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# Mandatory Arbitration in California-Governed Employment Agreements: What Employers Need to Know

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In October 2019, California enacted Assembly Bill 51 (AB 51) which prohibits employers from requiring employees to arbitrate labor claims brought under certain California laws. The law has since been challenged in court, leaving employers uncertain about whether mandatory arbitration clauses can and should be used for employment agreements moving forward. This note explains the current status of AB 51 and what it means for employers.

## Why You May (Or May Not) Want to Arbitrate a Dispute

It is common practice for employers to include in employment agreements a mandatory arbitration clause, requiring that any dispute between the employer and employee must proceed to arbitration, rather than the courts. Arbitration clauses offer employers a number of benefits, including that (*i*) arbitration is often less costly than litigation, (*ii*) arbitration typically moves more quickly than litigation, and (*iii*) arbitration is confidential, preventing public access to embarrassing or competitively sensitive information.

However, mandatory arbitration clauses are controversial because they bar employees from pursuing employment and discrimination cases in open court, which keeps the public (and other employees) from learning about employer misconduct. Additionally, arbitration has been criticized for favoring employers over employees.

## AB 51 and the Courts

Under AB 51, employers cannot require that employees or job applicants give up the right to sue employers in court for violations of the California Fair Employment and Housing Act (FEHA) or any other California law governing employment. FEHA prohibits employers from discriminating against a job applicant or employee because of a protected category (race, religion, creed, national origin, age, sex, gender, sexual orientation, gender identity, disability, medical condition, genetic information, marital status and military or veteran status). Employers violating AB 51 could face severe penalties, including possible criminal prosecution.

Shortly after AB 51 was enacted, a group of litigants challenged it in court, claiming that it was inconsistent with Federal law. In January of 2020, the court temporarily suspended AB 51, and the issue is now before the Court of Appeals. Until the case is resolved, AB 51 is not in effect.

What This Means for Employers with California Employees

The litigation around AB 51 has left employers uncertain about whether they can or should continue to include mandatory arbitration clauses in agreements with their California-based employees. The short answer is that until the California courts resolve the challenge to AB 51, employers can continue to use mandatory arbitration clauses.

While there is some risk that the California courts will ultimately reject the challenge to AB 51, and AB 51 will go into effect, we believe that is unlikely. Even if that were to happen, any arbitration clauses included in employment contracts before AB 51 took effect would still be valid. All that is to say, from our perspective, employers who prefer arbitration can continue to include mandatory arbitration clauses in their contracts unless and until advised otherwise.

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We encourage you to contact us with questions about how these issues impact your California-law governed employment agreements. We'll continue to monitor the pending litigation regarding AB 51 and provide further updates as the case develops.