

Mandatory Arbitration of Statutory Employment Claims

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Until recently, it was unclear whether California employers could require their employees to arbitrate employment disputes arising under the California Fair Employment Housing Act ("FEHA"), the state's anti-discrimination statute. Last month, this issue was clarified by the California Supreme Court's landmark decision in *Armendariz v. Foundation Health Psychcare Service*.

In *Armendariz*, the Court ruled that employers could require the mandatory arbitration of statutory employment claims, including claims of discrimination, sexual harassment, and retaliation under the FEHA, as long as the arbitration permitted employees a fair opportunity to vindicate their statutory rights. Thus, a valid and enforceable arbitration agreement must allow for: (1) a neutral arbitrator, (2) limitations on the costs of arbitration to employees, (3) adequate discovery, (4) no limit on remedies, (5) a written decision, (6) limited judicial review, and (7) some form of mutuality of claims.

Facts of The Case

In *Armendariz*, two employees filed a complaint for wrongful termination against their former employer, alleging that they were subjected to sexually-based harassment and discrimination, and that they were terminated because of their sexual orientation. Both employees had previously signed agreements requiring them to arbitrate all employment disputes. When the employees refused to submit to arbitration, the employer filed a motion to compel arbitration.

The trial court denied the motion, indicating that the arbitration agreement was unfairly one-sided and unconscionable. The employer appealed. The appellate court concluded that although certain provisions in the agreement were unconscionable and therefore unenforceable, the remaining valid provisions should be enforced to require arbitration. The employees appealed.

The California Supreme Court reviewed the case in order to clarify the confusion over the validity of mandatory arbitration of statutory employment claims in California. The Court pointed out that both California and federal law favored arbitration, and that nothing in the language of the legislative history of the FEHA suggested that it was intended to prohibit arbitration. Nonetheless, the Court indicated that it certainly would not enforce any arbitration agreement that would compel employees to forfeit their substantive statutory rights under the FEHA. Accordingly, the Court described the precise type of mandatory arbitration agreement that would be valid and enforceable under these guidelines.

Required Provisions

- *Neutral Arbitrator*. The Court indicated that it was obvious that the arbitration agreement must provide for a neutral arbitrator, which was essential to ensuring the integrity of the arbitration process.
- *Limitations on the Costs of Arbitration to Employees*. The Court determined that the imposition of substantial forum fees upon the employee in a mandatory arbitration agreement would be contrary to public policy, since it would have a chilling effect on employees' claims. The Court even rejected the provision in the *Armendariz* agreement that only required the employees to pay their pro rata share of the arbitration. Instead, the Court held that the arbitration agreement cannot require the employees to bear any expense that they would not otherwise be required to bear if they brought the action in court. Thus, the agreement should require the employer to pay for all costs that are unique to arbitration, including arbitration forum costs.
- *Adequate Discovery*. The Court stated that the denial of adequate discovery in arbitration would frustrate the employee's statutory rights, since such discovery is usually indispensable for the vindication of FEHA claims. Although the Court indicated that the lack of discovery procedures in an arbitration agreement is not automatically fatal, the agreement should contain specific provisions allowing for adequate discovery, such as limited written discovery and depositions.
- *No Limitation on Remedies*. The Court further emphasized that arbitration agreements cannot be valid if they contain any limits on the remedies available to the employee. Therefore, the agreement must grant employees the right to recover the same remedies they could recover under the FEHA, including punitive damages and attorney's fees.
- *Written Decision*. Although this issue was not directly before the Court in this case, the Court commented that the agreement should also require the arbitrator to prepare a written decision that set forth the essential findings and conclusions upon which the award is based.
- *Limited Judicial Review*. According to the Court, the agreement should allow for some form of limited judicial review of the arbitrator's decision.
- *Some Form of Mutuality of Claims*. Finally, the Court stated that the arbitration agreement must have at least "a modicum of bilaterality" in order to be valid, since it would be unfair to require the employee to arbitrate all disputes with the employer, but allow the employer to sue the employee in court. Although the Court did not strictly require that the agreement mandate the arbitration of all claims between employer and employee in order to be valid, the Court commented that the agreement should address this issue of mutuality of claims in some meaningful way. However, the Court did not provide any further guidance concerning this point. **The Court's Final Ruling**

In conclusion, the Court ruled that since the *Armendariz* arbitration agreement did not contain these required provisions, the agreement was therefore unconscionable and unenforceable. Thus, the Court denied the employer's motion to compel arbitration.

Advice To California Employers

If you have existing arbitration agreements, you should carefully review them to ensure that they comply with the strict requirements of *Armendariz*. If you do not currently have arbitration agreements, you should consider the benefits of mandatory arbitration, as well as the limitations of arbitration imposed by this case. We recommend that you consult with experienced labor counsel so that you may make an intelligent and informed decision concerning this important issue.

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