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State's anti-arbitration stance requires Supreme Court intervention yet again

By Anthony J. Oncidi and Philippe A. Lebel

Time and again, the U.S. Supreme Court has had to remind the legislature and courts of California that the Federal Arbitration Act ("FAA") requires arbitration agreements to be treated no differently than any other type of contract, and it has consistently held that attacks on arbitration based on unique rules and requirements are preempted. *See, e.g., Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 662 (2022); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011); *Kindred Nursing Centers Ltd. P'ship v. Clark*, 581 U.S. 246, 248 (2017).

TThe repeated scoldings seem to have fallen on deaf ears. Instead, the legislature and courts continue to impose hurdles on employment arbitration agreements, in particular, in a manner inconsistent with the U.S. Supreme Court's unambiguous directive. And although further challenges to California's arbitration-specific rules seem inevitable, the state's ongoing hostility may require employers to consider once again revising their arbitration agreements.

There is perhaps no better example of the legislature's aversion to employment arbitration than the enactment of Assembly Bill 51 in 2018, codified as Labor Code section 432.6. With this backdoor attack, the legislature sought not to prohibit arbitration outright but rather to bar employers from requiring employees to waive, as a condition of employment, the right to litigate in court certain types of claims, including those arising under California's Fair Employment and Housing Act. To prove it was serious, the legislature even attached criminal penalties to violations of this "request arbitration, go to jail" law.

Section 432.6 resulted in widespread confusion, leading some employers to refrain from entering into new arbitration agreements–at least until the Ninth Circuit finally invalidated the law in 2023. *See Chamber of Commerce v. Bonta*, 62 F.4th 473 (9th Cir. 2023); *Chamber of Commerce v. Bonta*, 2024 WL 3564626 (E.D. Cal. Jan. 1, 2024) (entering permanent injunction against enforcement and awarding plaintiffs $822,496 in attorneys' fees and expenses).

In 2019, the legislature unleashed yet another scheme that imposes special burdens on employment and consumer arbitration agreements with the enactment of sections 1281.97, et seq., of the Code of Civil Procedure. This statute requires a party seeking to enforce an arbitration agreement to pay all arbitration provider invoices within 30 days or face a permanent waiver of the right to arbitrate. The conceit of this statute is that if the drafting party fails to pay these fees within 30 days it is in "material breach" of the arbitration agreement–though, of course, this "pay-or-waive" requirement is not

actually part of any arbitration agreement so it is a complete misnomer to label the failure to pay within 30 days a "material breach" of anything.

Section 1281.97 seems to have thrown the court of appeal into overdrive as it has published more than a half-dozen opinions over the past two years addressing the statute, which have generally upheld the law until Division 5 of the Second Appellate District ruled in May that the statute is preempted by the FAA. *See Hernandez v. Sohnen Enterprises, Inc.*,102 Cal. App. 5th 222 (2024). In his pithy and possibly prophetic dissent in another recent opinion (review of which is now pending before the California Supreme Court), 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." H*ohenshelt v. Super. Ct.*, 99 Cal. App. 5th 1319 (2024) (rev. granted Jun. 12, 2024) (Wiley, J., dissenting).

But the legislature is not alone in its hostility toward arbitration. California courts also have been hard at work blocking enforcement of employment arbitration agreements based on all sorts of arbitration-specific rules. For instance, although no such rule exists with respect to any other type of contract, courts continue to find arbitration agreements in the employment context to be substantively unconscionable if they are anything but completely reciprocal in absolutely every respect. *See, e.g., Carlson v. Home Team Pest Def., Inc.*, 239 Cal. App. 4th 619, 635 (2015). While these decisions often purport to uphold general contract principles, it is hard to reconcile them with the reality that many other types of non-reciprocal agreements are commonplace and rarely challenged–e.g., invention assignment agreements and non-disparagement agreements almost universally benefit employers more than employees.

The court of appeal seems particularly fixated on confidentiality requirements in arbitration. In multiple recent decisions, courts relied on confidentiality provisions to find employment arbitration agreements unenforceable. *E.g., Hasty v. American Automobile Assoc.*, 98 Cal. App. 5th 1041, 1062 (2023); *Dopp v. Now Optics, LLC*, No. D081665, 2024 WL 2265759, at *7 (Cal. Ct. App. May 20, 2024) (unpublished). This overwhelming hostility toward confidentiality provisions now extends beyond the confines of arbitration agreements themselves; in a particularly concerning example, last year, the court of appeal invalidated an arbitration agreement because it was executed at the same time as a confidentiality agreement that permitted the employer to obtain injunctive relief without posting a bond. *See Alberto v. Cambrian Homecare*, 91 Cal. App. 5th 482, 491 (2023). Thus, even if an arbitration agreement itself is unproblematic, employers still may face enforcement issues if there is a concern about a contemporaneously executed document.

In addition to confidentiality, California courts also have developed a preoccupation with the temporal scope of arbitration provisions. In one decision this year, the Second Appellate District deemed a fully mutual arbitration provision substantively unconscionable, in part, because it potentially would extend beyond the end of the plaintiff's employment. *See Cook v. University of S. Cal.*, 102 Cal. App. 5th 302, 325-26 (2024). In another case, the same court read an expiration date into an arbitration agreement so that it did not apply to a second period of employment, even though the agreement itself contained no such limitation. *See Vazquez v. SaniSure, Inc.*, 101 Cal. App. 5th 139, 146 (2024). In contrast, courts take no issue with perpetual inventions assignment or confidentiality obligations, in general.

In view of the U.S. Supreme Court's penchant for striking down California arbitration-specific rules on FAA preemption grounds, these most recent arbitration-disfavoring restrictions are unlikely to withstand high court review. However, given the Supreme Court's crowded docket, it may not get around to addressing these issues immediately. Until then, uncertainty in this area of the law is likely to persist for some time to come.

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