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NEWSALERT

Employee Arbitration Agreements

Law Barring Mandatory Agreements Shot Down

A U.S. COURT of appeals has struck down a landmark California law that prohibits employers from requiring their workers to sign agreements to arbitrate any disputes arising from their employment.

The ruling clears the way for employers to continue using arbitration agreements without risking criminal liability that the law – AB 51 – calls for. The law took effect Jan. 1, 2020, but after a coalition of employers led by the California Chamber of Commerce sued to block the measure's implementation, a lower-court judge issued a temporary restraining order, halting enforcement until the matter could be resolved by the courts.

Arbitration agreements usually require both the employer and employee to submit any employment-related disputes to arbitration, rather than to the traditional court process. They are designed to reduce tension and save both parties money and time.

The Chamber said the Feb. 15, 2023 ruling by the Ninth U.S. Circuit Court of Appeals invalidating the law was a win for the state's employers. The business advocacy group had asserted that the law contradicted federal legislation and would result in increased litigation and higher costs for employers and workers alike.

The ruling by the Ninth Circuit upheld a lower court's preliminary injunction order and holding that AB 51 is preempted by the Federal Arbitration Act (FAA).

What did AB 51 require?

The law made it a criminal misdemeanor for an employer to require an existing employee or a job applicant to sign an arbitration agreement as a condition of employment.

However, due to a quirk in the law, even though an employer could be subject to criminal prosecution if it required employees to sign arbitration agreements, the contracts, if signed, would still be enforceable.

The law was written in this way to avoid conflicting with the FAA. But in the end, the court opined that AB 51 was preempted by the federal law after all.

The takeaway

The ruling paves the way for employers to continue using arbitration agreements with employees in the Golden State. That said, if you are using such agreements or plan to, you should consult with your legal counsel to ensure your agreement is up to date.

If the case is not appealed, the court's opinion will likely lead to the law being nullified.

But an appeal would be an uphill battle, legal observers say. "SCOTUS (the U.S. Supreme Court) has clearly said that state rules burdening the formation of arbitration agreements are at odds with the FAA," the law firm of Fisher Phillips wrote in a blog about the ruling.

One important note: The Ninth Circuit's decision does not affect the federal Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, which gives employees the right to opt for arbitration agreements and class- or collective-action waivers if they are making sexual assault or sexual harassment claims. ❖

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Commercial Vehicle Tracking

Digital License Plate Law Creates Privacy Headache

A NEW STATE law that allows for digital license plates to be installed on vehicles in California, may have created a privacy nightmare for employers.

The Motor Vehicle Digital Number Plates Act, which took effect Jan. 1, enables fleet and commercial vehicle owners to purchase and install digital license plates and soon-to-be-approved alternative devices for tags, stickers, tabs and registration codes that can track vehicles and make registration easier.

The new law has significant implications for fleet and commercial vehicle owners that want to track vehicles using a digital license plate or alternative GPS device, and they will need to follow the law's driver disclosure requirements to avoid fines.

What employers can and can't do

The law allows fleet and commercial vehicle owners to track vehicles through the digital license plate as long as it is "strictly necessary for the performance of the employee's duties." Employers may only monitor them during work hours.

If you choose to monitor employees, you are required to provide them with a notice, which under AB 984 must – at a minimum – include the following:

- A description of the activities that will be monitored.
- A description of the worker data that will be collected.
- A notification of whether the data gathered through monitoring will be used to make or inform any employment-related decisions, including disciplinary and termination decisions.
- A description of the vendors or other third parties, if any, to which information collected through monitoring will be disclosed or transferred.
- Names of personnel authorized to access the data.
- Dates, times and frequency of monitoring.
- Where the data will be stored and for how long.
- A notification of employees' rights to disable monitoring, including vehicle location technology, outside of work hours.

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THE PLATES EXPLAINED

Currently Reviver Auto is the only firm currently approved to sell digital license plates in California.

There are two types of plates available: battery and hard-wired plates:

- Battery-powered plates go for $19.95 a month, or $215.40 for a four-year agreement.
- The hard-wired plates, which are only available to businesses, cost $24.95 a month.

Firms that violate the law can be subject to:

- Civil penalties of $250 for the initial violation, and
- $1,000 per employee for each subsequent violation. For subsequent violations, penalties will be calculated per employee, per violation and per day an employer monitors its workers without proper notice.

The takeaway

With potential civil penalties at stake, employers that want to use these plates should tread carefully, legal experts say.

If you want to use them, you should revise your employee handbook to include the required notice. Additionally, if you plan to monitor employees using these plates, ensure you get their signatures on the disclosure form.

Be aware that you may need to comply with other legal requirements to protect your employees' privacy, including how you handle, store and convey data from the plates. ❖

Credit: Reviver

Non-Disparagement, Confidentiality Clauses

NLRB Deals Blow to Severance Agreements

THE NATIONAL Labor Relations Board has issued a decision that non-disparagement and confidentiality clauses in employee severance agreements are illegal.

The board ruled that these provisions stifle employees' and ex-employees' rights under Title 7 of the National Labor Relations Act to discuss work and their employer with one another, among other things.

Since the NLRB's decision applies to both unionized and non-unionized workers, legal experts advise all employers to revisit their severance agreement templates. However, the decision only covers employees – and not severance agreements for supervisors or managers, who are not afforded rights under Title 7.

Decision is far-reaching

In the case before the NLRB, an employer decided to lay off a group of union workers and offered them a severance agreement that included them receiving additional months of pay and benefits depending on their tenure with the company.

It also included a standard confidentiality clause and non-dispargement clause that are found in many severance agreements:

Confidentiality Agreement. *"The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction."*

Non-Disparagement Agreement. *"At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives."*

The ruling

The board ruled that merely including non-disparagement and non-disclosure agreements in severance agreements constituted unfair labor practices under Title 7, which guarantees employees (in part):

"The right to self-organization ... and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Translation: Workers have the right to discuss their jobs and even complain about their employer and management to one another.

The takeaway

The ruling may be appealed, but for now it stands and is not on hold.

The decision will affect employers in virtually every industry and regardless of whether they have union workers or not.

If you plan to continue using severance agreements going forward, you should consult your legal counsel, particularly if your current agreements contain the clauses that offended the NLRB. ❖

Construction Falls and the Perils of Suspension Trauma

ONE OF THE most common construction industry accidents is falls from heights, which is why it's crucial that you have in place fall protection systems for your workers.

One of the best ways to prevent injuries and death from falls is by using a fall-arrest system. But while these systems can save lives, they can cause suspension trauma if the worker is not rescued and brought to ground level as soon as possible and is instead left suspended in an upright position, with their legs dangling.

Because the worker is suspended in an upright position with their legs hanging, blood begins to accumulate in the legs. This is commonly called venous pooling (the accumulation of too much blood in the veins), which reduces the flow of oxygenated blood to the heart and brain.

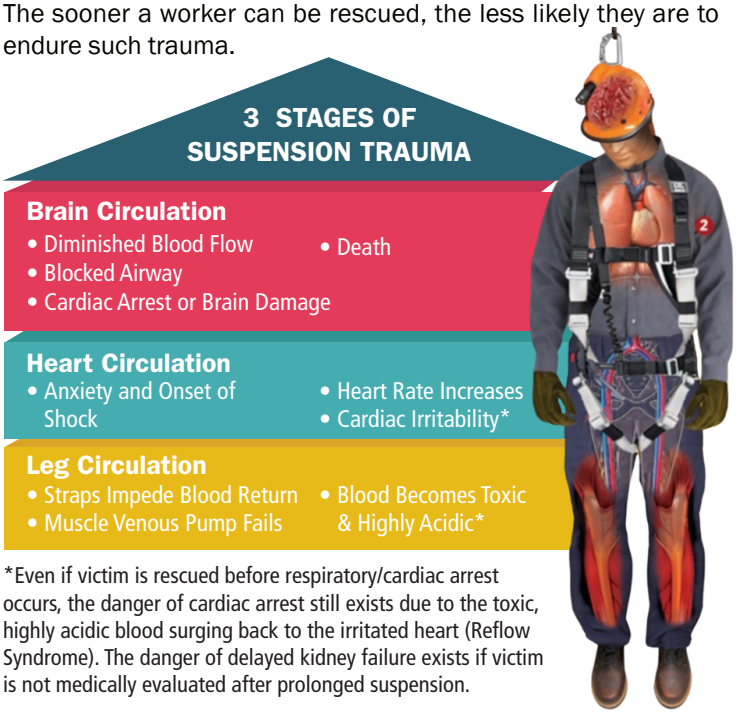
Remaining in this position for a long time can cause the worker to pass out and the longer they hang in place, the more it can result in serious health problems – and even death.

Warning Signs of Trauma

- Faintness
- Nausea
- Dizziness
- Sweating
- Paleness
- Narrowing of vision

How to avoid suspension trauma

Safe, prompt rescue is the key to preventing suspension trauma. The sooner a worker can be rescued, the less likely they are to endure such trauma.



*Even if victim is rescued before respiratory/cardiac arrest occurs, the danger of cardiac arrest still exists due to the toxic, highly acidic blood surging back to the irritated heart (Reflow Syndrome). The danger of delayed kidney failure exists if victim is not medically evaluated after prolonged suspension.

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What qualifies as a referral?

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During the rescue, care should be taken to slowly put the victim back on the ground. Try to avoid suddenly letting them into a horizontal position, which can cause deoxygenated blood to flow back into the body (reflow syndrome) and cause damage to the brain and other organs – and even cause the heart to stop.

Suspended workers awaiting rescue can take some action to guard against injury, including:

- Adopting a sitting position, if possible.
- Moving into a horizontal position as much as possible.
- Using their legs to push off from a hard surface, keeping the muscles active.
- Pumping legs frequently to maintain blood flow and prevent venous pooling.

One of the primary ways to slow the progression of suspension trauma is to stand up. When standing, the leg muscles must contract to provide support and maintain balance and these actions also put pressure on the veins. This pressure, along with a series of one-way valves in the veins, helps blood get to the heart and reduces the amount of blood pooling in the legs.

Workers can "stand" by using the trauma-relief straps that are attached in pouches on the side of the fall-arrest harness. When suspended, the worker can deploy the trauma-relief straps, which provide a loop that they can put their feet into and press against to simulate standing up. ❖

More tips

- Train workers on the rescue procedures for suspension trauma and how to avoid reflow syndrome.
- Have a plan in place to rescue suspended workers quickly and get them immediate medical attention.
- Ensure that medical personnel are aware of the possibility of suspension trauma.
- When rescuing a suspended worker, do not lay them flat into a horizontal position; instead keep them sitting up with their legs straight out in front of them.
- After a rescue, keep the worker calm and monitor them so they do not faint and fall into a horizontal position.