Volume 30, Issue 6 | June 2018

EMPLOYMENT LAW COMMENTARY

CONTRIBUTORS

SAN FRANCISCO

Lloyd W. Aubry, Jr., Editor
laubry@mofo.com

Karen J. Kubin
kkubin@mofo.com

Eric A. Tate
etate@mofo.com

PALO ALTO

Christine E. Lyon
clyon@mofo.com

Tom E. Wilson
twilson@mofo.com

LOS ANGELES

Tritia M. Murata
tmurata@mofo.com

Janie F. Schulman
jschulman@mofo.com

Timothy F. Ryan
tryan@mofo.com

NEW YORK

Miriam H. Wugmeister
mwugmeister@mofo.com

NORTHERN VIRGINIA

Andrew R. Turnbull
aturnbull@mofo.com

LONDON

Annabel Gillham
agillham@mofo.com

BERLIN

Hanno Timner
htimner@mofo.com

BEIJING

Paul D. McKenzie
pmckenzie@mofo.com

HONG KONG

Stephen Birkett
sbirkett@mofo.com

TOKYO

Mitsuyoshi Saito
msaito@mofo.com

MORRISON FOERSTER

FROM SOCIAL MEDIA TO SOCIAL CHANGE: WILL #METOO ALTER CALIFORNIA ARBITRATION LAW?

By Joline Desruisseaux

What began as a hashtag trending on Twitter may spur major change in the legislative arena in California. #MeToo not only brought global attention to the magnitude of sexual harassment and assault but also sparked a much-needed conversation about how to combat the problem outside of cyberspace. In the workplace, issues regarding sexual harassment, sex discrimination, and retaliation have moved to the forefront of the California Legislature as it attempts to address perceived shortcomings posed by mandatory arbitration. One bill getting particular attention is Assembly Bill 3080, introduced by Assemblywoman Lorena Gonzalez Fletcher. It specifically aims to ban employers from requiring workers to agree to arbitration as a condition of employment.[1] Although the bill has passed the Assembly, challenges regarding preemption and significant employer opposition may ultimately send the Legislature back to the drawing board. In this article, we provide an analysis of the history of #MeToo, the aim of the pending legislation, and the conflicts with federal and case law that may well derail the legislation.

continued on page 2

ATTORNEY ADVERTISING

BACKGROUND

On October 15, 2017, American actress Alyssa Milano urged women to write "Me Too" as a social media status if they had ever been victims of sexual assault.[2] The call went viral on Twitter and elsewhere as over 1.7 million tweets responded from 85 countries.[3] On Facebook, the hashtag was used more than 12 million times.[4] The phrase was originally coined in 2006 by Tarana Burke, mainly as a movement to help survivors of sexual assault find healing.[5] The social media hashtag has since expanded the movement, encompassing not only healing but awareness and a call for social responsibility through change. The movement has spurred conversations that touch all sectors of life, identifying sexual assault and harassment as a rampant problem that needs addressing. One such area is in employment, as numerous women shared stories about workplace harassment and subsequent blacklisting, particularly in the wake of the Harvey Weinstein sexual assault allegations. As the conversation has expanded, the California Legislature has taken steps to address the problem, although its solutions will be difficult to implement.

MAJOR LEGISLATION

Proposed California legislation involves a broad range of approaches to mandatory arbitration agreements and sexual harassment to further the goals of #MeToo advocates. These range from an attempt to extend the current one-year statute of limitation on sexual harassment and discrimination to three years (SB 1300), to a proposal making it illegal for sexual harassers to condition a settlement on confidentiality (SB 820).[6] The main one, however, is Assemblywoman Fletcher's AB 3080. The purpose of the act is both "to ensure that individuals are not retaliated against" for refusing to consent to arbitration agreements with their employers and to preclude agreements making claims or settlements of sexual harassment confidential.[7] In essence, this bill aims to limit what an employer can require as a condition of employment by making it illegal to prohibit potential and current employees from disclosing any instance of sexual harassment they may "suffer, witness or discover" in the workplace.[8] In addition, regarding mandatory arbitration, Section 4 of the bill provides:

> A person shall not, as a condition of employment . . . require any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act . . . including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency . . . or any court or other governmental entity of any alleged violation.

In describing the problem, Assemblywoman Fletcher writes, "[r]equiring workers to waive their basic rights as a condition of employment is fundamentally unfair. All contracts must be voluntary, not the result of coercion, and denying a worker a livelihood if they do not sign is anything but voluntary."[9] The counterargument points to the high costs of litigation for both parties if arbitration is discouraged, emphasizing the studies that support the notion that "access to civil courts is not a realistic option for low wage employees."[10] Opponents of this bill include the California Chamber of Commerce, the California Manufacturers and Technology Association, and the Civil Justice Association of California.[11]

CONFLICT

Notable obstacles face AB 3080. Judicial approval of arbitration, federal preemption, and past failed attempts at similar restrictions are all factors stacked against the bill.

First, federal preemption will pose a stiff challenge to this bill. Proponents of AB 3080 recognize that the Federal Arbitration Act (FAA), as currently interpreted, prevents state legislatures from discouraging or discriminating against arbitration either directly or indirectly.[12] The proponents argue against preemption by the FAA, however, by narrowly reading their proposed bill and its impact. The argument goes:

> [T]here is a reasoned case to be made that the author and sponsor of this bill have carefully crafted a statute that responds to preemption doctrine by taking the U.S. Supreme Court's admonition seriously: that consent is the touchstone of arbitration agreements. [Citation omitted.] In this way, this bill would ensure employees may *choose* to waive their rights in order to keep a job, but they are never *forced* to.[13]

Thus, the reasoning remains that the proposed legislation does not seek to outlaw arbitrations, but instead it simply aims to ensure that all arbitrations are entered into voluntarily. Putting an end to what proponents characterize as "forced arbitrations" is the goal, with the reasoning that making something a condition of employment is a type of coercion that renders the decision involuntary. The reasoning seems weak at best, as it still seems to ignore the "obvious preemption elephant" in the room.[14] It probably rests on a hope that by the time the bill, if enacted, reaches the U.S. Supreme Court, the court will have new justices who will reconsider — if not overturn — the current decisions.

continued on page 3

On October 11, 2015, Governor Brown rejected a similar bill, AB 465, which purported to outlaw the use of mandatory arbitration agreements as a condition of employment.[15] Governor Brown explained that he was returning the bill without his signature because it was a "far-reaching step," and it would likely be struck down as a violation of the FAA.[16] He also pointed to the protections provided to ensure fair arbitrations and called on lawmakers to make specified changes to combat any abuses rather than a "blanket prohibition."[17] This leaves substantial uncertainty as to whether Governor Brown will sign AB 3080. Will it suffer the same fate as its predecessors in the courts, or will the new climate of #MeToo pave the way for its acceptance?

CONCLUSION

#MeToo has shown us that social media can have effects that reach far beyond the computer screen. Women in positions of power have mobilized to argue for laws they believe reflect the core goals of the movement, one of which is to extinguish sexual harassment in the workplace. Whether a limitation on required arbitration agreements effectively achieves this goal is up for debate. On the one hand, the proponents of AB 3080 argue that the bill would outlaw an unfair process cloaked in secrecy by giving employees the flexibility to choose their forums. On the other hand, its opponents argue that AB 3080 is an impermissible hindrance to a mutually effective and fairly structured process. Regardless of the position one takes, however, one thing is clear: This conversation is far from over.

Joline R. Desruisseaux is a summer associate in the San Francisco office. She can be reached at (415) 268-7706 or jdesruisseaux@mofo.com.

Lloyd W. Aubry is of counsel in the firm's Employment and Labor Group in the San Francisco office, and the editor of *ELC*. He can be reached at (415) 268-6558 or laubry@mofo.com.

To view prior issues of the ELC, click here.

---

1 *See* https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201720180AB3080.

2 *See* https://twitter.com/alyssa_milano/status/919659438700670976?lang=en (Milano stating "If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet.").

3 *See* https://www.cbsnews.com/news/metoo-reaches-85-countries-with-1-7-million-tweets/.

4 *Id.*

5 *See* https://variety.com/2018/biz/news/tarana-burke-me-too-founder-sexual-violence-1202748012/.

6 *See* http://www.sacbee.com/opinion/editorials/article213325609.html (listing all of the #MeToo-related California pending legislation).

7 Assembly Bill No. 3080, Section 1(b), *available at* https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201720180AB3080.

8 Section 2(a).

9 *See* http://womenscaucus.legislature.ca.gov/sites/womenscaucus.legislature.ca.gov/files/PDF/AB%203080%20Fact%20Sheet.pdf.

10 *See id.*

11 *See* https://www.recode.net/2018/4/18/17252032/susan-fowler-uber-forced-arbitration-labor-bill-california.

12 *See* http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180AB3080 (Bill Analysis, Senate Judiciary 06/18/18 p. 15).

13 *See id.*

14 *See* https://www.jdsupra.com/legalnews/and-now-the-bad-news-avalanche-of-42567/.

15 *See* https://www.gov.ca.gov/wp-content/uploads/2017/09/AB_465_Veto_Message.pdf (Governor Edmund G. Brown Jr.'s Veto Message).

16 *Id.*

17 *See id.* (listing protections of arbitration as neutrality of the arbitrator, adequate discovery, no limitation on damages or remedies, a written decision that permits some judicial review, and limitations of the costs of arbitration from *Armendariz v. Foundation Health Psychcare Services, Inc.* 324 Cal. 4th 83 (2000)).

We are Morrison & Foerster — a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, and Fortune 100, technology, and life sciences companies. We've been included on *The American Lawyer*'s A-List for 13 years, and the *Financial Times* named the firm number six on its 2013 list of the 40 most innovative firms in the United States. *Chambers USA* honored the firm as its sole 2014 Corporate/M&A Client Service Award winner and recognized us as both the 2013 Intellectual Property and Bankruptcy Firm of the Year. Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger.

Because of the generality of this newsletter, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. The views expressed herein shall not be attributed to Morrison & Foerster, its attorneys, or its clients. This newsletter addresses recent employment law developments.

© 2018 Morrison & Foerster LLP