

Law Report

LEGAL NEWSLETTER

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ARBITRATION OF EMPLOYMENT DISPUTES

New, Stricter Standards for Handling Workplace Claims Outside of Court

Arbitration is the process of hearing and determining a dispute outside of the judicial system by a person or persons the disputing parties choose. While the California courts endorse arbitration as an acceptable, even encouraged avenue for handling employment disputes in lieu of the long haul of court action, key California Supreme Court decisions in 2000 (*Armendariz*) and August, 2007 (*Gentry v. Circuit City*)

The Supreme Court of California invalidates employment arbitration agreements found grossly unfair (“unconscionable”) to workers.

signal tight standards for protecting workers against unbalanced and unfair procedures imposed as a condition of employment.

Of course, workers hold strong rights to receive fair

wages and to work in environments free of discrimination, harassment and retaliation. Any agreement that takes away even some portion of an employee’s access to recover on workplace laws, including that worker’s right to take his claim to court, are viewed skeptically by the courts. On the other hand, the courts have for decades encouraged parties to agree to arrangements for dispute resolution off of court lines.

“Unconscionable” has traditionally referred to contract terms that were so grossly unfair to a party that they “shocked the conscience.” The courts will invalidate any employment arbitration agreement that is both procedurally (mandatory “take it or leave it”) and substantively (employees to “give away the farm”) unconscionable.

“Procedurally unconscionable” means giving employees no choice on the arbitration of workplace disputes. “Substantively unconscionable” means arbitration procedures that take away

rights workers would have if they were to take their dispute to court. For examples, an arbitration agreement that shortens a worker’s statute of limitations for filing a claim or one that

“Procedurally unconscionable” is giving employees no choice on the arbitration of workplace disputes (“take it or leave it”).

requires him/her to pay a portion of the arbitrator’s fees (when a plaintiff does not have to pay a court judge to oversee or decide a lawsuit) are substantively unconscionable.

Since *Armendariz*, these two factors, procedural and substantive unconscionability, are evaluated by degree. The courts will tolerate a great deal of procedural inequity as long as the terms of the arbitration obligations are imminently fair (i.e., an

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CALIFORNIA: DON’T LINK AND DRIVE

Less Bars in More Places Starting July 1, 2008

As originally reported in *Bowles Law Report* Volume 8, Issue 2, California’s new Vehicle Code section 23123, effective July 1, 2008, makes it unlawful to drive a motor vehicle while using a wireless telephone (cell phone) unless the driver uses a hands-free listening and talking device. A companion law, Vehicle Code section 23124, also effective July 1, 2008, forbids anyone under the age of 18 to drive while using a cell phone, period. In light of these new laws, should employers forbid all employees from talk-

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absence of substantive unconscionability). On the other hand, a great deal of substantive inequity is tolerated if an employee, fully informed of the consequences, freely enters the agreement to arbitrate.

This means for instance that if an employer made

“Substantively unconscionable” means arbitration procedures that strip workers of rights guaranteed in a court action (“give away the farm”).

its arbitration entirely optional, with huge protections to the employee to ensure he/she had every opportunity to participate after becoming fully informed on the up- and downsides of the process (i.e., absolutely no procedural unconscionability), then it would not matter how grossly unbalanced the actual arbitration terms were.

In *Gentry*, the employer Circuit City – no doubt figuring it was eliminating the procedural unconscionability element – presented an “optional” arbitration program to its employees along with a brochure outlining its features, a full set of the rules/procedures and a form the worker signed establishing he/she had 30 days to write to HR his preference NOT to participate. The form stated that the worker’s silence (or, if you will, failure to respond) within the 30 days meant that he/she elected to par-

ticipate in the program. The logic of this arrangement of course included the opportunity for employees to investigate the proposal for a month before signaling their agreement/disagreement.

A solid opportunity for workers to make informed decisions on this Circuit City arbitration plan was crucial as the substantive terms of that plan did include some provisions unfair to those employees (i.e., shortened a three-year statute of limitations on wage claims to one year and limited the amount of damages a worker could collect through arbitration).

Offended by the substantive unconscionability of the above terms, the Supreme Court went out of their way to find some degree of procedural unconscionability in the 30-day “opt-out” plan, opening up the possibility of invalidating the entire arbitration plan. Again, if there is no

Both “procedural” and “substantive” unconscionability are required to invalidate an arbitration agreement.

procedural unconscionability, then it would not matter how grossly unfair the actual plan was to the workers. There has to be at least some degree of each type of unconscionability to invalidate an arbitration agreement.

The majority of the Court gleaned procedural unfairness from the short, supposedly inadequate description of the downsides to arbitration in Circuit City’s

brochure on the arbitration plan. The majority also found possible procedural unconscionability in “subtle” pressures the company supposedly imposed by promoting arbitration as its clear choice for handling disputes.

Updating Enforceable Arbitration Programs:

Boiled down, to construct an arbitration program with the maximum chance of enforcement in the courts, employers should make the plan optional to the employees while making the actual procedures as fair and balanced as possible.

Under *Armendariz*, such fair terms would include:

• Government Agency Complaints Must Be Permitted:

The agreement cannot restrict a worker’s right to first bring any discrimination complaint before an appropriate government agency, including the California Department of Fair Employment and Housing (DFEH), the body responsible for enforcing California Fair Employment and Housing Act (FEHA);

• Arbitration of FEHA and Federal Employment Claims Should Be Specified:

The worker should be given notice in writing that mandatory arbitration includes any claims under FEHA or its federal counterpart, the Civil Rights Act of 1964 (also called “Title VII”);

• Neutrality of Arbitrator: The arbitrator must be truly neutral, with no conflict of interest or loyalty to either side;

• No Limitation on Remedies and Damages in Arbitration: The worker’s remedies and damages available through arbitration cannot be lim-

ited to a level less than he or she is entitled under law;

• Mandatory Arbitration Must Be Mutual: The obligation to arbitrate must be mutual. The employer company cannot be free to bring any claims against the worker in

An employer should make its arbitration plan optional to the employees and ensure the actual procedures are as fair and balanced as possible.

court while the worker is bound to arbitrate all of his or her complaints against the employer;

• 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;

• Written Arbitration Decision: The agreement 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; and

• No Unfair Expenses on Employee: The agreement may not impose any type of expense upon the employee that he or she would not be required to bear if free to bring a complaint in courts a prerequisite for the right to arbitrate.

Recommendations to Employers on Updating Arbitration Programs: In light of the letter and spirit of the *Armendariz* and

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ing on their cell phones while driving on the job? Must employers furnish their 18-plus employees with cell phone headsets? ***Drivers Must Keep Their Eyes on the Road, Their Hands Upon the Wheel:***

According to the Assembly Committee on Transportation’s report, the main reason for the new legislation (section 23123) is to encourage driving with two hands on the steering wheel. Although studies show drivers remain distracted to a certain degree while talking on cell phones, even with two hands on the wheel, the legislature acknowledges the safety benefits associated with using cell phones, such as reporting road hazards, stranded motorists, and car accidents. Accordingly, the new law attempts to strike a balance for certain cell phone use while driving (unless under the age of 18 as discussed below). Section 23123 pro-

Section 23123 prohibits drivers from using cell phones unless they are using a hands-free listening and talking device, such as an earpiece, headset, speaker phone or even Bluetooth technology.

hibits drivers from using cell phones unless they are using a hands-free listening and talking device, such as an earpiece, headset, speaker phone or even Bluetooth technology. Any

such hands-free listening device will suffice.

Section 23123 does not apply to persons using a cell phone for emergency purposes, to emergency services professionals, nor to persons using digital two-way radios that operate by depressing a push-to-talk feature while driving a truck (requiring commercial class A or B driver’s license to operate), farm vehicle, or tow truck. Nor does the law apply to anyone driving a motor vehicle on private property.

Minors are forbidden from driving while using any one of a multitude of electronic items including cell phone, even if equipped with a hands-free device.

A violation of this law is an infraction punishable by a base fine of twenty dollars (\$20.00) for a first offense and fifty dollars (\$50.00) for each subsequent offense.

Teens Talk at Their Own Peril: Minors are forbidden from driving while using any one of a multitude of electronic items including cell phone, even if equipped with a hands-free device. California Vehicle Code section 23124. The prohibited list includes cell phone, pager, two-way messaging device, laptop computer with mobile data access, specialized mobile radio device, or broadband personal communication device, unless for emergency purposes, such as an emergency call to a law enforcement agency, health care provider, fire depart-



“Alison, please phone Mr. Bradshaw and tell him I won’t be available for lunch. Then call the Coast Guard and tell them I’m drowning near Long Branch, New Jersey.”

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ment, or other such emergency services agency. Violation of this law is an infraction punishable by a base fine of twenty dollars

Employers should update their company handbooks and other policy pertaining to employee driving and cell phone use.

(\$20.00) for a first offense and fifty dollars (\$50.00) for each subsequent offense. Unlike the ban on handheld cell phones, however,

a law enforcement officer may cite a teen for a suspected violation of this law only in connection with another suspected driving offense – meaning law enforcement officers cannot stop a vehicle for the sole purpose of determining whether the driver is violating this law.

Sensible Employer Actions: Employers should update their company handbooks and other policy pertaining to employee driving and cell phone use. Obviously, the safest policy would be to prohibit all cell phone use – hands free or otherwise – unless in an emergency. Employers

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Gentry decisions, employers should take several steps to update arbitration programs, preferably with assistance of a California lawyer experienced in employment law:

Arbitration is the process of hearing and determining a dispute outside of the courts by a person or persons the disputing parties choose.

- Revise arbitration policies, employment agreements and all other company documents and agreements covering arbi-

tration to replace all substantively unconscionable provisions with enforceable, balanced provisions consistent with *Armendariz*.

- Revise policies, employment agreements and all other company documents and agreements covering arbitration to make participation in arbitration optional.

- Create a memo for the company's personnel division explaining the above basics, including the "neutral" approach to take with incoming employees with these provisions and the importance of getting each new hire to initial one of the above two options.

- Suitably knowledgeable on the company's optional arbitration program in the event of later employment disputes, the personnel divi-

sion should present individualized, revised employment agreements with the

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expanded arbitration provisions to each employee one-on-one, obtaining signatures and initials for each consenting worker.

Our office is available to assist employers and their personnel divisions to effect such improvements in company arbitration programs.

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probably do not want to find themselves in the unenviable position of having to justify the lack of such a policy if an employee causes a traffic collision while talking on a cell phone about work-related matters or while driving on the job, even if using a hands-free system.

With this increased focus on the manner of work-related driving, employers should also ensure they have updated copies of employee drivers' licenses and insurance policies for those employees whose jobs require them to drive on company time. Please contact this office for assistance in updating these policies and procedures.