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cause for concern: trivedi ratchets up scrutiny of pre-dispute employment arbitration agreements

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The enforceability of many employers' pre-dispute employment arbitration agreements with their employees may be in doubt with the California Court of Appeal's recent decision in *Trivedi v. Curexo Technology Corporation*, 189 Cal. App. 4th 387 (2010). The plaintiff in *Trivedi* had filed suit against his former employer asserting various claims related to his termination, including age and race discrimination in violation of the Fair Employment and Housing Act ("FEHA"). On appeal was the trial court's ruling striking down the arbitration clause in the plaintiff's written employment contract.

A decade ago, in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000), the California Supreme Court held that that pre-dispute employment arbitration agreements that were both procedurally and substantively unconscionable were unenforceable. The two are evaluated on a sliding scale whereby the more substantively oppressive a contract term, the less evidence of procedural unconscionability is required and vice versa. Applying this standard, the Supreme Court still ruled that employment discrimination claims under FEHA may be arbitrated, as long as the arbitration proceedings meet certain minimum standards, including the following: the arbitration must provide for a neutral arbitrator, adequate discovery, and a written decision that permits a limited judicial review; it must not limit the statutorily imposed remedies available to an employee; it must not allow the employer to litigate claims while requiring the employee to arbitrate; and it must not require an employee to pay unreasonable costs and fees that exceed those he would incur in court.

Trivedi is the latest in a long line of post-*Armendariz* cases providing guidance as to what provisions may lead to an unenforceable arbitration agreement. *Trivedi*, however, was not your typical dispute over employment arbitration, where the

court is seeking to protect a possibly powerless and/or unsophisticated employee from unwittingly waiving the right to a jury trial. Rather, the *Trivedi* plaintiff was the President and CEO of the company, a fact that, somewhat surprisingly, appears to have played no role in the Court's analysis.

The *Trivedi* Court held that the arbitration provision was procedurally unconscionable for two reasons. First, the company had drafted the arbitration provision and presented it to the prospective CEO on a "take it or leave it" basis, that is, without any suggestion that the provision was negotiable. Second, the company failed to provide the CEO with a copy of the American Arbitration Association ("AAA") rules referenced in the arbitration provision. Noting that the AAA rules were 26 pages long, the Court found this failure to be "no trifling matter." While not identified as a basis for its decision, the Court noted that the arbitration provision was in the same typeface and no more conspicuous than any other provision, warning that this was another factor a court could consider in evaluating procedural unconscionability.

The Court further concluded that the at-issue arbitration provision was substantively unconscionable on two separate grounds. First, by providing that the "prevailing party" was entitled to recover attorneys' fees and costs incurred in the arbitration, the agreement forced the employee to waive an important public policy protection of the FEHA, which limits an employer's right to recover attorneys' fees to instances where the employee's claims are found to be frivolous, unreasonable, without foundation, or brought in bad faith. In other words, the employee faced a much greater risk by bringing a FEHA claim to arbitration than if he retained the right to a jury trial. Second, by allowing the parties access to the courts for injunctive relief but no other claims or remedies, the agreement was unconscionably one-sided in the employer's favor because employers were more likely to seek injunctive relief. The Court lastly held that the lower court had not abused its discretion by refusing to sever these two offending clauses as they reasonably caused the agreement to be "permeated by unconscionability."

Following *Trivedi*, employers are wise to review their employment arbitration agreements carefully with the aim of removing or correcting offending provisions in order to safeguard the arbitrability of future employment-related disputes.

Ask MSK - Q&A Session

Q: After *Trivedi*, how should employers revise their arbitration agreements?

A: Several changes should be made. First, any attorneys' fees clause should provide an exception for awards not permitted by law in order to ensure that the employer has not created for itself a greater right to a fee award than would be available in a judicial forum. Second, employers should look out for any provision that favors it over the employee, particularly any exception to the mandated use of the arbitration forum to seek injunctive relief. Third, employers should, to the extent feasible, provide employees with copies of any third-party arbitration rules incorporated into the agreement, especially if the agreement does not itself outline specific arbitration procedures. Fourth, employers should take the court's cue on formatting and make certain that their arbitration provisions stand out either through separate stand-alone agreements or with the use of other techniques, such as a larger font, bold lettering, and/or underlining. Beyond the revisions suggested by *Trivedi*, employers should

consult with experienced employment counsel to determine their optimal strategy going forward.

Q: How can an employer revise arbitration agreements for *existing* employees?

A: If a current pre-dispute employment arbitration agreement needs to be revised, a safer course to ensuring later enforceability, assuming that no unconscionable provisions remain, is to ask current employees to sign the new arbitration agreement in exchange for a small sum (*e.g.*, $100).

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