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California Legislature Targets Employment Arbitration Agreements

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It is no secret that ***California*** is no friend to arbitration agreements. As the ***United States Supreme Court*** noted in its 2011 opinion in *AT&T Mobility LLC v. Concepcion*, "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts," despite directives from the High Court that arbitration agreements must be placed "upon the same footing as other contracts."

Not to be outdone by the courts, the California Legislature decided to weigh in on the ongoing battle over arbitration agreements with the introduction of Assembly Bill 465 ("AB 465") earlier this year. The bill, which passed the California State Senate on Tuesday and is now pending before the Assembly, would add a new provision to the Labor Code to prohibit any person from:

> [R]equir[ing] another person to waive any legal right, penalty, remedy, forum, or procedure for a violation of any provision of [the California Labor Code], as a condition of employment, including the right to file and pursue a civil action or complaint with, or otherwise notify, the Labor Commissioner, state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity.

If enacted, the bill would make such waivers, including, presumably, class action waivers that were expressly sanctioned by *Concepcion*, "involuntary, unconscionable, against public policy, and unenforceable" if made a condition of employment. The bill also would make it unlawful to threaten, retaliate, or discriminate against any person who refuses to sign such a waiver.

AB 465 would not apply to individuals registered with a self-regulatory organization under the Securities Exchange Act of 1934 (e.g., FINRA arbitrations) or to employees who are "individually represented by legal counsel" in "negotiating the terms" of a waiver. On its face, AB 465 only prohibits the waiver of a "legal right, penalty, remedy, forum, or procedure" for a violation of *the California Labor Code*, meaning that it should not affect arbitration agreements relating to claims

arising under the Fair Employment and Housing Act or other California statutes not housed within the Labor Code (although the bill *could* be construed more broadly under the "last antecedent rule").

Nevertheless, AB 465 would result in a substantial change in the law. Quite obviously, it would severely restrict, if not outright prohibit, California employers' use of mandatory arbitration agreements as well as class action waivers involving wage and hour issues. Because the Federal Arbitration Act (the "FAA") has been almost universally interpreted (outside of California) to reflect "a liberal federal policy favoring arbitration agreements" and to preempt "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives" or are "applied in a fashion that disfavors arbitration," AB 465 almost certainly would be struck down by a federal court soon after its enactment. In any event, it is likely that if this bill becomes law, it will touch off a whole new round of "whack-a-mole" by the United States Supreme Court, in which it once again tries to try to bring California judges (and now its legislature) in line with "the supreme Law of the Land."

Should AB 465 become California law, employers should be prepared to make sure that agreements to submit claims to arbitration are voluntary on their face and as a practical matter. Most new employees will willfully sign arbitration agreements even when they are not made a condition of employment.

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