CMDA Action Alert!

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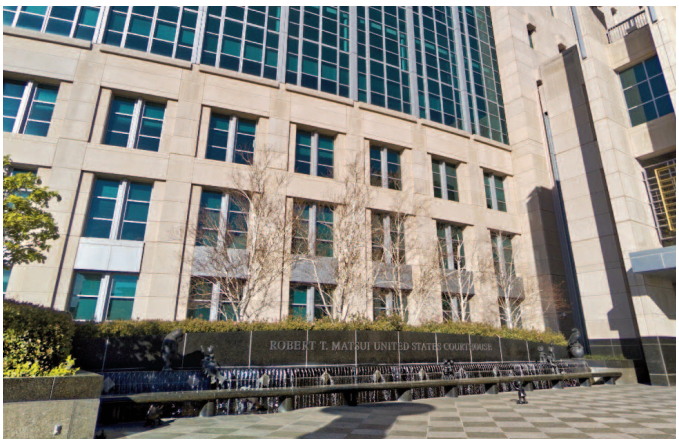
Special Issue; Must Read — The U.S. Ninth Circuit Appeals Court Partially Reinvigorates the California Law Limiting Arbitration!

The Ninth Circuit created a judicial "tremor" on Wednesday, September 15, 2021, when it issued a ruling partially tossing out a District Judge's Order blocking enforcement of a California law barring employers from requiring workers to sign agreements mandating arbitration of certain employment disputes as a condition of employment.

In the closely watched matter of *U.S. Chamber of Commerce v. Bonta, Ninth Circuit Case No. 20-15291*, the Ninth Circuit partially reinvigorated California's controversial AB 51, which not only imposed the prohibition noted above, but also imposed criminal and civil penalties on employers who attempted to require such agreements of employees.



U.S. Ninth District Court of Appeals Courthouse in Sacramento

While affirming the injunction relative to the imposition of criminal and civil penalties against employers embodied within AB 51, the Ninth Circuit *reversed* the injunction relative to the anti-arbitration prohibitions found in AB 51 (which is now codified in California Labor Code § 432.6), thus paving the way for enforcement of those prohibitions.

In reaching these conclusions, the divided 3-judge panel simply concluded that the challengers failed to establish the likelihood of success on the merits of their claim, explaining that because the law was designed exclusively to regulate pre-agreement conduct – but not the enforceability of such agreements – it was not preempted by the Federal Arbitration Act, 9 U.S.C. §§ 1, et seq. ("FAA").

The panel, however, concluded that the District Court's injunction was proper with respect to the state's ability to impose criminal and civil penalties, holding that such enforcement was preempted by the FAA. The panel did not opine on any of the other issues presented.

Unfortunately, the majority opinion creates confusion over the applicability of the surviving portions of AB 51, leaving employers to wonder about several important issues.

For example, the majority decision concludes that the surviving prohibitions of AB 51 apply only to parties that do not sign an arbitration agreement, and that Section 432.6 does not make invalid or unenforceable any agreement to arbitrate, even if such agreement is consummated in violation of the statute.

Thus, if an employer offers, and an employee signs/agrees to, an arbitration agreement in a form prohibited by Labor Code § 432.6, that statute has no bearing on the actual validity or enforceability of that consummated agreement.

As pointed out by the dissenting opinion, the effect of the majority's decision is that an employer's attempt to enter into a mandatory arbitration agreement which is a condition of employment is unlawful, but a completed attempt, i.e., the resulting consummated agreement itself is lawful.

This awkward circumstance, combined with the circuit court split on the issue referenced by the dissent, creates a powerful incentive for the challengers to seek further clarification regarding the statute's effect by way of further judicial review.

And, as those who watch such things can tell you, the author of the dissenting opinion frequently is found on the winning side of decisions that make their way to the U.S. Supreme Court. *Stay tuned*.

Further, the majority decision notes that traditional contract defenses remain unchanged vis-à-vis the formation and enforcement of such agreements. This presumably means "unconscionability" challenges typically thrown at employers attempting to enforce arbitration agreements remain unchanged.

However, this dicta appears internally inconsistent with other portions of the decision which seem to invite challenges to pre-AB 51 agreements based on the prohibitions set forth in Section 432. Again, this provides further fodder that the challengers may reference for purposes of further judicial review.

Similarly, though the majority panel confirms that statutory law does not apply retroactively, the majority appears to invite challenges to pre-AB 51 arbitration agreements based on the prohibitions set forth in Section 432.6, e.g., without opining on the answer, the majority queries whether an otherwise valid and enforceable agreement that was consummated before Section 432.6's effective date would be valid under Section 432.6 if that agreement was required as a condition of employment.

There are two primary takeaways for employers from this significant and confusing decision:

1. Employers should continue to monitor this case for further developments, which could occur at any time within the 21-day period following the opinion's date (concluding October 6, 2021).

Under Court rules, the parties may seek further judicial review of the ruling, which could be either a petition for rehearing before an en banc panel of the Ninth Circuit or a petition for a stay of mandate pending the filing of a petition for review to the U.S. Supreme Court.

If either of these filings occurs, the District Court's injunction will remain in place until a final decision is reached. Absent these filings, AB 51 will become effective, subject to the injunction on civil and criminal penalties affirmed by the Ninth Circuit.

2. Employers should promptly evaluate their existing arbitration agreements and consult competent legal counsel for advice regarding arbitration agreements they already have in place with their employees, as well as advice on the advisability and strategies for implementing new arbitration agreements moving forward with current and prospective employees.

Despite this decision, it is not time to abandon arbitration agreements with employees, but until obtaining such legal counsel and advice, employers should think twice before requiring employees to sign new, modified, or extended arbitration agreements, or doing anything that might jeopardize the pre-AB 51 agreements they may already have in place.

The CMDA thanks Cory King, Esq. who provided this vital, fast-breaking employment agreement information that all CMDA Members should be aware of. ◆

In order to address these and other related California HR issues in more detail, please contact the CMDA's local FordHarrison attorney, Cory King, Esq. at his Escondido office (858) 214-3951.