February 27, 2019

TO: Members, Assembly Committee on Labor and Employment

SUBJECT: AB 51 (GONZALEZ) EMPLOYMENT DISCRIMINATION: ENFORCEMENT OPPOSE

The California Chamber of Commerce and the organizations listed below respectfully **OPPOSE AB 51 (Gonzalez)** as it: (1) essentially prohibits arbitration of labor and employment claims as a condition of employment and is likely preempted by federal law; (2) interferes with and prohibits settlement agreements for labor and employment claims; (3) exposes employers to criminal liability regarding arbitration agreements; and, (4) adds another private right of action onto employers under the Fair Employment and Housing Act (FEHA). **AB 51** will create more litigation, significant delays in the resolution of disputes, and higher costs for employers and employees.

As Stated by Governor Brown, the California Court of Appeal, and the United States Supreme Court, This Bill, Which Seeks to Prohibit Arbitration Is Clearly Preempted by Federal Law:

The Federal Arbitration Act prohibits any state statute that seeks to interfere with, limit, or discriminate against arbitration. *See Southland Corp. v. Keating,* 465 U.S. 1, 10, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984); *AT&T Mobility LLC v. Concepcion*, 562 U.S. 333 (2011).

.

Last year, the identical bill (AB 3080) was vetoed by Governor Brown. In his veto message, Governor Brown stated: **"[T]his bill plainly violates federal law."** (emphasis added). Governor Brown explained as follows:

> "This bill prohibits an applicant for employment or employee from being required to waive his or her right to a judicial forum as a condition of employment or continued employment.
> In my veto message of a similar bill in 2015, I referred to recent court decisions that invalidated state policies which unduly impeded arbitration. I also wanted to see how future United States Supreme Court decisions developed before endorsing a broad ban on mandatory arbitration agreements.
>
> The direction from the Supreme Court since my earlier veto has been clear - states must follow the Federal Arbitration Act and the Supreme Court's interpretation of the Act. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015).
>
> This bill is based on a theory that the Act only governs the enforcement and not the initial formation of arbitration agreements and therefore California is free to prevent mandatory arbitration agreements from being formed at the outset. The Supreme Court has made it explicit this approach is impermissible. In 2017 **Justice Kagan, an appointee of President Obama**, writing on behalf of a near-unanimous Supreme Court, clearly rejected the assertion that the Federal Arbitration Act has no application to contract formation issues:
>
> > 'By its terms, . . . the Act cares not only about the "enforce[ment]" of arbitration agreements, but also about their initial "valid[ity]"-that is, about what it takes to enter into them. Or said otherwise: A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made. Precedent confirms that point.' *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421, 1428 (2017); (**emphasis added**)."

In March 2018, the Second District California Court of Appeal also determined that banning arbitration agreements as a condition of a consumer contract violated the Federal Arbitration Act (FAA) and was preempted. Specifically, in *Saheli v. White Memorial Medical Center*, 21 Cal.App.5th 308, the court determined that AB 2617 was preempted under the FAA as it placed a special restriction on arbitration agreements that were not imposed on other contracts. The Court stated:

"The Ralph Act and Bane Act, as amended by AB 2617, unquestionably discriminate against arbitration by placing special restrictions on waivers of judicial forums and procedures in connection with claims brought under those acts. In effect, sections 51.7 and 52.1 deem an agreement to arbitrate such claims unenforceable unless the party seeking to enforce it proves (1) the other party knowingly and voluntarily agreed to arbitration, and (2) the arbitration agreement was not made a condition of a contract for goods or services or of providing or receiving goods or services. (§§ 51.7, subd. (b)(5); 52.1, subd. (l).) For the reasons we discuss, **we conclude these restrictions are preempted by the FAA**." (emphasis added).

In addition, the appellate court stated, "The above legislative history clearly shows the motivating force behind the enactment of AB 2617 was a belief that arbitration is inherently inferior to the courts for the adjudication of Ralph Act and Bane Act claims. In accordance with this dim view of arbitration, the Legislature placed special restrictions on waivers of judicial forums and procedures in connection with such

claims. In practice, such restrictions discourage arbitration by invalidating otherwise valid arbitration agreements. It is precisely this sort of hostility to arbitration that the FAA prohibits."

Finally, the United States Supreme Court and California Supreme Court have issued numerous opinions over the past decade that have consistently held any state statute that interferes with, discriminates against, or limits the use of arbitration is preempted: *See Southland Corp. v. Keating,* 465 U.S. 1, 10, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984) (FAA pre-empts state financial investment statute's prohibition of arbitration of claims brought under that statute); *Perry v.Thomas*, 482 U.S. 483 (1987) (FAA pre-empts state-law requirement that litigants be provided a judicial forum for wage disputes); *Mastrobuono v. Shearson Lehman Hutton, Inc*., 514 U.S. 52, 56, 115 S.Ct. 1212,131 L.Ed.2d 76 (1995) (FAA pre-empts state law requiring judicial resolution of claims involving punitive damages); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) (FAA pre-empts state statute that required special notice requirements for arbitration agreements, as such notice requirements were not required for all other contracts); *Preston v. Ferrer*, 552 U.S. 346 (2008) (FAA pre-empts state law granting state commissioner exclusive jurisdiction to decide issue the parties agreed to arbitrate); *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463 (2015) (holding California's application of an invalid state law to only arbitration agreements and no other contracts, placed arbitration agreements on unequal footing with other contracts and, therefore, was preempted by the FAA); *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S.Ct.1421 (2017) (state law based on "contract formation" was invalid and preempted under the FAA as it was applicable only to arbitration provisions); *Epic Systems Corp. v. Lewis*, 2018 WL 2292444 (May 21, 2018) (affirmed the validity of arbitration agreements for employment disputes that include class action waivers); *Sanchez v. Valencia Holding Co., LLC*, 61 Cal.4th 899 (2015) (unanimous California Supreme Court opinion by Justice Goodwin Liu that a mandatory, consumer, adhesion arbitration agreement that contained a class action waiver is enforceable as the FAA preempts any state statute, including the California Consumer Legal Remedies Act, that interferes with arbitration); *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348 (2014) (holding that based upon *AT&T, supra*, an employment arbitration agreement that includes a class action waiver is enforceable, but is not applicable to Private Attorney General Act); and *Sonic-Calabasas A, Inc. v. Moreno (Sonic II)*, 57 Cal.4th 1109 (2013) (reversing its initial decision after the Supreme Court's ruling in *AT&T, supra*, and holding that an arbitration agreement that waives an employee's right to pursue a Berman hearing before the Labor Commissioner is not per se unenforceable).

Accordingly, **AB 51** will undoubtedly be challenged as preempted under the FAA, creating more litigation, but not actually providing any benefit to employees as intended.

AB 51 Interferes with Settlement Agreements of Labor and Employment Claims:

AB 51 interferes with and will basically eliminate settlement agreements as it prohibits an employer from requiring an applicant or employee to waive any right, forum, or procedure, or the right to pursue any claim in court under FEHA or the Labor Code as a condition of any "contractual agreement." A settlement agreement in the most basic terms is a contractual agreement to provide something of value to a party who agrees to dismiss a pending complaint in court and/or waive their rights to pursue any claim the individual may have, including those under the Labor Code or FEHA. Precluding the informal resolution of civil claims would eliminate the opportunity for early and expedited resolution of employee claims, overwhelm California's judiciary system by forcing all claims to be tried by a jury or judge, and thereby create significant delays that would harm individuals who have suffered a wrong.

AB 51 Exposes Employers to Criminal Liability with Regard to Any Labor and Employment Dispute:

Given the placement of the provisions of **AB 51** in Chapter 2, Article 3 of the Labor Code, it is subject to Labor Code Section 433, which states that any violation of Article 3 is a misdemeanor. Accordingly, not only will an employer face civil liability for any violation of the various provisions of **AB 51**, as discussed below, but also an employer can face criminal charges.

AB 51 Creates A New Private Right of Action Under FEHA:

Proposed Section 12953 of **AB 51** states that any violation of the various provisions in **AB 51** will be an "unlawful employment practice," which means it is subject to the private right of action under FEHA set forth in Government Code Section 12960. Presumably this will require an employee to exhaust the administrative remedy under FEHA, placing more costs and burden on the Department of Fair Employment and Housing, and expose an employer to another layer of costly litigation including attorney's fees, lost wages, and punitive damages. The entire point of an arbitration agreement is to avoid the costs of litigation, which **AB 51** only exacerbates.

AB 51 Denies Timely Access to Justice:

By banning arbitration and settlement agreements, the only option left for employees to resolve many labor and employment claims is litigation. As indicated in the California Democratic Party's Platform on Civil Justice, budget cuts to the judiciary have limited many individuals' access to timely resolution of disputes in civil courts:

"'Justice delayed is justice denied' is the reality that California's civic justice system will continually face without budget reforms and state budget reprioritization. Budget cuts to California's Judicial Branch means extended waits for civil lawsuits and legal issues that touch everyday lives – divorces, child custody hearings, conservatorships, probate, traffic hearings, and small claims – in extreme examples from several months to several years."

Several studies have indicated that this delay and limited access to the civil courts is worse for low-wage workers. *See University of San Francisco Law Review*, "Employment Arbitration and Workplace Justice," Lewis L. Maltby, President of the National Workrights Institute, 2003, "[I]t would be a terrible mistake to eliminate the use of arbitration as a tool for addressing and resolving employment disputes. Employees are more likely to have their day in court in arbitration than in litigation and are more likely to receive justice when the day is over. Employment arbitration needs to be preserved and improved, not abandoned;" and University of Michigan Law School, "Mandatory Arbitration: Why It's Better Than It Looks," Theodore St. Antoine, 2003, "The vast majority of ordinary, lower- and middle-income employees (essentially, those making less than $60,000 a year) cannot get access to the courts to vindicate their contractual and statutory rights. Most lawyers will not find their cases worth the time and expense. Their only practical hope is the generally cheaper, faster, and more informal process of arbitration. If that is so-called mandatory arbitration, so be it. There is no viable alternative."

Accordingly, eliminating settlement agreements and arbitration as proposed by **AB 51** will flood the already crowded dockets of the civil courts with new lawsuits that will significantly delay resolution of all civil claims.

For these reasons, we are **OPPOSED** to **AB 51**.

Sincerely,

Jennifer Barrera
Executive Vice President, Policy
California Chamber of Commerce

American Property Casualty Insurance Association
California Ambulance Association
California Association of Joint Powers Authorities
California Association of Winegrape Growers
California Bankers Association
California Beer and Beverage Distributors

California Building Industry Association
California Employment Law Council
California Farm Bureau Federation
California Hospital Association
California Hotel and Lodging Association
California League of Food Producers
California Manufacturers and Technology Association
California New Car Dealers Association
California Professional Association of Specialty Contractors
California Restaurant Association
California Retailers Association
California Trucking Association
Citizens Against Lawsuit Abuse
Civil Justice Association of California
El Centro Chamber of Commerce
Family Business Association of California
Folsom Chamber of Commerce
Fresno Chamber of Commerce
Garden Grove Chamber of Commerce
Greater Conejo Valley Chamber of Commerce
Greater Riverside Chambers of Commerce
Job Creators for Workplace Fairness
League of California Cities
Official Police Garages of Los Angeles
Orange County Business Council
Oxnard Chamber of Commerce
Palm Desert Area Chamber of Commerce
Rancho Cordova Chamber of Commerce
Redondo Beach Chamber of Commerce
San Gabriel Valley Economic Partnership
Santa Ana Chamber of Commerce
South Bay Association of Chambers of Commerce
Southwest California Legislative Council
Western Growers Association
Wine Institute

cc: Anthony Williams, Office of the Governor
Denise Tugade, Office of Assembly Member Gonzalez
Paul Dress, Assembly Republican Caucus
Consultant, Assembly Committee on Labor and Employment
Labor and Workforce Development Agency
Department of Industrial Relations