AB 51 burdens the defining feature of arbitration agreements. The burden imposed on the formation of arbitration agreements is severe."

In a strongly worded dissent, Carlos F. Lucero of the U.S. Court of Appeals for the Tenth Circuit, sitting by designation, questioned his colleagues for so easily discounting the non-negotiability of arbitration agreements. "My colleagues' misinterpretation leaves state legislatures powerless to ensure that arbitration clauses in these employment agreements are freely and openly negotiated."

So is this the end of the line for California's efforts to limit or abolish mandatory employment arbitration? The state could ask for the matter to be heard by the entire Ninth Circuit, but any different result will likely be appealed to the U.S. Supreme Court, a forum that has recently demonstrated its support of the FAA and expressed antipathy toward anything that limits the right of businesses to invoke arbitration.

That being said, employers across the country are now barred by federal law from forcing Title VII sexual harassment claims into arbitration. H.R. 4445, signed into law last year by President Joe Biden, not

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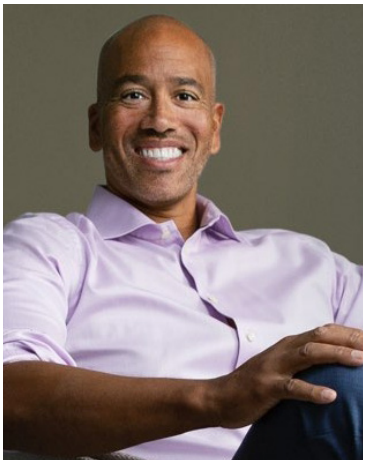

only prohibits employers from requiring arbitration of claims involving allegations of Title VII sexual harassment or sexual assault going forward, but it nullifies existing policies or agreements that require those claims to be arbitrated. It should be noted H.R. 4445 does not prohibit arbitration of these claims, but rather it allows the employee to choose the forum. In matters of interpretation, courts, not arbitrators, determine the applicability of H.R. 4445.

Could additional carve-outs be on the horizon? If the public interest favors allowing sexual assault/harassment victims to have their day in court, Congress could include more limitations, by allowing for the carve out of race, gender, religion, or other discrimination claims. Indeed, Biden has expressed support for expanding limitations to predispute claims involving discrimination on the basis of race, wage theft, and unfair labor practices. Some states have already begun this process. For example, New York prohibits mandatory arbitration of any allegation of discrimination.

Based on the rationale of laws like H.R. 4445, it would not be surprising to see other MeToo-like movements that drive additional carve-outs, at either the state or federal levels. At a minimum, it is likely that an employee who has a claim covered under H.R. 4445 might also include claims not covered by the statute, in an effort to encourage the consolidation of covered and uncovered claims in arbitration. Employers, in those cases, may be faced with the expensive choice of allowing the bifurcation of covered or uncovered claims or submitting all claims to arbitration.

So, while the recent Ninth Circuit decision supports mandatory employment arbitration, decisions regarding which employment-related claims are ultimately required to be arbitrated will likely continue to be refined.