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California Seeks To Sidestep Mandatory Workplace Arbitration Agreements, Again

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California's hostility to workplace arbitration agreements continues. In the wake of the #MeToo movement and the proliferation of workplace arbitration agreements with class and collective waivers post-*Epic Systems*, California has joined several other states in enacting legislation that seeks to prohibit mandatory arbitration agreements for employment related claims under certain circumstances.

Assembly Bill 51 (AB 51), which Governor Newsom signed on October 10, 2019, is similar to legislation former Governor Jerry Brown refused to sign. AB 51 will likely be challenged on the grounds that it is preempted by the Federal Arbitration Act (FAA). Nevertheless, employers in California would be wise to acquaint themselves with its contours.

Effective January 1, 2020, AB 51 significantly limits employers' ability to require employees to sign new mandatory arbitration agreements for employment disputes arising under the California Labor Code or the California Fair Employment and Housing Act. Under AB 51, employers will no longer be able to require an agreement to arbitrate employment claims as a condition of employment, a condition of continued employment, or a condition to receive any employment-related benefits.

The law further prohibits retaliation and discrimination against any individual who refuses to agree to the employer's workplace arbitration agreement. Even opt-out provisions contained in a workplace arbitration agreement will

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not pass muster under the new law. AB 51 does not, however, limit an employer's ability to present an employee with a voluntary workplace arbitration agreement, or to offer other consideration in exchange for an employee's agreement to arbitrate workplace disputes.

While AB 51 is undoubtedly significant, there is reason to believe that the law may not have a lasting effect. First, it is important to note that AB 51 only prohibits mandatory arbitration agreements entered into or modified after January 1, 2020. Existing agreements, entered into as of December 31, 2019, remain intact and are unaffected by AB 51.

Second, AB 51 will likely be challenged under the FAA, which expressly preempts any state law that stands as an "obstacle" to arbitration. Although the new law states that arbitration agreements that are "otherwise enforceable" under the FAA will not be "invalidate[d]," this provision may stand as an "obstacle" to enforcement of arbitration agreements because it will not prevent opponents from using the provisions of AB 51 to attack the validity of the formation of arbitration agreements. Federal courts around the country, including the Supreme Court of the United States, have consistently held that state laws seeking to limit the enforcement of arbitration agreements are preempted by the FAA, including state laws with federal law carve-outs.

Employers in California would be well served by monitoring the treatment of AB 51 by federal courts, as it is very likely to be challenged in the near term on preemption grounds.