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# arbitration of employee claims - it isn't over 'til it's really over

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The old adage is that bad facts make bad law. The bad facts of *Pearson Dental Supplies, Inc. v. Superior Court* (California Supreme Court, April 26, 2010), resulted in bad law for employers concerning finality of employee claims in arbitration.

The plaintiff, Luis Turcios, was 67 years old when terminated from employment. He contended that his termination occurred because of his age in violation of the Fair Employment and Housing Act ("FEHA"). He sued his employer, Pearson Dental Supplies, in Los Angeles County Superior Court. Surprisingly, the employer did not raise Turcios' signed arbitration agreement as an affirmative defense and did not file a motion to compel arbitration until five months into the court case. Turcios opposed that motion, arguing that his employer had waived arbitration by its participation in the lawsuit. The trial court rejected Turcios' contention and ordered the case to arbitration.

After the parties had selected an arbitrator, the employer filed a motion for summary judgment with the arbitrator, contending that Turcios had blown the one-year time limit to request arbitration, as required in the arbitration agreement. Turcios opposed that motion, contending, among other things, that the one-year contractual period to request arbitration had not yet expired because applicable law provided that the court proceedings had "tolled," or suspended, the running of that period.

The arbitrator agreed with the employer and dismissed Turcios' case before any hearing on the merits of his discrimination claim. Turcios then moved in Superior Court to vacate the arbitrator's dismissal. The Superior Court agreed with Turcios and vacated the arbitration award, ruling that the arbitrator had made a clear error of law by misinterpreting the tolling statute. That court also ruled that it was required to conduct a judicial review sufficient to protect Turcios' unwaivable rights under FEHA, and pursuant to that authority it concluded that the arbitrator had acted in excess of his jurisdiction.

The employer appealed. While the Court of Appeal agreed that the arbitrator had misinterpreted the tolling statute, it nonetheless held that the arbitrator's erroneous decision was "insulated from judicial review." As a result, the Court of Appeal confirmed the dismissal of Turcios' case even though it agreed that the arbitrator's interpretation of the tolling statute was wrong.

The California Supreme Court granted review, facing a difficult choice. The Supreme Court could let the erroneous arbitration decision stand, thereby eliminating any forum for Turcios to litigate the merits of his FEHA claim, or the Court could vacate the arbitrator's award, which would seriously undermine the notion that arbitration is a quick, efficient, and final forum for resolving disputes. The Supreme Court chose the latter, and California employers may now have to view arbitration decisions as only one stage in a longer litigation process.

The California Supreme Court's 4-3 majority first determined that the trial and appellate courts were both correct in concluding that the arbitrator had misapplied the tolling statute and had erroneously dismissed Turcios' arbitration proceeding. The majority went on to hold that, "when, as here, an employee subject to a mandatory employment-arbitration agreement is unable to obtain a hearing on the merits of his FEHA claims, or claims based on other unwaivable statutory rights, because of an arbitration award based on legal error, the trial court does not err in vacating the award."

A second issue in the case was whether the arbitration agreement was enforceable at all. Turcios contended that the arbitration agreement was unconscionable and unenforceable because its preamble that cited the "inconvenience, cost, and risk that accompany formal administrative or judicial proceedings" arguably limited his resort to an administrative forum. The Supreme Court rejected this contention, finding that Turcios had waived the unconscionability argument by not raising it in the lower courts.

In any event, the Supreme Court concluded that Turcios' arbitration agreement was subject to a lawful interpretation, namely, that it could lawfully bar Turcios from invoking an administrative forum that acted as an "adjudicator," rather than a "prosecutor," of an employee's claims. Accordingly, this decision suggests that an arbitration agreement lawfully may preclude employees from filing administrative complaints, at least with adjudicatory agencies like the Labor Commissioner, and presumably also with the Department of Fair Employment and Housing ("DFEH") to the extent that FEHA administrative complaints result in an **adjudicatory** hearing before the Fair Employment and Housing Commission ("FEHC"). However, those agreements probably may not lawfully restrict employees from filing administrative complaints with "prosecutorial" agencies such as the EEOC, and probably also the DFEH for the vast majority of claims filed with that agency that do not result in an FEHC proceeding.

The three dissenting California Supreme Court Justices strongly criticized the majority's "unsupported and unprecedented move to judicialize the arbitration process." They noted that, "[g]iven the vast number of statutory schemes that can be claimed to protect unwaivable rights, as well as the myriad ways in which legal error can be claimed to preclude or impair a hearing on the merits, the majority's holding makes for an exception that will surely 'swallow the rule of limited judicial review.' [Citation omitted.]" They also found the decision "irreconcilable with the fundamental premise that the risk of arbitral error is what contracting parties bargain for in exchange for a quick, inexpensive, and conclusive resolution to their dispute."



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Accordingly, employers and their lawyers should think carefully before using an arbitration agreement's contractual deadline or other agreement requirement as the basis for a motion to the arbitrator to dismiss the arbitration proceeding *before* a hearing on the merits of the employee's claim. As the *Pearson Dental* decision indicates, final and binding arbitration concerning some, if not many, employee statutory claims may be neither final nor binding.

**Ask MSK - Q&A Section**

Q: How can an employer ensure that an agreement to arbitrate disputes will be valid?

A: The arbitration agreement ordinarily should be written and signed, preferably as a separate agreement, by both the employee and the employer who each agree to arbitrate their claims against the other. It should contain a mechanism for ensuring that the decision will be rendered by a neutral party; there must be an opportunity for both the employer and employee to be heard; and the agreement must specify that the decision will be binding. These agreements may spell out procedures in detail, so long as they do not eliminate or truncate rights, or they may simply adopt rules set out by organizations such as the American Arbitration Association or JAMS.

Q: Can a California employer require *existing* employees, rather than simply new employees, to sign arbitration agreements?

A: Probably not. Under current law, an employer may have incumbent employees sign a carefully drafted acknowledgment agreement stating that their continued employment (even employment at-will) with the employer will constitute consent to submitting any disputes to binding arbitration. If employees sign such an agreement and continue working for the employer, the agreement to arbitrate should be binding. The federal Ninth Circuit Court of Appeals has held that an employee's failure to sign and submit an employer-provided arbitration opt-out form may constitute acceptance of an arbitration agreement even without the employee's signature, but this acceptance-by-silence approach appears to remain an open question for California's state courts.

Some employers might find it prudent to pay incumbent employees a separate amount, such as $100 or $150, for signing such an agreement in order to remove all doubt that legal "consideration" existed for the employee's signature. If an incumbent employee wants to preserve the *status quo ante* by refusing to sign an arbitration agreement, to the extent that future pay increases are discretionary, the employer might want to reciprocate by preserving the *status quo ante* of that employee's compensation (i.e., no pay increases until the arbitration agreement has been signed). However, we do not think that incumbent employees should be terminated for refusing to sign an arbitration agreement, or threatened with termination for that refusal.

In any event, an e-mail notice or memo to all employees containing a new arbitration policy or agreement probably will not be sufficient to establish a valid arbitration agreement, at least absent the employee's electronic or other signature or possibly an accompanying arbitration opt-out form. Given the intense court scrutiny of employee arbitration agreements and their genesis, employers should consult experienced employment counsel for guidance in drafting them and any related arbitration policies.



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