New Laws that Will Significantly Impact the Litigation of Employment Disputes

by: Lizbeth "Beth" West, Esq.

The October 13, 2019 deadline for Governor Newsom to take his final actions in the 2019 legislative season has come and gone and as expected, he signed into law a number of employment-related bills. Below is a summary of just a few of those bills that will have a significant impact on employment litigation in California.

A. Assembly Bill 51.

AB 51 was introduced by Assemblymember Lorena Gonzales and will severely restrict the use of mandatory arbitration agreements in employment. The Bill adds section 12953 to the California Government Code ("FEHA") and states that it is an unlawful employment practice for an employer to violate section 432.6 of the California Labor Code. In part, the newly enacted section 432.6 provides that:

> *A person shall not, as a condition of employment, continued employment, or the receipt of any employment-related benefit, require any applicant for employment or any employee, to waive any right, forum, or procedure for a violation of any provision of the [FEHA] or [the Labor Code], including the right to file and pursue a civil action or a complaint with, or otherwise notify any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation.*

The above language means that employers cannot require that applicants or employees enter into an arbitration agreement as a condition of employment, if the agreement would require them to waive their right to file a civil action for any claim under the Labor Code or FEHA. While AB 51 does not apply to other employment claims outside of FEHA and the Labor Code (e.g. common law tort claims for things like intentional or negligent infliction of emotional distress, or defamation), the truth is that the vast majority of employment litigation in California consists of claims under FEHA or some section of the Labor Code.

As with most employment statutes, section 432.6 has an anti-retaliation provision that makes it unlawful for an employer to retaliate against any applicant or employee if they refuse to consent to a waiver [arbitration agreement], and a prevailing plaintiff attorney's fees provision for employees who succeed in a claim against an employer for violating the statute.

While the new law is intended to seriously restrict employers' ability to contain litigation costs and control the forum in which they resolve disputes with employees, there are a few important provisions of the law employers should be aware of:

1. The new law only applies to contracts entered into, modified, or extended on after January 1, 2020. Therefore, it will not retroactively invalidate [otherwise enforceable] arbitration agreements that existed prior to January 1, 2020.

2. The new law states expressly that it is not intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act ("FAA"). This is important because there is settled legal authority holding that the FAA preempts conflicting state laws. For example, in 2017 the U.S. Supreme Court explained in *Kindred Nursing Ctrs. L.P. v. Clark* that:

> *A court may invalidate an arbitration agreement based on "generally applicable contract defenses" like fraud or unconscionability, but not on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." The FAA thus preempts any state rule discriminating on its face against arbitration—for example, a "law prohibit[ing] outright the arbitration of a particular type of claim." And not only that: The Act also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements. In Concepcion, for example, we described a hypothetical state law declaring unenforceable any contract that "disallow[ed] an ultimate disposition [of a dispute] by a jury." Such a law might avoid referring to arbitration by name; but still, we explained, it would "rely on the uniqueness of an agreement to arbitrate as [its] basis"—and thereby violate the FAA.*

(*Kindred Nursing Ctrs. L.P. v. Clark*, No. 16-0032, 2017 WL 2039160, 4).

Thus, even with the express statement in section 432.6 that it does not intend to invalidate arbitration agreements that are otherwise enforceable under the FAA, many attorneys - including myself - believe that the new law may be subject to a federal preemption challenge.

B. Senate Bill 707.

In *Armendariz v. Foundation Health Psychcare Services, Inc.* case (2000) 24 Cal. 4th 83, the California Supreme Court concluded, among other things, that "when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court." In a number of

cases after *Armendariz*, courts have held that an employer's failure to pay the arbitration costs [and thus delaying or preventing the arbitration of the dispute] constitutes a material breach of the arbitration agreement.

In line with this case law, SB 707, introduced by Senator Wieckowski, provides that a company's failure to pay the fees of an arbitration service provider in accordance with its obligations contained within an arbitration agreement or through application of state or federal law or the rules of the arbitration provider hinders the efficient resolution of disputes and contravenes public policy. According to SB 707, a company's strategic non-payment of fees and costs severely prejudices the ability of employees [or consumers] to vindicate their rights. This practice is particularly problematic and unfair when the party failing or refusing to pay those fees and costs is the party that imposed the obligation to arbitrate disputes.

Therefore, among other things, SB 707 adds section 1281.97 to the California Code of Civil Procedure and provides that in an employment or consumer arbitration that requires, either expressly or through application of state or federal law or the rules of the arbitration administrator, the drafting party to pay certain fees and costs before the arbitration can proceed, if the fees or costs to initiate an arbitration proceeding are not paid within 30 days after the due date, the drafting party is in material breach of the arbitration agreement, is in default of the arbitration, and waives its right to compel arbitration. As a result, the employee [or consumer] may do either of the following:

1. Withdraw the claim from arbitration and proceed in a court of appropriate jurisdiction; or

2. Compel arbitration in which the drafting party shall pay reasonable attorney's fees and costs related to the arbitration.

If the employee withdraws the claim from arbitration and proceeds with an action in a court of appropriate jurisdiction, the statute of limitations with regard to all claims brought or that relate back to any claim brought in arbitration shall be tolled as of the date of the first filing of a claim in any court, arbitration forum, or other dispute resolution forum. Further, if the employee proceeds with an action in a court, the court shall impose sanctions on the drafting party in accordance with Civil Code section 1281.99, which requires the drafting party to the reasonable expenses, including attorney's fees and costs, incurred by the employee as a result of the material breach. The court may also impose additional sanctions against a drafting party including, but not limited to, discovery sanctions and terminating sanctions.

C. Assembly Bill 9.

AB 9 was introduced by Assemblymember Eloise Gomez Reyes and will extend the period of time an employee may file a claim with the California Department of Fair Employment and Housing ("DFEH"). Under current California law, if an employee wishes to file a civil action against an employer or other individual under the Fair Employment and Housing Act ("FEHA")

for employment claims like harassment, discrimination, or retaliation, the employee must first exhaust his or her administrative remedies by filing a verified complaint with the DFEH within one year from the date upon which the alleged unlawful conduct occurred, unless otherwise excused by some statutory exception. If the employee timely files the DFEH complaint, he or she is entitled to receive a right to sue letter from the DFEH and then has one year from the date of the right to sue letter to file a civil lawsuit. Absent some statutory exception excusing the tardy filing, if an employee fails to timely file the DFEH complaint within the one year statute of limitations, the employee will be barred from bringing a civil action for a violation of FEHA.

AB 9 amends California Government Code section 12960(e) to extend the one year statute of limitations for filing a complaint with the DFEH to three years. This extension of time (which is six-times the length of the federal standard and three-times the length of the current state standard) will surely have a significant impact on both the workplace itself and the litigation of employment disputes. For example, if an employee has three years to bring a DFEH claim, the employee may be less inclined to try and resolve a dispute soon after it happens, rather than litigating it. Further, if a DFEH claim is filed three years after the alleged events occurred, and the employee then has another year to file the civil lawsuit after receiving the DFEH right to sue letter, the parties to the lawsuit will have to deal with problematic evidentiary issues like witness memories fading and the preservation of other documentary evidence.

TAKEAWAY: Employers wishing to have enforceable employment arbitration agreements in place for their employees should work with their employment counsel to be sure the agreement complies with the FAA and other requirements under California law, and implement the agreements with their employees by December 31, 2019. Employers should also work with their employment counsel to determine if they need to reevaluate certain policies and procedures relating to document retention to ensure that employment records which may be relevant to claims under the DFEH are timely preserved based on the extended statute of limitations.

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