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Client Alert

Two recent cases show what to avoid in placing arbitration provisions in employment contracts.

Avoiding Unconscionable Arbitration Provisions In Employment Contracts

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A pair of recent cases serves as a reminder of the difficulty in putting into effect an enforceable arbitration agreement in employment contracts.

Case 1. The arbitration provision in *Ajamian v. CantorCO2E* provides a relatively straight-forward refresher on what *not* to do:

- Punitive and statutory damages were precluded
- The fees provision was one-sided
- New York law applied, arguably waiving some of the employee's statutory rights
- The arbitration would be in New York, instead of California, imposing high travel costs
- The arbitration organization would be unilaterally chosen by the employer when the dispute arose
- The employee was not provided with a copy of the arbitration rules

Thus, even though the employee was highly educated, given six months to review her employment contract, and had an attorney advise her on its provisions, the court had little difficulty finding that the arbitration provision was unconscionable, and should be stricken from the employment contract.

Case 2. The arbitration agreement in *Mayers v. Volt Management Corp.*, by comparison, looked destined to be upheld:

- The arbitration agreement was contained in the employment application, the handbook, and the employment contract, all of which were signed by the employee
- The agreements were on the front pages, in bold, and all capital letters
- Arbitration would be through the American Arbitration Association ("AAA") organization, and under AAA rules
- The prevailing party would recover attorneys' fees (i.e., fees were mutual, not one sided)
- Nothing in the provision prevented the employee from filing a claim with any governmental or administrative body
- All employees were subject to the same arbitration provision

Yet the provision was deemed so unfair that the court struck it down as unconscionable. The employer failed to specify which of the several AAA rules applied (e.g., the commercial or employment rules), failed to give any AAA rules to the employee, and failed to tell the employee where to find the rules. The court found

these failures to mean that the actual terms of the arbitration were a "surprise" to the employee.

Next, the arbitration provision altered the risks faced by employees when it comes to fee awards. Under the discrimination law relied on by the employee (the Fair Employment and Housing Act), fees are rarely to be denied to the prevailing employee, but rarely awarded to the prevailing employer. By simply stating that the prevailing party shall obtain fees in the arbitration — without appropriate carve outs — the employee faced an undue risk of having a fee award against him.

Based on these factors, the court found that the provision had a "high degree" of unconscionability, and that the unconscionability so permeated the agreement, the offending portions could not be severed from the contract so that the principle of arbitration could be preserved.

Conclusion
There is a substantial benefit to avoiding submitting an employment case to a jury of employees. Doing so requires a model arbitration provision tailored for your company, a checklist for handling new employees with accountability, and frequent updating of both.

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