ARBITRATION

Not all arbitration agreements are created equal

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Over the past several years, many employers have implemented dispute resolution programs and imposed arbitration agreements as a condition of employment. As the California Court of Appeal recently explained, while arbitration agreements are generally valid, an employer must understand their limits and not rely on courts to sever unconscionable provisions placed in them. When an arbitration agreement overall lacks basic fairness and mutuality, courts have discretion to invalidate the entire thing.

Facts

Julie Carlson, a former office manager for Home Team Pest Defense, Inc., filed a lawsuit against her former employer alleging various employment claims, including wrongful termination. Home Team had conditioned Carlson's employment on her execution of an arbitration agreement. The agreement was made available to her through the company's intranet on her first day of work. A dispute resolution policy was incorporated by reference into the agreement, but Carlson didn't receive a copy of the policy.

Carlson objected to signing the agreement in an e-mail to the HR manager because it didn't contain all of its essential terms. The HR manager met with her the following day and told her that she would provide a telephone number she could call "in a couple of weeks" to see if someone could give her a copy of the policy but that she needed to sign the agreement that day or else her employment offer would be withdrawn. Carlson signed the agreement.

The agreement stipulated that certain disputes relating to Carlson's employment with Home Team would be submitted to an unspecified arbitration service selected by the company for final and binding determination. The agreement set forth prearbitration procedures Carlson was required to follow in order not to waive her claims against Home Team.

Specifically, Carlson was required to request dispute resolution in writing, and within 90 days of her request, she had to file a "demand for arbitration." During the first 90 days, she was required to meet with Home Team to attempt to resolve her disputes, but she wasn't allowed to have legal representation. Except for statutory civil rights claims, the parties stipulated to splitting the costs, fees, and expenses of the arbitration.

The agreement excluded any claims Home Team may have against Carlson relating to unfair or unlawful competition, such as solicitation of its customers for her own benefit or misappropriation of its trade secrets. Home Team wasn't required to follow the prearbitration procedures. The agreement also contained a severability clause providing that if a court were to find any of its provisions contrary to law, the remaining provisions of the agreement would remain in full force and effect.

Substantive and procedural unconscionability

In deciding whether to enforce an arbitration agreement, courts examine whether its terms are both procedurally and substantively unconscionable. Procedural unconscionability focuses on oppression and unfair surprise that primarily results from unequal bargaining power and hidden terms within the agreement. Substantive unconscionability focuses on overly harsh or unfairly one-sided terms.

In this case, Carlson asserted that Home Team's arbitration agreement was procedurally unconscionable because it was presented to her as "take it or leave it" and incorporated the dispute resolution policy without providing her a copy of it. She also claimed a number of provisions in the arbitration agreement were substantively unconscionable, including clauses that:

(1) Required her to submit disputes to an unspecified form of dispute resolution and to meet with Home Team's representatives within the first 90 days without an attorney being present;

(2) Placed time limits on when she needed to demand arbitration that are more restrictive than under California and federal law; and

(3) Required her to split fees and expenses associated with arbitration, except for statutory civil rights claims.

After Carlson filed her lawsuit, Home Team agreed to waive the provision relating to the payment of arbitration fees and costs.

Court's decision

The court agreed with Carlson, holding that the arbitration agreement was invalid and unenforceable. The court found that the agreement was procedurally unconscionable since Carlson was required to sign it without time for reflection, was never provided a copy of the dispute resolution policy for her review, and was threatened with withdrawal of her job offer.

The court also found that the agreement was substantively unconscionable because it lacked basic fairness and mutuality. While Carlson was required to arbitrate all of her employment claims (except claims filed with federal and state agencies) and demand dispute resolution of her claims against Home Team, the company was provided unfettered access to the courts since it excepted the claims it would likely have against an employee. Furthermore, Home Team wasn't required to follow the pre-dispute resolution procedures and didn't have a restrictive time period for filing its claims. It also required Carlson to split costs and fees associated with arbitration, which she wouldn't need to do if she pursued the same claims in court.

The court rejected Home Team's argument that it was required to sever the unconscionable provisions and enforce the rest of the agreement. While the agreement contained a severability provision, the court found there were multiple provisions it would need to sever, which would place it in a position of rewriting the parties' agreement. If an agreement is "permeated" with unconscionability, a court may strike the entire thing. *Carlson v. Home Team Pest Defense, Inc.* (California Court of Appeal, 1st Appellate District, 8/17/15).

Bottom line

Arbitration agreements continue to be beneficial alternatives to litigation, and this case provides practical guidelines for employers on how to draft enforceable agreements. Arbitration agreements should contain objectively reasonable and mutually binding terms and not place the burden of paying arbitration costs on employees. In addition, employees should be provided with a reasonable opportunity to review the agreement before signing it and given copies of all the rules and procedures to be followed in the event of a dispute.

A severability clause won't be applied if it operates to sever one or more essential terms of the parties' agreement. You should carefully draft arbitration agreements and not rely on a court to sever unconscionable terms after the fact.

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EMPLOYMENT LAW

California editors to play key role in national employment law event

Schickman

Yonahara

California Employment Law Letter editor Mark I. Schickman and assistant editor Cathleen S. Yonahara will have important roles in the 20th annual Advanced Employment Issues Symposium (AEIS) set for Las Vegas November 4-6.

Schickman, a partner with Freeland Cooper & Foreman LLP in San Francisco, will participate in the session "Mock Trial: Pregnancy Discrimination or Legitimate Termination?" and present the luncheon session "Employment Law Jeopardy!" Yonahara, also with Freeland Cooper & Foreman, will be participating in the "Mock Trial" session as well.

Special workshop

Schickman and Yonahara also will be presenting a three-hour workshop—"California Harmony for Multistate HR Maestros: How to Tune Employment Policies and Practices." This important session will address such things as:

- Changes under California employment law—and what to do now to gear up;
- The top five employment issues that cause the biggest legal headaches in California;
- Handling claims by a "perceived" whistleblower;
- Legally protected categories in California, including pregnancy disability, and how to manage workplace policies and practices so they align with current compliance requirements; and
- How the new "AB 60" driver's license affects an employer's obligations under federal and state law.

For more information on AEIS, go to http://aeisonline.com. You can contact Schickman and Yonahara at 415-541-0200. ✤