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California Governor Newsom Signs Landscape-Changing Worker-Friendly Bills

On October 10, 2019, Governor Newsom signed AB 51 and AB 9 into law. These two worker-friendly laws may require employers to review and revise current policies and procedures relating to employment-related claims. Specifically, AB 51 prohibits employers from entering into mandatory arbitration agreements for all employment-law related claims under the Fair Employment and Housing Act (FEHA) and the California Labor Code. Additionally, under AB 9, the deadline for filing an employment-related administrative complaint with the Department of Fair Employment and Housing (DFEH) is extended by two years. The laws are **set to take effect on January 1, 2020**, and may face some challenges in the meantime; however, employers should prepare now for the changes in the landscape of employment-related claims.

Mandatory Arbitration Agreements Nearly Obsolete

Under the new law, employers can no longer require employees to arbitrate any potential claim under FEHA or the California Labor Code as a condition of employment. Notably, AB 51 specifies that "[a]n agreement that requires an employee to opt-out of a waiver or to take action to retain their rights is deemed a condition of employment." Thus, even if an arbitration agreement is "voluntary" and allows an employee to opt-out, the agreement may not require arbitration of FEHA or Labor Code claims (including wage and hour).

An employer also cannot threaten, retaliate, or discriminate against an applicant for employment or an employee for refusing to consent to arbitration of a potential claim under FEHA or the Labor Code. Any violation of AB 51 is considered an "unlawful employment practice" and creates a new private right of action under FEHA.

Of most concern for this bill's viability is its potential conflict with the Federal Arbitration Act (FAA). The FAA protects the validity and enforceability of arbitration agreements. Most state laws that have attempted to interfere with an employer's right to use arbitration agreements have been struck down as preempted by the FAA. However, the legislature seems to have already considered this potential conflict: AB 51 includes a provision expressly stating "[n]othing in this section is intended to invalidate a written agreement that is otherwise enforceable under the Federal Arbitration Act."

Whether AB 51 withstands possible immediate and inevitable preemption challenges is unclear. Regardless, employers should take note now to review their arbitration agreements to ensure compliance come January 1, 2020.

Statute of Limitations Extended for DFEH Claims

By signing AB 9, Gov. Newsom also extended the deadline for filing an employment-related administrative complaint with the DFEH from one year to three years, beginning January 1, 2020. Although this bill largely stems from the #MeToo movement as an effort to increase the statute of limitations for bringing sexual harassment claims, this bill extends the statute of limitations for all employment claims under FEHA.

Opponents of AB 9 express both policy and practical concerns with extending the FEHA statute of limitations. Policy-wise, the prior one-year statute of limitations ensured that claims were brought forward in a timely fashion to aid in a prompt resolution. Practically, opponents also argue that AB 9 could cause significant issues with possibly stale evidence and unavailable witnesses, as FEHA claims tend to be more subjective.

The bill specifies that it "shall not be interpreted to revive lapsed claims," meaning those claims that have lapsed under the prior one-year statute of limitations cannot be brought. However, employers should start now to review their internal investigation policies and procedures to ensure the preservation of potential evidence for the new statutory period for FEHA claims.