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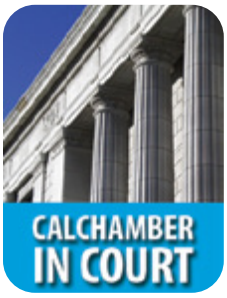
CalChamber

ALERT

Court Order Underscores Reasoning Behind Lawsuit

AB 51 Anti-Arbitration Provisions Violate U.S. Law



The U.S. District Court order formalizing the ruling halting enforcement of the anti-arbitration law challenged by a California Chamber of Commerce-led coalition highlights the merits of the lawsuit.

The CalChamber identified the law, **AB 51 (Gonzalez; D-San Diego)**, as a job killer that would have banned employers from, as a condition of employment, entering into arbitration agreements for claims brought under the Fair Employment and Housing Act and the Labor Code.

The lawsuit points out that AB 51 conflicts with the Federal Arbitration Act (FAA).

"We are pleased that after considering all briefing, Judge Mueller granted our request for a preliminary injunction in full," said CalChamber President and CEO Allan Zaremberg. "The ruling recognizes that placing businesses at risk for criminal penalties for a practice that has long been supported both by California and federal law was excessive. While it may not serve the best interests of the trial lawyers, expeditious resolution through the arbitration process serves the interests of employees and employers."

Court Order

In her February 7 order, U.S. District Court Judge Kimberly Mueller explained why she halted enforcement of and invalidated AB 51, detailing how it conflicts with the FAA.

Judge Mueller noted that the U.S. Supreme Court has declared "as a bedrock principle" that the FAA was designed to promote arbitration, reflecting, as outlined in another court case, a "national policy favoring arbitration."

The "clear target" of AB 51, she

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2020 Promises More Workplace Regulations for California Employers

Last year brought some big changes under the California Division of Occupational Safety and Health (Cal/OSHA), and 2020 is virtually certain to bring new obligations for employers confronting some very hot new issues—including wildfire smoke and indoor heat.

Lead

After notable frustration by legislators, including most notably Assemblymember Bill Quirk (D-Hayward), Senate Bill 83 (2019) imposed a September 30, 2020 deadline for the Cal/OSHA Standards Board to pass new lead standards. As a result of SB 83, we can expect new lead regulations to be passed at or before the Standards Board's September meeting, based primarily on 2016's draft language.

Substantively, the new standards will significantly reduce permissible lead exposure in the workplace. The present Standardized Regulatory Impact Assessment (SRIA) draft (which may yet be revised upward based on Department of Finance comments), estimates the new regulations will raise costs for the private sector by approximately $248 million in

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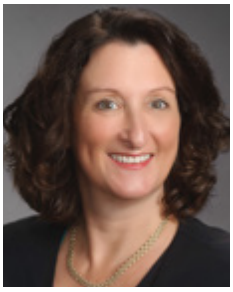
Labor Law Corner

Voter's Choice Act May Be Game Changer for Voting Time Off Rules



Ellen S. Savage
HR Adviser

My employee wants to take time off to vote in the California Primary Election on March 3. She says I have to pay her for the time. She is registered to vote in a county where all voting can be done by mail or at a drop off box. Do I need to give her paid time off to go vote in person?

California law allows employees up to two hours of paid time to vote in a statewide election if they do not have sufficient time to vote outside of working hours. Many employees, however, live in counties that have adopted California's new Voter's Choice Act, which allows approximately a month in which to cast a ballot, either by mail or at multiple ballot drop boxes in their county.

In addition, voting centers to vote in person are open not only on election day, but for up to 11 days beforehand as well, including weekends. In such counties, it would be extremely difficult for your employee to justify that she does not have time outside of her working hours to cast a ballot.

Voter's Choice Counties

The following counties participate in the Voter's Choice Act model: Amador, Butte, Calaveras, El Dorado, Fresno, Los Angeles, Madera, Mariposa, Napa, Nevada, Orange, Sacramento, San Mateo, Santa Clara and Tuolumne.

Keep in mind that it is the county where your employee is registered to vote that determines whether the Voter's Choice Act applies, rather than the county where she works.

Rules in Other Counties

For employees who are registered to vote in counties that have not adopted the Voter's Choice Act model, California law still places several restrictions on an employee's right to take paid time off to vote in person.

- First, the employee must not have sufficient time outside of working hours to vote. Since statewide polling places are open for 13 hours (7 a.m. to 8 p.m.), most employees have plenty of time to vote either before or after their shift.
- Second, the employee must notify you at least two working days in advance to arrange a voting time.
- Finally, the time must be taken at the beginning or end of the shift, whichever allows the most free time for voting and the least time off from working, unless otherwise mutually agreed upon.

You may not require the employee to use vacation or paid time off (PTO).

'Time Off to Vote' Poster

Also note that California law requires employers to post the "Time Off to Vote" poster issued by the California Secretary of State at least 10 days before every statewide election, regardless of the extended voting time provided by the Voter's Choice Act.

The "Time Off to Vote" poster is included in the California Chamber's *California and Federal Labor Law Posters* set.

Column based on questions asked by callers on the Labor Law Helpline, a service to California Chamber of Commerce preferred and executive members. For expert explanations of labor laws and Cal/OSHA regulations, not legal counsel for specific situations, call (800) 348-2262 or submit your question at www.hrcalifornia.com.

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Labor Law

Starting Off on the Right Foot—Keys to Employee Recruitment. CalChamber. February 20, Webinar. (800) 331-8877.

Leaves of Absence: Making Sense of It All. CalChamber. February 21, Sacramento; April 24, Costa Mesa; June 26, San Diego; August 13, Oakland. (800) 331-8877.

HR Boot Camp. CalChamber. March 5, Modesto; March 27, San Diego; April 23, Costa Mesa; May 6, Sacramento; June 12, Walnut Creek; August 21, Pasadena; September 10, Sacramento. (800) 331-8877.

Best Practices for Disciplining and Terminating Employees in California. CalChamber. March 19, Webinar. (800) 331-8877.

International Trade

UAE Food Security Mission. United States-United Arab Emirates Business Council. February 16–20, Dubai, United Arab Emirates. +971-4-3321000.

See CalChamber-Sponsored: Page 4

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The Workplace

What AB 51's Preliminary Injunction Means for California Employers

U.S. District Court Judge Kimberly Mueller formalized on February 7 her order halting enforcement of and invalidating in full an anti-arbitration law identified by the California Chamber of Commerce as a job killer—AB 51 (Gonzalez; D-San Diego).

In Episode 48 of The Workplace podcast, CalChamber Executive Vice President and General Counsel Erika Frank is joined by special guest Donald M. Falk, partner at Mayer Brown, to discuss the CalChamber's successful legal challenge to AB 51 that he helped lead and what steps employers should take now that a preliminary injunction has been issued.

Preliminary Injunction Granted

AB 51 banned employers from, as a condition of employment, entering into arbitration agreements for claims brought under the Fair Employment and Housing Act and Labor Code, Frank reminds listeners. The bill was signed into law by Governor Gavin Newsom last fall, and shortly thereafter, a coalition of businesses led by the CalChamber filed litigation, arguing that AB 51 conflicted with federal law.

After considering all briefing, Judge Mueller granted the CalChamber's request for a preliminary injunction in full. The ruling recognizes that placing businesses at risk for criminal penalties for a practice that has long been supported both by California and federal law was excessive.

Of particular concern to employers were provisions of the law that placed on employers the extraordinary burden of criminal penalties punishable by imprisonment and fines.

Judge Mueller acknowledged this concern in her order, writing "…because the employer may be sanctioned specifically for requiring an arbitration agreement as a condition of employment… AB 51's design does not comport with the equal footing principle and its effort to avoid FAA [Federal Arbitration Act] preemption fails."

The order went on to point out that a provision in AB 51 stating it is not intended to invalidate a written arbitration agreement otherwise enforceable under the FAA "does not exonerate employers who require the agreement in the first place. Given the penalties imposed on employers found to violate AB 51, the court finds that the law also interferes with the FAA and for this reason as well is preempted."

Appeal Is Possible

The preliminary injunction issued last week means that the responsible government officials cannot enforce AB 51 against California employers for entering into arbitration agreements that are covered by the FAA—which is most employment-related arbitration agreements, Falk says.

Now that a preliminary injunction has been issued, the decision can be appealed, and if it is appealed, employers can expect an appellate decision within the year or shortly after. Falk tells Frank that the CalChamber would very likely win on appeal, and in the U.S. Supreme Court—if the case winds its way there.

Takeaways for Employers

Employers can sigh with some relief following the preliminary injunction, but the road is still long until they receive a final resolution, Frank says. In the meantime, employers can continue to require disputes to be resolved by arbitration, Falk says.

He stresses that now is a good time for employers to revise their current employment agreements and/or establish new arbitration agreements while the new law cannot be enforced against employers.

One warning for employers, however: A provision of AB 51 that still is enforceable is a ban on "supercharged" confidentiality agreements, as a condition of employment, that would forbid an employee from contacting a government agency about a problem, Falk cautions. This portion of the law is not affected by the FAA and remains undisturbed by last week's preliminary injunction.

Because of this, Falk recommends that employers have counsel look at any employment agreement they have that requires confidentiality (regardless of whether it's connected to an arbitration agreement), to ensure it doesn't run afoul of the undisturbed part of AB 51 and incur civil or criminal liabilities.

Frank points out that the world of arbitration has been evolving over the years and employers do see litigation challenging poorly drafted or outdated arbitration agreements.

Falk agrees. "I think it's always a good idea if your arbitration agreement in your employment application or employee handbook or employee agreement has not been reviewed by counsel that are well-versed in this area of employment and arbitration law [to] have somebody take a look, because now, especially with this confidentiality and reporting provision, [there] are criminal penalties, and you don't want to find yourself in criminal court because of something that someone put into your employment agreement 20 years ago and never really thought about," Falk says.

Legal Documents

The legal documents related to the case, *Chamber of Commerce of the United States of America, et al. v. Xavier Becerra, et al.*, can be viewed at ***www.calchamber.com/legalaffairs***.

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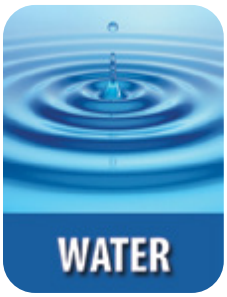
Voluntary Water Agreements Get Nudge Forward from Administration



Ongoing discussions on improving conditions in the Sacramento-San Joaquin Delta, central to water access and supply considerations in California, inched ahead this month.

The focus was on the voluntary water agreements process as Governor Gavin Newsom penned a commentary highlighting the agreements the same day as two state agencies released a framework for voluntary agreements to improve habitat and flow in the Delta and key watersheds.

The Governor wrote that the framework "will provide the foundation for binding voluntary agreements between government agencies and water users with partnership and oversight from environmental groups."

In the news release announcing the framework, California Natural Resources Secretary Wade Crowfoot said the framework is "an important milestone, but there is much work ahead to shape it into a legally enforceable program."

Framework

The State Water Resources Control Board is obligated by federal and state water law to protect beneficial uses, including fish and wildlife, in the Bay-Delta watershed.

The voluntary agreements framework is outlined in a fact sheet and PowerPoint on the California Natural Resources Agency website:

- The 15-year program aims to "improve environmental conditions, in an adaptive way."
- The framework generates more than $5 billion in new funding for environmental improvements and science, with $2.34 billion (44%) coming from water users, $2.22 billion (42%) from state government, and $740 million (14%) from the federal government.
- More than 60,000 acres of new and restored habitat will be created, ranging from targeted improvements in tributaries to "large landscape-level restoration" in the Sacramento Valley.
- Up to 900,000 acre-feet of new water flows is to be provided for the environment above existing conditions in dry, below normal and above-normal water years, and several hundred acre-feet in critical and wet years to help recover fish populations.
- A key goal is to double the California salmon populations by 2050.
- Projected allocations of the new funding include $285 million (5%) for a "collaborative science" program to augment existing monitoring; $456 million (9%) for voluntary paid fallowing of land; $1.204 billion (23%) for water purchases; $1.632 billion (31%) for new water projects and programs; and $1.684 billion (32%) to expand and improve habitat.

What's Next

The Resources Agency and the California Environmental Protection Agency (Cal/EPA) will be working with water users and other participants "in coming weeks and months" to refine the framework into a legally enforceable program, according to the news release.

The refined framework will serve as the basis for developing legally enforceable voluntary agreements that will go through a third-party scientific review, environmental review and public approval process at the State Water Board.

Agreements approved by the State Water Board could be implemented right away, according to the fact sheet.

CalChamber Position

The California Chamber of Commerce supports the voluntary agreements process as a viable means of meeting environmental objectives of the Bay-Delta Water Quality Control Plan.

Stakeholders are working with regulators and environmentalists to improve conditions for fish and wildlife on the San Joaquin River and its tributaries. They are voluntarily reducing their water draw at certain times of the year, modifying some business practices to use less water, and contributing to conservation habitats in the Delta.

A voluntary process to achieve environmental goals is preferable to mandatory restrictions.

Staff Contact: Valerie Nera

CalChamber-Sponsored Seminars/Trade Shows

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Exporting Mechanics Webinar Series II: Drop Shipments and Routed Transactions. National Customs Brokers & Forwarders Association of America, Inc. and U.S. Department of Commerce. February 18, Webinar. (202) 466-0222.

U.S. Commercial Service Cybersecurity Global Chat. U.S. Commercial Service. February 25–27, San Francisco. (415) 517-0265.

Israel-USA Business Summit. Israel-America Chamber of Commerce, U.S. Chamber of Commerce, Federation of Israeli Chambers of Commerce, U.S. Commercial Service and SelectUSA. February 26, Tel Aviv, Israel. +972-544370124.

The 51st General Assembly of the World Trade Centers Association. World Trade Center Taipei. March 1–4, Taipei, Taiwan. (212) 432-2626.

International Trade Luncheon with Consul General of Mexico Remedios Gómez Arnau. Hayward Chamber of Commerce. March 5, Hayward. (510) 537-2424.

Exporting Mechanics Webinar Series II: Cultural Sensitivity Program. National Customs Brokers & Forwarders Association of America, Inc. and U.S. Department of Commerce. March 10, Webinar. (202) 466-0222.

CosmoProf Bologna. CosmoProf Worldwide Bologna. March 12–15, Bologna, Italy. +39-02-454708236.

Access Asia: U.S. Department of Commerce, International Trade Administration. March 23–March 26, Sacramento, San Francisco, Oakland, Silicon Valley. Email *george.tastard@trade.gov*.

CalChamber Calendar

Board of Directors:
February 27–28, La Jolla
Capitol Summit:
June 3, Sacramento
Host Breakfast:
June 4, Sacramento

Overview of March Ballot Measure

Following is a brief summary of the measure that will appear on the March 3 Primary Election ballot. The reasons for the California Chamber of Commerce position are summarized.

The CalChamber encourages employers to share this information with their employees. Businesses are within their rights to do so—just remember: NO PAYCHECK STUFFERS, no coercion, no rewarding or punishing employees (or threatening to do so) for their political activities or beliefs.

For more guidelines on political communications to employees, see the brochure at ***www.calchamber.com/guidelines***. Note the distinction between *internal* communications (to employees, stockholders and their families) and communications to *external* audiences (such as nonstockholder retirees, outside vendors, customers and passersby).

For more information on the ballot measure, see the link listed below or visit the website of the Secretary of State at ***www.sos.ca.gov***.

Proposition 13

Authorizes Bonds for Facility Repair, Construction, and Modernization at Public Preschools, K–12 Schools, Community Colleges, and Universities. Authorizes $15 billion in state general obligation bonds for construction and modernization of public education facilities.

Placed on Ballot by: Legislature.

CalChamber Position: Support

Reasons for Position

CalChamber President and CEO Allan Zaremberg has commented: "California needs to invest in our future workforce, whether they be in K–12 or higher education, and Proposition 13 will provide the facilities for California students to be the successful entrepreneurs and workers of tomorrow."

The CalChamber historically has supported statewide school construction bonds. The CalChamber Board voted to support this measure because it will help moderate the cost of new housing by preventing new local mitigation fees, as without new state funding, builders who pay fees to mitigate school impacts will see those fees double or triple as school districts demand full mitigation. Depending on the jurisdiction, school impact fees could increase by $15,000 or more per unit over what is currently being paid.

Proposition 13 on the March ballot (which should not be confused with the landmark, property tax-cutting Proposition 13 initiative passed in 1978) would generate $9 billion for K–12 facilities, and $2 billion each for the California Community College, California State University (CSU) and University of California (UC) systems.

The K–12 spending would be allocated for new construction ($2.8 billion), modernization/rehabilitation of old facilities ($5.2 billion, including $150 million to remediate lead infiltration in school plumbing), career-technical education facilities ($500 million), and charter schools ($500 million). The measure also provides immediate relief, such as temporary facilities, for schools affected by natural disasters (such as recent wildfires).

For higher education, the measure prioritizes deferred maintenance, seismic and safety issues. It also requires the UC and CSU systems to adopt five-year affordable student housing plans.

More Information:
YesonProp13.com

Hong Kong Commissioner Meets with CalChamber

A February 4 meeting at the CalChamber offices provides an opportunity to discuss trade, investment, innovation and logistics for (from right) Eddie Mak, Hong Kong commissioner to the United States for economic and trade affairs; Susanne T. Stirling, CalChamber vice president of international affairs; Ivanhoe Chang, director of the Hong Kong Economic and Trade Office in San Francisco; and Michael Yau, deputy director of the Hong Kong Economic and Trade Office in San Francisco.

2020 Promises More Workplace Regulations for California Employers

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year 1, and then cost approximately $195 million in subsequent years.

In addition to acknowledging likely health benefits, the SRIA notes that the public sector will also face increased costs of $14 million in the first year, and $12 million thereafter. Employers should review both the SRIA and the draft text to stay informed and determine to what extent their industry may be affected.

Wildfire Smoke Protection

Despite persistent and acknowledged ambiguities with the present emergency regulations, employers should expect very similar if not identical text to be approved by the Standards Board in the permanent regulation around July 2020, when the emergency regulations can no longer be extended.

Any employers who missed this issue in 2019 need to review the regulation, begin monitoring the Air Quality Index (AQI) for PM2.5 when a wildfire occurs nearby, and acquire N95 respirators to make available for employees (among other requirements).

Looking forward, Cal/OSHA staff already have indicated interest in potentially making the existing language more burdensome—including lowering the smoke thresholds that trigger compliance and expanding the regulation to include indoor spaces and vehicle testing.

As a result, employers should prepare to voice their concerns about the costs and ambiguities of this regulation in mid-2020 as the permanent regulation is in front of the Standards Board and thereafter as modifications are considered.

Injury and Illness Prevention Plan

At its January meeting, the Standards Board approved a new regulation requiring California's employees have access to their employer's Injury and Illness Prevention Program (IIPP). The regulation requires employers to provide one copy of the IIPP to an employee or their designee, upon request, and notify employees of their right to such a copy.

The regulation, though imperfect in a few respects, was not seriously opposed by the employer community.

Indoor Heat

This long-overdue regulation is waiting on the SRIA, though the financial effects on California's business community will certainly be significant.

The present text being analyzed poses significant obligations for businesses across the state, including requiring businesses where any work area exceeds 82 degrees Fahrenheit (or a heat index of 87 degrees) to reduce the temperature and maintain a "cool-down area." Notably, this applies regardless of whether the heat is inherent to the area (such as an exceptionally hot day) or workplace (such as a restaurant kitchen).

Employers should watch for the release and finalization of this SRIA sometime during 2020, but do not expect any Standards Board action until late 2020 at the soonest.

Walking Working Surfaces

After a federal overhaul of walking-working surfaces went into effect in 2017, Cal/OSHA is attempting to follow suit. Because of the breadth of the federal changes, California's regulations will be broken into multiple separate rulemaking packages.

First up will be new regulations focused on fixed ladders, with a Standards Board advisory committee set for February. Though a final regulation isn't likely until 2021, this is only the first portion of the federal regulation that Cal/OSHA will pursue and staff has indicated interest in covering industries that were excluded from the federal regulation, such as the agriculture and maritime industries.

As a result, employers in all industries should prepare to weigh in at advisory committees and make their voices heard early as walking-working surfaces regulations pick up speed in 2020 and 2021.

In short, my advice for businesses in California remains the same: keep a careful eye on California's upcoming regulations at Cal/OSHA (and elsewhere) heading into 2020.

Story adapted from the Capitol Insider blog post.

Staff Contact: Robert Moutrie

Flying Domestically? REAL IDs Will Be Required by October 1

Executives and employees who frequent the skies for work are being encouraged by the California Department of Motor Vehicles (DMV) to be REAL ID-ready by October 1, if they wish to continue using their California driver license to board domestic flights in the United States.

The federal REAL ID Act places new rules on which forms of identification may be used to board flights within the United States and enter secure federal facilities, such as military bases and federal courthouses, starting October 1. A California-issued REAL ID driver license or identification card meets these new requirements and is marked with a gold bear and star.

Documents Needed

Applying for a REAL ID requires the following:

- Proof of identity (birth certificate or U.S. passport);
- Proof of Social Security number; and
- Two documents to prove California residency (such as a cable or cell phone bill, bank statement or lease agreement).

If you have changed your name, a legal name change document, such as a marriage certificate or divorce decree, may also be required.

How to Apply

To apply for the REAL ID, customers should fill out the REAL ID online application, gather all necessary documentation and head to their local DMV office.

There is no need for an appointment to get a REAL ID. Customers should check business hours and wait times of their local office on the DMV website to help plan their visit. More than 60 DMV offices across the state are also open on Saturdays.

In an effort to make obtaining a REAL ID easier, the DMV offers a business-direct service called DMV2U available to some of California's largest employers.

After setting up a mini-office on site, DMV staff process applications and employees receive their new REAL IDs in the mail within a few weeks.

To date, the DMV has held eight pop-up events with more than 5,600 REAL ID applications processed—with more scheduled as the federal enforcement date approaches in October.

For more information about REAL ID, go to ***realid.dmv.ca.gov***.

Court Order Underscores Reasoning Behind Lawsuit

From Page 1

wrote, "is arbitration agreements, given the sponsors' concern regarding an overabundance of arbitration agreements in the California employment market."

Of particular concern to employers were provisions of the law that placed on employers the extraordinary burden of criminal penalties punishable by imprisonment and fines.

Judge Mueller acknowledged this concern in her order, writing "…because the employer may be sanctioned specifically for requiring an arbitration agreement as a condition of employment…AB 51's design does not comport with the equal footing principle and its effort to avoid FAA preemption fails."

The order continued, "…AB 51 is preempted by the FAA because it singles out arbitration by placing uncommon barriers on employers who require contractual waivers of dispute resolution options that bear the defining features of arbitration."

She went on to point out that a provision in AB 51 stating it is not intended to invalidate a written arbitration agreement otherwise enforceable under the FAA "does not exonerate employers who require the agreement in the first place. Given the penalties imposed on employers found to violate AB 51, the court finds that the law also interferes with the FAA and for this reason as well is preempted."

Timeline

The CalChamber and the employer coalition filed their initial motion to invalidate and stop enforcement of AB 51 on December 6, 2019.

On December 30, 2019, Judge Mueller issued a temporary restraining order, halting enforcement of AB 51 until the matter could be resolved.

On January 31, 2020, Judge Mueller issued the minute order halting enforcement of AB 51, spelling out the reasoning in the preliminary injunction order issued on February 7.

More Information

To learn more on what the AB 51 preliminary injunction means for employers, listen to Episode 48 of The Workplace podcast at ***www.calchamber.com/theworkplace***. Podcast special guest Donald M. Falk, partner at Mayer Brown, offers insights on the successful legal challenge to AB 51 that he helped lead.

To view legal documents related to the case, *Chamber of Commerce of the United States of America, et al. v. Xavier Becerra, et al.*, go to ***www.calchamber.com/legalaffairs*** and click on "CalChamber in Court" in the dropdown menu.

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