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Will California Open the Floodgates to Employment Litigation?

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Will California Open the Floodgates to Employment Litigation?

*Chris Micheli**

I. AB 9 – STATUTE OF LIMITATIONS EXTENDED FOR EMPLOYMENT CLAIMS.....	285
II. AB 51: EMPLOYMENT ARBITRATION AGREEMENTS PROHIBITED.....	287
A. Statement of Legislative Intent	288
III. AB 673: FAILURE TO PAY WAGES PENALTIES.....	291
IV. AB 749: “NO-HIRE” CLAUSES PROHIBITED	293
V. SB 707: ARBITRATION DISCRETIONARY IF FEES ARE NOT PAID	295

With the conclusion of the 2019 California Legislative Session, there are several new avenues for employment lawsuits in this state. While the Legislature adjourned in the early morning hours of September 14, Governor Gavin Newsom did not finish reviewing the 1,042 bills sent to his desk until October 13. Thereafter, attorneys were able to evaluate several important labor and employment law changes that will result in employees filing many more lawsuits against California employers. This Article examines those measures.

I. AB 9 – STATUTE OF LIMITATIONS EXTENDED FOR EMPLOYMENT CLAIMS

The Legislature enacted AB 9 (Reyes) as Chapter 709 on October 10, 2019. This bill extends to three-year the statute of limitations for complaints alleging employment discrimination. It specifies the operative date of the verified complaint is the date that the intake form was filed with the Labor Commissioner.¹

The bill also makes conforming changes to current provisions for a person

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1. See GOV. CODE § 12960(b), which provides: “For purposes of this section, filing a complaint means filing an intake form with the department and the operative date of the verified complaint relates back to the filing of the intake form.”

allegedly aggrieved by an unlawful practice when the person first obtains knowledge of the facts of the alleged unlawful practice after the limitations period expires

AB 9 provides that complaints alleging a violation of the Unruh Civil Rights Act² shall not be filed after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred.³ However, an employee shall not file a complaint alleging any other violation of Article 1 of Chapter 6⁴ after the expiration of three years from the date upon which the unlawful practice or refusal to cooperate occurred.⁵ Finally, this bill prohibits its provisions from being interpreted to revive lapsed claims.⁶

In support of the bill, the author argued:

The #MeToo movement has brought attention to many of the dynamics related to sexual harassment. In particular, many victims have shared that they needed ample time to fully grasp what happened to them before they felt comfortable coming forward. In addition, the fear of retaliation often prevented victims from being able to report incidents of sexual harassment. These barriers are not limited to sexual harassment. Victims of all forms of discrimination and harassment may be initially unclear about what happened, unaware of their rights, or reluctant to report misconduct to their boss. This bill would address these barriers by extending the deadline to file a complaint involving a violation of the Fair Employment and Housing Act (FEHA) with the Department of Fair Employment and Housing (DFEH) from one year from the date of the violation to three years.⁷

As sponsor of the bill, the California Employment Lawyers Association wrote: “One of the biggest barriers workers face when trying to seek justice and relief through our administrative or civil justice system, is the unreasonably short filing deadline for workers to submit their claims. . . . By the time they realize they have a legal claim, or feel emotionally and economically secure to file, they are often past the time to file or close to having their statute expire. . . .”⁸

In addition, in support, the Consumer Attorneys of California wrote: “Victims of harassment and discrimination should have time to file their claims with the Department commensurate with other types of civil actions, especially in light of the common barriers that exist, including trauma and a lack of awareness of their rights.”⁹

In opposition to the bill, the California Chamber of Commerce and 49 co-

2. CAL. CODE OF CIVIL PROCEDURE §§ 51, 51.5, 51.7, 54, 54.1, and 54.2.

3. GOV. CODE § 12960(e).

4. GOV. CODE § 12940.

5. GOV. CODE § 12960(e).

6. GOV. CODE § 12960 (3) provides: “This act shall not be interpreted to revive lapsed claims.”

7. ASSEMBLY FLOOR, CONCURRENCE IN SENATE AMENDMENTS OF AB 9, at 1 (Sept. 5 2019).

8. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS ON AB 9, at 6 (Jul. 9 2019).

9. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS ON AB 9, at 6 (Jul. 9 2019).

signatories wrote:

While AB 9 is being promoted as an anti-sexual harassment bill, it actually has a broad, sweeping effect on all employment harassment, discrimination and retaliation complaints. . . . AB 9 will impose a statute of limitations that is six-times the length of the federal standard and three-times the length of the state standard. . . . If the statute of limitations is tripled for FEHA complaints, the employer will not have the ability to eradicate the inappropriate behavior in a timely and efficient manner. Extending the statute of limitations will reduce the motivation for the victims to quickly come forward. If the employer is not made aware of the harassing or discriminatory conduct, it cannot take the appropriate remedial measures necessary to properly deal with the offender. . . . For these reasons, we respectfully request that AB 9 be amended to only apply to sexual harassment claims because that is the impetus for the bill. Additionally, we request the bill be amended to clearly apply prospectively. . .¹⁰

II. AB 51: EMPLOYMENT ARBITRATION AGREEMENTS PROHIBITED

The Legislature enacted AB 51 as Chapter 711 on October 10, 2019. The bill's first section provides uncodified statements of legislative intent.¹¹

The bill's second section adds a new provision to the law proclaiming that “[i]t is an unlawful employment practice for an employer to violate Section 432.6 of the Labor Code.”¹² As such, the Legislature deems any violation of the prohibition regarding pre-dispute arbitration an unlawful employment practice under California Fair Employment and Housing Act (“FEHA”)—which provides numerous remedies, including injunctive and declaratory relief, punitive damages, and attorney’s fees.

The bill's third section adds an entirely new section to the Labor Code.¹³ This new law prohibits a person from requiring any employment applicants or employees to waive any right, forum, or procedure for a FEHA violation or other specific statutes governing employment as a condition of employment, continued employment, or the receipt of any employment-related benefit.¹⁴

This prohibition includes the right to file and pursue a civil action or complaint

10. ASSEMBLY FLOOR, CONCURRENCE IN SENATE AMENDMENTS OF AB 9, at 1 (Sept. 5 2019).”

11. CAL. LABOR CODE § 432.6 (enacted by Chapter 711) “(a) The Legislature finds and declares that it is the policy of this state to ensure that all persons have the full benefit of the rights, forums, and procedures established in the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code) and the Labor Code. (b) It is the purpose of this act to ensure that individuals are not retaliated against for refusing to consent to the waiver of those rights and procedures and to ensure that any contract relating to those rights and procedures be entered into as a matter of voluntary consent, not coercion.”

12. CAL. LABOR CODE § 432.6 (enacted by Chapter 711).

13. CAL. LABOR CODE § 432.6 (enacted by Chapter 711).

14. CAL. LABOR CODE § 432.6 (a) (enacted by Chapter 711).

with or notify any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation.¹⁵ The law also prohibits an employer from threatening, retaliating or discriminating against, or terminating any applicant for employment or any employee because of the refusal to consent to the waiver of any right, forum, or procedure for a violation of specific statutes governing employment.¹⁶

In addition, the law states an agreement that requires an employee to opt out of a waiver or take any affirmative action in order to preserve their rights is a condition of employment.¹⁷ In terms of enforcement, in addition to injunctive relief and any other remedies available, a court may award a prevailing plaintiff's rights under this section as well as award attorney's fees.¹⁸

There is one exception to this prohibition. If a person is registered with a self-regulatory organization that the Securities Exchange Act of 1934 defines—or regulations adopted under that act pertaining to any requirement of a self-regulatory organization—that person must arbitrate disputes that arise with their employer or any other person the self-regulatory organization's rules specify.¹⁹

The bill explains that “nothing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act (9 U.S.C. Sec. 1 et seq.).”²⁰

The new law excludes post dispute settlement agreements and negotiated severance agreements.²¹ Its provisions are prospective in nature as it applies to contracts for employment entered into, modified, or extended on or after January 1, 2020.²²

This bill also contains a severability clause. In other words, the provisions of this new section of law are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.²³

A. Statement of Legislative Intent

Assemblywoman Gonzalez submitted a letter to the *Assembly Daily Journal* on September 14, 2019 which reads as follows:

Dear Mr. Wilson

The purpose of this letter is to express my intent in enacting Assembly Bill 51,

15. *Id.*

16. CAL. LABOR CODE § 432.6 (b) (enacted by Chapter 711).

17. CAL. LABOR CODE § 432.6 (c) (enacted by Chapter 711).

18. CAL. LABOR CODE § 432.6 (d) (enacted by Chapter 711).

19. CAL. LABOR CODE § 432.6 (e) (enacted by Chapter 711).

20. CAL. LABOR CODE § 432.6 (f) (enacted by Chapter 711).

21. CAL. LABOR CODE § 432.6 (g) (enacted by Chapter 711).

22. CAL. LABOR CODE § 432.6 (h) (enacted by Chapter 711).

23. CAL. LABOR CODE § 432.6 (i) (enacted by Chapter 711).

which prohibits California employers from forcing employees to waive their right to have certain potential legal disputes heard in the dispute resolution forum of their choice, as a condition of employment, continued employment, or the receipt of any employment-related benefit. The bill also protects California workers from retaliation if they refuse to agree to such a waiver.

The bill states that it does not apply to postdispute settlement agreements or negotiated severance agreements. It is my intent that the term “postdispute” in this context means any time after both parties are aware that an actual point of legal controversy has arisen between them. It is my intent that the term “negotiated” in this context means that the agreement is voluntary, deliberate, and informed, provides consideration of value to the employee, and that the employee is given notice and an opportunity to retain an attorney or is represented by an attorney.

Sincerely,

Lorena Gonzalez, Assemblymember, 80th District

In support of the bill, the author wrote:

Forced arbitration agreements have become a common tool of employers who seek to prevent employees from filing a lawsuit or, in instances of discrimination or harassment, filing a complaint with the state’s Labor Commissioner or Department of Fair Employment and Housing. Instead, employees who sign these agreements are forced to go through the arbitration process with any workplace violation complaint. A 2015 report by the California Labor Federation described this process as “a rigged system. . .in which an employer pays for its own arbitrators who then hear disputes in private. . .this process rarely results in justice for an exploited worker.” Workers often do not even realize what they are signing when they enter into these contracts as a condition of employment. In forced arbitration, any settlements often require the victim to refrain from discussing the case publicly. In a workplace with a culture of discrimination and harassment, these arbitration agreements are p majority of employment disputes subject to mandatory arbitration agreements “simply evaporate before they are ever filed.”²⁴

The Consumer Attorneys of California wrote, “The real impact of forced arbitration is not dispute resolution, but claim suppression. The disappearance of workplace claims cannot be an acceptable outcome.” A February 2018 article concluded that the vast majority of employment disputes subject to mandatory arbitration agreements “simply evaporate before they are ever filed.”²⁵

As a sponsor of the bill, the California Labor Federation wrote “Forced arbitration of sexual harassment claims epitomizes all of the most harmful practices that have enabled widespread abuse to go undetected for decades. Workers are forced to sign away their rights in order to get hired. When they seek

24. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 51, at 10 (Jul. 9, 2019); SENATE FLOOR, FLOOR ANALYSIS OF AB 51, at 4 (May 5, 2019).

25. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 51, at 10-11 (Jul. 9, 2019).

to report violations, they are denied the ability to go to court or file a claim with the Labor Commissioner. Instead they are trapped in the employer's handpicked arbitration system. The system is secret and confidential, protecting abusers from any public scrutiny. State agencies have no knowledge of repeat violations or arbitration decisions and there is no public record."²⁶

In opposition to the bill, the California Chamber of Commerce and 55 co-signatories wrote:

[AB 51]: (1) essentially prohibits arbitration of labor and employment claims as a condition of employment and is likely preempted by federal law; (2) exposes employers to criminal liability regarding arbitration agreements; and, (3) 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. . . .

[T]he 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. . . . 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. . . .

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, particularly toxic.

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 . . . but also an employer can face criminal charges. . . .

By banning arbitration, the only option left for employees to resolve many labor and employment claims is litigation. . . . Accordingly, eliminating arbitration as proposed by AB 51 will flood the already crowded dockets of the civil courts with new lawsuits that will significantly delay effective resolution of all civil claims.²⁷

In further opposition to the bill, the California State Council of the Society for Human Resources Management wrote:

[A]lthough AB 51 states it is intended to combat "sexual harassment," as drafted it actually applies to ALL violations of the California Fair Employment and Housing Act (FEHA), as well as the Labor Code. While much of the testimony on the bill during the legislative process was focused on high profile sexual harassment incidents, it is important to note that the bill would significantly affect the entire body of workplace disputes, including wage and hour claims,

26. ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT, COMMITTEE HEARING ON AB 51, at 3 (Mar. 5, 2019).

27. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 51, at 11-12 (Jul. 9, 2019).

discrimination, etc. In this regard, this bill goes way beyond its stated purpose, and would unnecessarily preclude the more efficient arbitration resolution mechanism even where the bill's author has not identified any public policy reason to do so. [Emphasis in the original.]²⁸

III. AB 673: FAILURE TO PAY WAGES PENALTIES

The Legislature enacted AB 673 (Carrillo) as Chapter 716 on October 10, 2019. The bill contains one section which provides several amendments to Section 210 of the Labor Code. This provision's purpose is to provide penalties for failure to pay wages to workers in this state. First, the bill adds a new category of failure to pay wages to being subject to a penalty.²⁹ Second, it removes the description of a "civil" penalty.³⁰

Third, it provides the penalties under Labor Code Section 210: statutory penalties for employees, or the Labor Commissioner may recover a civil penalty through a citation.³¹ The procedures for issuing, contesting, and enforcing judgments for these citations issued by the Labor Commissioner are the same as existing law.³²

Finally, the new law specifies that an employee can only recover the statutory penalty provided in Section 210 or to enforce a civil penalty under the Private Attorneys General Act,³³ but not both, for the same violation of the Labor Code.³⁴

In support of the bill, the author wrote:

This February, the Labor Commissioner issued the largest citation in state history, fining a Los Angeles construction company nearly \$12 million for repeated wage theft violations that left more than a thousand workers waiting weeks or months for their pay. . . . In San Francisco, a worker was evicted from his apartment because he was not able to pay his rent on time due to his employer being weeks late in paying him his wages.

Employees who are not paid on time have no clear or effective recourse. At present, an employee could file a lawsuit under the Fair Labor Standards Act (FLSA) to recover the unpaid wages plus damages. (*Biggs v. Wilson*, 1 F.3d 1537 (9th Cir. 1993)). However, it is unsettled whether an employee can file such a claim for late payments under the equivalent state law provisions.³⁵

As sponsors of the bill, the California Employment Lawyers Association,

28. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 51, at 11-12 (Jul. 9, 2019).

29. CAL. LABOR CODE § 210 (a) (enacted by Chapter 716).

30. CAL. LABOR CODE § 210 (a) (enacted by Chapter 716).

31. CAL. LABOR CODE § 210(b).

32. Compare CAL. LABOR CODE § 1197.1(b) – (k), with CAL. LABOR CODE § 210 (enacted by Chapter 716).

33. See CAL. LABOR CODE § 2699 (a).

34. CAL. LABOR CODE § 210 (enacted by Chapter 716).

35. ASSEMBLY FLOOR, FLOOR ANALYSIS OF AB 673, at 1 (May 24 2019).

California Rural Legal Assistance Foundation, the Center for Workers' Rights, and Legal Aid at Work wrote:

[C]urrent law does not explicitly provide a remedy for employees who are not paid on their designated payday. This can cause extreme financial hardship for the many employees living paycheck to paycheck, who need their wages paid on time so that they can pay for food, rent, and other daily necessities. Moreover, this delay in payment essentially amounts to an interest-free loan from the employee to the employer. . . .

The problem is that employees who are not paid on time have no clear or effective recourse. . . . Other Labor Code penalties for late payments may be available, but only in limited circumstances or are otherwise impractical to pursue. . . . AB 673 will amend section 210 to provide a clear remedy for employees who are not paid on time.³⁶

Additionally, California Rural Legal Assistance Foundation, wrote:

In our 35 plus year history of representing farm workers, we have seen many instances when an unscrupulous farm labor contractor has failed to issue farm workers a pay check when it is due. In our experience, this is a tactic of control and oppression utilized almost exclusively in the underground economy. . . .

Farm worker clients of rural legal services offices are often told by such employers: "I owe you the money but I can only pay half today. Work next week and I'll pay you everything I owe at the end of the week." What happens the next week varies—sometimes they pay, sometimes not—but often the workers get strung along until the end of the job (when they still may not get paid all they're owed).

Although there are adequate and effective legal remedies when an employer cuts workers a bad check, or stiffes them after they've quit or been discharged, failure to issue a paycheck to a current employee when it is due has weak remedies. For example, under California law, only the Labor Commissioner can issue a civil penalty against a violating employer, and she has rarely used that authority. Workers cannot even bring a claim before the Labor Commissioner to recover a penalty for this behavior, which perversely incentivizes some employers to continue to engage in these practices.³⁷

Opposing to the bill, a coalition of five local chambers of commerce wrote:

"California already has some of the most onerous and complex labor laws in the country. This complexity is exemplified by the duplicative penalty provisions contained in the Labor Code. With this statutory scheme, one, unintentional and minor violation of the Labor Code can result in the threat of financially devastating civil litigation against an employer. One prime example is found in Labor Code Section 210. Labor Code Section 210 is the penalty provision imposed for late

36. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 673, at 5-6 (Jul. 9 2019).

37. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 673, at 6 (Jul. 9 2019).

payment of wages. . . . Paying an employee ‘on time’ might seem like a simple requirement; however, it is increasingly difficult to do so in California. . . . [R]ecent cases demonstrate the challenge employers face in determining the appropriate calculation and payment of wages, such as overtime.”³⁸

IV. AB 749: “NO-HIRE” CLAUSES PROHIBITED

The Legislature enacted AB 749 (Stone) as Chapter 808 on October 12, 2019. The bill adds Chapter 3.6 (commencing with Section 1002.5) to Title 14 of Part 2 of the Code of Civil Procedure (“CCP”), and names it “Agreements Settling Employment Disputes.” It only adds one section to the CCP.

This bill prohibits an agreement to settle an employment dispute from containing a provision that prohibits, prevents, or otherwise restricts a settling party that is an aggrieved person from working for the employer against which the aggrieved person has filed a claim or any parent company, subsidiary, division, affiliate, or contractor of the employer.³⁹

If the employer has made a good faith determination that the person engaged in sexual harassment or sexual assault, Chapter 808 clarifies that an employer and an aggrieved person are free to agree to end a current employment relationship⁴⁰, or to prohibit or otherwise restrict the settling aggrieved person from obtaining future employment with the settling employer, if the employer has made a good faith determination that the person engaged in sexual harassment or sexual assault.⁴¹

Chapter 808 further clarifies that an employer is not required to continue to employ or rehire a person if there is a legitimate, nondiscriminatory or nonretaliatory reason for terminating the employment relationship or refusing to rehire the person.⁴²

The bill provides that a provision in an agreement entered into on or after January 1, 2020, that violates this no-rehire clause prohibition is void as a matter of law and against public policy.⁴³ Finally, the bill defines three terms⁴⁴ that are used in the new statute:

“Aggrieved person” means a person who has filed a claim against the person’s employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer’s internal complaint process.⁴⁵

“Sexual assault” means conduct that would constitute a crime under Section

38. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 673, at 6-7 (Jul. 9 2019).

39. CAL. CODE OF CIVIL PROCEDURE §.5(a).

40. CAL. CODE OF CIVIL PROCEDURE § 1002.5(b)(1)(A).

41. CAL. CODE OF CIVIL PROCEDURE § 1002.5(b)(1)(B).

42. CAL. CODE OF CIVIL PROCEDURE § 1002.5(b)(2).

43. CAL. CODE OF CIVIL PROCEDURE § 1002.5(a).

44. See CAL. CODE OF CIVIL PROCEDURE § 1002.5(c).

45. CAL. CODE OF CIVIL PROCEDURE § 1002.5(c)(1).

243.3, 261, 262, 264.1, 286, 287, or 289 of the Penal Code, assault with the intent to commit any of those crimes, or an attempt to commit any of those crimes.⁴⁶

“Sexual harassment” has the same meaning as in subdivision (j) of Section 12940 of the Government Code.⁴⁷

In support of the bill, the author stated:

AB 749 will bring greater fairness and clarity to existing law by voiding any settlement provision arising from an employment dispute if the provision restricts the ability of an “aggrieved” employee to work for the employer. The bill defines an “aggrieved” employee as one who has filed a claim against the employer, whether the employee filed the claim in court, with an administrative agency, in an alternative dispute resolution forum, or through an internal grievance procedure. In short, it will only protect employees who are victims of alleged discrimination, harassment, or other labor law violations. It will not protect the perpetrators of wrongful acts that give rise to an employment dispute. An employer always retains the right to discharge an employee or refuse to re-hire an employee if there are valid grounds for doing so.⁴⁸

In addition, as sponsors of the bill, the California Employment Lawyers Association and Equal Rights Advocates wrote:

Our attorneys often represent victims of sexual harassment and other forms of discrimination and workplace abuse in settlement negotiations. A troubling trend that our attorneys have witnessed in these negotiations, particularly in the wake of the #MeToo movement, is the increasingly common use of “no-rehire” provisions that employers impose as a condition of settling a dispute. Often, this bars workers from not only returning to their same employer, but from working at any workplace that is owned, operated, affiliated, or that contracts with the employer. . . .

Such provisions are especially egregious when they require the victim of discrimination or sexual harassment to forgo continuing employment, while the offender remains in the job. Such clauses can therefore also dissuade employees from reporting workplace misconduct in the first place for fear of lasting repercussions on their careers.⁴⁹

Also, in support, the California Women’s Law Center wrote:

“No-rehire” clauses punish victims by barring them from returning to their employer as well as from working anywhere owned, operated or affiliated with

46. CAL. CODE OF CIVIL PROCEDURE § 1002.5(c)(2).

47. CAL. CODE OF CIVIL PROCEDURE § 1002.5(c)(3).

48. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 749, at 8 (Jul. 9 2019).

49. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 749, at 8-9 (Jul. 9 2019).

that employer. In many cases, such provisions impose a substantial burden on an employee's ability to practice a chosen occupation or career. These retaliatory provisions dissuade employees from reporting workplace misconduct out of fear of being penalized for doing so. AB 749 would bring greater fairness to the settlement process by prohibiting any provision that restricts the ability of an employee who is a victim of alleged discrimination, harassment or other labor employment law violation, to continue to work for that employer.⁵⁰

On the other hand, in opposition to the bill, the California Chamber of Commerce and 21 co-signatory business and trade associations wrote:

[AB 749's] language fails to consider . . . that many employees who have engaged in unlawful or egregious behavior often file complaints against their employers.

For example, in sexual harassment cases, it is not uncommon for the alleged harasser to file a complaint against an employer for defamation. . . . [B]y simply filing a complaint of defamation through the employer's internal complaint process, the alleged harasser would be protected under AB 749 and have the right to seek re-employment at the same workplace, with the same employee whom the individual harassed. . . .

[E]xisting law already provides a limitation on the use of no re-hire provisions in settlement agreements to the extent they impose a "restraint of a substantial character." Completely banning the use of no re-hire provisions in settlement agreements for any "aggrieved employee," no matter how narrowly tailored, as proposed by AB 749, imposes unnecessary administrative burdens on an employer as well as potential litigation.⁵¹

V. SB 707: ARBITRATION DISCRETIONARY IF FEES ARE NOT PAID

The Legislature enacted SB 707 (Wieckowski) as Chapter 870 on October 13, 2019. In the bill's first section, there are six legislative findings and declarations, including statements that private contracts that violate public policy are unenforceable.⁵² Also, the California Supreme Court has concluded that an employee arbitration agreement cannot require the employee to bear additional expenses that would not otherwise be required in a court action.⁵³

In addition, a company's failure to pay arbitration service provider fees hinders the efficient resolution of disputes.⁵⁴ Additionally, a company's strategic non-payment of fees severely prejudices the ability of employees and consumers to

50. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 749, at 9 (Jul. 9 2019).

51. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 749, at 9 (Jul. 9 2019).

52. Section 1, subdivision (a).

53. Section 1, subdivision (b).

54. Section 1, subdivision (c).

vindicate their rights.⁵⁵

The Legislature cited two cases from the Ninth Circuit regarding an employer's refusal to pay fees or participate in arbitration constitutes a material breach.⁵⁶ Finally, it is the Legislature's intent to affirm three state court decisions regarding a company's failure to pay arbitration fees that constitute a breach of the arbitration agreement.⁵⁷

Section two of the bill amends Section 1280 of the Code of Civil Procedure by adding three definitions: "consumer"; "drafting party"; and "employee."

Consumer means an individual who uses or purchases any goods or services for personal or household purposes.⁵⁸ Drafting party means the company or business that includes in a consumer or employment agreement any arbitration provision.⁵⁹ Employee means an applicant for employment, as well as a current or former employee, and those who have been misclassified as an independent contractor.⁶⁰

Section Three of the bill amends Section 1281.96 of the Code of Civil Procedure to add specified information to be collected. Under existing law, a private arbitration company that administers or is otherwise involved in a consumer arbitration shall collect, publish at least quarterly, and make available to the public on its website a single cumulative report that contains specified information regarding each consumer arbitration within the preceding five years.⁶¹

This bill adds a twelfth category of specified information.⁶² As a result, the private arbitration company must collect the following information: Demographic data—reported in the aggregate—relative to ethnicity, race, disability, veteran status, gender, gender identity, and sexual orientation of all arbitrators as self-reported by the arbitrators.⁶³ Demographic data, disclosed or released pursuant to this paragraph, shall also indicate the percentage of respondents who declined to respond.⁶⁴

Section four of the bill adds Section 1281.97 to the Code of Civil Procedure. In either employment or consumer arbitrations that require the drafting party to

55. Section 1, subdivision (d).

56. Section 1, subdivision (e).

57. Section 1, subdivision (f).

58. New subdivision (c) reads as follows: "Consumer" means an individual who seeks, uses, or acquires, by purchase or lease, any goods or services for personal, family, or household purposes.

59. New subdivision (e) reads as follows: "Drafting party" means the company or business that included a predispute arbitration provision in a contract with a consumer or employee. The term includes any third party relying upon, or otherwise subject to the arbitration provision, other than the employee or consumer.

60. New subdivision (f) reads as follows: "Employee" means any current employee, former employee, or applicant for employment. The term includes any person who is, was, or who claims to have been misclassified as an independent contractor or otherwise improperly placed into a category other than employee or applicant for employment.

61. CAL. CODE OF CIVIL PROCEDURE § 1281.96(a)(12) (enacted by Chapter 870).

62. *Id.*

63. *Id.*

64. *Id.*

pay certain fees and costs before the arbitration can proceed, the drafting party is in material breach of the agreement, is in default, and thereby waives its right to compel arbitration if the fees or costs to initiate an arbitration are not paid within 30 days after their due date.⁶⁵

If the drafting party materially breaches the agreement and is in default, the consumer or employee can either withdraw the claim from arbitration and proceed to civil court or compel arbitration in which the drafting party must pay all fees and costs.⁶⁶ If the consumer or employee proceeds with a court action, the statute of limitations is tolled as of the first filing of a claim.⁶⁷ If such a civil action proceeds, then the court must impose sanctions on the drafting party.⁶⁸

Section five of the bill adds Section 1281.98 to the Code of Civil Procedure. Similar to the prior section of law, in either employment or consumer arbitrations that require the drafting party to pay certain fees and costs during the pendency of an arbitration proceeding, the drafting party is deemed to be in material breach of the agreement, is in default and thereby waives its right to compel arbitration if the fees or costs to continue an arbitration are not paid within 30 days after their due date.⁶⁹

If the drafting party materially breaches the agreement and is in default, the consumer or employee “may unilaterally elect” to either withdraw the claim from arbitration and proceed to civil court,⁷⁰ or continue the arbitration if the arbitration company agrees to continue the procedure.⁷¹ The arbitration company may institute a collection action at the conclusion of the arbitration proceeding against the drafting party.⁷²

The employee or consumer may petition the court for an order compelling the drafting party to pay all arbitration fees it is obligated to pay.⁷³ Or the consumer or employee can pay the drafting party’s fees and be awarded in recovery the fees that were paid on the drafting party’s behalf.⁷⁴

If the consumer or employee proceeds with a court action, the statute of limitations is tolled as of the first filing of a claim.⁷⁵ And, if such a civil action proceeds, the employee or consumer may bring a motion or action to recover all attorney’s fees and costs for the abandoned arbitration proceeding.⁷⁶ Thereafter,

65. CAL. CODE OF CIVIL PROCEDURE § 1281.96(a)

66. CAL. CODE OF CIVIL PROCEDURE § 1281.97(b)(1); CAL. CODE OF CIVIL PROCEDURE § 1281.97(b)(2).

67. CAL. CODE OF CIVIL PROCEDURE § 1281.97(c).

68. CAL. CODE OF CIVIL PROCEDURE § 1281.97(d).

69. CAL. CODE OF CIVIL PROCEDURE § 1281.98(a).

70. CAL. CODE OF CIVIL PROCEDURE § 1281.98(b)(1).

71. CAL. CODE OF CIVIL PROCEDURE § 1281.98(b)(2).

72. *Id.*

73. CAL. CODE OF CIVIL PROCEDURE § 1281.98(b)(3).

74. CAL. CODE OF CIVIL PROCEDURE § 1281.98(b)(4).

75. CAL. CODE OF CIVIL PROCEDURE § 1281.98(b)(1).

76. CAL. CODE OF CIVIL PROCEDURE § 1281.98(e)(1).

the court must impose sanctions on the drafting party.⁷⁷ In addition, if the employee or consumer continues the arbitration, the arbitrator must impose monetary, issue, evidence, or terminating sanctions against the drafting party.⁷⁸

Section six of the bill adds Section 1281.99 to the Code of Civil Procedure. This section requires a court to impose a monetary sanction against a drafting party that materially breaches an arbitration agreement.⁷⁹ If the court imposes such a sanction, the drafting party must pay the reasonable expenses—including attorneys’ fees and costs—incurred by the employee or consumer as a result of the material breach.⁸⁰

In addition to a monetary sanction, a court may order additional sanctions against a drafting party unless the court finds that the party acted with substantial justification or that other circumstances make the imposition of the sanction “unjust.”⁸¹ The additional sanction can include an evidence sanction⁸² or a terminating sanction.⁸³

In support of the bill, the California Employment Lawyers Association states: “SB 707 bill addresses two distinct problems in arbitration. First, workers and consumers face the procedural limbo and delay when they submit to arbitration, pursuant to a mandatory arbitration agreement, but the employer fails or refuses to pay their share of the arbitration fees. Second, the alarming lack of diversity in the arbitration industry, which calls into question the ability of the industry to fairly adjudicate claims brought by an increasingly diverse workforce in California.”⁸⁴

The California Chamber of Commerce and a coalition of affiliated business organizations, opposed the bill, writing “The main remaining concern is the actions or omissions that qualify as a ‘material breach’ and trigger loss of opportunity to arbitrate, monetary damages/sanctions, and possibly more severe sanctions such as evidentiary or terminating sanctions. For example, we are concerned that, even if the drafting party paid a majority of the fees and costs, but yet a small, minor portion was not paid, SB 707 would deem that nominal amount a ‘material breach’, thereby subjecting the employer or company to the same list of punishments as an employer or company who intentionally withheld the entire payment in an effort to delay the arbitration.”⁸⁵

77. CAL. CODE OF CIVIL PROCEDURE § 1281.98(c)(2).

78. CAL. CODE OF CIVIL PROCEDURE § 1281.98(d).

79. CAL. CODE OF CIVIL PROCEDURE § 1281.99(a).

80. *Id.*

81. CAL. CODE OF CIVIL PROCEDURE § 1281.99(b).

82. CAL. CODE OF CIVIL PROCEDURE § 1281.99(b)(1). The evidence sanction would prohibit the drafting party from conducting in the civil action.

83. CAL. CODE OF CIVIL PROCEDURE § 1281.99(b)(2) (the terminating sanction would result in an order striking the pleadings, rendering judgment by default, or a contempt sanction).

84. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 707, at 11 (Jun. 18 2019).

85. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 707, at 11 (Jun. 18 2019).