

# DELMORE ♦ GREENE

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**Employment Law Flash Update**

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## **US NINTH CIRCUIT REVIVES BAN ON MANDATORY ARBITRATION IN EMPLOYMENT**

On September 15, 2021, a divided Ninth Circuit Court of Appeals panel dealt a blow to California employers. The Ninth Circuit issued a ruling in [\*Chamber of Commerce v. Bonta\*](#) that will impact a large number of employers in California. The ruling struck down an injunction that had prevented the state of California from enforcing a law which bars employers from requiring employees and applicants to arbitrate job-related claims, while also invalidating certain provisions that allowed for criminal penalties against employers who violate the law.

The law at issues is AB 51 (which was codified as Labor Code sections 432.6 and Government Code section 12953). The law prohibits employers from mandating arbitration agreements as a condition of new or continued employment. It also prohibits employers from utilizing arbitration agreements which require employees to take affirmative action in order to opt-out.

The law was originally set to take effect in California on January 1, 2020. However, days before it became effective, a United States District Court enjoined its enforcement on the grounds that it likely violated the Federal Arbitration Act (“FAA”) by disfavoring arbitration agreements in employment. The Ninth Circuit’s September 15 ruling lifted that injunction, clearing the way for enforcement of AB 51. The Ninth Circuit did, however, find that portions of AB 51 which created new criminal and civil penalties for employers who violate the law are preempted by the FAA.

We fully expect the case will be appealed, which may again change the legal landscape on this issue. Nevertheless, in the meantime, California employers who continue to use mandatory arbitration agreements for employees and applicants after September 15 may run afoul of the law.

Be assured that the Ninth Circuit ruling has no impact on arbitration agreements that were already signed as of September 15, 2021. All previously entered arbitration agreements that were otherwise lawful remain valid and enforceable. The Ninth Circuit ruling only applies prospectively.

Employers should contact counsel immediately to discuss and determine what changes need to be made to their current practices.

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