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Make Sure Your Arbitration Agreement is Enforceable

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EXECUTIVE SUMMARY

After last year's Supreme Court's ruling approving arbitration agreements, many companies are requiring its employees to sign agreements moving all disputes into arbitration and out of the courts. However, companies have to proceed with caution. In a lesson learned by a law firm in California, the arbitration agreement must be enforceable and not unconscionable. Therefore, before drafting and distributing arbitration agreements, companies need to ensure that they meet each state's requirements.

Ever since (and even before) the U. S. Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), companies are asking its employees to sign mandatory arbitration agreements. However, the experience of a law firm and one of its income partners should cause companies to pause. Constance Ramos was an income partner with a law firm in California. After she filed a complaint in court alleging a wrongful termination and violations of employment laws, the law firm asked the state Superior Court to compel her to arbitrate the disputes. The Superior Court agreed and ordered arbitration. Ramos appealed and the First District Appellate Court ordered the Superior Court to vacate its order. The case will now proceed in court rather than arbitration. See *Ramos v. Superior Court of San Francisco County*, 28 Cal. App. 5th 1042, (Nov. 28, 2018).

First, the Appellate Court ruled that Ramos's claims fall within the scope of arbitration. The Court relied upon the language of the arbitration agreement. In the agreement, Ramos agreed to arbitrate claims "arising under or related to" the Partnership Agreement she signed. Since the alleged employment law claims relate to her relationship with the law firm, the claims are arbitrable, but only if the agreement is enforceable.

However, the Court found that the agreement was void because it was unconscionable. The Court analyzed the following five minimum requirements – (a) the use of a neutral arbitrator; (b) no limitation regarding remedies provided under a law; (c) sufficient discovery; (d) a written arbitration decision and judicial review; and (e) the employer's payment of all arbitration fees. Here, the arbitrators' decision was limited, because they could not substitute their judgment for the judgment of the law firm. Second, another provision did not allow Ramos an award of attorneys' fees, if she prevailed, although, under state discrimination laws, a prevailing party will be awarded attorneys' fees. Third, the arbitrators' fees would be shared equally by Ramos and the law firm. In addition to analyzing these five requirements, the Court ruled that the agreement required that

Ramos maintain all aspects of the arbitration confidential, which would prevent her from gathering evidence for her case in arbitration. Finally, the Court also found the arbitration agreement procedurally unconscionable, because Ramos had no opportunity to negotiate or amend any term of the agreement. Instead, the law firm presented her with the agreement, and she was told that she needed to sign and return it within 30 days. Thus, she received the agreement on a take it or leave it basis.

Therefore, as companies race to draft arbitration agreements for their employees to sign, companies need to carefully word those agreements. Lawyers representing current and former employees will likely file suit in court and vigorously argue that a court should deny the employer's attempt to compel arbitration.