

ASSEMBLY THIRD READING
 AB 3080 (Gonzalez Fletcher)
 As Amended May 25, 2018
 Majority vote

Committee	Votes	Ayes	Noes
Labor	5-1	Thurmond, Gonzalez Fletcher, Jones-Sawyer, Kalra, McCarty	Flora
Judiciary	7-3	Mark Stone, Chau, Chiu, Weber, Holden, Kalra, Reyes	Cunningham, Kiley, Maienschein
Appropriations	12-4	Gonzalez Fletcher, Bloom, Bonta, Calderon, Carrillo, Chau, Eggman, Friedman, Eduardo Garcia, Nazarian, Quirk, Reyes	Bigelow, Fong, Gallagher, Obernolte

SUMMARY: Prohibits a person from conditioning employment, continued employment, or the receipt of any employment-related benefit on the applicant for employment, the employee or independent contractor waiving certain rights and/or not disclosing sexual harassment. Specifically, **this bill:**

- 1) Prohibits a person from conditioning employment, continued employment, the receipt of any employment-related benefit or a contractual arrangement on the prohibition of disclosing an instance of sexual harassment or otherwise opposing any lawful practice, or from exercising any right or obligation or participating in any investigation or proceeding with respect to unlawful harassment or discrimination.
- 2) Prohibits a person from conditioning employment, the receipt of any employment-related benefit or as a condition of entering into a contractual agreement, on an employee or applicant waiving any right, forum, or procedure for a violation of any provision the California Fair Employment and Housing Act or the Labor Code, and prohibits a person from threatening, retaliating, or discriminating against any applicant or employee because of their refusal to agree to such a waiver.

FISCAL EFFECT: According to the Assembly Appropriations Committee, one-time special fund costs of \$420,000 and ongoing costs of \$400,000 as a result of an anticipated increase in retaliation claims.

COMMENTS: According to the author, "Recent revelations of widespread sexual harassment have focused policy makers on the need to ensure that victims have access to justice and that violators are held accountable. They have also demonstrated the harm that comes from keeping these cases confidential," which the author asserts exposes "countless other women to the same treatment." The author also contends, "Arbitration is a highly effective dispute resolution method when both parties chose it freely. It is far less successful when the more powerful party forces the other to accept the terms"

Arguments in Support

The American Civil Liberties Union (ACLU) writes in support of this bill that the measure promotes, "consent and fairness in the waiver of important workplace rights, such as by private arbitration or other agreements." They continue, "It expresses no hostility to arbitration to protect against the forced and involuntary waiver of vital rights enacted by the legislature for the public good. The law is replete with examples of rules to prevent injustice in the enforcement of private agreements – some by statute and others crafted by the courts, such as the strictures applied to adhesion contracts and the unconscionability doctrine that invalidates contracts too one-sided to be upheld."

The ACLU asserts, "With respect to agreements that purport to waive unwaivable employment rights, the California Supreme Court observed in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83 that the Federal Arbitration Act does not exempt arbitration clauses from general principles that apply to all contracts. First, Civil Code Section 1668 states: 'All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.' 'Agreements whose object, directly or indirectly, is to exempt [their] parties from violation of the law are against public policy and may not be enforced.' Second, Civil Code section 3513 states, "Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." The ACLU continues, "*Armendariz* recognized that the statutory rights established by the Fair Employment and Housing Act (FEHA) are for a public reason that cannot be annulled by private contracts. The provisions of the Labor Code are no different."

Arguments in Opposition

The California Chamber of Commerce and others write that they oppose this measure because, they believe "it: 1) prohibits settlement agreements for labor and employment claims; 2) prohibits arbitration of labor and employment claims; 3) creates significant litigation exposure and expense; 4) is preempted by federal law; and 5) only serves to benefit trial attorneys at the expense of both employers and employees."

The Chamber and others also argue that the measure denies low-wage employees access to justice. They assert, "By banning arbitration, the only option left for employees to resolve many labor and employment claims is litigation." They continue, "Several studies support this notion that access to civil courts is not a realistic option for low wage employees. *See* University of San Francisco Law Review, "Employment Arbitration and Workplace Justice," Lewis L. Maltby, President of the National Workrights Institute, 2003, '[I]t would be a terrible mistake to eliminate the use of arbitration as a tool for addressing and resolving employment disputes. Employees are more likely to have their day in court in arbitration than in litigation and are more likely to receive justice when the day is over. Employment arbitration needs to be preserved and improved, not abandoned;' *and* University of Michigan Law School, 'Mandatory Arbitration: Why It's Better Than It Looks,' Theodore St. Antoine, 2003, 'The vast majority of ordinary, lower- and middle-income employees (essentially, those making less than \$60,000 a year) cannot get access to the courts to vindicate their contractual and statutory rights. Most lawyers will not find their cases worth the time and expense. Their only practical hope is the generally cheaper,

faster, and more informal process of arbitration. If that is so-called mandatory arbitration, so be it. There is no viable alternative.'"

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