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california court strikes down employer's arbitration agreement, causing employers to review their agreements for compliance

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On May 24, 2024, the California Court of Appeal held that USC's arbitration agreement with its employee, Pamela Cook, was unenforceable. USC requested that the court reconsider its decision, and on June 13, 2024, the Court of Appeal denied the request. The decision in *Cook v. USC*, 102 Cal.App.5th 312 (2024), *reh'g denied* (June 13, 2024), has therefore become binding law in California and may warrant employers reviewing their arbitration agreements to ensure they do not contain the provisions that rendered USC's agreement unenforceable.

The Lower Court Finds Three of USC's Arbitration Provisions Unconscionable

On July 1, 2022, Ms. Cook filed a lawsuit against USC for racial discrimination, retaliation for reporting discrimination, and failure to accommodate her disabilities and health-related time-off requests. Each of these claims arose out of Ms. Cook's employment with USC. Because Ms. Cook agreed to arbitrate such claims, USC sought to compel the dispute to arbitration. The trial court denied USC's motion and held that three provisions together rendered its arbitration agreement unenforceable:

- The first offending provision provided that USC's arbitration agreement "shall survive the termination of Employee's employment, and may only be revoked or modified in a written document that expressly refers to the 'Agreement to Arbitrate Claims' and is signed by the President of the University." The court found that this provision gave the agreement an "infinite duration" and was thus unconscionable.
- The second provision provided that the parties "agree to the resolution by arbitration of all claims, whether or not arising out of Employee's University

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employment, remuneration or termination, that Employee may have against the University . . . ." The court found that this provision was unconscionable because it gave near-infinite scope to the agreement—for example, Ms. Cook could be forced to arbitrate a botched surgery she received at USC's hospital in the future, or an injury she sustained attending a college football game.

- The third and final provision provided that Ms. Cook agreed to arbitrate her claims "against the University or any of its related entities, including but not limited to faculty practice plans, or its or their officers, trustees, administrators, employees or agents, in their capacity as such or otherwise [USC 'related entities']; and all claims that the University may have against Employee." This provision was unconscionable according to the court, because it was too one-sided: Ms. Cook was required to arbitrate all of her claims against USC and its related entities, but only USC—not its related entities—must arbitrate against Ms. Cook.

The California Court of Appeal Decision

The California Court of Appeal agreed with the lower court's analysis and rejected each of USC's arguments. The court first addressed USC's argument that its arbitration agreement did not have a near-infinite scope. USC argued that even if the express language of its agreement was broad, it should be read to apply only to disputes arising out of Ms. Cook's employment. The court acknowledged that in some instances, employment contracts can provide a "margin of safety" to employers but rejected USC's argument because USC could have drafted a more limited and precise provision. The court also rejected USC's argument that the arbitration agreement's broad scope was "of no consequence" because Ms. Cook's claims were all limited to her employment because courts judge the fairness of the arbitration agreement "at the time the contract is made."

The Court of Appeal then considered—and rejected—USC's attempts to defend the indefinite nature of its arbitration agreement. USC argued that this provision was not actually indefinite, but instead should be read as terminating "after a 'reasonable time.'" The Court disagreed, because the provision at issue explicitly stated that the arbitration agreement remains in effect "unless and until" Ms. Cook and USC's president terminate the agreement in writing, which amounted to an arbitration agreement with infinite duration.

Lastly, the Court found that the arbitration agreement lacked mutuality since Ms. Cook must arbitrate all of her claims against USC's related entities but those related entities were not required to arbitrate their claims against Ms. Cook. Although third parties may enforce arbitration agreements in certain scenarios, USC did not "attempt to justify this one-sidedness" or why Ms. Cook must give up her ability to bring claims in court against USC's related entities for claims unrelated to her employment at USC. Nor did the court think Ms. Cook could successfully enforce USC's arbitration agreement against USC's related entities, and therefore held that the provision was unconscionable.

Because severing these three provisions would have required the court to rewrite USC's arbitration agreement, the court held that the entire arbitration agreement could not be enforced.

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Takeaways: California Employers Should Review Their Arbitration Agreements

In light of this holding, California employers should review their arbitration agreements for provisions that could be read similarly to USC's agreement and should consider:

- Does the arbitration agreement remain in effect indefinitely? For example, requiring the president of an organization to authorize terminating an arbitration agreement could be interpreted to mean the agreement is effectively infinite in duration.
- Does the arbitration agreement cast too wide of a net? For example, covering all claims related ***or not*** to an employee's employment may be deemed to be too broad.
- Does the arbitration agreement require an employee to arbitrate claims against third parties, but not require those third parties to arbitrate their claims against the employee? If so, consider whether the agreement should be narrower in scope as to such third parties.

It is important to note that the court did not hold these provisions ***alone*** rendered USC's arbitration agreement unenforceable. Rather, it was the three provisions ***together*** that led to the unfavorable result to the organization. Still, employers should review their arbitration agreements to ensure they avoid the issues raised in *Cook v. USC*, even though it is unclear if only one of these provisions alone would render an arbitration agreement unenforceable.

MSK's Labor & Employment team regularly reviews arbitration agreements to ensure they are fully compliant with the current state of the law and is ready to assist its clients and California employers on this important issue.