

***TRIVEDI DECISION CALLS VALIDITY OF MANY EXISTING ARBITRATION AGREEMENTS
INTO SERIOUS QUESTION***

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In the past 15 years, it has become common for employers to require employees to agree, as a condition of employment, to resolve disputes regarding employment through binding arbitration instead of jury trials. Employees, who typically prefer to submit their claims to a jury of their peers, have responded by challenging the enforceability of mandatory arbitration policies. In response to the employee challenges, state and federal courts have issued a series of decisions defining the terms under which arbitration agreements may be enforceable, and declining to enforce those agreements deemed inherently unfair or one-sided. A new decision issued by the California Court of Appeal last month further clarifies the rules regarding arbitration and calls into question the validity of many existing arbitration agreements and policies utilized by employers.

In *Trivedi v. Curexo Technology Corporation*, the defendant sought to compel its former employee to resolve his discrimination and termination claims through arbitration after he had filed a lawsuit against it in court. The court refused to enforce the arbitration agreement, however, and cited three facts as the primary basis for its decision. First, the company did not give the employee a copy of the rules that were to govern the arbitration proceeding. Second, the arbitration agreement permitted the prevailing party to recover its legal fees and costs, a right which the employer would not have enjoyed if the dispute had been resolved in court. Finally, the arbitration agreement also specified that each party could seek injunctive relief in court, and was not required to seek such relief from the arbitrator.

The *Trivedi* decision is noteworthy because the factors that prompted the court to refuse to enforce the arbitration agreement are found within many of the arbitration agreements utilized by employers today. Although most arbitration agreements written in recent years state that they will be governed by the rules of a well-known arbitration organization (typically either the American Arbitration Association or JAMS), few employers provide copies of the applicable rules to their employees. Similarly, many agreements purport to entitle the prevailing party to recover its legal fees and costs, and many permit both sides to see injunctive relief in court if they wish to do so.

If a single, overriding principle is discernable from recent court decisions regarding arbitration, it is this- arbitration must not leave employees on a playing field that is any different than that which would exist in court. In other words, arbitration policies should merely substitute an arbitrator for a judge or jury as the party who will decide the outcome of the case. To the extent that arbitration agreements or policies otherwise seek to define the rules through which a dispute will be resolved, they are likely to be found unenforceable, particularly if the discrepancies between arbitration rules and the rules that would otherwise be applicable in court tend to favor the employer.

In light of the *Trivedi* decision, employers that have arbitration agreements or policies in place should review them to determine whether they are likely to be enforceable following *Trivedi*. If existing policies are vulnerable to challenge, employers should either revise them or abandon them, if they feel that the advantages of arbitration no longer outweigh the disadvantages. In order to make an intelligent decision regarding arbitration as a means of dispute resolution, employers

must understand the advantages and disadvantages of the process. Some of the advantages of arbitration over court litigation include:

- Avoidance of a trial by jury. Many businesses regard the difference between a trained, experienced arbitrator and a jury comprised primarily of employees as sufficient in and of itself to warrant use of arbitration as a means of resolving employment disputes.
- Increased privacy. Unlike court proceedings, arbitration proceedings are typically private. Neither the filing of an arbitration claim nor the ultimate result are public record, so the potential for adverse publicity is much lower in arbitration than in court litigation.
- Potential for more rapid resolution. Arbitration often involves fewer, and shorter, pre-trial proceedings than court litigation, and the parties can often exert greater control over scheduling than is possible in court. As a result, disputes often conclude more rapidly through arbitration than through traditional litigation.

Many of the advantages of arbitration are well-known to employers. Other aspects of arbitration can be disadvantageous, however, and should be considered carefully before deciding whether to adopt a policy requiring employees to resolve claims through arbitration.

- No right to appeal. The appellate courts exist to provide parties aggrieved by errors during trial with an avenue to rectify those errors. No such mechanism exists in the arbitration context. Except in the case of fraud or corruption in the arbitration process, arbitration decisions are generally not subject to appeal.
- Rules of law may not be applied strictly. Judges and juries are bound to apply the law when resolving disputes litigated in court. In the arbitration context, however, rules of law have traditionally been viewed as offering guidance to the arbitrator, rather than controlling the decision. Some are disinclined to decide cases based upon technical legal defenses (such as the statute of limitations) or to exclude evidence that would be inadmissible in court.
- Payment of arbitrator's fees. The parties to an arbitration agreement must pay the arbitrator for the time he or she spends presiding over the case, and arbitrator's fees can be substantial. In California, the employer must generally pay the arbitrator's fees, and cannot require the employee to bear any portion of them, even if the employer prevails in the case.

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The *Trivedi* decision is particularly important for employers with arbitration agreements or policies already in force. Employers with existing arbitration agreements should review their agreements to determine whether they are likely to be enforceable in light of *Trivedi* and, if not, they should revise their documents accordingly if they wish to resolve disputes through arbitration. If you have any questions about resolving employment disputes through arbitration, or would like assistance in creating or updating an arbitration policy, please contact one of our attorneys:

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