

Employee Arbitration Agreements are Enforceable

By *Larry N. Murnane, Esq.**

In a long-awaited decision, the California Supreme Court recently upheld the use of mandatory binding arbitration provisions in employment agreements, provided certain minimum requirements are met. The Supreme Court found unpersuasive the reasoning in a recent Ninth Circuit Federal Court case, which held such arbitration agreements invalid as a matter of law. (See, *Duffield v. Robertson Stephens & Co.* (9th Cir. 1998) 144 F. 3d 1182.)

In *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, the Supreme Court held that employers can require employees to arbitrate all employment claims, including statutory discrimination claims, if the arbitration agreement permits the employee to vindicate his or her statutory rights.

In the *Armendariz* case, two terminated employees brought a wrongful termination action against their former employer, alleging discrimination in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, section 12900, et seq.) and other causes of action. The employer moved to compel arbitration under an arbitration provision in plaintiffs' employment application forms and in separate employment agreements. On appeal, the Supreme Court affirmed the trial court's decision that the arbitration agreement was an adhesion contract because portions were unconscionably one-sided, limiting damages to back pay, and precluding discovery. However, the Supreme Court held that FEHA claims are arbitrable if the arbitration agreement permits an employee to vindicate his or her statutory rights. For vindication to occur, the arbitration agreement must provide for certain "minimum requirements," including: (1) neutrality of the arbitrator, (2) no limitation on statutorily imposed remedies such as punitive damages and attorney fees, (3) adequate discovery rights, (4) a written decision that will permit a limited form of judicial review, and (5) limitations on the employee's costs of arbitration.

Based upon the *Armendariz* decision, an employer wishing to avoid the costs and risks of jury trials, by compelling employees to arbitrate all disputes, should include a mutual arbitration provision in the employment agreements that explicitly and conspicuously states that all employment disputes between employer and employee are subject to binding arbitration, including statutory and discrimination claims such as those brought under Title VII of the Civil Rights Act of 1964, FEHA, and other state and federal anti-discrimination laws. The arbitration provision should further designate a neutral arbitration service provider, such as the American Arbitration Association, the cost of which will be covered by the employer.

Although employers generally prefer binding arbitration to a jury trial for claims of wrongful termination, discrimination and harassment, arbitration is not without its drawbacks. For example: (1) the cost of an arbitrator can be substantial; (2) mutual arbitration may be less practical in situations where the employer desires injunctive relief to stop the misappropriation of trade secrets or other wrongful activities of an employee; and (3) an arbitrator's decision is generally not subject to review for errors of fact or law, pursuant to another Supreme Court decision in *Moncharsh v. Heily & Blase* (1992) 3 Cal. 4th 1. Therefore, an employer should give careful consideration as to whether and how to compel employee arbitration.

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