The Performance Review Podcast

Episode 19

Greenberg Traurig

Voiceover (00:06):

Welcome to The Performance Review, Greenberg Traurig's California Labor and Employment Law Podcast, where we discuss and review important trends in topics for California employers, with hosts, Ryan Bykerk and Philip Person.

Ryan Bykerk (00:18):

All right, everyone, welcome back to The Performance Review. This is a special episode where just Philip and I are going to be on, because we're going to be talking about a new development that happened on February 15. The Ninth Circuit came out with an update, a new opinion in the Chamber of Commerce v. Bonta case that's been in the Ninth Circuit for some time. We're going to talk about that opinion. We're going to talk about how it came to be and what it means. No special guest today, but we will have a crazy employment story for you. Please stick around for that.

Philip Person (00:48):

No special guest, but every episode with us is special.

Ryan Bykerk (00:52):

That's right. That's what we aspire to, specialness. To kick off the specialness, really today we're capping off what has been a long and ultimately pointless history of AB51, a bill that was first penned I think in December, actually, of 2018, ultimately introduced in 2019, and then never became effective due to a federal court injunction. And now, of course, as of February 15, 2023, years after it was first dreamed up, now the Ninth Circuit has found that the Chamber of Commerce is likely to prevail in its actions seeking declaratory relief and a permanent injunction.

Philip Person (01:33):

In other words, Ryan, we're back to square one, right?

Ryan Bykerk (01:37):

Yeah, more or less. That's where we are, back to square one. We're going to take you on a long trip, but it's going to end right where it started. Look, as background here, the Federal Arbitration Agreement, which was first enacted in 1925, that sets the background. It ensures that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." That's from 9 USC Section 2. That provision preempts state law, any state law, that stands as an obstacle to the accomplishment of the execution of the full purposes and objectives of Congress.

(02:16):

That means very simply that state courts, state legislatures can't put roadblocks in the way of agreements to arbitrate. The California legislature and judiciary, however, over the years have really not taken that rule to heart, and there's been a pretty long and storied history of California having some run-ins with, in particular, the US Supreme Court on this point. In fact, probably more than any other state, although I haven't done all the reading to be able to back that up. It just seems anecdotally like California's got a pretty long history of run-ins.

Philip Person (02:47):

Even with these run-ins and in a lot of these rulings, the California legislature still tried to take a different approach to have anti-arbitration legislation. In 2015, it passed Assembly Bill 465, which banned employers from requiring arbitration agreements as a condition of employment and rendered unenforceable any offending contract. Then California Governor Jerry Brown vetoed that bill on the grounds that such a blanket ban has been, and I quote, "consistently struck down in other states as violating the Federal Arbitration Act," the FAA, we'll refer to it here. He also noted that the California Supreme Court and the United States Supreme Court had been validated similar legislation.

(03:36):

Fast forward three years to 2018, the state again tried to pass AB 3080, which prohibited an employer from acquiring employees to waive a judicial forum as a condition of employment. Governor Brown, again, exercises veto power and explained that this plainly violates federal law. Not being satisfied, in late 2018, AB 51 was introduced. That's the legislation we're talking about here, and it's doing basically the same thing. It was intended to ban mandatory employment arbitration agreements for employment related claims. It included as a mandatory contracts that require the employee to take an affirmative step to opt out.

(04:24):

But to avoid or in an attempt to avoid FAA preemption, the California legislature included a provision ensuring that if parties did enter into the arbitration agreement, it would be enforceable. Legislative reports made clear that AB 51 provided that criminal conduct that would be entering into an arbitration agreement with an employee does not affect the enforceability of the resulting agreement to arbitrate. The legislature put it through. Newsom, who had none of Jerry Brown's qualms with these types of legislation, he signed it. In December 2019, a collection of trade associates and business groups, Chambers of Commerce, hence the name Chamber of Commerce v. Bonta, they filed a complaint.

(05:13):

And in January 2020, a federal judge issued a preliminary injunction against the enforcement of AB 51 on the grounds that it's preempted by the FAA. That's the background. Little bit long, but follows down the journey. That's what happened there in the background, and then it went up to the Ninth Circuit, right, Ryan?

Ryan Bykerk (05:33):

Yeah, no, exactly. This is where you may remember from I think our 2021 year-end recap, we talked about the prior Ninth Circuit opinion on this. This came out in September 15 of 2021. Again, this is long after AB 51 has first been introduced. The Ninth Circuit gets it for the first time. And in that opinion, in a two to one decision, the Ninth Circuit reversed in part the trial court's decision vacating that preliminary injunction and remanded the case for further proceedings. The court found that there was no preemption under FAA because AB 51 was, according to the court, "solely concerned with pre agreement employer behavior close."

(06:16):

In the majority's view there, AB 51 did nothing more than codify what the enactors of the FAA took as a given, "that arbitration is a matter of contract and agreements to arbitrate must be voluntary and consensual." That said, the Ninth Circuit did find that the criminal and civil sanctions in AB 51 did run afoul of the FAA, and so those portions of AB 51 were in fact preempted. If you're scratching your head now, that's exactly what Philip and I were doing at the end of 2021 because the opinion is dense, it's a little bit hard to follow, but it's really well characterized by Justice Ikuta's dissent. She starts it kind of like how we started this podcast.

(07:03):

She writes, "Like a classic clown bop bag, no matter how many times California is smacked down for violating the Federal Arbitration Act, the state bounces back with even more creative methods to sidestep the FAA."

Philip Person (07:18):

What is a clown bop bag?

Ryan Bykerk (07:22):

I don't know, but it is one of my favorite phrases. I mean, immediately upon reading that, it's just one of my favorite phrases in any opinion. She goes on to explain why you read the majority opinion in that September 15th, 2021 opinion and you scratch your head. She writes, in case the effect of this novel holding is not clear, it means that if the employer offers an arbitration agreement to a prospective employee as a condition of employment and the prospective employee executes the agreement, the employer may not be held civilly or criminally liable. But if the prospective employee refuses to sign, then the FAA does not preempt civil and criminal liability for the employer under AB 51's provisions.

(08:08):

In other words, the majority holds that if the employer successfully forced employees into arbitration against their will, the employer is safe. But if the employer's efforts fail, the employer is a criminal. It really just set up a very strange set of circumstances. Now, it wasn't immediately clear, of course, after that opinion came down what it ultimately meant. You had to get into the appellate rules to understand whether it became effective or not. What ultimately happened, the decision never became final because the Ninth Circuit never issued mandate on its opinion. That opinion just hung out there for a while.

(08:45):

Philip and I predicted at the end of 2021 that this would go to the Supreme Court right after where it would be added to the tally of the US Supreme Court opinions cutting down California efforts just to get in the way of arbitration. But instead, this ended up being reheard en banc. Again, no mandate ever issued, but that's what brings us here to the new opinion.

Philip Person (09:07):

What's interesting, the opinion you're talking about was in September 15, 2021, and then August 22 of '22, the Ninth Circuit issued an order sua sponte granting the rehearing and withdrew that September 15, 2021 opinion, leaving us with even more questions. But luckily, they answered our questions fairly recently. On February 15, 2023, the Ninth Circuit reheard that issue and upheld the injunction. This time, Justice Ikuta, who was formally the dissent, now had the majority pen.

(09:51):

In that majority, she takes us through much of the history, which we've already laid out, I won't repeat it for you, but she points out that the legislature was trying to do in AB 51 was to criminalize only the contract formation, meaning an arbitration agreement executed in violation of the law is enforceable, but the process of getting it signed was criminal. She noted that California took this approach to avoid the Supreme Court precedent we were talking about as it related to the FAA and the preemption issues there. Unsurprisingly, she concluded that those attempts wouldn't work. She analyzed the decisions, including decisions from the First Circuit and the Fourth Circuit, and she held that.

(10:40):

And I quote, "We agree with our sister circuits that the FAA preempts a state rule that discriminates against arbitration by discouraging or prohibiting the formation of an arbitration agreement." The majority then asks whether AB 51 discourages the formation of an arbitration agreement. Again, she finds that it does. The threat of criminal and civil liabilities is intended to have that determined effect. That's what she wrote. And then the highlight quotes that I've seen in there is that she said, and I quote, "AB 51 singles out arbitration provisions as an exception to generally applicable law.

(11:23):

California law generally allows an employer to enter into a contract with an employee that includes non-negotiable terms as a condition of employment, including all the requirements we've known related to compensation and drug usage. But under AB 51, an employer cannot enter into a contract with non-negotiable terms essential to an arbitration agreement." Another quote that goes hand in hand with that is she just says, "AB 51's deterrence of an employer's willingness to enter into an arbitration agreement is antithetical to the FAA's liberal federal policy favoring arbitration agreements." She ultimately concluded or the majority ultimately concluded that AB 51 is therefore preempted.

(12:12):

The Ninth Circuit generally just ruled that the rules that impede the party's ability to form arbitration agreements hinder the broad national policy favoring arbitration. The takeaway of that today is AB 51 is effectively dead, and it's just a reminder that this was an appeal from a preliminary injunction. The court held that the Chamber of Congress is likely to succeed on the merits of this claim and for declaratory and injunctive relief. That's where we're at. As Ryan said, we are back to square one.

Ryan Bykerk (12:53):

Yeah, pretty much. Yeah, it's interesting. Philip, I think you advisedly said that AB 51 is effectively dead, right? I think it is. The path, we were discussing this before recording, what's the next step for the state? Does really want to keep fighting this fight? If it does, it really is two options. I mean, it can go back to the district court, and in light of all these opinions try and fight there. It doesn't seem like there's a high chance of success moving that direction. The other option, of course, would be to try to appeal it to the United States Supreme Court.

(13:30):

I don't see that being particularly effective either, just based on California's history, based on the text of AB 51 and the analysis that Justice Ikuta gives us here, which I think is really strong. Hard to know what they'll do next, but like a clown bop bag, whatever that is, we can expect California to probably try something in the near future. Anyway, a good update, a good reminder that this is still out there and ongoing, but this new opinion is out and it's likely to shape... Well, it's likely to put an end to AB 51 if not in the immediate term, in the very short term.

Philip Person (14:12):

That's our summary on the Bonta opinion that recently came out, but we'd be remiss if we didn't have a crazy employment story. Again, this is not one that I've worked on or anybody at the firm has worked on, but I found this online and I thought it was pretty entertaining. This one involves an abrasive CEO who alienated the company's board of directors, so much so that they wanted to fire him. However, he had an employment agreement that provided a pretty sizable severance if he was terminated without cause.

(14:50):

The company had the standard policies that stated that it could search its computers and systems and there's no expectation of privacy on those devices or that system. They waited until the CEO went out of town for business. The company conducted a search of the CEO's computer and emails, and it found that some emails between the CEO and the president of one of the company's primary vendors, where the two individuals talked about the "bedability..." First of all, I never heard the word bedability.

Ryan Bykerk (15:30):

That's a new one.

Philip Person (15:31):

The bedability of the company's female employees, referred to the women by name and debated which sexual acts would be most pleasurable.

Ryan Bykerk (15:43):

Oh boy!

Philip Person (15:43):

The great part about this is when the CEO returned from his trip, the board president handed him a notice of termination with cause, as well as a booklet containing all of the emails in question, plus the relevant portions of the employment agreement and the policies in question. He had a nice booklet on the way out, but he did not have a check for that severance amount. From what I read online, is the CEO settled that case with the company, the company agreed to forgive some small loan amount in exchange for a general release, and the CEO missed out on the sizable severance.

(16:30):

What I see here is be careful with your emails on your company computers and your company systems, because those policies of you don't have privacy, it might ring true.

Ryan Bykerk (16:46):

Don't be bad. That's the consistent advice from The Performance Review podcast. Don't be bad.

Philip Person (16:53):

I feel like all of our crazy employment stories, they have that underlying moral point there is that just don't be bad at work.

Ryan Bykerk (17:01):

Just don't be bad. Well, Philip, thank you for giving us a crazy employment story. That's fantastic. Don't be bad. Those are the words from The Performance Review. That's how we're sending you off on this

episode. Thank you so much for tuning in for this update on AB 51 and the Chamber of Commerce case. As always, if you have any ideas for us for future episodes, or if you have thoughts about this episode, please feel free to email us at performancereview@gtlaw.com, and we look forward to catching you on the next one.

Voiceover (17:51):