

Arbitration Pacts Are Cost-Effective Despite Questions Unresolved by Courts

By Jonathan Fraser Light

To arbitrate, or not to arbitrate — that is the question with employee claims.

Employers are probably tired of hearing about the issue, and advisers are in a quandary about what to advise their clients. Having implemented arbitration agreements, or learning later that agreements thought to be effective are now unenforceable as a result of new case law, some practitioners are questioning the usefulness of arbitration in the employment context. There are still good reasons to implement arbitration agreements, however.

If employers do opt to implement arbitration agreements, how should it be done, and what are some of the pitfalls? Here are a few thoughts on what to consider when implementing an arbitration program. However, this is not a comprehensive discussion of the many details of the actual language of the agreement, and there are significant requirements, in part detailed in *Armendariz v. Foundation Health Psychcare Services Inc.*, 24 Cal.4th 83 (2000), and its progeny.

Can employers force arbitration on employees?

No, but there are strategies for introducing the concept in the workplace that will increase the likelihood that employees will agree. For example, in a case now pending before the California Supreme Court, *Gentry v. Superior Court*, 37 Cal.Rptr.3d 790 (Cal.App.2006) (review granted April 26), employees could opt out of arbitration in writing within 30 days of receiving the agreement. An employee's silence was deemed acceptance by the lower court. We will see if the Supreme Court agrees.

Management should avoid any effort to coerce signatures or retaliate against employees for failing to sign. Such "procedurally unconscionable" conduct will almost certainly void the agreement.

Can new hires be treated differently from existing employees?

Yes. It appears that employers may still require new hires to agree to arbitration as a condition of starting employment. Failure to sign would void the offer of employment,

and that should be indicated clearly in the appropriate documentation (e.g., the offer letter).

Employers should reference the company's mandatory arbitration policy in applications for employment, so that there are no surprises when the applicant is presented with the agreement once there has been an offer and acceptance of employment.

If the employee first learns of the arbitration requirement when he receives the hiring packet after acceptance of the offer, the employer could have a problem based in part upon the concept of detrimental reliance. In that situation, the employee would be unaware of the mandatory signing requirement, and may have already quit another job or moved geographically in reliance on the employer's silence regarding arbitration. The employee might be entitled to damages if he refuses to sign the agreement and his employment offer is revoked, or the employer may be forced to allow the employee to continue his employment without an arbitration agreement in place.

How should the employer introduce the concept to existing employees?

There are three documents needed to effectively present an arbitration agreement. The first is a reference to the company's arbitration policy in the employee handbook, briefly extolling the virtues of arbitration, noting the company's support of the process, and indicating that employees will be asked to sign such an agreement.

The second document is the arbitration agreement itself, separately issued to employees and not included as part of the handbook. The handbook is not a binding agreement (the employer can change it without agreement by employees), whereas the arbitration agreement should be a binding contract. Putting a binding arbitration agreement into the non-binding handbook may make the agreement unenforceable.

The third document is an introductory memorandum to employees that accompanies the actual agreement. That document discusses the benefits of arbitration and asks

the employee to return the signed agreement to the human resources manager or other appropriate recipient by a certain date. It also references what the employee will receive in return (see below). If the employer chooses to adopt the 30-day opt-out language from *Gentry*, that would be a reasonable alternative, subject to the Supreme Court's decision on the issue. A signature would be better, so that the employee cannot claim he never received it.

Do employers have to give employees something in return for signing away their right to a jury trial?

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The case law is unclear, and the most recent cases on arbitration don't directly discuss the issue. There did not appear to be any consideration offered to employees in the *Gentry* case. We have advised clients to provide existing employees with reasonable consideration, such as a day of pay or a day of vacation accrual, in return for signing the agreement. This does not apply to new hires who can be required to sign an arbitration agreement without consideration. The new job, subject of course to at-will employment, appears to be sufficient consideration in return for waiving rights.

What if the employer already has an agreement in place, but the new court decisions demonstrate that it is now insufficient or unenforceable?

It's not clear what you can or cannot do to resolve this issue. Assuming a newly modified substitute agreement is entirely in the employee's favor (which is likely to be the case), and perhaps no new consideration is required to enforce the new agreement. An employer may be able to force employees to accept the new agreement simply by issuing it to employees and indicating that it replaces the old agreement, and noting that the changes

all favor the employee. To be safe, employers might consider giving the same consideration as that given in the past. In doing so, however, employees may choose not to sign the new agreement and the employer might not have any recourse.

What are the current significant benefits to arbitration?

One of the most significant benefits is the potential for avoiding class action wage and hour lawsuits. The language in the agreement at issue in *Gentry* specifically prohibited an arbitrator from considering class action claims. Again, we will see

Additional claims that should be excluded from mandatory arbitration are administrative claims with the California Department of Fair Employment and Housing or the federal Equal Employment Opportunity Commission. If employees obtain a right-to-sue letter from these agencies and choose to pursue a civil action, however, they would not be allowed to pursue the action in court, but would be forced to arbitrate, based on the language in the agreement. Workers' compensation, unemployment insurance, retirement plans and medical insurance claims also should be excluded from the arbitration agreement. In some situations, such as with retirement and medical plans, federal Employee Retirement Income Security Act rules may preclude forcing an employee to arbitrate such claims. This isn't critical, however, as employers should be most interested in arbitration to avoid large jury verdicts for wrongful termination, harassment, discrimination or retaliation claims.

Should the agreement be translated into the first language of the employee?

It would certainly increase the likelihood of enforceability if the written agreement were translated into the employee's first language. In addition, for unsophisticated or relatively illiterate employees, employers may want to certify in a memo to the employee's file that the agreement was read and/or explained to the employee before signing, and done so in the employee's primary language.

Can the employer force the employee to pay for some or all of the arbitration?

The employee can only be required to pay an amount equal to whatever filing fees might have been required if the employee had been able to file in court or otherwise pursue a claim outside of arbitration. This is usually a relatively negligible amount, and employers are encouraged to voluntarily pay for the entire cost of the arbitrator and any related filing or processing fees with the arbitration organization. The employee remains responsible for his own attorney fees and related costs, however. The statu-

tory rules, such as those found in the discrimination and harassment statutes in California Government Code Section 12940 et seq., would govern recovery of attorney fees, if any. As a general rule, the employer cannot create payment requirements, forfeiture requirements, or shortened statutes of limitation that are inconsistent with the statutes that would otherwise govern the employee's claims in court.

What will arbitration cost?

Employers sometimes are surprised when they have to write a check for \$5,000 to \$25,000 (or more) prior to arbitration to cover some or all of the arbitration expenses. Arbitration is not inexpensive, but as every trial lawyer knows, preparation for arbitration is less time-consuming, presentation of evidence at arbitration moves much more quickly, and the overall process takes far less time than a trial. Once employers understand that their attorneys' fees will be considerably reduced, combined with a significant reduction in the risk of a runaway jury award, employers will likely opt for arbitration of most employment-related claims.

There are significant questions that remain to be answered and several pitfalls in the process of implementing arbitration agreements. Additional court opinions should provide further clarification on how an employer may implement an enforceable arbitration agreement and the language it should contain. *Gentry* may be a significant step in that process, but will not resolve all pending questions. On balance, however, arbitration of many employment-related claims appears preferable to risking a trial in front of a jury. A jury of true peers is rarely possible for an employer, as the average juror almost always readily identifies with the employee plaintiff — certainly at the outset of a case, if not throughout the trial — and therein lies the primary risk to the employer.

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