Employer Update

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Ninth Circuit Partially Resurrects California Statute Barring Mandatory Arbitration Clauses in Employment Contracts – Ascertaining Impact and Looking Forward

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On September 15, 2021, the Ninth Circuit issued a decision in *Chamber of Commerce v. Bonta* concerning arbitration provisions and how they will be assessed under California law. This decision could potentially create civil and criminal exposure for businesses that amend existing, or enter into new, agreements containing arbitration provisions for California-based employees. However, it likely has no immediate practical consequences for businesses with executed arbitration agreements in place. Below, we briefly discuss the pertinent California statute at issue in *Bonta* and the lower court record, and provide practical advice to employers regarding *Bonta*'s impact as the appellate process unfolds.

Background: California Labor Code Section 432.6

Over the last few years, the California legislature has attempted to proscribe the use of mandatory employment-related arbitration agreements. In October 2019, Governor Newsom signed Assembly Bill 51 (AB 51) into law. AB 51 added § 432.6 to the California Law Code, which prohibits an employer from imposing "as a condition of employment, continued employment, or the receipt of any employment-related benefit" the requirement that an individual "waive any right, forum or procedure" available under the California Fair Employment and Housing Act ("FEHA") and Labor Code. In other words, AB 51 effectively attempts to outlaw provisions calling for the arbitration (rather than court litigation) of employment discrimination and related claims. For violations, it imposed civil and criminal penalties, including imprisonment in a county jail for not more than six months, a fine of not more than $1,000, injunctive relief, an award of attorney's fees to a prevailing plaintiff, and even investigation and potential litigation by the Department of Fair Housing and Employment.

Two days before § 432.6 was to take effect on January 1, 2020, a District Court in the Eastern District of California granted a temporary restraining order, and subsequently issued a preliminary injunction, enjoining the enforcement of § 432.6 on the basis that the Federal Arbitration Act ("FAA") preempted § 432.6. The District Court's reasoning applied precedent that when federal law has fully spoken on an issue or topic (such as with the FAA's recognition of arbitration as a valid form for resolving employment law claims), then the federal law preempts or prohibits efforts by state or local law to contradict the federal law.

Ninth Circuit Decision

On September 15, 2021, in *Chamber of Commerce v. Bonta*, a split Ninth Circuit panel partially reversed the injunction, thereby resurrecting portions of § 432.6, because it found that § 432.6 was factually distinct so that it did not run afoul of FAA's preemptive authority. The Ninth Circuit started with the very broad proposition that employers cannot require California employees to sign arbitration agreements, and they cannot retaliate against employees or prospective employees for refusing to agree to arbitrate claims. The Ninth Court, however, then stepped backed from that proposition by agreeing with the District Court that the FAA preempted § 432.6 to the extent it exposed employers to civil or criminal penalties if an employee in fact signs an agreement to arbitrate. As expressly reflected in the statute, the Ninth Circuit also noted that § 432.6 cannot be used to invalidate, revoke, or fail to enforce an arbitration agreement that is already in place. But behavior occurring *prior to* the execution of an arbitration agreement is not, according to the Ninth Circuit, preempted by the FAA. Thus, employees who are presented with but do not sign arbitration agreements may ultimately allege that they were subject to an improper condition of employment in violation of § 432.6.

Practical Implications

It is likely that this decision will be appealed, whether it be a panel rehearing petition, *en banc* rehearing petition, or a Supreme Court petition for *certiorari*. If an appeal is filed before the Ninth Circuit issues a formal mandate, which we believe is likely, the District Court's injunction will remain in effect. Therefore, it is too soon to tell what the ultimate impact of the Ninth Circuit's ruling will be on employers. However, there are some practical implications worth considering in the event this statute does become binding and enforceable.

First, given that arbitration agreements that are fully executed are valid in California, and § 432.6 was designed to prevent retaliation against employees who do not sign arbitration agreements, employers considering revising or updating existing arbitration agreements may want to delay that process. Employers in these circumstances may want to assess the risk of asking large numbers of California-based employees to enter into amended agreements before the appeals process is complete.

Second, employers may want to consider the risks of presenting job applicants with an agreement containing an arbitration provision. Per the *Bonta* decision, if these employees sign an arbitration agreement then the FAA should apply and insulate the employer from potential liability. However, if § 432.6 becomes enforceable and the new employees do not sign arbitration agreements, then the plaintiffs' bar will likely argue that the law was in effect retroactive to January 1, 2020 or at least the date of the *Bonta* decision.

Third, in case the *Bonta* opinion survives appeal and the District Court's injunction is lifted, employers may want to outline the contours of a hiring process that will provide employees with the opportunity to voluntarily enter into an arbitration agreement, such as one that does not require employees to opt out of arbitration or take affirmative steps to preserve their right to sue in court.

Fourth, while the risk of any individual bringing suit may be low, and the attendant civil exposure relatively small, real exposure exists. A class of applicants for employment or employees who do not sign the arbitration agreement could dramatically increase the cost of litigation and potential costs for resolution of such claims. Moreover, it remains unknown how actively and aggressively the Department of Fair Housing and Employment will pursue investigations and enforcement actions in this space, and whether California will bring criminal prosecutions.

We will continue to monitor this case and will provide updates on material developments.

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