

# TIMOTHY BOWLES

ATTORNEY AT LAW

ONE SOUTH FAIR OAKS AVE., SUITE 301  
PASADENA, CA 91105

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# Law Report

LEGAL NEWSLETTER

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## MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES

*Recent Federal Court Decision Eliminates a Conflict in Workplace Law Applicable to California Employers*

As long as the procedure is fair and balanced, most American businesses can require private arbitration outside the court system for resolving any employee discrimination claim. However, for the past five years, through the so-called *Duffield* decision, the federal Ninth Circuit Court of Appeals has prohibited employers in California and the other far western states, including Washington and Oregon, from imposing

*As long as the procedure is fair and balanced, California businesses may now impose mandatory arbitration for all employment-related disputes.*

mandatory arbitration for any claim under so-called "Title VII," the U.S. civil rights law that prohibits discrimination for race, color, national origin, religion and sex/gender. The Ninth Circuit reversed the *Duffield* decision on October 1, 2003. This article

summarizes the current law now applicable to California employers, including the ability to impose mandatory arbitration for the entire range of an employee's state and federal discrimination, harassment and retaliation claims.

***The Advantages of Employment Mediation and Arbitration:*** Over the past 30 years or more, the courts have steadily expanded their favor toward so-called "alternative dispute resolution" (ADR). ADR is a general term encompassing any sort of procedure to resolve legal disputes outside of the formalities of the often overcrowded, cumbersome, and expensive court system. The two most common forms of ADR are mediation and arbitration.

Mediation could be considered "assisted negotiations." Here, opposing parties in a lawsuit designate – and pay – a professional "neutral" to analyze the strengths and weaknesses of each side and meet with the adversaries toward an agreement to resolve the dispute. In a case where the parties understand – or, perhaps, after some litigation have come to understand – that

an early settlement is preferred over a prolonged, uncertain fight in court, mediation is the vehicle to end that case.

In contrast, arbitration is an adversarial process, like a formal lawsuit, except that a private arbitrator (or sometimes a panel of arbitrators) hears the conflicting evidence of each side and makes the decision, rather than a judge and jury.

***Mediation could be considered "assisted negotiations" between disputing parties.***

Employers tend to favor arbitration over jury trial as arbitrators are usually experienced lawyers or retired judges and are generally more inclined to consider the evidence dispassionately and to objectively apply the facts to the law. Employment agreements may also require a sequence of mediation and, if unsuccessful, arbitration of workplace disputes. Such ADR vehicles will not only allow a faster, less-expensive, and less-public

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## CALIFORNIA'S NEW EMPLOYMENT LAWS FOR 2004

*All Employers Must Comply with Revised and Expanded Workplace Rules*

California continues among the leaders in state regulation of the workplace. This article summarizes this state's principal new employment laws effective January 1, 2004. All of these provisions were signed into law by now-recalled Governor Gray Davis. If such standards are not already in place, employers outside California should note these developments as possible models for future regulation of the workplace in their states.

***A Business May Now Be Liable for Customer or Client Harassment Against an Employee:*** California's Fair Employment and Housing Act (FEHA) protects the public from employment-related discrimination or harassment based on one or more of the so-called protected classifications: race, religious

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*The Law Offices of Timothy Bowles work primarily in employment and health care fraud law; mediation; arbitration; and civil litigation. While published articles convey the firm's views on topics it has found concern many of its clients, the articles are not intended and should not be considered legal advice. Such professional advice requires full disclosure to an attorney of a client's circumstances and that attorney's opportunity to analyze those circumstances against applicable law.*

TIMOTHY BOWLES, ATTORNEY AT LAW

ONE SOUTH FAIR OAKS AVE., SUITE 301, PASADENA, CA 91105 • TELEPHONE: (626) 583-6600 • FAX: (626) 583-6605

tbowles@tbowleslaw.com • www.tbowleslaw.com

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avenue for resolving employment claims but discourage frivolous lawsuits from failed workers bent on extracting some retribution for imagined wrongs.

If properly structured, contracts establishing such ADR methods will be upheld by the courts. The practical effect is that if a worker tries to bypass a well-drafted mediation/arbitration provision by filing suit, that suit will be dismissed and the employee directed to proceed as he or she agreed.

Of course, some employers have attempted to overreach with such agreements, imposing significantly unjust conditions on arbitration.

***Arbitration is adversarial, with a private individual or panel paid to decide the conflict rather than a publicly salaried judge and a jury.***

Examples would be requiring the opposing employee to agree to a limit on damages in arbitration, to file for arbitration a very short time after the dispute arises or to pay some significant portion of the arbitration fees. In such instances, courts have commonly invalidated the agreements – or at least the unjust conditions – on the grounds that the law should not support “unconscionable” terms offered as a take-it-or-leave-it prerequisite to hiring.

***California Permits Mandatory Arbitration Agreements for Employees Within Certain Guidelines:*** In *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 California Reports (Cal.) 4th series 83, 99

*California Reporter (Cal. Rptr.) 2d series 745*, the California Supreme Court specified the essential elements required for a valid mandatory arbitration agreement on anti-discrimination claims brought under the California Fair Employment and Housing Act (FEHA).

The two plaintiffs alleged their former employer, Foundation Health Psychcare Services, targeted them as heterosexuals for sexually based harassment and, finally, termination. They challenged the employer’s arbitration agreement as unfair and thus unenforceable. That agreement included a ceiling on an employee’s possible damages and a provision that left the employer free to sue the worker in court while the worker could only arbitrate his or her complaints.

In its August 24, 2000 decision, the California Supreme Court issued the following guidelines, applicable to all employment arbitration agreements in the state:

- As a condition of hiring, employers may require employees to agree that all disputes between them shall

***Employers tend to favor arbitration over jury trial as arbitrators are legally trained and generally more inclined to consider the evidence dispassionately.***

be arbitrated, including any worker claims of illegal harassment or discrimination under FEHA.

- However, if a mandatory arbitration agreement entered at the hiring stage fails to meet certain minimum requirements of fair-

ness to the worker, the entire agreement can be invalidated. Those minimum requirements must include:

### ***1. Administrative Complaints Must Be Permitted:***

The agreement cannot restrict a worker’s right to first bring any discrimination complaint before the California Department of Fair Employment and Housing (DFEH), the agency responsible for enforcing FEHA (24 Cal.4th at 99, note 6);

### ***2. Arbitration of FEHA Claims Should Be Specified:***

The worker should be given notice in writing that mandatory arbitration includes any claims under FEHA (24 Cal.4th at 99, note 7);

### ***3. Neutrality of Arbitrator:***

The arbitrator must be truly neutral, with no conflict of interest or loyalty to either side (24 Cal.4th at 103);

### ***4. No Limitation on Remedies and Damages in Arbitration:***

The worker’s remedies and damages available through arbitration cannot be limited to a level less than he or she is entitled under law (24 Cal.4th at 103-104);

### ***5. Mandatory Arbitration Must Be Mutual:***

The obligation to arbitrate must be mutual; the company cannot be free to bring any claims against the worker in court while the worker is bound to arbitrate all of his or her complaints against the employer (24 Cal.4th at 117-121);

### ***6. Discovery Provisions:***

The agreement must provide for adequate pre-arbitration discovery, so that each side may fairly be informed of the other’s position before the adversarial proceeding (24 Cal.4th at 104-106);

### ***7. Written Arbitration Decision:***

The parties must specify that the arbitrator’s decision must be adequately explained in writing so that the courts are later able to

review the proceedings for fairness (24 Cal.4th at 106-107); and

### ***8. No Unfair Expenses on Employee:***

The agreement may not impose any type of expense upon the employee that he or she would not be

***The California Supreme Court specified the essential elements for a valid mandatory arbitration agreement on anti-discrimination claims in the workplace.***

required to bear if free to bring a complaint in courts a prerequisite for the right to arbitrate (24 Cal.4th at 107-113).

***The Ninth Circuit Also Authorizes Mandatory Arbitration of Employment Discrimination Under the Federal Civil Rights Act:*** Since 1998, the status of the law for medium to large employers in the states west of the Rockies, including California, was complicated by the Ninth Circuit’s decision in *Duffield v. Robertson Stephens & Co.* (9th Cir. 1998) 144 Federal Reporter, third series (F3d) 1182. In that case, the federal appeals court decided that the Civil Rights Act of 1991 prohibits enforcement of mandatory employment agreements to arbitrate claims under “Title VII,” the section of that U.S. law that prohibits discrimination on the basis of race, color, national origin, religion and sex/gender. Title VII applies to employers with 15 or more persons on payroll.

*Duffield* involved a securities broker who sued her employer for alleged sexual discrimination harassment under both the federal Title VII and California’s

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FEHA. The federal court examined the legislative history of Title VII and concluded that employees could not be forced to agree to arbitrate such claims as a condition of hiring. *144 F.3d at 1194-1195*.

However, based on a later decision by the Supreme Court of the United States generally validating mandatory arbitration agreements under federal law, the Ninth Circuit invalidated the *Duffield* decision. *Equal Employment Opportunity Commission (EEOC) v. Luce, Forward (October 1, 2003) 345 F.3d 742, 754* (as the U.S. Supreme Court has found that mandatory arbitration agreements do not violate an employee’s basic civil rights, “*Duffield* no longer remains good law”).

Thus, in their employment agreements, California employers no longer have to scale back mandatory arbitration to only certain discrimination claims while offering optional arbitration of Title VII-based claims. Based on *EEOC v. Luce, Forward*, such agreements can provide for compulsory arbitration on discrimination claims across-the-board. This office’s newly revised model form employment agreement allows for this change in the law.

**Conclusion:** Enforceable mandatory arbitration agreements in California must include at least the above eight minimum standards specified in the *Armendariz* decision. Even though other states may not yet require such detailed protections of employee rights, employers outside California are free to utilize these particularly stringent standards and thus stay ahead of the emerging trend of invalidating arbitration agreements perceived to be one-sided. ■

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creed, color, national origin, ancestry, physical or mental disability, medical condition, marital status, sex (gender), age (over 40), or sexual orientation.

Traditionally, FEHA has held an employer responsible for such unlawful harassment against an employee, applicant or independent contractor carried out by one or more of that company’s non-supervisory employees or independent contractors if that company knew or should have known of the conduct and failed “to take immediate and appropriate corrective action.” Effective January 1, 2004, California employers may also be liable for unlawful harassment against an employee, applicant or independent contractor by a “nonemployee” associated with the company where the employer, its agents or supervisors knew or should have known of the conduct and failed to take immediate and appropriate corrective action.

***All of these new workplace rules provisions were signed into law by now-recalled Governor Gray Davis.***

This means that a business may be liable for a customer’s or client’s harassment of an employee. It remains to be seen how far the California courts will allow this expanded prohibition against harassment to reach. The new law cryptically states that in “reviewing cases involving the acts of nonemployees, the extent of the employer’s control and any other legal responsibility which the employer may have with respect to the conduct of those nonemployees shall be considered.” Thus, will a bank be



Shanahan

“I see by your résumé that you’re a woman.”

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liable for FEHA harassment for a customer repeatedly making lewd, offensive statements to a teller on the bank’s premises? Will that same bank be liable under FEHA if the customer made the same statements to the teller at a nightclub after-hours? To what extent must that bank inform its clientele that it will not tolerate such offensive behavior against that bank’s employees? Only time and future court decisions will tell.

***Transsexuals and Cross-Dressers Are Now Protected Against Sex and Gender Discrimination and Harassment:*** FEHA has traditionally extended the prohibitions against “sex” or “gender” discrimination and harassment to an employee’s actual sex or gender as well as conditions that relate to gender such as pregnancy or childbirth.

Effective January 1, 2004, California’s prohibitions against such discrimination and harassment will be expanded from an employee’s actual gender to the employer’s *perception* of an employee’s gender identity, appearance, or behavior, “whether or not that identity, appearance, or behavior is different from that traditionally associated with the employee’s sex at birth.” This means that employers now cannot discriminate

against a worker because he or she is a transsexual and cross-dresser.

*Merriam-Webster* defines transsexual as “a person with a psychological urge to belong to the opposite sex that may be carried to the point of undergoing surgery to modify the sex organs to mimic the opposite sex.” *Merriam-Webster* defines cross-dressing as “the wearing of clothes designed for the opposite sex.”

While this expansion of FEHA protection specifies that an employer may still “require an employee to adhere to reasonable workplace appearance, grooming, and dress standards,” that employer must “allow an employee to appear or dress consistently with the employee’s gender identity.” Thus, while a company with office workers can specify that employees wear presentable office attire, that company is prohibited from barring a transsexual and cross-dresser from wearing the presentable attire of the gender with which that person identifies.

***Employees Who Are Crime Victims May Be Entitled to Unlimited Leaves of Absence:*** California and many other states have long prohibited employers from terminating or discriminating against an employee for taking time off. Please see “EMPLOYMENT,” page 4

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to serve on a jury. Effective January 1, 2004, California employers must allow an employee who has been a "victim" of certain types of crimes – or an employee who is a close relative of the victim – to be absent from work in order to attend judicial proceedings related to the crime. The crimes covered are: (a) any one of 23 designated violent felonies, including murder, rape, arson and robbery; (b) any one of 42 designated "serious felonies," including drug dealing, sexual abuse of children and intimidation of crime victims or witnesses; and (c) felony theft or embezzlement.

To qualify for this "crime victim" leave of absence, the employee is required to pro-

vide the employer in advance a copy of the notice of each scheduled proceeding that is provided to the victim by the agency responsible for providing notice, "unless advance notice is not feasible." Where advance notice is not feasible, the absent employee must provide the notice "within a reasonable time after the absence." The absent employee may elect to use his or her accrued paid vacation time or sick leave compensation to the extent it covers the period of absence. An employer is required to keep confidential the employee's notice of the proceedings.

***Employees May Now Bring Private Suit to Collect Statutory Penalties for a Business' Violation of Workplace Rules:*** The California Labor Code

imposes specified civil penalties against employers who violate certain workplace legal standards. For example, Labor Code section 558 imposes certain civil penalties for each employer violation of California's overtime provisions, including \$50 for each underpaid employee for each underpaid pay period on for any initial violation, and \$100 for each underpaid employee for each underpaid pay period for each subsequent violation.

Previously, only the state's Labor and Workforce Development Agency was authorized to assess and collect a host of such penalties. Effective January 1, 2004, any employee who has experienced such a rules violation may bring private suit to collect such penalties. That worker may bring the

lawsuit on behalf of himself or herself and "other current or former employees against whom one or more of the alleged violations was committed." An employee who prevails in any such suit may also collect his or her reasonable attorney fees.

This new law, titled "The Labor Code Private Attorneys General Act of 2004," is intended to entrust a significant portion of the enforcement power of California's labor laws to attorneys in private practice, thus averting the continuing inability of government officials, strapped by budget shortfalls, to reach employers in violation.

If you would like any further information regarding any of these additions to California employment law, please contact our office. ■