

June 29, 2018

Edmund G. Brown, Jr.
Governor
State of California
State Capitol
Sacramento, California 95814

Re: AB 3080

I am submitting this comment as the Associate Labor Counsel at the Economic Policy Institute (EPI). EPI is a think tank that studies the economy and how government policies affect the lives and well-being of America's workers. I write this letter in support of California AB 3080 and its requirement that contractual agreements involving pre-dispute waivers of workers' legal rights be entered into with voluntary consent, not coercion.

AB 3080 allows parties to freely agree to pre-dispute arbitration and fully allows for such agreements to be enforced according to their terms. In instances where private arbitration is a superior alternative for workers this bill leaves them free choose it—but as the Supreme Court has explained, their consent must be voluntary. This bill ensures that workers are not coerced into signing pre-dispute waivers of their rights because it is a requirement of obtaining, or maintaining, a contract or job. The bill simply states that under California law, employers cannot refuse to hire, fire, or retaliate against an employee who chooses not to enter into such a contract in the first place.

The first section of AB 3080 bars employers from prohibiting employees or independent contractors from disclosing instances of sexual harassment or discrimination that occur in the workplace or during performance of a contract. Preventing employers from silencing employees who experience or observe sexual harassment at work is an important goal, especially considering the widespread abuses that have been disclosed in the wake of the MeToo movement.

The second section of AB 3080 ensures that employees and independent contractors are not coerced into signing a contract to waive their rights to pursue civil actions or file complaints with state law enforcement agencies, among other things, in order to obtain or maintain a job. Because AB 3080's provisions have no effect on whether a validly agreed to arbitration agreement is fully enforceable, it does not conflict with the Federal Arbitration Act (FAA) and is not preempted by federal law.

The United States Supreme Court has long held that agreements to arbitrate must be consensual. As the Court has stated, “the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration ‘is a matter of consent, not coercion.’” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 681(2010) (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). Indeed, the Court has specifically noted that arbitration agreements in employment contracts must be consensual. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) (enforcing an arbitration agreement in employment in part because, “[t]here is no indication in this case . . . that [the employee] . . . was coerced or defrauded into agreeing to the arbitration clause in his registration application.”). By prohibiting employers from requiring employees to sign such waivers as a condition of employment, AB 3080 ensures that an employee’s agreement to waive their constitutional and California legal rights must be consensual. Accordingly, AB 3080’s mandate that employees are not coerced into signing employment contracts with pre-dispute waivers of their legal rights is consistent with the Court’s jurisprudence interpreting the FAA.

In addition, when interpreting the FAA, the Court has specified that state legislatures are free to regulate contracts of adhesion as long as validly agreed-to arbitration agreements remain enforceable according to their terms. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 347 n.6 (2011) (“States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.”). And the Court has explained that the formation of contracts – including contracts agreeing to arbitration – should not be governed by the FAA, but by state law. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (when interpreting the formation of contracts with arbitration agreements, courts “should apply ordinary state-law principles that govern the formation of contracts”); see also *Huckaba v. Ref-Chem, L.P.*, ___ F.3d___, No. 17-50341, 2018 WL 2921137, at *2 (5th Cir. June 11, 2018) (“Determining whether there is a valid arbitration agreement is a question of state contract law and is for the court.”). By prohibiting employers from requiring employees to sign such waivers as a condition of employment, AB 3080 proposes an acceptable regulation of the formation of contracts of adhesion without affecting the enforceability of arbitration contracts once they are agreed to. Therefore, AB 3080 is a permissible exercise of state legislative authority pursuant to Supreme Court precedent and is not preempted by the FAA.

Moreover, AB 3080 does not contain other prohibitions that the Court has found preempted by the FAA. For example, the Supreme Court has found the FAA preempts state laws that specifically single out arbitration clauses in contracts, *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996), and state laws that invalidate class-action waivers in already-signed arbitration agreements. *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). AB 3080 does not specifically target arbitration and it does not involve ex-post invalidation of signed arbitration agreements as it only applies prospectively to employment contracts entered

into after January 2019. The Court has repeatedly held that “courts must ‘rigorously enforce’ arbitration agreements according to their terms,” (*Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013)), and AB 3080 is consistent with that precedent because it fully allows for all arbitration agreements that employees and employers voluntarily enter into to be enforce according to their terms.

Furthermore, AB 3080 would not be preempted under the rationale of the recent California Court of Appeal case, *Saheli v. White Mem’l Med. Ctr.*, 21 Cal. App. 5th 308 (Ct. App. 2018), *review filed* (Apr. 23, 2018). In *Saheli*, the court held that the FAA preempted certain provisions of California civil rights laws (found in the Bane Act and the Ralph Act) because those provisions “unquestionably discriminate[d] against arbitration.” Specifically, the court held that a provision requiring the party seeking to enforce the arbitration agreement to show the other party “knowingly and voluntarily agreed to arbitration” impermissibly targeted arbitration because that burden of proof does “not apply to contracts generally.” *Id.* at 323-24. And the *Saheli* court took issue with the laws’ provisions declaring certain already-signed arbitration agreements to be void as against public policy. *Id.* at 324-25. AB 3080 does not contain those provisions; there is no alteration in the burden of proof for enforcing arbitration agreements, nor does it contain any provision that would void already-existing contracts. All this bill does is regulate contract formation by ensuring that contractual agreements between employers and employees involving pre-dispute waivers of rights or forums be truly voluntary.

Research shows that approximately 67.4% of employers in California have adopted coercive, mandatory employment arbitration procedures. See Colvin, Alexander J.S., [*The growing use of mandatory arbitration: Access to the courts is now barred for more than 60 million American workers*](#), Economic Policy Institute (April 6, 2018). As such, AB 3080 is an important public policy tool for ensuring that working people are not coerced into signing contracts that waive their rights to important labor and employment protections in order to get, or maintain, their jobs.

Sincerely,



Marni von Wilpert
Associate Labor Counsel
Economic Policy Institute
1225 Eye St. NW, Suite 600
Washington, DC 20005