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EXPERT ANALYSIS

# Changes to California Civil Rights Laws Implicate Arbitration Agreements: What Employers Need to Know

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On Sept. 30, California Gov. Jerry Brown, D, signed into law Assembly Bill 2617, which forbids arbitration of claims under the state's civil rights laws, Cal. Civ. Code §§ 51.7, 52 and 52.1, unless the employer can prove that the employee entered into the agreement to arbitrate voluntarily, knowingly and not as a condition of employment.

Section 51.7 of the state's Civil Code, the Ralph Civil Rights Act, prohibits "any violence, or intimidation by threat of violence, committed against ... persons or property" on account of a person's protected category, such as his or her position in a labor dispute, sex, race, color, religion, marital status or sexual orientation.

In addition to the prohibitions under the Ralph Act, Section 52.1, the Tom Bane Civil Rights Act, prohibits interference and attempted interference with the "exercise or enjoyment by any individual or individuals of rights secured by" the U.S. or California constitutions or federal or state laws by threats, intimidation or coercion.

Individuals can sue under Section 52 of the Civil Code to enforce the Ralph and Bane laws and recover damages, civil fines, punitive damages and attorney fees. The attorney general or any district or city attorney may also bring a civil action on behalf of individuals whose rights have been violated under the Ralph and Bane statutes to obtain injunctive and equitable relief as well as civil penalties of up to $25,000.

AB 2617 prohibits employers, among others, from requiring an individual to waive the right to pursue a civil action or contact state agencies under these statutes. It also prohibits businesses from refusing to contract with or employ individuals who refuse to waive such rights.

The law, which applies to contracts entered into, modified or extended after Jan. 1, 2015, specifically includes arbitration agreements in its prohibitions. The Federal Arbitration Act, 9 U.S.C. § 1, requires that arbitration agreements be treated like any other contract and, absent grounds for revocation of such contracts, must be enforced as written. Can AB 2617 avoid this mandate?

California has been down this road before. Inevitably, and once again, federal and state law will clash, and, once again, the courts will have the final word.

## CAN AB 2617 WITHSTAND THE FAA'S PREEMPTIVE REACH?

Under the Supremacy Clause of the U.S. Constitution, the Federal Arbitration Act has been held to preempt various California statutes that created obstacles to the enforcement of arbitration agreements.[1]

This line of cases drives home a consistent theme: The FAA prevents state legislatures from creating obstacles to the enforcement of private agreements to arbitrate regardless of the public policy supporting their enactments. However, although arbitration agreements cannot be singled out for

harsher treatment than other contracts, the FAA provides that state law defenses applicable to all contracts may be applied to arbitration contracts.[2]

So the question for the courts will be whether AB 2617 applies generally applicable contract law to the arbitration agreements within its purview or whether it impermissibly creates obstacles to the enforcement of agreements protected by the FAA.

The bill analysis of AB 2617 sets forth the premise that "the effectiveness of civil rights protections is seriously undermined" by arbitration agreements implemented as a condition of employment.[3] Further, the analysis reasons that cases falling under the Ralph and Bane laws are "best adjudicated under the state's civil rights statutes and enforced by the courts."[4]

The statute itself provides:

- "The legislature finds and declares that it is the policy of the State of California to ensure that all persons have the full benefit of the rights, penalties, remedies, forums, and procedures established by" the Ralph and Bane laws and such rights cannot be subject to "involuntary or coerced waivers."[5]
- Any such agreement as a condition of employment is per se "involuntary, unconscionable, against public policy, and unenforceable."[6]
- An employer seeking to enforce the contract carries the burden of proving that the "waiver was knowing and voluntary and not made as a condition" of employment.[7]

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Thus, in order for an arbitration agreement to be enforceable under AB 2617, the employer must prove there is a written agreement, it was signed knowingly and voluntarily, and such agreement is explicitly not a condition of employment.

The significance of AB 2617 is the develop-ment of a public policy that specifically undermines arbitration as an equal forum for resolution of disputes and the presumption against voluntariness in cases in which such contracts are a condition of employment. However justifiable the state's expressed public policy may be, the FAA prevents a state from adopting a policy that singles out arbitration agreements for treatment harsher than that which applies to contracts in general.[8]

Indeed, the U.S. Supreme Court has repeatedly rejected arguments that mandatory arbitration is inferior and suspect.[9]

Requirements that certain categories of arbitration agreements be "knowing and voluntary" arguably are not consistent with the FAA. Indeed, *Concepcion* holds that adhesive arbitration agreements are enforceable.[10] Thus, for example, compulsory arbitration agreements in employment agreements cannot be per se unconscionable unless Congress provides otherwise.[11]

AB 2617 creates more rigorous standards for the enforcement of arbitration agreements covering Bane Act and Ralph Act claims than the standards applicable to the enforcement of ordinary contracts or even arbitration agreements that apply to other types of employment claims. Thus, the Legislature appears to be treating arbitration agreements differently from, and as being inferior to, other contracts. This may lead to strong arguments that AB 2617, insofar as it applies to arbitration agreements, is preempted by the FAA.

## IMPLICATIONS OF *ISKANIAN*

What is the impact of *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (Cal. 2014) on these issues? In *Iskanian*, the California Supreme Court held that although class waivers are enforceable in mandatory pre-dispute arbitration agreements, California Private Attorneys General Act[12] waivers in such agreements are not. The court held that a mandatory PAGA representative action waiver is not pre-empted by the FAA because "the FAA aims to ensure an efficient forum for the resolution of *private* disputes, whereas a PAGA action is a dispute between an employer and the [Labor and Workforce Development] Agency."

The court likened a PAGA claim to a *qui tam* action and held that it is "not a dispute between an employer and an employee," but rather a "dispute between an employer and the *state*." Thus, "[r]epresentative actions under the PAGA, unlike class action suits for damages, do not displace the

bilateral arbitration of private disputes between employers and employees over their respective rights and obligations toward each other."

The court explained that the PAGA was enacted to provide the State of California with a mechanism to enforce the California Labor Code and "to augment the limited enforcement capability of the [Labor and Workforce Development] Agency."

On which side of *Iskanian* does AB 2617 fall? Is it preempted in the same way that anti–class-waiver policies are preempted, or does it apply to "dispute[s] between an employer and the state," which, according to the California Supreme Court, are not preempted by federal law?

Unlike the PAGA, the Ralph and Bane statutes may be enforced by individual plaintiffs suing in their own name or by the attorney general or district or city attorneys.

In either situation, each individual whose rights have been found to have been violated, not a state agency, will be awarded damages or civil penalties. Thus, if Bane and Ralph claims are brought by individuals on their own behalf, *Iskanian*'s class-waiver analysis, rather than its PAGA-waiver analysis, should control.

Moreover, *Iskanian*'s future regarding PAGA waivers is clouded, especially in the federal courts. For example, in *Fardig v. Hobby Lobby Stores, Inc.*, No. SACV 14-00561 JVS, 2014 WL 4782618, at *4 (C.D. Cal. Aug. 11, 2014), the court reviewed and rejected *Iskanian*'s PAGA analysis:

> [I]t remains the case that whether or not the FAA preempts a California rule is a question of federal law. ... Even in light of *Iskanian*, the court continues to hold that the FAA preempts the rule making PAGA claim waivers unenforceable. There is nothing in *Iskanian* that persuades the court otherwise, and the court is not bound by the California Supreme Court's understanding of federal law.

A number of other federal district courts have reached the same conclusion.[13] In contrast, California state appellate courts have followed *Iskanian* with respect to PAGA claims and denied enforcement of PAGA waivers in arbitration agreements.[14] The U.S. Supreme Court denied a petition for *certiorari* in the *Iskanian* case Jan. 20 without comment. *CLS Transp. LLC v. Iskanian,* No. 14-341, *cert. denied* (U.S. Jan. 20, 2015).

*The Legislature's analysis of AB 2617 says "the effectiveness of civil rights protections is seriously undermined" by arbitration agreements implemented as a condition of employment.*

## PRACTICAL IMPLICATIONS FOR EMPLOYERS

The Ralph and Bane laws have typically been considered to be hate crime statutes, but they have found their way into cases involving wrongful termination, harassment, discrimination and negligence.[15]

Most employers have never, or at most rarely, had to deal with Ralph Act and Bane Act claims. That may soon change.

If AB 2617 survives the inevitable FAA preemption challenge, employers with arbitration agreements covering claims arising out of or relating to the employment relationship may find, once again, that their agreements to arbitrate, which are enforceable in every other way, are vulnerable to attack.

More broadly, if AB 2617 is not preempted, employers may also have to prepare themselves for amendments to other statutes adopting language taken from the AB 2617 playbook.

## NOTES

[1] Employment arbitration contracts in interstate commerce (with limited exceptions) are covered by the FAA. *Circuit City Stores v. Adams,* 532 U.S. 105, 121-22 (2001). This article presumes that the FAA would apply to employment arbitration agreements placed at issue by AB 2617. *See, e.g., Southland Corp. v. Keating,* 465 U.S. 1, 10 (U.S. 1984) (FAA preempts California Franchise Investment Law, which invalidated certain arbitration agreements); *Perry v. Thomas,* 482 U.S. 483, 491 (U.S. 1987) (FAA preempts Labor Code provision purporting to make employee wage claims non-arbitrable); *Preston v. Ferrer,* 552 U.S. 346 (U.S. 2008) (FAA preempts California Talent Agencies Act, which purported to vest Labor Commissioner with exclusive original jurisdiction over certain claims); *Sonic-Calabasas A Inc. v. Moreno*, 57 Cal. 4th 1109 (Cal. 2013) (following *AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740, 1753 (U.S. 2011), and holding that the FAA preempted provisions of the Labor Code providing for administrative adjudication of claims that were otherwise subject to an agreement to arbitrate).

[2] *See, e.g., Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev.,* 55 Cal. 4th 223 (Cal. 2012).

[3] *Civil Rights: Waiver of Rights: Hearing on A.B. 2617 Before the Cal. S. Judiciary,* 2014 Leg., 2013-2014 Reg. Sess. 5 (Cal. 2014).

[4] *Id.*

[5] 2014 Cal. Legis. Serv. 910, Sec. 1(a) (AB 2617) (WEST).

[6] *Id.* at Sec. 2(4); *Civil Rights: Waiver of Rights: Hearing on A.B. 2617 Before the Cal. S. Judiciary,* 2014 Leg., 2013-2014 Reg. Sess. 10 (Cal. 2014).

[7] 2014 Cal. Legis. Serv. 910, Sec. 2(5).

[8] *Concepcion*, 131 S. Ct. at 1753.

[9] *See, e.g., Am. Express Co. v. Italian Colors Rest.,* 133 S. Ct. 2304, 2310 (2013); *Marmet Health Care Ctr. v. Brown,* 132 S. Ct. 1201, 1203-04 (2012) (*per curiam*); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.,* 473 U.S. 614, 626-27 (1985); *Circuit City,* 532 U.S. at 122-23; *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 34 n.5 (1991); *Shearson/Am. Express Inc. v. McMahon,* 482 U.S. 220, 230 (1987).

[10] *Concepcion*, 131 S. Ct. at 1746. *See also Doctor's Assocs. v. Casarotto,* 517 U.S. 681, 687, n.3 (1996); *Pinnacle*, 55 Cal. 4th at 247-48.

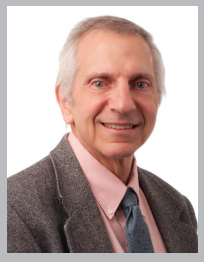
[11] *EEOC v. Luce, Forward, Hamilton & Scripps,* 345 F.3d 742, 745 (9th Cir. 2003) (overruling *Duffield v. Robertson Stephens & Co.,* 144 F.3d 1182 (9th Cir. 1998)) ("All of the other circuits have concluded that Title VII does not bar compulsory arbitration agreements.").

[12] PAGA refers to the California Private Attorneys General Act of 2004 set forth under California Labor Code § 2698. The PAGA authorizes individuals "on behalf of themselves and others" to act in place of California's Labor and Workforce Development Agency in seeking civil penalties for Labor Code violations. Any recovery is divided, with 75 percent going to the state and the "private attorney general" keeping 25 percent.

[13] *E.g., Lucero v. Sears Holdings Mgmt. Corp.,* No. 3:14-cv-01620 (S.D. Cal. Dec. 3, 2014); *Mill v. mart Corp.,* No. 14-CV-02749-KAW, 2014 WL 6706017 (N.D. Cal. Nov. 26,); *Langston v. 20/20 Cos.,* No. EDCV 14-1360 JGB SPX, 2014 WL 5335734 (C.D. Cal. Oct. 17, 2014); *Chico v. Hilton Worldwide Inc.,* No. CV 14-5750-JFW SSX, 2014 WL 5088240 (C.D. Cal. Oct. 7, 2014); *Ortiz v. Hobby Lobby Stores,* No. 2:13-CV-01619, 2014 WL 4961126 (E.D. Cal. Oct. 1, 2014).

[14] *E.g., Ramos v. Fry's Elecs. Inc.,* No. B246404, 2014 WL 6269307 (Cal. Ct. App., 2d Dist. Nov. 17, 2014) (unpublished); *Ybarra v. Apartment Inv. & Mgmt. Co.,* B245901, 2014 WL 4980896 (Cal. Ct. App., 2d Dist. Oct. 7, 2014) (unpublished).

[15] *See, e.g., In re Joshua H.,* 13 Cal. App. 4th 1734, 1748 (Cal. Ct. App., 6th Dist. 1993) (describing the Ralph and Bane laws as "California's response to this alarming increase in hate crimes"); *Stamps v. Super. Ct.,* 136 Cal. App. 4th 1441, 1459 (Cal. Ct. App., 2d Dist. 2006) (an employee claimed that an employer subjected him to race-based harassment; the court allowed Ralph and Bane law claims in addition to wrongful-termination and employment discrimination claims); *Ventura v. ABM Indus.,* 212 Cal. App. 4th 258, 259 (Cal. Ct. App., 2d Dist. 2012) (a jury verdict for $125,000 and attorney fees in an employee suit for negligent supervision and hiring and for violation of the Ralph Act, on the basis of a supervisor's sexual harassment of the plaintiff).



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