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E-UPDATE EMPLOYMENT LAW

CALIFORNIA SUPREME COURT APPROVES ARBITRATION FOR WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY CLAIMS
(February 28, 2003)

The California Supreme Court yesterday issued another decision validating mandatory arbitration of employment disputes. The court also reaffirmed its 2000 decision in *Armendariz v. Foundation Health Psychcare Services, Inc.* that requires specific procedural and substantive safeguards as a condition of enforcing pre-dispute agreements to arbitrate employment claims.

In *Little v. Auto Steigler*, a car dealer used a broad arbitration agreement with its employees, which covered all claims and disputes arising out of employment. The arbitration agreement also contained a provision allowing either party to have a second arbitrator review any award over $50,000. The agreement was silent on who would bear the cost of arbitration.

The *Little* Case

In the *Little* case, a service manager filed a lawsuit against the dealership, asserting various employment related claims including tortious termination in violation of public policy. The trial court denied the dealership's motion to compel arbitration, on the ground that the arbitration agreement did not have the required *Armendariz* safeguards. The Court of Appeal reversed, and the California Supreme Court granted review.

The California Supreme Court held that, so long as the *Armendariz* safeguards were present, wrongful termination in violation of public policy claims are arbitrable. In issuing this decision, the court clarified that the *Armendariz* safeguards are required not only for statutory claims (e.g., discrimination, harassment, etc.), but also for common law tort claims, such as a wrongful discharge claim. The main *Armendariz* safeguards require that there be basic mutuality, a limitation on costs and fees the employee must pay in the arbitration, the right to adequate discovery, no limitation on damages, and a written decision. (See E-Update of August 24, 2000.)

The decision contains more good news for supporters of arbitration agreements. The Supreme Court held that a single unconscionable provision does not necessarily invalidate the entire agreement. As long as an arbitration agreement

does not have an unconscionable provision that infects the core of the agreement, a single offending provision can be excised and the rest of the agreement enforced. In the *Little* case, the court invalidated the provision allowing either party to appeal any award exceeding $50,000 to a second arbitrator. Since only the employer would likely be hit with such an award, the court found the provision unfairly one-sided, and unenforceable.

Finally, the California Supreme Court expressly reaffirmed the "employer pays" approach for allocating the additional cost of arbitration, and rejected a recent United States Supreme Court decision calling for a case-by-case inquiry into the fairness of sharing the cost of arbitration. Here, the agreement was silent on the issue of who bears the cost. That does not make the agreement unconscionable, but by operation of law, the employer will pay for the cost of arbitration.

What this means:

This decision is good news for California employers who want to use mandatory arbitration agreements. It is now clear that claims for wrongful termination in violation of public policy are subject to arbitration. In addition, a single unconscionable provision in an arbitration agreement does not invalidate the agreement, so long as it is severable from the rest of the terms. And, if an arbitration agreement does not specify that the employer, and not the employee, must pay for any additional cost associated with arbitration, the agreement is enforceable (although the employer must pay the costs of arbitration).

The *Armendariz* safeguards remain the single most important factor in an arbitration agreement. These safeguards apply to virtually any conceivable wrongful termination dispute. Employers should be sure that their arbitration agreements conform to these standards. If you are uncertain whether your agreements comply with these standards, it may be time to have your employment law counsel perform a "tune up" on your arbitration agreements.

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