

# Federal Arbitration Act Preempts California Ban on Mandatory Arbitration Contracts, Ninth Circuit Holds

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The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's grant of a preliminary injunction barring enforcement of California's Assembly Bill (AB) 51 with respect to arbitration agreements governed by the Federal Arbitration Act (FAA). [\*Chamber of Commerce of the U.S., et al. v. Bonta, et al.\*](#), No. 20-15291 (9th Cir. Feb. 15, 2023).

AB 51 seeks to impose criminal and civil penalties on employers that require individuals to sign, as a condition of employment or employment-related benefits, arbitration agreements affecting rights under the California Fair Employment and Housing Act or Labor Code. A majority of the Ninth Circuit panel concluded the FAA preempts AB 51.

### Background

Under AB 51, employers are prohibited from requiring individuals to sign as a condition of employment or employment-related benefits arbitration agreements concerning disputes arising under the California Fair Employment and Housing Act or Labor Code. AB 51 purports to apply to any arbitration agreement entered into, modified, or extended on or after January 1, 2020.

As AB 51 took effect in early 2020, a California federal district court [\*granted the U.S. Chamber of Commerce's request for a preliminary injunction, enjoining enforcement of AB 51\*](#) with respect to arbitration agreements governed by the FAA. The State of California appealed the preliminary injunction to the Ninth Circuit.

In 2021, [\*a divided Ninth Circuit panel held\*](#) the FAA does not completely preempt AB 51. *Chamber of Commerce of the U.S., et al. v. Bonta, et al.*, 13 F.4th 766 (9th Cir. 2021).

The U.S. Chamber of Commerce soon thereafter filed [\*a petition for rehearing en banc\*](#), which the Ninth Circuit deferred pending the U.S. Supreme Court's decision in [\*Viking River Cruises v. Moriana\*](#). The U.S. Supreme Court issued its decision on June 15, 2022, and subsequently denied the respondent's petition for rehearing.

On August 22, 2022, instead of granting or denying the petition for rehearing, [\*the Ninth Circuit made a surprise decision to withdraw its prior opinion and grant a panel rehearing\*](#).

### Ninth Circuit's New Decision

In affirming the district court's grant of a preliminary injunction, a majority of the Ninth Circuit panel stressed long-standing U.S. Supreme Court precedent that state rules that burden the formation of arbitration agreements are an obstacle to the legislative intent of, and thus preempted by, the FAA. The majority also noted the U.S. Court of Appeals for the First and Fourth Circuits reached similar conclusions when confronted with state laws that attempted to prevent parties from entering arbitration agreements.

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The Ninth Circuit panel majority also rejected arguments from the State of California that it should sever clauses that were deemed preempted by the FAA and leave the remainder of the law intact. The majority explained that AB 51 could not be dissected and salvaged because the statute's provisions all work together to burden the formation of arbitration agreements and, in any event, there was no authority in the legislation to sever the penalty portions of the law.

### Next

The preliminary injunction barring enforcement of AB 51 with respect to arbitration agreements governed by the FAA will remain in effect for the time being. The State of California could request a rehearing by the Ninth Circuit *en banc* (as the U.S. Chamber of Commerce did previously) or appeal to the U.S. Supreme Court. If either a rehearing is granted or a petition to the U.S. Supreme Court is granted, the injunction would remain in effect until a decision in the matter.

If the State of California does not pursue a further appeal, the matter will return to the district court to proceed for a final determination on the legality of AB 51.

The Ninth Circuit's decision is a significant win for proponents of arbitration and could help proponents of arbitration outside California. States such as Illinois, Maryland, New Jersey, New York, Vermont, and Washington have enacted state laws that purport to restrict an employer's ability to enter predispute arbitration agreements with its employees. The Ninth Circuit's decision provides further support that such state laws may be preempted by and invalid under the FAA.

Jackson Lewis attorneys will continue to track developments related to AB 51. If you have questions about how the Ninth Circuit ruling affects your business or about arbitration agreements, please contact a Jackson Lewis attorney to discuss.