

Labor & Employment

9th Circuit Blocks California's Ban on Mandatory
Arbitration Agreements | February 2023

By: Robert Rosenthal

On Tuesday, February 14, 2023, the 9th Circuit Court of Appeals held that California's proposed ban of mandatory arbitration agreements for employees was preempted by the Federal Arbitration Act (FAA). Therefore, California employers can continue using arbitration agreements with employees and job applicants.

How Did We Get Here?

California Assembly Bill 51 (AB 51), which was signed by Governor Newsom in 2019, would have made it unlawful for California employers to require applicants and employees to sign arbitration agreements as a condition of employment. Violations of the law could not only lead to civil and criminal penalties, but would also be considered an "unlawful employment practice." This meant they would have been subject to the private right of action under California's Fair Employment and Housing Act set forth in Government Code Section 12960, which could have exposed employers to retaliation claims associated with an employee's refusal to sign a mandatory arbitration agreement.

However, right before AB 51 was supposed to go into effect on January 1, 2020, a federal district court granted a preliminary injunction that blocked AB 51 from being enforced. Subsequently, in September 2021, the 9th Circuit partially upheld and partially blocked AB 51. Several months later, the 9th Circuit decided to withdraw its prior ruling and rehear the case altogether, which ultimately resulted in Tuesday's ruling where a three-judge panel found that AB 51 was preempted by the FAA.

Takeaways from the 9th Circuit's Decision

- 1. Arbitration is Still Favored by Courts.** The 9th Circuit explained that AB 51 aimed to protect employees from "forced" arbitration. Notably, however, the FAA "embodies a national policy favoring arbitration," and under U.S. Supreme Court precedent, the FAA preempts state rules that discriminate against arbitration.

2.Mixed Messages Caused Confusion. According to the 9th Circuit, in order to work around the federal policy favoring arbitration, California lawmakers only imposed criminal sanctions on employers for requiring an employee to enter into an arbitration agreement — whereas an executed agreement itself would still be enforceable. The Court noted that, “This resulted in the oddity that an employer subject to criminal prosecution for requiring an employee to enter into an arbitration agreement could nevertheless enforce that agreement once it was executed.” This created uncertainty for many employers when implementing arbitration agreements.

3.The US Supreme Court Remains the Law of the Land. The US Supreme Court has clearly held that state rules burdening the formation of arbitration agreements are at odds with the FAA, and that the FAA controls. Accordingly, the 9th Circuit has now joined the 1st and 4th Circuits in finding that “the FAA preempts a state rule that discriminates against arbitration by discouraging or prohibiting the formation of an arbitration agreement.”

4.Federal Law Preempts California Law. The 9th Circuit held that AB 51 was preempted by the FAA; therefore, AB 51 should now be permanently blocked.

5.It’s Not Necessarily Over. While the 9th Circuit’s ruling is essentially the end of AB 51, California could still appeal the decision to the full 9th Circuit or the U.S. Supreme Court.

For more information about the 9th Circuit’s ruling, please contact Robert Rosenthal of Howard & Howard Attorneys PLLC.



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