

Five FAQs on California's New Ban on Mandatory Arbitration Agreements

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On October 11, 2019, Governor Gavin Newsom signed into law AB 51, which will drastically change the requirements for employers who use arbitration agreements. Specifically, the new law bans employers from requiring, as a condition of employment, that an applicant or employee “waive any right, forum, or procedure” relating to a future claim under either the California Labor Code or the Fair Employment and Housing Act (“FEHA”). It also states that employers cannot “threaten, retaliate or discriminate against, or terminate an applicant [] or employee because of the refusal to consent to the waiver of any right, forum, or procedure . . .”

In other words, employers cannot require new applicants or current employees to sign arbitration agreements in order to obtain or keep their jobs. Rather, employees need to voluntarily enter into such agreements.

1. **Does the New Law Apply to Existing Arbitration Agreements?** No. The new law expressly states that it “applies to contracts for employment entered into, modified, or extended on or after January 1, 2020.” Accordingly, arbitration agreements signed before that date – even if they are sought to be enforced in 2020 and beyond – are unaffected.
2. **Will the New Law Be Challenged in the Courts?** The new law is very likely to be challenged as a violation of the Federal Arbitration Act (“FAA”), which prohibits state laws that obstruct, discriminate against, or are otherwise hostile to arbitration agreements. Indeed, just last year, California’s previous Governor, Jerry Brown, vetoed a similar bill, stating, “This bill plainly violates federal law.” Further, a similar New York law was recently held to be preempted by the FAA. However, due to the circuitous nature of litigation – including that challenges may take place in state and federal courts simultaneously – AB 51’s standing is difficult to predict.
3. **What Are the Consequences for Employers that Violate the Law?** The new law states that a violation of its provisions constitutes a FEHA violation, granting employees a private right of action. That is, merely requiring an applicant or employee to sign an arbitration agreement, or taking action against one who refuses – even if the arbitration agreement is never enforced – will subject employers to a lawsuit. The law additionally authorizes attorneys’ fees for prevailing employees, and imposes criminal penalties for violation of its provisions.

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4. **Can Employers Still Utilize Employment Agreements?** Yes. The law does not ban the use of arbitration agreements in the employment context; rather, it prohibits employers from making them mandatory. Accordingly, arbitration agreements that employees enter into voluntarily would continue to be enforceable.
5. **How Should We Revise Our Arbitration Agreements and Practices?** To comply with the new law, employers should work with their counsel to carefully review arbitration agreements, as well as any accompanying materials that are distributed to employees, for language indicating that signing such agreements is a condition of employment. Employers should also revise their internal policies and procedures, including scripts or guides for onboarding trainings conducted by Human Resources, to avoid language that the execution of such agreements are mandatory.

Dorsey's employment attorneys are closely monitoring these issues. If your company uses or is considering using arbitration agreements, contact us regarding potential changes and best practices before this new law takes effect.