Maximizing your experience in arbitrating the employment case: What consumer attorneys need to know when your clients are required to arbitrate their employment claim

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Arbitration is now a fact of life in employment litigation. Many employers require contractual arbitration agreements as a term and condition of employment in an effort to avoid jury verdicts. As such agreements become more sophisticated in response to the developing body of law surrounding their enforceability, courts are enforcing these agreements in ever-increasing numbers. It is therefore imperative for the plaintiff's employment law practitioner to have a thorough understanding of arbitration agreements and how to leverage them to their advantage.

The decision whether to fight a motion to compel arbitration or stipulate to arbitration should be made strategically. In the majority of cases, arbitration is likely to be compelled. In some cases, however, there may be defects in the arbitration agreement that would allow you to successfully oppose a motion to compel arbitration (e.g., lack of mutuality, overly restrictive discovery, cost shifting to employee, etc.). In these cases, plaintiff's counsel should seriously consider vigorously opposing any attempts to compel arbitration. If you conclude that the arbitration agreement is enforceable, it may make sense to stipulate to arbitration. By doing so, you may be able to negotiate more favorable arbitration terms with the employer by not forcing it to file a motion to compel arbitration.

Thus, the starting point in any analysis is a determination of the arbitration agreement's enforceability. Enforceability requires an analysis of unconscionability, including both its substantive and procedural components. (*Am. Software, Inc. v. Ali* (1996) 46 Cal.App.4th 1386 [54 Cal.Rptr.2d 477].) However, the inquiry does not end at whether you believe that the court will compel arbitration. Rather, the minimum standards of fairness against which substantive unconscionability are measured are as relevant throughout the arbitration process as they are at the inception of the case. (*Armendariz v. Found. Health Psychcare Servs., Inc.* (2000) 24 Cal.4th 83 [99 Cal.Rptr.2d 745].) If you believe that the arbitration agreement is likely to be enforced but is lacking in any of the six minimum standards (discussed further below), then you should seek a stipulation or court order that will ensure they are followed throughout the arbitration process. The following are some suggestions on how to make the most of arbitration, thereby maximizing your client's chances of recovery.

Be sure to enforce the minimum standards afforded to employees in arbitration

If the claim is subject to arbitration, you can still positively affect the enforcement of the claim to protect against both substantive and procedural overreaching. So, for example, if you are prepared to concede that the matter is

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subject to arbitration, make sure that the terms of the arbitration are neither *overly harsh* nor *one-sided*. (*Armendariz, supra, at* 24 Cal.4th at 114 [99 Cal.Rptr.2d at 767] *(citing A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486-487 [186 Cal.Rptr. 114, 122].)

The qualifying test requires that the arbitration agreement have a "modicum of bilaterality." (*Armendariz, supra, at* 24 Cal.4th 116 [99 Cal.Rptr.2d at 769].) In *Armendariz*, the California Supreme Court identified six minimum requirements that must be satisfied in an arbitration provision of an employment agreement in order to be enforceable. Remember that these are supposed safeguards for the employee, and you should be proactive about using each one of them to their fullest.

The arbitration must offer: (1) neutral arbitrators; (2) adequate discovery rights; (3) a written award; (4) availability of all types of relief that would otherwise be available in court; (5) the employer must pay all costs of arbitration; and (6) the agreement must be mutual. (*Armendariz, supra,* 24 Cal.4th at 102 [99 Cal.Rptr.2d at 759], *citing Cole v. Burns Int'l Security Svcs.* (1997) 105 F.3rd 1465, 1481-1482.)

As you navigate through the arbitration process, assuming you find yourself there, be mindful of each of these protections.

Actively participate in the choice of a neutral arbitrator

First, the arbitration agreement must provide a fair and determined procedure for selecting a neutral arbitrator. Arbitrators are usually selected from a list provided by the arbitration service provider. The most commonly used methods are either alternating strike out, or ranking of the arbitrators.

Under the American Arbitration Association's (AAA) "Employment Arbitration Rules and Mediation Processes," the method of choosing an arbitrator is outlined in detail. The most important part for you to know, however, is that the parties may choose an arbitrator, even if the agreement specifies an elaborate means for doing so. The clear lesson, therefore, is that you *may*, and *should*, take a proactive role in investigating and recommending the arbitrator to your opposing counsel at the earliest opportunity in the process.

Under rule 13 of the AAA rules, the parties may appoint an arbitrator. Also bear in mind that under rule 16, the arbitrator "shall be impartial and independent." In addition, the arbitrator is subject to disqualification for partiality or lack of independence. Because this is one of the few bases for asserting grounds for vacatur following an award, it is absolutely imperative that you scrutinize the background, experience and disclosures before agreeing to a particular arbitrator. JAMS rules are similar in this regard.

The benefit of this process is that the parties can control the arbitrator selection and in essence select their own judge. Know that if you have particular qualities or specific expertise in mind, you may also request that whichever agency you are using tailors the initial list of arbitrators to include those possessing the particular qualities you have listed.

If you find that you are unfamiliar with the reputation or integrity of a particular arbitrator, ask questions. You may conduct an informal review of credentials and history via the Web sites of the providers or the individuals recommended, or you may even go further and recommend a sort of *voir dire* process where the opposing sides prepare a list of mutually agreeable questions to pose to several arbitrators, in order to ascertain in which of several arbitrators you will have the most confidence.

The economic realities of arbitration cannot be overlooked. As neutral as an arbitrator may want to be, he or she may be subconsciously influenced by extraneous economic factors, such as repeat institutional players in arbitration. One tactic to counter this is to attempt to utilize arbitrators with whom you have previously worked, either in arbitration or mediation.

Assert your right to adequate discovery

The arbitration process must ensure a right to "adequate discovery" according to *Armendariz*. Therefore, although discovery may be curtailed in some commercial arbitration proceedings, in an employment action you are entitled to seek additional discovery based merely upon a "showing of need".

It would be a mistake to wait to raise discovery issues until you are already in arbitration. You should carefully consider before you get there what discovery you will need to vindicate the claims. That way, you will be in a position to seek to extract the necessary discovery procedures from defense counsel if you are stipulating, or ask the court to fashion an order if you unsuccessfully oppose a motion to compel arbitration.

Under Code of Civil Procedure section 1283.05, all available discovery under the code is similarly available in arbitration. Under rule 9 of the AAA rules, the arbitrator has the authority to order "such discovery, by way of depositions, interrogatories, document production or otherwise as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration." Under the JAMS rules, the parties are obligated to "cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information relative to the dispute or claim." (JAMS, rule 17).

Therefore, at the initial preliminary conference, be prepared with a carefully thoughtout discovery plan. In most employment cases, the employer has superior access to relevant information, and thus this becomes critical in the employee's case. You will not need to give the arbitrator notice of the discovery you serve unless there is a dispute, but if you have outlined your proposed discovery early and thoroughly, you will be able to pave the way for a favorable result in the event that a dispute arises, because you will have announced your intention to both the arbitrator and

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opposing counsel of the discovery tools you intend to employ.

Once again, be mindful that the arbitration process is designed to be faster and less expensive than a court trial. You may be able to minimize your discovery burden, and still maximize your gathering of the evidence if you tailor your discovery to the critical inquiries necessary to establish each element of your claim. The ultimate test is stated as "adequate discovery essential for the vindication of statutory claims." (*Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 715 [13 Cal.Rptr.3d at 97].) Make sure that you take advantage of that opportunity by determining what really is essential at the earliest stages of the arbitration.

The parties are entitled to a written, reasoned award

AAA, rule 39, requires that an award "shall provide the written reasons for the award unless the parties agree otherwise." Therefore, you may expect (and should demand) a full explanation of why the arbitrator made the decision she made. Whether you are in a private arbitration or with an agency, you should assert your right to a fully-reasoned award, just in case you wish to challenge the award after it is given.

One of the primary reasons for a request for vacatur is a showing that the arbitrator has willfully disregarded the law. In order to discern whether this is the case, you should do two things: Order a court reporter to transcribe the proceedings in order to create a formal record of the arbitration, and request the arbitrator issue a detailed opinion.

Plaintiffs are entitled to all types of relief that would be available to them in court

When reviewing the arbitration clause, be ever vigilant to spot any provision that would have the effect of reducing the rights an employee would otherwise have in court, or seeking to expand the rights an employer would otherwise have in court. Do not allow the employer to artificially impose higher standards of proof or lesser burdens merely because you are not in court.

Employees are entitled to all remedies that would otherwise be available in court, such as economic, emotional distress and punitive damages. Equitable and injunctive relief are available, although public injunctions may not be available. Both JAMS and AAA rules provide for injunctive relief. (JAMS, rule 24; AAA, rule 39(d).) However, Code of Civil Procedure section 1281.8 seemingly restricts provisional remedies to a showing that the award to which the claimant may be entitled "may be rendered ineffectual without provisional relief."

Similarly, the statute of limitations may neither be extended nor shortened as a result of the arbitration clause.

Finally, the prevailing plaintiff may obtain attorneys' fees, just as he/she would in a court action, as well as all other rights afforded under FEHA or similar statutory schemes.

The employee cannot be required to pay the arbitration fees

Under *Armendariz*:

> [W]hen the employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or the arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he/she were free to bring the action in court.

(*Armendariz, supra,* 24 Cal.4th at 110-111 [99 Cal.Rptr.2d at 765].) Simply put, the employer must pay for all arbitration forum access costs. The costs include not only the arbitrator fees, but the hearing room fees and any other forum costs. Remember that in the case of any discovery disputes or pretrial issues, the arbitrator is similarly compensated for such pre-hearing conferences by the employer.

Conversely, one "cost-saving feature" (according to the employer's view) is that no court reporter is required. However, the absence of a court reporter obviously would deprive your client of the benefit of preserving that testimony for later review (despite the relatively limited grounds to appeal in arbitration). Therefore, if you have any intention of possibly appealing, you should always request a court reporter. Since it is unclear whether the employer must pay for the court reporter, you should either ask the court to order it if a motion to compel is filed, or discuss it with defense counsel as part of any negotiation that may result in an arbitration stipulation.

Although employers have generally touted the *benefits* of arbitration to avoid runaway jury verdicts, the reality is that the arbitration procedure itself is very expensive for the employer.

The arbitration agreement must assure fairness and mutuality

Perhaps the most important *Armendariz* factor to consider at the outset of a dispute is that the arbitration agreement must not be lacking in mutuality. Thus, for example, arbitration agreements requiring employees to arbitrate their claims, but exempting from arbitration the types of claims the employer will ordinarily have against its employees (*e.g.*, trade secrets), are unenforceable. This mutuality must also be prevalent throughout the arbitration process. Ensure that the employer does not have unfair advantages, including even facially neutral provisions that have the effect of providing an advantage to the employer.

Once in arbitration, remember your client's rights to request other means of dispute resolution

Many unwilling participants in an arbitration sometimes overlook the fact that they are still entitled to request a pre-arbitration mediation. Moreover, you are not bound to use the same forum or provider. Just as in court litigation, you should carefully consider whether you want the same person who will preside over your arbitration to conduct your mediation. For example, it is important to recognize that if your arbitrator also serves as your mediator, she

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or he may have ex parte information that would not otherwise be made available and which could influence the outcome of the case. (This is one reason many arbitrators will refuse to conduct a mediation in a case in which they are presiding as arbitrator). If you do choose to utilize your arbitrator as your mediator, be sure to obtain clear written waivers from the parties.

Keep in mind that the mediation process may be subject to cost-sharing, rather than paid for by the defendant. However, the worst case scenario in a meaningful mediation is that you learn a lot about your opponent's case and position. The best case scenario is that you settle the case for a fair amount that satisfies both you and your client.

Beware of dispositive motions which may be made even during the arbitration hearing without notice

One important difference between litigation and arbitration is that in arbitration, unless the arbitration agreement specifically provides for a dispositive motion, the arbitrator may not have the authority to hear one. Even in the event that the arbitration agreement provides for a dispositive motion, a plaintiff has additional defense mechanisms that may avoid such motions entirely. First, the point of arbitration is to have an adjudication on the merits, and some courts have held that this precludes dispositive motions. Second, a powerful weapon against summary judgment is that a non-moving party should be afforded full statutory notice, which may not be possible in the abbreviated timeframe of an arbitration (despite JAMS, rule 18, which requires "reasonable notice"). Plaintiffs may also object to a Motion for Summary Judgment under the AAA rules since the rules require that such a motion be made only "if the arbitrator determines that the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case." (AAA, rule 27.)

An interesting study found that one possible explanation for the disparity between the outcome at trial in employment cases and the outcome in arbitration in the same type of case, was that so many employment cases were dismissed before getting to trial on a motion for summary judgment. The authors of the study theorized that because only those cases which *survive* a summary judgment motion get to trial, it stands to reason that once they are tried, they are statistically more likely to favor plaintiff and come in at a higher average amount in damages. By contrast, many cases that would otherwise be dismissed pretrial on a motion for summary judgment, proceeded to a full arbitration hearing, where they essentially ended up with the same result as they would have had in court had the legal theories and evidence been tested in advance of trial. (*Theodore Eisenberg and Elizabeth Hill,* "Arbitration and Litigation of Employment Claims: An Empirical Comparison," Dispute Resolution Journal, Nov. 2003 - Jan. 2004.)

In addition to summary judgment, you should anticipate the usual panoply of pretrial motions – some of which may be made orally, without notice and require you to think on your feet. Be prepared for motions for non-suit, motions to strike portions of your petition or claim and motions to dismiss certain individuals or entities. Again, remember that the point of arbitration is to have an adjudication on the merits – which a plaintiff will be denied if one of these motions is granted.

Best practice would suggest that you brief any issues which you anticipate may arise during the hearing, as you may not have easy access to a law library or Internet during the hearing itself.

Finally, even though you are in an arbitration, you may still use the traditional tools for gaining settlement leverage, such as a Code of Civil Procedure section 998 offer as a tool to recover your own costs and fees, as well as a way to communicate to the arbitrator (and your opposing counsel) your value of the case in its worst case scenario.

Remain vigilant at the arbitration and approach it as you would a trial

An arbitration typically takes on a somewhat more rigid pace, even though it is often held in a much less formal environment than a courtroom. That means the days are long and if a witness needs to be taken out of order, for example, the arbitrator will do that in order to maintain full days of hearing. Do not be misled by this informality.

Another benefit of arbitration is that evidence may be presented by declaration. The arbitrator, however, cannot *read in* the emotions, veracity and strength of this type of testimony. It is always advisable to bring live witnesses and direct evidence if possible, even though not required by most rules of arbitration. Of course, if you determine that your witnesses' testimony will be better read than heard, you may use declarations to your benefit.

Finally, focus on damages. Arbitrators do not have the advantage of a building filled with colleagues with whom they can discuss the value of cases, a jury to help to evaluate the damages or even a bevy of reported decisions which can guide them in assessing the right award. Help them by providing current statistics, similar cases within the desired verdict ranges or a carefully considered justification for the amount which your client is requesting to be awarded. In the absence of clear and compelling evidence or testimony, an arbitrator may disappoint you in the award, even while believing the liability to be compellingly in your favor.

Consider all post-award remedies available to you, including your limited rights to vacatur and appeal

The rules of arbitration under Code of Civil Procedure section 1285 *et. seq.* severely limit the basis for vacating an arbitration award. You may petition to correct, confirm or vacate an award based upon an improper calculation, if the arbitrator exceeded his authority, or if the form of the award is inaccurate.

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Unfortunately, there is no right to appeal from legal or factual errors an arbitrator may make.

However, you still have a number of post-award remedies available to you – including a motion for new trial, a motion for reconsideration (following a dispositive motion), a motion for additur or a request for vacatur. The rules of vacatur allow an arbitration award to be vacated if it is obtained by corruption, fraud or misconduct, including an arbitrator who exceeds his authority.

There are also a few lesser-known indiscretions that will facilitate a vacatur. You should be aware that if you request a postponement and it is denied, the arbitration award may be subject to vacatur. Also, if you request that the arbitrator disqualify herself, and she refuses, or fails to disclose grounds for disqualification, the subsequent award is subject to vacatur. Barring these rare instances, your arbitration award is likely to be entered as a judgment and confirmed. However, if you unsuccessfully opposed a motion to compel arbitration, you may still appeal on issues of enforceability even after an award has been rendered. (Code Civ. Proc., §§ 1294(a); 1294.2; *Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638 [9 Cal.Rptr.3d 422].)

Conclusion

Though the arbitration environment may seem unpredictable and even undesirable to you and your clients, it is possible to successfully navigate through an employment arbitration by practicing these few tips. Choose your arbitrator wisely, exercise all of your client's rights with regard to discovery, fees and alternative means of dispute resolution and stay on your toes during the hearing. With a little practice, you should be able to maximize your recovery and minimize the risks of arbitrating your employment claim the next time you find yourself in these stormy waters.

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