



Status of Arbitration Agreements in California and Beyond

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Federal Arbitration Act (9 USC § 1, et seq.)

- **Provides for contract-based compulsory and binding arbitration**
 - Arbitration is a matter of contract, and courts must enforce arbitration agreements according to their terms
 - *Unless* the agreement is revocable under ordinary principles of contract law
- **Provides for judicial enforcement of most arbitration agreements**
 - § 3 and 4 of the FAA require courts to compel arbitration and stay proceedings, after finding that:
 - a valid arbitration agreement exists, and
 - the scope of the dispute falls within the scope of the arbitration provision
- **Grounds to challenge an arbitration award are limited**

Recent Federal Legislative Developments

- **Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Public Law 117-90**
 - Amends the FAA
- **Provisions**
 - Invalidates all predispute arbitration agreements with respect to any case filed that relates to a sexual assault or sexual harassment dispute
 - A court, not an arbitrator, decides whether this law applies
 - Person bringing the claim may bring it as an individual, class or collective action, even if waived before the dispute arose
- **Applies to all disputes or claims that arise or accrue on or after the date the law was enacted, March 3, 2022**
- **[Proposed] Forced Arbitration Injustice Repeal (FAIR) Act of 2022, H.R.963**

State Laws Developments - California

▪ Private Attorneys General Act (PAGA)

- Permits any individual employee to sue individually or on behalf of other employees for any violations of the CA Labor Code
- Invalidates contractual waivers of right to assert class or collective actions under PAGA
- Supreme Court: FAA preempts PAGA to the extent it prohibits class/collective waivers

▪ Assembly Bill 51

- prohibits employers from mandating that employees consent to arbitration as a condition of employment or continued employment
- Includes civil and criminal penalties
- Ninth Circuit partially upheld AB 51 in face of challenge by the Chamber of Commerce
 - Request for rehearing pending

Developments in Other States

- **State Arbitration Restrictions – Claims of Sex Harassment, Discriminations, and Sexual Assault**
 - Examples: New Jersey, New York, Washington
 - All found to be preempted by FAA
- **State Arbitration Restrictions Not Yet Preempted**
 - Examples: Illinois, Maryland, Vermont
 - If challenged in court, will likely be preempted

Employer Arbitration Clauses and Policies

▪ Drafting Considerations

- Include language to the effect that the agreement is governed by the FAA
- Include language clarifying that employees still have the right to file claims with appropriate governmental agencies
- Include a severability clause so that if one part of the agreement is invalid, the rest will be enforced
- Require signatures on arbitration agreements, rather than relying on handbooks or unsigned policies
- Keep an eye on state law and all judicial developments

Questions?



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