

12-1-2000

## Eliminating the Mandatory Trade-off: Should Employees Have the Right to Choose Arbitration ?

Michael Peabody

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/drlj>

 Part of the [Contracts Commons](#), [Dispute Resolution and Arbitration Commons](#), [Labor and Employment Law Commons](#), [Law and Society Commons](#), [Legislation Commons](#), and the [Other Law Commons](#)

---

### Recommended Citation

Michael Peabody, *Eliminating the Mandatory Trade-off: Should Employees Have the Right to Choose Arbitration ?*, 1 Pepp. Disp. Resol. L.J. Iss. 1 (2000)

Available at: <https://digitalcommons.pepperdine.edu/drlj/vol1/iss1/8>

This Article is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Dispute Resolution Law Journal by an authorized editor of Pepperdine Digital Commons. For more information, please contact [josias.bartram@pepperdine.edu](mailto:josias.bartram@pepperdine.edu), [anna.speth@pepperdine.edu](mailto:anna.speth@pepperdine.edu).

# Eliminating the Mandatory Trade-off: Should employees have the right to choose arbitration?

Michael Peabody

## I. INTRODUCTION

Facing the rising costs and time commitments required to respond to employment litigation, California employers have joined the national trend in turning to Alternative Dispute Resolution (ADR) as the method of choice for resolving employer-employee conflicts.<sup>1</sup> The promulgation of this approach is attributable to employers' perception that arbitration will yield lower damage awards, limit the possibility of jury bias toward employees, and leverage the business experience of arbitrators, while avoiding the negative publicity that comes with litigation.<sup>2</sup> In recent years, these incentives have encouraged many employers to include mandatory or compulsory arbitration provisions in employment contracts, by which employees agree before a dispute arises to have the suit heard by an arbitrator rather than by a judicial officer.<sup>3</sup>

As more employers include mandatory arbitration provisions in their employment contracts, policy-makers are becoming concerned that employees are being forced to trade their civil and statutory rights for their jobs.<sup>4</sup> The California Legislature is considering legislation designed to combat this tendency and to provide legal protection for employees who might otherwise be forced to waive the right for redress of grievances, legal protections against discrimination, and other rights.<sup>5</sup>

---

1. See Michele M. Buse, Comment, *Contracting Employment Disputes Out of the Jury System: An Analysis of the Implementation of Binding Arbitration in the Non-Union Workplace and Proposals to Reduce the Harsh Effects of a Non-Appealable Award*, 22 *PEPP. L. REV.* 1485, 1496-97 (1995).

2. *Id.*

3. See *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1187 (9th Cir. 1998). The Ninth Circuit defined an arbitration agreement as compulsory when "individuals must sign an agreement waiving their rights to litigate future claims in a judicial forum in order to obtain employment with, or continue to work for, the employer." *Id.*

4. See John A. Gray, *Have the Foxes Become the Guardians of the Chickens? The Post-Gilmer Legal Status of Predispute Mandatory Arbitration as a Condition of Employment*, 37 *VILL. L. REV.* 113, 115 (1992).

5. See *Consumer Contracts: Waiver of Fundamental Rights: Hearing on A.B. 858 Before the Assembly Comm. on Judiciary*, ##st Legis., #st Reg. Sess. 8 (Cal. 1999) [hereinafter *Hear-*

Although the legislation was designed to protect the constitutional rights of employees, there are legal considerations and policy concerns that challenge the viability of this type of legislation. The primary question is whether the act is preempted by the Federal Arbitration Act (FAA), which states that agreements to arbitrate claims are irrevocable and so is contrary to the proposed legislation.<sup>6</sup>

In addition to the legal concerns, there is the potential for conflict between the constitutional right of business and individuals to make contracts and the constitutional preservation of civil rights.<sup>7</sup> This Comment discusses the above issues in addition to the history of legislation on arbitration provisions in employment contracts in California, and the potential impact that this line of legislation could have on individuals and business.

## II. THE LEGISLATION

Public policy makers have historically sought to enact legislation designed to protect the constitutional rights of citizens against opportunistic attempts to force them to “voluntarily” surrender these rights.<sup>8</sup>

Among the most jealously protected of these liberties is the right to petition for redress of grievances, in other words, the right to sue.<sup>9</sup> With the national promulgation of ADR, however, employers seeking to gain the full benefit of the alternative forum began inserting mandatory arbitration clauses into employment contracts, thus short-circuiting the ability of employees to bring lawsuits against their employers.<sup>10</sup> Aggrieved employees who signed these contracts without a full understanding of the ramifications were often astonished to discover that they had surrendered the basic right to bring a suit in a forum other than that of the employer’s choosing.<sup>11</sup> Employees who were dissatisfied with the outcome of the arbitration proceeding were further shocked to find that the outcome of an arbitration procedure could not be appealed to a judicial forum or vacated, even when based on erroneous fact or

---

*ing*(statement of Donna Hershkowitz and Drew Liebert, policy analysts).

6. See discussion *infra* Part III.

7. See discussion *infra* Part IV.

8. See *Moncharsh v. Heily & Blase*, 832 P.2d 899 (Cal. 1992) (holding that an award resulting from a binding arbitration is not appealable, even when the decision is based on erroneous fact or law). This opinion chronicles the history of arbitration in California. *Id.*

9. See CAL. CONST. art. I, § 16. The California constitution protects the right of citizens to redress of grievances in a jury trial. *Id.*

10. See Gray, *supra* note 4, at 116-17.

11. See Buse, *supra* note 1, at 1501-02. Employees often are not aware of the consequences of signing a compulsory arbitration agreement. *Id.*

application of law, unless they could demonstrate that the arbitrator had exhibited “corruption, fraud, or other undue means.”<sup>12</sup> In *Moncharsh v. Heily & Blase*,<sup>13</sup> the Supreme Court of California held that “arbitrators are not bound to award on principles of dry law, but may decide on principles of equity and good conscience.”<sup>14</sup> Furthermore, the court noted that “courts will not review the validity of the arbitrator’s reasoning” – in other words, the arbitrator’s opinion becomes the law as far as employees are concerned.<sup>15</sup>

In an effort to prevent employees from being taken advantage of in such situations, Californian legislators drafted legislation explicitly prohibiting employers from requiring or even requesting that employees waive specified guaranteed privileges as a condition of employment.<sup>16</sup> Among the specified rights, the legislation included the right to a jury trial, which is protected by both the California<sup>17</sup> and United States Constitutions, and civil rights or rights under the anti-discrimination laws including protection from unlawful employment discrimination under Title VII of the Federal Civil Rights Act,<sup>18</sup> or under California’s Fair Employment and Housing Act (FEHA),<sup>19</sup> or the Unruh Civil Rights Act.<sup>20</sup> In addition, the proposed legislation would prohibit the compelled waiver of communication privileges established in the Evidence

---

12. See Cal. Civ. Proc. Code § 1286.2(a) (West 1982 & Supp. 2000) (listing grounds for vacation of an award in an arbitration proceeding to include corruption, fraud, or other undue means.)

13. See *Moncharsh*, 832 P.2d at 899.

14. *Id.* at 904.

15. *Id.*

16. See CAL. CIV. CODE § 1670.7 (West 1999) (“[I]t is the policy of the State of California to ensure that employees have the full benefit of constitutional, statutory, or common law rights and protections and that they not be coercively deprived of those rights and protections.”)

17. CAL. CONST. art. I, § 16.

18. See 42 U.S.C. § 2000e-2 (West 1999). An employer may not “fail or refuse to hire or to discharge an individual, or otherwise discriminate against any person with respect to compensation, terms, conditions, or privileges of employment based on the person’s race, color, religion, sex, or national origin.” *Id.*

19. See CAL. GOV’T CODE § 12900 (West 1999). Commonly referred to as the Fair Employment and Housing Act (FEHA), this provision makes it unlawful for an employer to discriminate on the basis of race, religion, creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex. *Id.*

20. See CAL. CIV. CODE § 51 (West Supp. 2000). The Unruh Civil Rights Act prohibits discrimination in public accommodations by a business establishment on the basis of sex, race, color, religion, ancestry, national origin, or disability. *Id.*

Code, including but not limited to the right to attorney-client privileges,<sup>21</sup> the spousal privilege and the confidential marital communications privilege, the physician-patient privilege, and the psychotherapist-patient privilege.

The proposed legislation would deem any waiver requested or obtained in violation of the above rights as beyond the reasonable expectations of the employee and therefore involuntary, unconscionable, and void.<sup>22</sup> To ensure compliance, the legislation stipulates that employers who violate the statute by requesting such a waiver would be fined five thousand dollars (\$5,000) for each violation.<sup>23</sup>

Although this legislation would apply to individuals, it specifically would not prohibit collective bargaining agreements that require employment-related claims be submitted to arbitration.<sup>24</sup> This exemption is supported by a presumption that labor unions are much more likely to have collective strength sufficient to ensure a more level playing field with employers.<sup>25</sup> The legislation does not preclude individual employees from choosing to arbitrate claims as they arise.<sup>26</sup>

Legislators originally intended to include provisions that would have extended the prohibition against mandatory arbitration clauses to insurance agreements.<sup>27</sup> These provisions, which were opposed by several organizations including insurance interests,<sup>28</sup> would have prohibited insurance companies from requiring customers to waive the right to jury trial, the right to reject or rescind a contract during statutorily mandated time periods, and the right to legal protection against discrimination.<sup>29</sup> These provisions further stipulated that such waivers of consumer rights would be void, and "deemed involuntary, beyond the reasonable expectations of the consumer, and unconscionable."<sup>30</sup>

---

21. See CAL. EVID. CODE § 952 (West 1999). Confidential communication between client and lawyer refers to the transmission of information between a client and his or her lawyer in the course of the attorney-client relationship. *Id.*

22. CAL. CIV. CODE § 1670.7 (West 1999).

23. *Id.*

24. *Id.*

25. See Buse, *supra* note 1, at 1511.

26. See *Hearing, supra* note 5, at 9. The author of the bill argued that the bill did not prohibit all arbitration, but rather prohibited compulsory arbitration clauses that are acceded to, predispute. *Id.*

27. *Id.* at 1.

28. See *Hearing, supra* note 5, at 18. Opposing entities included the California Association of Professional Liability Insurers, the California Medical Association, Blue Cross of California, and CAN Insurance Company among others. *Id.*

29. *Id.* at 1-2.

30. See CAL. CIV. CODE § 1670.8 (amended 1999).

### III. LEGAL ISSUES RAISED BY THE LEGISLATION

#### A. *Compatibility with the Federal Arbitration Act (FAA).*

In 1925, Congress passed the Federal Arbitration Act (FAA), which applies to any contract that represents a transaction involving interstate commerce.<sup>31</sup> The FAA is broadly written and preempts any state provision that interferes with interstate commerce by failing to enforce any arbitration clause to the same extent as any other contractual provision.<sup>32</sup> Opponents of the proposed legislation have expressed concern that it would conflict with the FAA.<sup>33</sup>

##### 1. The FAA.

Congress passed the FAA to place agreements to arbitrate “upon the same footing as other contracts,” thereby overcoming the previous refusal of courts to enforce these agreements.<sup>34</sup> The FAA provides, in pertinent part, that “[a] written provision . . . to settle by arbitration a controversy thereafter arising . . . or an agreement in writing to submit to arbitration an existing controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>35</sup>

##### 2. Applicability of the FAA to legislation that does not specifically mention arbitration.

Whether the FAA applies to state courts and preempts state law dealing with arbitration has been an issue of contention in recent years, as the United States Supreme Court has sought to determine Congress’ legislative intent.<sup>36</sup> In *Southland Corp. v. Keating*, the Court examined Congress’ intent and reasoned that Congress would have wanted state and federal courts to reach the same decisions regarding the validity of arbitration in similar cases.<sup>37</sup> Therefore, the Court said,

---

31. *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 268 (1995).

32. *Id.* at 272.

33. *See Hearing*, *supra* note 5, at 9.

34. *See Volt Info. Sciences, Inc. v. Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989)(quoting *Scherck v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

35. 9 U.S.C. § 2 (1999).

36. *See Volt Info. Sciences*, *supra* note 34, at 479.

37. *See Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984). The Supreme Court held

“Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”<sup>38</sup> The Court held that the FAA is applicable to both state and federal courts through the Commerce Clause and, therefore, the FAA preempts conflicting state law.<sup>39</sup> The Court further held that state courts could not apply state statutes that invalidated arbitration agreements.<sup>40</sup>

In *Allied-Bruce Terminix Co. v. Dobson*, the Court examined the second section of the FAA which provides that “[S]tates may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause ‘upon such grounds as exist at law or in equity for the revocation of any contract’.”<sup>41</sup> The Court defined the boundaries of this regulatory power by holding that “[w]hat States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause.”<sup>42</sup> The Court reasoned that the FAA would make this type of state policy unlawful because it “would place arbitration clauses on an ‘unequal footing’, directly contrary to the Act’s language and Congress’ intent.”<sup>43</sup>

The following year, in *Doctor’s Associates, Inc. v. Casarotto*, the Court ruled that a Montana statute requiring that contracts containing mandatory arbitration clauses provide notice of such on the first page of the contract was preempted by the FAA because Montana’s statute only applied to those contracts “subject to arbitration.”<sup>44</sup> The Court reasoned that “[b]y enacting §2 [of the FAA] . . . Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed ‘upon the same footing as other contracts.’”<sup>45</sup>

---

that Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration: the FAA preempts state law on the issue of whether courts may compel arbitration. *Id.*

38. *Id.* at 10.

39. *Id.* at 11.

40. *Id.*

41. See *Allied-Bruce Terminix*, *supra* note 31, at 281 (emphasis added)(quoting 9 U.S.C. § 2 (1999)).

42. See *Allied-Bruce Terminix*, *supra* note 31, at 281.

43. See *Id.* (emphasis added) (quoting *Volt Information Services*, *supra* note 34, at 474).

44. *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 683 (1996).

45. See *id.* at 687 (emphasis added) (quoting *Scherck v. Alberto-Culver Co.*, 417 U.S. 506,

Although the proposed legislation exhibits facial neutrality when it does not specifically refer to arbitration, the legislation implicitly affects compulsory arbitration clauses when it prohibits an employer from requiring an employee to waive the right to a jury trial or to a judicial forum.<sup>46</sup> This effect on compulsory arbitration clauses was contemplated. The author of the legislation noted that it was designed to protect individuals from being coerced into signing compulsory arbitration agreements<sup>47</sup> in furtherance of the policy that was enunciated by the Supreme Court in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, which held that “arbitration under the (Federal Arbitration) Act is a matter of consent, not coercion . . . ”<sup>48</sup>

Opponents to the proposed California legislation argue that *Allied-Bruce* and *Doctor’s Associates* preempt in situations where an employer is involved in interstate commerce, because it would create a separate rule for local intrastate employers and another rule for employers that operate in more than one state.<sup>49</sup> Additionally, the legislation may still be preempted if a future court finds that the text of the law implicitly singles out arbitration, placing it on unequal footing with the other terms of a contract.<sup>50</sup>

### 3. The second line of defense: Does the FAA apply to employment contracts?

Even if the proposed legislation is found to single out arbitration, courts have found in recent years that the FAA does not extend to certain areas of the law and that state statutes, including those which specifically single out arbitration, are not preempted by the FAA.<sup>51</sup> In *Gilmer v. Interstate/Johnson Lane Corp.*, Robert Gilmer was hired by

511 (1974).

46. See *Hearing*, *supra* note 5, at 13.

47. *Id.* at 8.

48. See *Volt Info. Sciences*, *supra* note 34, at 479.

49. See *Hearing*, *supra* note 5, at 10.

50. *Id.* at 13.

51. See *Duffield*, *supra* note 3, at 1185 (holding that employers may not compel individuals to waive Title VII rights to a judicial forum) *cert. denied* 119 S. Ct. 445 (1998); see also *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999)(holding that the Federal Arbitration Act does not apply to labor or employment contracts).



Interstate/Johnson Lane Corporation and, as a condition of employment, Gilmer was required to register as a securities representative with a number of stock exchanges, including the New York Stock Exchange (NYSE).<sup>52</sup> When he registered with the NYSE, the application included a stipulation that he agree to submit “any dispute, claim, or controversy” resulting from his employment or termination of employment to arbitration.<sup>53</sup> At the age of sixty-two, Gilmer’s employment was terminated and he filed suit stating that he had been fired for his age in violation of the Age Discrimination in Employment Act (ADEA).<sup>54</sup> Gilmer never filed for arbitration. He feared that he would not receive a fair hearing because he knew that the arbitration panels were composed of industry members who, Gilmer presumed, would be biased toward employers.<sup>55</sup> In order to determine whether compulsory arbitration in this case would compromise Congress’ intent to end age discrimination, the Supreme Court first had to determine whether the FAA applied to an employment contract.<sup>56</sup> Section 1 of the FAA provides that “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>57</sup> The Court sidestepped the issue by reasoning that a securities contract is not an employment contract and that the FAA therefore applied, thus leaving open the question of whether the FAA applied to employment contracts in general.<sup>58</sup>

In his dissent in *Gilmer*, Justice Stevens stated that “not only would I find that the FAA does not apply to employment-related disputes between employers and employees in general, but also I would hold that compulsory arbitration conflicts with the congressional purpose animating the ADEA, in particular.”<sup>59</sup>

The Ninth Circuit examined this issue in *Duffield v. Robertson*

---

52. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (holding that the right to a judicial forum for resolution of a federal age discrimination claim may be waived by an employee).

53. *Id.* at 23.

54. *Id.*

55. See Gray, *supra* note 4, at 124.

56. *Id.* at 125.

57. 9 U.S.C. § 1 (1999).

58. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n. 2 (1991) (“it would be inappropriate to address the scope of the § 1 exclusion [of the FAA] because the arbitration clause being enforced here is not contained in a contract of employment . . . rather, the arbitration clause at issue is in Gilmer’s securities registration application.”)

59. *Id.* at 41.

*Stephens & Co.*<sup>60</sup> Tonyja Duffield, a securities broker, sued her employer under Title VII of the Civil Rights Act of 1964 and California's Fair Employment and Housing Act (FEHA), alleging breach of contract and tort claims and sexual discrimination and harassment.<sup>61</sup> Duffield furthermore sought a judicial declaration that securities industry employees could not be compelled to arbitrate employment disputes.<sup>62</sup> The Duffield court held that under the Civil Rights Act of 1991, employers may not require individuals to "waive their Title VII right to a judicial forum."<sup>63</sup> However, at this point the court did hold that this did not preclude employers from "requiring employees to agree in advance to arbitrate state-law tort and contract claims (other than for a violation of a state civil rights law)."<sup>64</sup>

Nine months later, the Court decided the issue in *Craft v. Campbell Soup Company*, holding that even if AB 858 is found to single out arbitration by placing it on a separate footing from other terms of a contract, the Ninth Circuit has found that the FAA does not extend to employment contracts at all and that state statutes which regulate arbitration in employment contracts are not preempted by the FAA.<sup>65</sup> The *Craft* court analyzed the rule first by looking at the legislative intent behind the FAA,<sup>66</sup> specifically section 2, which provides for the enforcement of particular arbitration provisions.<sup>67</sup> The court, noting

---

60. See Duffield, *supra* note 3, at 1185.

61. *Id.* at 1186.

62. *Id.*

63. *Id.* at 1185.

64. *Id.* at 1187. The court reasoned that allowing employers to demand that employees waive their civil rights would violate the social policy of "detering workplace discrimination on the basis of race, sex, and national origin." *Id.*

65. 177 F.3d 1083 (9th Cir. 1999).

66. *Id.* at 1084 (quoting *Sanchez v. Pacific Powder Co.*, 147 F.3d 1097, 1099 (9th Cir. 1998)). The court defined its procedure for interpreting Congressional intent as follows: "When interpreting a statute, this court looks first to the words that Congress used. Rather than focusing just on the word or phrase at issue, this court looks to the entire statute to determine Congressional intent." *Id.*

67. 9 U.S.C. § 2 (1999) ("A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.")

that this was a case of first impression for the Ninth Circuit, determined that when Congress passed the FAA in 1925, the term “transaction” within the FAA referred to “[a] business deal; an act involving buying and selling,”<sup>68</sup> not employment contracts. The court further determined that the FAA’s sole purpose was “to bind merchants who were involved in commercial dealings.”<sup>69</sup> The court found that “while neither this court nor the Supreme Court has definitely ruled on whether the FAA applies to employment contracts, both courts have suggested that it does not.”<sup>70</sup>

4. Does the FAA apply to state legislation preventing compulsory arbitration agreements in employment contracts?

The question of whether the FAA preempts state legislation affecting compulsory arbitration agreements will ultimately need to be decided by the courts because, as the above decisions demonstrate, there is no clear answer under the existing rulings.<sup>71</sup> As to the issue of whether the FAA preempts this legislation, the survival of the legislation depends on a narrow definition of whether it implicitly singles out arbitration to a sufficient extent when the legislation does not explicitly mention arbitration.<sup>72</sup> Even if the courts find that the FAA does preempt a state measure on these grounds, the second argument that the FAA does not apply to employment contracts appears to be sufficient to defend the legislation against preemption by the FAA.<sup>73</sup>

The fate of this legislation may hang on a recent decision holding that the FAA preempted California’s Health and Safety Code, which gave consumers the right to sue their health maintenance organization for failure to incorporate various disclosures in arbitration clauses.<sup>74</sup> In *Erickson v. Aetna Health Plans of California*, the plaintiff accused Aetna of violating the Health and Safety Code’s requirement that insurance subscribers be informed that they are waiving their right to a jury trial.<sup>75</sup>

---

68. See *Craft*, *supra* note 51, at 1083 (quoting WEBSTER’S INT’L DICTIONARY 2688 (2d ed. 1939)).

69. *Id.* at 1085.

70. *Id.* at 1090.

71. See *Hearing*, *supra* note 5, at 9.

72. *Id.* at 13.

73. See *Craft*, *supra* note 51, at 1094 (holding that the FAA does not apply to labor or employment contracts).

74. *Erickson v. Aetna Health Plans of California*, 84 Cal. Rptr. 2d 76 (Cal. Ct. App. 1999).

75. *Id.* at 650.

## IV. POLICY CONSIDERATIONS RAISED BY THE LEGISLATION

*A. Conflict of rights – The right to sign agreements versus the preservation of rights against discrimination, and preservation of the right to a jury trial.*

A major consideration behind the proposed legislation is to provide assurance that employees will receive the full benefit of the laws enacted for their protection, and not be forced to give them away.<sup>76</sup> In response, opponents of the measure argue that a side effect of the legislation is that the right to freely create and enter into binding contracts is lost.<sup>77</sup>

Mandatory arbitration agreements have only been added to employment contracts in recent years.<sup>78</sup> In fact, according to one commentator, employment provisions requiring arbitration would have been “believed unthinkable” only a few years ago.<sup>79</sup>

When California legislators presented this legislation for consideration, employee advocates argued along with the Supreme Court that “arbitration under the (Federal Arbitration) Act is a matter of consent, not coercion.”<sup>80</sup> Employee advocates expressed concern that employees do not often have a real understanding of the extent to which they are submitting to arbitration, and that they often presume mistakenly that “their dispute will be examined under the guiding principles of the law which govern the dispute, and that review may always be had by a court.”<sup>81</sup>

On the other hand, employer interests argue that although there is a risk that an arbitrator may make a mistake, the parties to a compulsory arbitration contract have agreed to “bear that risk in return for a quick, inexpensive, and conclusive resolution to their dispute.”<sup>82</sup> Legislative analysts noted that opponents to A.B. 858, California’s proposed legislation, suggested that “Californians have long been free to agree that their disputes can be resolved through arbitration instead of the lengthy and expensive litigation process . . . .

---

76. See *Hearing, supra* note 5, at 7.

77. *Id.* at 9.

78. See Gray, *supra* note 4, at 114.

79. *Id.*

80. See Volt Info. Sciences, *supra* note 34, at 479.

81. See *Hearing, supra* note 5, at 9 (quoting Moncharsh, *supra* note 8, at 904).

82. See Moncharsh, *supra* note 8, at 904.

[Under AB 858,] citizens would have no choice but to go to court.”<sup>83</sup> However, the author of the measure argued that statistics do not reflect that arbitration is necessarily a faster and cheaper approach to dispute resolution and that this legislation merely prohibits contracts which require employees to “accede to predispute mandatory arbitration.”<sup>84</sup>

Although opponents of mandatory arbitration clauses frequently express fears that employers somehow prefer arbitration because it gives them an advantage by providing less protection for employees’ rights, this fear may not be entirely justified because employers may actually prefer mandatory arbitration for its efficiency, privacy, and finality.<sup>85</sup> The concern that remains is that the “voluntary” submission to arbitration may in fact be more of a “take it or leave it” coercion of an adhesive contract despite the fact that the employer, in return, is theoretically foregoing his or her right to take the employee to court.<sup>86</sup>

The Supreme Court in *Gilmer* noted that “[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”<sup>87</sup> As such, employment contracts with compulsory arbitration provisions are enforceable to the same extent that other contracts of adhesion are enforceable under state law.<sup>88</sup>

Perhaps the California Court of Appeals best described the relationship between the liberties for redress of grievances, and other rights such as the right to enter into contracts, when it reasoned:

[the rights to] petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and in purpose, with other First Amendment rights of free speech and free press. ‘All these, though not identical, are inseparable.’ . . . The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that *laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State’s legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil.*”<sup>89</sup>

---

83. See *Hearing, supra* note 5, at 9.

84. *Id.*

85. See Gray, *supra* note 4, at 116-17.

86. *Id.* at 117-18.

87. See *Gilmer, supra* note 58, at 33.

88. See Gray, *supra* note 4, at 129.

89. See *Wolfram v. Wells Fargo Bank*, 53 Cal. App. 4th 43, 55-56 (Cal. Ct. App. 1997) (emphasis added) (quoting *Mine Workers v. Illinois Bar Assn.* 389 U.S. 217, 222 (1967)).

## V. IMPACT OF THE LEGISLATION

### A. *Existing Law*

Currently, employees required to sign employment contracts in which they submit to arbitration or waive rights to anti-discrimination protections are not wholly without legal recourse in the event that such rights are abridged.<sup>90</sup> In general, the law regulates the formation of contracts, including employment contracts. Statutory protections stipulate that any person may waive the advantage of a law intended only for his or her benefit, but that a law cannot be waived by private agreement if it is established for a reason of public policy.<sup>91</sup> In addition, courts are authorized to refuse to enforce a contract, in its entirety or only a provision of it, if the court finds that the contract was unconscionable when created.<sup>92</sup>

### B. *Changes to Existing Law*

However, under this proposed legislation, employers would no longer be permitted to require or even request that employees waive their constitutional rights or privileges in order to secure employment.<sup>93</sup> This proposed legislation, which depends on the application of the above provisions, appears to define the application of existing law rather than provide additional protections.<sup>94</sup>

### C. *The Incentive to Litigate*

Opponents to legislation prohibiting compulsory arbitration agreements in the employer-employee relationship have expressed concern that employees will be more willing to fight a court battle than submit to arbitration if such legislation is passed.<sup>95</sup> However, the cost benefits and increased efficiency of

---

90. See *Gray*, *supra* note 4, at 133. An individual under an arbitration agreement can still file with the E.E.O.C. See *id.* (citing *Gilmer*, 500 U.S. at 27).

91. CAL. CIV. CODE § 3513 (West 1999).

92. CAL. CIV. CODE § 1670.5 (West 1999).

93. See *Hearing*, *supra* note 5, at 2. Existing law provides many protections available to all contracts. Section 1670.7 provides a structure for the application of these protections. *Id.*

94. *Id.*

95. *Id.* at 9.

arbitration in a proper forum are attractive to employees as well as to employers.<sup>96</sup> Because there is no provision barring employees from agreeing to arbitration once a dispute arises, arbitration would continue to be a viable alternative.<sup>97</sup> An additional benefit of reserving the decision to arbitrate until the dispute arises is that employers who wish to arbitrate will need to make their arbitration procedures attractive enough that employees will choose arbitration over litigation.<sup>98</sup>

#### D. Fiscal Impact

It is difficult to assess the extent of the fiscal impact of the proposed legislation because the number of employees choosing arbitration as a result of more attractive arbitration proceedings has yet to be determined.<sup>99</sup>

### VI. CONCLUSION

LOS ANGELES, CALIFORNIA 2001. Austin is an engineer who does excellent work and makes a good income. At the age of 62, the same age as Robert Gilmer, he is contemplating retirement in three or four years, and is earnestly putting money into his retirement account. One day, he comes to work and is terminated when a younger employee, whom he has trained, takes his job.<sup>100</sup> If this legislation is passed, Austin may file with the EEOC and then independently make the choice whether to litigate or arbitrate.<sup>101</sup> His employer, nervous about the prospect of facing litigation, has created a strong arbitration program that promotes fair and reasonable outcomes for both the employer and the employee. Because of its efficiency and cost-effectiveness, Austin chooses arbitration and receives a decent settlement from an independent arbitrator.<sup>102</sup> The case is finished in much less time and in a far more cost-effective manner than going through the court system.<sup>103</sup>

---

96. See Buse, *supra* note 1, at 1489-1501 (discussing the increased use of ADR in general, and the benefits for both parties).

97. See *Hearing*, *supra* note 5, at 2.

98. *Id.* at 14.

99. *Id.* at 5 (the fiscal effect of the legislation is unknown).

100. See Gilmer, *supra* note 58, at 22.

101. *Id.* at 27.

102. See *Hearing*, *supra* note 5, at 14. The Consumers Union (CU) noted, "one result of the bill will be that businesses who want to arbitrate with their customers [or employees] will have to make arbitration sufficiently attractive that the customer [or employee] will choose it after the dispute arises. *Id.*"

103. See Buse, *supra* note 1, at 1497-1500.

Arbitration is a very attractive option when it is conducted properly, and now that employees once again do have the right to choose whether to arbitrate or litigate, employers will have the incentive they need to make sure that their arbitration procedures present a truly level playing field and are not the “kangaroo courts” that employees fear.<sup>104</sup> While there are challenges to the viability of this option under the FAA, there is enough latitude for the courts to affirm the validity of this legislation.<sup>105</sup> The conflict of rights which opponents cite between the right to sign contracts and the right of access to a judicial forum is not intensified simply because employers can no longer coerce their employees into signing contracts which, though legal, may have negative results.<sup>106</sup>

In order to make arbitration a truly attractive and viable alternative, employees must be given the information they need to make the informed decision whether to participate.<sup>107</sup> With the introduction of fairness that this legislation would provide, the arbitration process would achieve the goals of cost-effective, efficient, and just dispute resolution.

---

104. See *Hearing*, *supra* note 5, at 2.

105. See discussion *infra* Part III.

106. See discussion *infra* Part IV.

107. See Buse, *supra* note 1, at 1524-39. Proposing various arbitration procedures to provide the employers with a better understanding of the transaction and to ensure the arbitration proceedings are conducted in a fair manner. *Id.*



.