Pros And Cons As Calif. Employers Rethink Forced Arbitration

By **Nancy Lubrano and Brian Cole** (March 23, 2023)

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Many California employers previously reluctant to roll out mandatory arbitration agreements given uncertainties in developing case law are now reconsidering this decision.

This comes on the heels of the U.S. Court of Appeals for the Ninth Circuit's February decision in Chamber of Commerce v. Bonta, blocking California's bar to mandatory arbitration agreements,[1] and the U.S. Supreme Court's ruling in Viking River Cruises Inc. v. Moriana last June,[2] effectively permitting arbitration of individual Private Attorneys General Act claims.

California employers with existing arbitration agreements are, or at least should be, reviewing and likely revising existing agreements to comport with recent case law to ensure continued enforcement.

In wage and hour litigation, one of the primary benefits of having an arbitration agreement is the ability to include a class and representative action waiver, thereby requiring an employee to arbitrate his or her individual wage and hour claims, in addition to other purported employment-related disputes — except sexual harassment and assault — in arbitration rather than facing defense of alleged class action or representative and PAGA claims in court.

The enforceability of such waivers is an incredibly important and valuable shield for California employers who are faced with class and PAGA claims filed in court.

That said, and as previously discussed, there are pros and cons to arbitration agreements. Here are some of the pros and cons that employers must consider carefully:

PROS	**CONS**
Obtain class and representative action waivers.	May result in multiple individual wage and hour claims in arbitration.
Avoid class actions.	Employer bears the cost.
May avoid representative PAGA claims entirely if the California Supreme Court decides *Adolph v. Uber Technologies Inc.* in favor of employers.	May impact employee morale.
Avoid a public jury trial — except in sexual harassment/assault cases.	Requires careful implementation and communication.
May help achieve favorable settlements.	May result in less favorable settlements.

According to the California Supreme Court, Adolph v. Uber Technologies Inc. will address whether an aggrieved employee who has been compelled to arbitrate claims under PAGA that are

"premised on Labor Code violations actually sustained" by the aggrieved employee maintains statutory standing to pursue "PAGA claims arising out of events involving other employees" in court or in any other forum the parties agree is suitable, such as arbitration.[3]

The primary benefit of arbitration agreements for wage and hour litigation — class and representative or PAGA action waivers — may be diminished if it is not implemented carefully.

Moreover, as the law on arbitration agreements continues to evolve, the language contained in arbitration agreements must be carefully crafted to help ensure enforceability.

While a mandatory arbitration agreement program may be beneficial to many California employers in avoiding the costly defense of class or representative actions in court, it is imperative that such agreements are current, legally enforceable, and can be authenticated to actually utilize this benefit in wage and hour litigation.

Arbitration agreements, however, are not a panacea, and the pros and cons of arbitration in California should be considered when deciding whether to implement an arbitration agreement program.

The benefits of any arbitration agreement program necessarily rely on the ability to consistently enforce such agreements, and therefore it is important to ensure that any arbitration agreements are current in light of recent case law developments and rolled out to employees in a manner and method that is legally defensible, if later challenged.

Recent case law developments have not changed the requirement that arbitration agreements satisfy the so-called Armendariz factors.

In Armendariz v. Foundation Health Psychare Services Inc. in 2000, the California Supreme Court determined that arbitration agreements covering statutory or nonwaivable rights are enforceable if they provide the following minimum protections:

- A neutral arbitrator;
- No limitation of remedies;
- Adequate discovery;
- A written decision; and
- No additional costs to the employee unique to arbitration.[4]

Generally, an arbitration agreement that expressly states that a neutral arbitrator shall be appointed, including through the parties' selection of a mutually agreeable neutral, will satisfy this factor.

Many arbitration agreements expressly incorporate specific arbitration rules that provide for the selection of a neutral arbitrator, which may also suffice if done correctly.

If the arbitration agreement includes a provision that there will be no limitation on remedies and that the employee will be entitled to the same remedies as if the dispute was filed in

court, the second Armendariz factor will likely be satisfied.

Adequate discovery means that employees must be entitled to at least "discovery sufficient to adequately arbitrate their statutory claim, including access to essential documents and witnesses, as determined by the arbitrator(s)."[5]

The fourth and fifth factors are fairly easy to satisfy by including provisions explaining that the arbitration must provide a written decision and that the employee will not bear costs unique to arbitration.

More recent case law developments have created challenges for employers seeking to enforce an arbitration agreement. In Gamboa v. Northeast Community Clinic in the Court of Appeal of California, Second Appellate District, the standards for satisfying contract formation came under fire turning long-standing authority on its head.[6]

Indeed, it was well established that a party could not avoid contractual obligations simply by claiming, even if under oath, a failure to remember executing the contract. But that is essentially what the California Court of Appeal held in Gamboa in 2021.

Earlier this year, in Iyere v. Wise Auto Group, the Court of Appeal of California, First Appellate District, disagreed with Gamboa, providing some clarity on standards for establishing contract formation.[7]

Specifically, the Iyere court addressed the significant differences in authenticating handwritten signatures as compared to electronic signatures, which the Gamboa court called a distinction without a legal difference.

Hope Gamboa's signature was handwritten, and the court there applied the electronic signature analysis from its 2014 ruling in Ruiz v. Moss Bros. Auto Group Inc.[8] in rendering its decision.

While there seems to be obvious differences between an e-signature and a wet signature, that debate is not necessary. Instead, the Iyere court concluded:

> If a party confronted with his or her handwritten signature on an arbitration agreement is unable to allege that the signature is inauthentic or forged, the fact that that person does not recall signing the agreement neither creates a factual dispute as to the signature's authenticity nor affords an independent basis to find that a contract was not formed.[9]

So it would seem that the same reasoning applies when an arbitration agreement is e-signed.

To avoid the contract conundrum created by the Gamboa decision, employers contemplating an arbitration agreement rollout must pay close attention to the manner in which the agreement is presented to and executed by employees.

When it comes to enforcing the agreement, a custodian of record must be able to attest to basic facts to authenticate the employee's agreement.

That said, employers who obtain executed arbitration agreements through electronic means, must make sure that process complies with Ruiz to help ensure enforceability when an employee seeks to avoid arbitration.

Ruiz requires that the employer prove that the electronic signature was the act of the employee. Thus, employers must maintain a secure process by which electronic signatures are obtained by employees that can be proven as the act of the employee by a preponderance of the evidence.

Finally, as to the impact of Viking River, and regardless of how the Uber case is decided, arbitration agreements that expressly exclude all PAGA claims from arbitration create challenges when employers seek to compel individual PAGA claims to arbitration.

While some arbitration agreements may have included a provision that PAGA claims are not covered under the agreement in recognition of the California Supreme Court's 2014 ruling in Iskanian v. CLS Transportation Los Angeles LLC — prohibiting agreements to waive the right to bring PAGA claims[10] — employers would be well served to update the provision.

When doing so, they should take Viking River into consideration, specifically that PAGA claims can be split between an individual PAGA claim, which is arbitrable, and a representative PAGA claim, which is not arbitrable.

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[1] https://www.callaborlaw.com/entry/ninth-circuit-delivers-employers-a-valentine-blocks-californias-bar-to-mandatory-employment-arbitration-agreements.

[2] https://www.callaborlaw.com/entry/us-supreme-court-raids-californias-paga-jurisprudence-in-viking-river.

[3] Adolph v. Uber Technologies Inc., (California Supreme Court Case Docket (S274671) Issues Ordered Limited Aug. 1, 2022).

[4] Armendariz v. Foundation Health Psychare Services Inc., 24 Cal. 4th 83 (2000).

[5] Armendariz, 24 Cal. 4th at 106.

[6] Gamboa v. Northeast Community Clinic, 72 Cal. App. 5th 158, 168 (2021).

[7] Iyere v. Wise Auto Grp., 87 Cal. App. 5th 747 (2023).

[8] Ruiz v. Moss Bros. Auto Group Inc., 232 Cal. App.4th 836 (2014).

[9] Iyere at 758.

[10] Iskanian v. CLS Transportation Los Angeles LLC, 59 Cal. 4th 348 (2014).