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'Request arbitration, go to jail' law remains on hold

By Anthony J. Oncidi

Late last year, the California Legislature enacted and Gov. Gavin Newsom signed into law an anti-arbitration statute that masquerades as a curb on "employer behavior," rather than an outright ban on workplace arbitration. It now seems clear that the California Legislature has once again proved itself to be too clever by half.

During last Friday's hearing on the U.S. Chamber of Commerce's motion for a preliminary injunction seeking to invalidate Assembly Bill 51 (Labor Code Section 432.6; Government Code Section 12953), the attorney general's office argued that the statute is not preempted by the Federal Arbitration Act because it purports to regulate employer conduct and does not expressly invalidate arbitration agreements in the workplace.

In response, Chief U.S. District Judge Kimberly J. Mueller inquired: "How do I draw a line between employer behavior and arbitration?" On Dec. 30, 2019, Judge Mueller granted the Chamber's motion for a temporary restraining order enjoining the state from enforcing AB 51, pending the hearing on the motion for preliminary injunction.

AB 51 is the creature of a Legislature (and its many friends and admirers in the plaintiff's bar) that is implacably hostile to arbitration — twice before, the Legislature passed, and former Gov. Jerry Brown vetoed, similar statutes aimed at outlawing employment arbitration in California.

With this latest attempt, the Legislature came up with an artifice that only a lawyer could love: Pretend we're doing something that we're not and see if we can sneak what we're really doing past the federal judiciary!

So far, not so good for the Legislature and AB 51. At the conclusion of Friday's hearing, Judge Mueller left in place until Jan. 31, 2020 a modified version of the restraining order, pending further briefing from the parties on issues involving standing and severability of certain of the statute's less consequential provisions.

In addition to assiduously avoiding the "A" word (arbitration) in the statute's main prohibitory provisions, the Legislature added another jurisdictional

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Chief U.S. District Judge Kimberly J. Mueller.

Easter egg at the end of the bill: "Nothing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the [FAA]." What does that mean?

If it means that the statute only applies to arbitration agreements and the "behavior" of employers who are not engaged in interstate commerce, then it presumably self-neuters the statute so profoundly that it only applies to the (perhaps dozen?) employers in California who might flunk the practically unflunkable "engaged in interstate commerce" test. That would, to say the least, seem to be a pyrrhic victory for arbitration foes.

The state knew it was facing significant pushback in its third time at bat seeking to outlaw employment arbitration in California. After all, in the wake of the MeToo movement, several other states including New York enacted similar prohibitions only to see them struck down by a federal judge on FAA preemption grounds. *See, e.g.*, *Latif v. Morgan Stanley & Co.*, 2019 WL 2610985 (S.D.N.Y. Jun. 26, 2019).

Central to the state's position that AB 51 is something new under the sun and, therefore, not preempted by the FAA, is the argument that it "regulates not arbitration agreements but the hiring and employment practices of employers to preserve employee autonomy in deciding whether to waive their legal rights and remedies under labor and employment laws." (Defendants' Oppo. Brief at 6.)

The state further argued that "AB 51 is neutral and does not disfavor arbitration. It generally applies to any employer hiring policy or practice that requires waiver of 'any right, forum, or procedure'" (*id.* at 9) — though it is unclear what employer "policy or practice" other than arbitration would affect the forum for future disputes.

Not surprisingly, the attorney general's office downplayed the state's obscene overreach in criminalizing the activity prohibited by AB 51, making it the nation's first "Request Arbitration, Go to Jail!" law.

The state's brief accused the Chamber of Commerce of "sensationaliz[ing]" the potential for criminal penalties, coldly comforting the court that "the same [criminal] penalties adhere to nearly every violation of the Labor Code" and blandly offering that "criminal penalties can be avoided by compliance…" (Defendants' Oppo. Brief at 11.)

In response to the state's arguments, the Chamber of Commerce and the other trade association plaintiffs argued that AB 51 violates Section 2 of the FAA because it treats arbitration agreements differently from other contracts: "Businesses can and do include a wide variety of non-negotiable conditions in form contracts in a variety of contexts… For example, California law still allows an employer to offer on a take-it-or-leave-it basis, say, $15 an hour for 40 hours a week, or 20 days a year of paid vacation." (Plaintiffs' Reply Brief at 2-3.)

Plaintiffs relied in part upon *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) in which the Supreme Court (in an opinion written by Justice Ruth Bader Ginsburg) held that a Montana statute was preempted by the FAA because it imposed " a special notice requirement [for arbitration agreements] not applicable to contracts generally." Quoting a treatise, the Supreme Court determined that "state legislation requiring greater information or choice in the making of agreements to arbitrate than in other contracts is preempted."

Similarly, the Supreme Court has held that any rule, even if it "avoid[s] referring to arbitration by name," "covertly accomplishes" the impermissible objective of disfavoring arbitration agreements by instead "disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1427 (2017) (Kagan, J.).

Finally, plaintiffs argued that they and other California employers will suffer irreparable harm if the court fails to enter a preliminary injunction, especially in light of the criminal penalties imposed by AB 51. Citing 9th Circuit precedent, plaintiffs argued that the "threat of prosecution under the [challenged] statute" itself establishes irreparable harm. *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013).

Judge Mueller ordered the supplemental briefing to be completed by Jan. 24 and will presumably issue her ruling on the motion for preliminary injunction on or before Jan. 31. In the meantime, employers in California may still request that employees and applicants sign arbitration agreements without fear of doing time in the county jail. ■

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