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Anti-Arbitration Statute Gets Zapped!

California Employment Law Update on **May 28, 2024**

The Empire Struck Back last week when the California Court of Appeal held that the state's latest back-door attempt to outlaw employment arbitration by any means necessary is preempted by the Federal Arbitration Act (FAA). *Hernandez v. Sohnen Enterprises, Inc.*, 2024 WL 2313710 (Cal. Ct. App. 2024). As indicated in our earlier post on this topic, it was just a matter of time before an appellate court found FAA preemption of Cal. Code Civ. Proc. § 1281.97, which requires that an employer pay (and the arbitrator receive) all arbitration fees that are owed within 30 days or face an automatic "waiver" of the right to arbitrate.

In his pithy and prophetic dissent in another recent case upholding the statute, Justice John Shepard Wiley Jr. predicted that "[b]y again putting arbitration on the chopping block, this statute invites a *seventh* reprimand from the Supreme Court of the United States," which has "rebuked California state law that continues to find new ways to disfavor arbitration." *Suarez v. Superior Court*, 99 Cal. App. 5th 32 (2024) (Wiley, J., dissenting). Before *Hernandez*, the Court of Appeal spray-painted the official reports with at least a half dozen published opinions upholding the pernicious pay-or-waive statute that the legislature enacted in 2019.

But as Justice Wiley noted in *Suarez*, the federal district court got it right when it concluded back in 2022 that the statute violates the equal-treatment principle of FAA preemption "because it mandates findings of material breach and waiver for late payment [of arbitration fees] that do not apply generally to all contracts or even to all arbitrations" (citing *Belyea v. GreenSky, Inc.*, 637 F. Supp. 745, 759 (N.D. Cal. 2022)).

Perhaps the most important takeaway from *Hernandez* is that employers should run (not walk!) to confirm that their arbitration agreement expressly states that it is governed by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* Failure to invoke the FAA may mean that the more employee-friendly (and *arbitration-hostile*) California Arbitration Act (including Section 1281.97) will apply.

And any employer that still thinks it’s safe testing its luck with a California jury need not look much further than last week’s jaw-dropping verdict awarding a Palmdale train yard worker who slipped and fell on the job over $58 million as compensation for a “microfracture” to his foot…

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