Arbitration Face Off between California and the Federal Government leaves California employers in Limbo

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AB 3080, a bill inspired by the #MeToo movement that would bar employers from inserting binding arbitration clauses into contracts as a condition of employment, passed the California State Assembly on May 31, 2018. The bill is not the law yet – it still must get through the Senate and be signed by Governor Brown, who vetoed a similar bill in 2015. Further, its future may already be in jeopardy as it comes on the heels of the momentous decision in the U.S. Supreme Court *Epic Systems Corp. v. Lewis*, in which the Court held that employers can include provisions in arbitration contracts that bars workers from suing collectively.

In *Epic*, the Supreme Court upheld the enforceability of arbitration agreements containing class and collective action waivers of wage and hour disputes. It resolved the circuit split between the Sixth, Seventh, and Ninth Circuits – which held class action waivers violate the right to "concerted activities" under Section 7 of the National Labor Relations Act (NLRA) – and the Second, Fifth and Eighth Circuits, which held that class action waivers were enforceable under the Federal Arbitration Act. In its 5-4 decision, the Supreme Court in *Epic* found that Congress enacted the FAA "in response to a perception that courts were unduly hostile to arbitration." In doing so, it not only instructed courts to enforce agreements to arbitrate, but it "also specifically directed them to respect and enforce the parties' chosen arbitration procedures." The majority also rejected the employee's argument that the NLRA's reference to the right to engage in "other concerted activities for purposes of collective bargaining or other mutual aid or protection" supersedes the FAA's command to enforce arbitration agreements. The Court emphasized that while the NLRA grants employees "the right to organize unions and bargain collectively," it does not provide "express approval or disapproval of arbitration" and "does not mention class or collective action procedures." The Court held that the FAA mandates the enforcement of arbitration agreements, and that the right to pursue class or collective relief is not protected concerted activity under Section 7 of the NLRA.

In the meantime, the California legislature has moved in the opposite direction, by passing in the State Assembly proposed legislation that would prohibit employers from requiring arbitration of harassment or discrimination claims. The bill, drafted by Lorena Gonzalez Fletcher (D-San Diego), has been framed in the context of the #MeToo movement. Its supporters argue that the arbitration process, which generally bars disclosure of its proceedings, is linked to the silence over sexual harassment allegations in the workplace. It is crucial to note, however, that the bill is not limited to sexual harassment claims -- it prohibits *all* arbitration clauses as a condition of employment. Specifically, the bill bars employers from making employees sign arbitration agreements as a condition of employment, continued employment, or receipt of an employment-related benefit, such as a raise or a bonus. The bill also prohibits employers from retaliating against an employee who declines to sign an arbitration agreement that is permissible under the bill. The bill has been

criticized for disrupting cost-efficient means of resolving disputes with employees.

The bill must still pass the Senate, and if history repeats itself, Governor Brown may veto this bill. In 2015, he vetoed a similar bill that would have prohibited arbitration of claims arising under the California Labor Code in employment agreements. In his veto message, Governor Brown noted that such blanket bans on mandatory arbitration agreements are far-reaching and have "consistently [been] struck down in other states as violating the Federal Arbitration Act." Further, Governor Brown noted that "[r]ecent decisions by both the California and United States Supreme Court have found that state policies which unduly impede arbitration are invalid."

For now, we can only speculate on what will become of the 2018 bill. This is especially true given the upcoming state and federal elections, the polarizing political landscape, the continued repercussions resulting from #MeToo, and the Supreme Court's recent decision in *Epic*. California employers who use (or plan to use) arbitration agreements as a condition of employment should keep a close eye on the results of the bill's progress in the Senate. In the meantime, the decision in *Epic* allows California employers to confidentially re-introduce their class and collective action waivers to their arbitration programs, or be confident that their current waivers do not violate the NLRA. If and when AB 3080 is signed into law, California employers with mandatory arbitration policies should be mindful of potential exposure, but at least can be assured that the statute will face legal challenges that will further delay an answer to the question of whether mandatory arbitration agreements are enforceable in California.