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WILL OTHER STATES ADOPT CALIFORNIA'S AB 51 AFTER ITS VALIDATION BY THE NINTH CIRCUIT?

Henry Gluck

Roughly sixty million Americans have relinquished their right to litigate[1] any work-related claims against their employers.[2] This is due to employers including arbitration clauses in employment contracts—a condition of employment that has led to a mass waiver of this constitutionally granted right.[3] The pretext for this phenomenon is that arbitration is cheaper and more efficient than litigation.[4] But in fact, arbitration works to limit employers' legal exposure and litigation costs, and helps keep incidents of workplace abuse unexposed.[5] Employees are less likely to be awarded damages in arbitration, and the awards are usually smaller.[6] Employees who are governed by forced arbitration are also less likely to file claims.[7] Some firms—including Google, Intuit, and Adobe—have acknowledged the power imbalances surrounding mandatory arbitration clauses and have dropped these clauses from their employment contracts.[8]

To remedy the issue, on October 10, 2019, California enacted Assembly Bill 51 ("AB 51"), which bans the use of mandatory arbitration clauses in employment contracts.[9] After almost two years of litigation surrounding its constitutionality, the Ninth Circuit confirmed[10] that the drafters succeeded in crafting "a statute that does not conflict with the FAA and thereby avoids

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[1] The Court has held that the First Amendment includes an inherent right to sue in a court of law. *See* Bill Johnson's Restaurants, Inc. v. N.L.R.B., 461 U.S. 731, 741 (1983); BE & K Const. Co. v. N.L.R.B., 536 U.S. 516, 524 (2002); *see generally* U.S. Const. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."); *see also* Adam Newton, *Right to Sue*, FREEDOM F. INST. (Sept. 16, 2002), https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-petition/right-to-sue/ [https://perma.cc/ZU3R-3WKV].

[2] Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration: Access to the Courts is Now Barred for More than 60 Million American Workers*, ECON. POL'Y INST. (Sept. 27, 2017), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/ [https://perma.cc/MXB5-AC4P].

[3] *Id.*

[4] Erin Mulvaney, *California Law Limiting Arbitration Resurrected by Ninth Circuit*, BLOOMBERG L. (Sept. 15, 2021, 4:06 PM), https://news.bloomberglaw.com/daily-labor-report/california-law-limiting-arbitration-resurrected-by-ninth-circuit?context=search&index=0 [https://perma.cc/X73E-MXCB].

[5] *See generally* Senator Hannah-Beth Jackson, CAL. S. JUDICIARY COMM. (Mar. 26, 2019), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB51 [https://perma.cc/H572-JFK4] (to access the Senate Judiciary Committee PDF, click on the corresponding link on the landing page of the main URL, or visit the permalink).

[6] Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, ECON. POL'Y INST. (Dec. 7, 2015), https://www.epi.org/publication/the-arbitration-epidemic/ [https://perma.cc/3U7B-8GHN] (comparing a 21.40% success rate for employees with a mandatory arbitration agreement with a 36.40% success rate in federal court for employment discrimination claims, and a 57% success rate in state court for non-civil rights claims; authors also note a vast discrepancy between amounts awarded in arbitration compared to amounts awarded in federal or state courts).

[7] *Arbitration Agreements*, WORKPLACE FAIRNESS, https://www.workplacefairness.org/forced-arbitration-agreements [https://perma.cc/Z6U2-TCF2**]** (last visited Oct. 7, 2021).

[8] Shirin Ghaffary, *Google Will End a Practice That Prevents Their Workers from Taking the Company to Court Over Workplace Disputes*, VOX (Feb. 21, 2019, 3:44 PM), https://www.vox.com/2019/2/21/18235161/google-workplace-dispute-end-forced-arbitration [https://perma.cc/R52H-7UGN].

[9] Cal. Lab. Code § 432.6 (West 2020).

[10] Chamber of Com. of United States v. Bonta, 13 F.4th 766 (9th Cir. 2021) (the court only struck the portion of the bill that placed civil and criminal sanctions on employers that would violate the statute.).

preemption."[11] The court found that, because the bill did not invalidate any arbitration agreement, but only prohibited a non-consensual mandate to sign such an agreement,[12] it was not preempted by the Federal Arbitration Act (FAA).[13]

Does this mean that other states will be drafting similar bills soon? Here are three reasons to believe they will not rush to follow. First, the bill's success in passing constitutional muster can also be viewed as a weakness. Because AB 51 does not invalidate a signed arbitration clause—even though these clauses are presented on a "take-it-or-leave-it" basis—the bill does nothing to stop employers from keeping such arbitration clauses in their contracts and allowing unsuspecting employees to sign them. Although the bill will undoubtedly provide some relief, it will not protect uninitiated job seekers from signing arbitration agreements with their employers, and these now-employees would not be aware of the rights they are waiving in the process. Other states might want to see AB 51's success rate first, before adopting their own legislation.[14]

More importantly, AB 51's future is still uncertain.[15] If the plaintiffs appeal and the case makes its way to the full Ninth Circuit bench, or the pro-arbitration Supreme Court, AB 51 might be overruled.[16]

Finally, states might want to wait and see what happens with the Forced Arbitration Injustice Repeal Act ("FAIR Act").[17] Reintroduced in Congress earlier this year, the FAIR Act would render any pre-dispute arbitration agreement invalid with respect to an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.[18] The bill would resolve the preemption issue that state legislatures have been struggling with in passing similar bills. And it would be

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[11] Jackson, *supra* note 5, at 7.

[12] *Id.* at 10 ("AB 51 would not invalidate any contract once formed.").

[13] *Bonta*, 13 F.4th at 778; *see, e.g.*, *Can Employers Still Require Arbitration in New York and New Jersey?*, BLOOMBERG L. (Nov. 5, 2020), https://news.bloomberglaw.com/daily-labor-report/can-employers-still-require-arbitration-in-new-york-and-new-jersey [https://perma.cc/GB5N-J6VW] (citing examples of the New York and New Jersey legislatures prohibiting mandatory arbitration in employment agreements that courts have ruled to be unconstitutional). The Federal Arbitration Act states:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Federal Arbitration Act, 9 U.S.C. § 2.

[14] A simple solution to this concern might be to mandate that employers disclose the arbitration clause and its significance to a prospective employee before having the employee sign the agreement.

[15] *Ninth Circuit Ruling On AB 51 Means That Mandatory Arbitration Agreements Are Now Prohibited In California*, NAT'L L. REV. (Sept. 22, 2021), https://www.natlawreview.com/article/ninth-circuit-ruling-ab-51-means-mandatory-arbitration-agreements-are-now-prohibited [https://perma.cc/V5XX-F74Z] (noting that appellants are likely to appeal and that the full Ninth Circuit or the Supreme Court might overrule the decision, while also pointing out that the current Ninth Circuit ruling creates a circuit split with the First and Fourth Circuits).

[16] *Id.*; *see also* Christopher C. Murray & Danielle Ochs, *False Alarm? The Practical Impact of AB 51, California's New Anti-Arbitration Statute*, OGLETREE DEAKINS (Oct. 25, 2019), https://ogletree.com/insights/false-alarm-the-practical-impact-of-ab-51-californias-new-anti-arbitration-statute/ [https://perma.cc/6YWD-BH33] (providing alternative reasons why AB 51 might get overruled).

[17] Forced Arbitration Injustice Repeal Act, H.R. 963, 117th Cong. (2021).

[18] *The FAIR Act Would End Forced Arbitration and Help Workers Protect Their Rights*, FREKING, MYERS & REUL (Feb. 24, 2021), https://www.fmr.law/blog/2021/february/the-fair-act-would-end-forced-arbitration-and-he/ [https://perma.cc/M23M-FL3H].

more potent than AB 51-style bills, as it would render any pre-dispute arbitration agreement unenforceable.[19] State legislatures have all the reason to wait it out and hope that the FAIR Act, with its overwhelming public support,[20] will spare them the work.

[19] *Id.*

[20] *Id.* (citing a study that the FAIR Act had eighty-four percent of the public's support).