Supreme Court's Decision Not To Review California's Arbitration Framework Means We Have A Roadmap For Compliance

Insights
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The U.S. Supreme Court just did something that was more than just a bit out of character—it rejected the opportunity to find that California had once again overstepped its bounds by creating judicial rules disfavoring arbitration. It did so by rejecting the highly watched petition for certiorari that arose from *Ramos v. Winston & Strawn*. The October 7 determination not to take up the case for review means that we will have to live with the current state of affairs for the time being, but we now have a solid game plan for crafting arbitration agreements that comply with state law.

Facts And Arguments
After a contentious relationship, Constance Ramos left the law firm Winston & Strawn amidst allegations of wrongdoing on the part of the firm. According to Ramos, these allegations forced her to resign. She filed suit against her former firm, but Winston & Strawn pointed to the arbitration agreement she had signed when she joined the organization. A trial court upheld the agreement and rejected her chance to proceed in court.

Ramos asked the California Court of Appeal to overturn that ruling. She argued that the arbitration agreement violated the established "minimum requirements of enforceability" outlined by the California Supreme Court in the landmark *Armendariz v. Foundation Health Psychcare Services, Inc.* decision. That case requires agreements to contain provisions for: (1) neutral arbitrators; (2) all remedies allowed under statute; (3) adequate discovery procedures; (4) a written and well-reasoned arbitration decision; and (5) the employer's payment of all costs unique to the arbitration process itself.

Winston & Strawn argued that the requirements were plainly satisfied. But it also argued that, even if its arbitration agreement fell short of the targets set by the California Supreme Court, *Armendariz* should no longer be considered good law. It said that the case's "minimum requirements of enforceability" for arbitration agreements violated Supreme Court precedent by imposing impediments to the enforceability of arbitration agreements.

Analysis
The Court of Appeal rejected both arguments and concluded that the arbitration agreement was not enforceable, and that *Armendariz* was still solid law. It zeroed in on four particularly unconscionable terms—three of which violated *Armendariz* and one of which was substantively unconscionable for other reasons.

First, the court identified the agreement's requirement that the parties both split arbitration costs and bear their own attorneys' fees as substantively unconscionable. As recognized by the court, both terms directly went against *Armendariz*, which requires that the employer bear all unique arbitration costs, such as the arbitrator's fee. It also requires the availability of all remedies, such as awards of attorneys' fees for successful claims, which was absent in Winston & Strawn's agreement.

Second, the court identified a particularly unique clause that also appeared to limit the arbitrator's ability to award all remedies available under the law. Specifically, the clause read that the "arbitrator shall have no authority…to substitute its judgment for, or otherwise override the determinations of, the Partnership, or the Executive Committee or officers authorized to act on its behalf, with respect to any determination made or action committed to by such parties…" Because one of the claims in the lawsuit dealt with the firm's prior reduction of Ramos' pay, however, if Ramos prevailed on her claims this would have inherently required the arbitrator to "substitute its judgment for" or "override" the firm's prior determination that Ramos' wasn't entitled to this compensation—which the clause expressly prohibited the arbitrator from doing.

Third, the court found that the fourth term was substantively unconscionable even without reference to *Armendariz*. Specifically, the term obligated Ramos to maintain "all aspects of the arbitration" in confidence. As a consequence of this, however, the court reasoned that the obligation would effectively prohibit her from informally contacting witnesses to obtain information to support her case and force her to use more costly discovery procedures, such as depositions. In so recognizing, however, the court seemed to pay no heed to prospective advantages that confidentiality had for employees who may wish to shield their prior suits from prospective employers.

Ultimately, the court found that these terms, in aggregate, were sufficiently unconscionable to render the agreement unenforceable, when viewed in light of the superior bargaining position of Winston & Strawn. The firm then took its final leap, asking the U.S. Supreme Court to review the case and rule in its favor. Although the table was set for the Supreme Court to step up and scrap this line of reasoning, it denied certiorari on October 7.

That means the California Appellate Court's view of the arbitration agreement in the case remains good law. If there's any good news, it's that we now have valuable insight to craft more defensible arbitration agreements moving forward.

Blueprint For Arbitration Agreement Success

So what are the takeaways? In short, for the foreseeable future, *Armendariz* will continue to be the law of the land in California. As a result, we should pay special attention to the original California case that started it all to avoid similar pitfalls in our own arbitration agreements moving forward. We can start with the following practical tips.

First, if you have employees or partners in California, be careful in thinking that you can get away with not including all of the *Armendariz* requirements in your arbitration agreements. While

with not including all of the *Armendariz* requirements in your arbitration agreements. While *Armendariz* suggested that certain highly "sought-after" employees may not face the same pressures that mandatory employment arbitration agreements pose to other employees, the *Ramos* case suggests that that recognition may be mostly empty. If a high-powered law firm partner wielding multiple degrees still needs the protection of *Armendariz*, then you'd be well served by ensuring that those "minimum standards" are included within most of your arbitration agreements, whether it be with partners, shareholders, high-level executives, or otherwise.

Second, be careful about making confidentiality too broad. Confidentiality has its benefits for both sides, and can often protect employee litigants from the prying eyes of disapproving prospective employers. Nevertheless, confidentiality can go overboard by potentially depriving those same litigants of the ability to reach out to witnesses and otherwise build their case. To that end, consider including specific carve-outs that allow employee litigants to both: (a) access the written decisions of past arbitrations that may be relevant to the employee's claims; and (b) contact individuals about the arbitration, and the claims therein, for purposes of informal discovery. In doing so, you may be able to mitigate some of the concerns mentioned by the court in *Ramos*.

Even with these tips in mind, however, it is important to understand that what is right for one employer may not be right for another, and what is permissible now may not be permissible in a month's time. The law surrounding arbitration in California is constantly evolving, and even just last week, the passage of AB 51 signaled a potential end to certain mandatory employment arbitration agreements in California altogether. Accordingly, as the legal landscape continues to shift at an ever-increasing pace, you should take care to make sure that the terms contained within your arbitration agreements are aligned with your company's own evolving values and litigation objectives.