CDRC
CALIFORNIA DISPUTE RESOLUTION COUNCIL
YOUR VOICE FOR ADR IN SACRAMENTO

May 30, 2018

The Honorable Lorena S. Gonzalez-Fletcher
Room 2114, State Capitol
Sacramento, CA 94249-0080

Re: AB 3080

Dear Assemblymember Gonzalez-Fletcher:

On behalf of the California Dispute Resolution Council (CDRC), I write to you to suggest that AB 3080 be amended to provide assurance that 1) the bill will not be preempted by the Federal Arbitration Act (FAA) and 2) employees will be able to arbitrate their disputes should they voluntarily choose to do so.

The CDRC was organized in 1994 to advocate for fair, accessible, and effective alternate dispute resolution processes before the legislature, state administrative agencies, and the courts. The membership of CDRC consists of individual ADR neutrals, together with community dispute resolution organizations and providers of ADR services which, taken together, represent more than 15,000 mediators and arbitrators in California. CDRC positions do not represent the views of any individual member.

One of the CDRC's guiding principles is to oppose the practice of employers to require employees to enter involuntarily into arbitration agreements as a condition of employment. That is also the object of AB 3080 and so CDRC supports the basic concept of the bill.

However, the CDRC believes that, as presently written, the bill is preempted by the FAA and will either be vetoed by the Governor, which was the fate of AB 465, or ruled unenforceable by the courts, which was the fate of AB 2617. See *Saheli v. White Memorial Medical Center* (2018), 21 Cal. App. 5th 308, 323-28. Both bills, like AB 3080, were attempts to prohibit mandatory arbitration agreements and were found to be preempted because they singled out arbitration agreements from other contracts.



**CDRC Administration**
800 Wilshire Blvd., Suite 1200, Los Angeles, California 90017
Tel: 213-629-5700, Ext. 361 cpereyra@cpslawfirm.com www.cdrc.net

AB 3080 does not render unenforceable all arbitration agreements, but it does render unenforceable a forced or mandatory agreement that requires arbitration of disputes involving an alleged violation of the California Fair Employment and Housing Act (FEHA). Mandatory arbitration agreements, unfortunately, are permissible under the FAA, and, unless the FAA is amended, California cannot ban them except in the few cases where the Commerce Clause does not apply. Thus, a defense that the agreement was mandatory and a condition of employment would not be valid under the saving clause in Section 2 of the FAA. The United States Supreme Court has stated that the saving clause permits agreements to arbitrate to be invalidated by "generally applicable contract defenses such as fraud, duress, or unconscionability" but offers no refuge for "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue" *AT&T Mobility LLC v. Concepcion* (2011), 563 U.S. 333, 339. A defense that an arbitration agreement is unenforceable because it was mandatory and barred by AB 3080 would be a defense that "derives from the fact that an agreement to arbitrate is at issue" and a bill authorizing this defense would be preempted. It has been suggested that mandatory arbitration agreements are a violation of public policy and that this defense could be raised, citing *Armendariz v. Foundation Health Psychcare Services* (2000), 24 Cal. 4th 83. However, *Armendariz* bars only *unconscionable* mandatory arbitration agreements.

All employees should have the right of access to justice. We fear that if AB 3080 is enacted in its present form, an employee who has a claim that is worth less than $200,000 probably will not have access to the court system because it is not economical for an attorney in prosecuting a claim in court in that range. However, it might be economical to arbitrate such a claim because arbitration is faster and cheaper. Unfortunately, an employer probably will not agree voluntarily to arbitrate a claim under $200,000 after it has arisen, knowing full well that the employee might not be able to find an attorney to bring the claim in court. As a consequence, AB 3080, notwithstanding its salutary aim, will have the unintended consequence of denying many employees access to justice.

The issues of preemption and access to justice can be cured by allowing for contracts which give the employee the right to opt out of a dispute resolution clause. The opt out provision would have to be prominently displayed in the contract, the employee should have a reasonable time to exercise the opt out (at least 30 days), the opt out should be in writing, and should provide that an employee shall not suffer any consequences by exercising the right to opt out, i.e., the employee would retain the right to earn wage increases, promotions, etc. Thus, we propose therefore that Sections 432.6(a) (b) and (c) be replaced by a new Section 432.6(a) which would read as follows:

> *(a) A dispute resolution clause in an employment contract must give the employee the right to opt out of the clause. The opt out provision must be prominently displayed and must state that the employee shall be given a reasonable time to execute the opt out and shall not lose any rights or suffer retaliation or discrimination by executing the opt out.*

The advantage of our suggestion is that the employee, not the employer, will have the option to

decide whether a dispute resolution clause should be enforced, including whether disputes should be arbitrated.

We look forward to working with you to assure that employees have the right to choose their own dispute resolution process and continue to have access to justice.

Very truly yours,

*Paul J. Dubow*

Paul J. Dubow
Legislative Chair

Cc: Hon. Hannah-Beth Jackson
Hon. Richard Pan