NIESAR & VESTAL LLP
Law Alert
January 25, 2019

California Appellate Court Further Restricts Permissible Scope of Employment Arbitration Agreements

---

The California Court of Appeal issued a noteworthy new decision concerning the potential unconscionability of employment arbitration agreements. *Ramos v. Super. Ct. (Winston & Strawn LLP)*, No. A153390, Court of Appeal, 1st District, November 2, 2018.

Winston & Strawn LLP hired attorney Ramos as a non-equity "income partner." When Ramos later sued Winston, asserting claims of discrimination, retaliation, wrongful termination, and anti-fair-pay practices, Winston sought to compel arbitration under the partnership agreement Ramos signed shortly after joining the firm. The Winston agreement's arbitration clause provided that, should any dispute relating to the agreement arise, each party would pay its own legal fees and keep all aspects of the arbitration confidential except to the extent necessary to enter judgment on any arbitral award.

In opposition, Ramos argued that she was an employee of Winston, not a partner, and that Winston's arbitration provision failed to satisfy the minimum requirements for arbitration of an employee's unwaivable statutory claims.

The trial court agreed with Winston and referred the matter to arbitration, but the Court of Appeal concluded that some terms of the arbitration clause were unconscionable. Because those terms could not be severed, the arbitration agreement was void and unenforceable.

Two aspects of the *Ramos* court's analysis are particularly interesting. First, the court concluded that the arbitration clause's requirement that each party bear its own attorneys' fees was impermissible, in that it would prevent Ramos from obtaining an award of her attorneys' fees, one of the remedies available under the California Fair Employment and Housing Act (FEHA). Second, the court found the confidentiality requirement unconscionable, reasoning that it would hamstring Ramos's ability to gather evidence to prove her case; she would violate the agreement if she informally contacted or interviewed any witnesses. The confidentiality provision would also force Ramos to incur increased costs of obtaining information through formal means rather than through informal interviews, would defeat the purpose of using arbitration as a streamlined means of resolving disputes, would unreasonably favor Winston to the detriment of its employees, and might discourage potential plaintiffs from filing discrimination cases.

After *Ramos*, California employers seeking to maintain the enforceability of their mandatory arbitration agreements may wish to modify any attorney fee and confidentiality provisions in those agreements. For example, an employer might amend its agreement to provide that "each party shall bear its own attorneys' fees and costs, *except as provided by any applicable statute.*" Similarly, an employer seeking to maintain confidentiality of arbitration proceedings might amend its agreement to provide that, *"except as may be necessary to (1)*

obtain information to prove or defend against the asserted claims or (2) obtain entry of judgment on any arbitral award, all aspects of the arbitration shall be maintained by the parties and the arbitrators in strict confidence."

If you have questions concerning the *Ramos* decision or enforceability of arbitration agreements, please feel free to contact Gerald Niesar (gniesar@nvlawllp.com), Peter Vestal (pvestal@nvlawllp.com), John Kelley ((jkelley@nvlawllp.com), or any other attorney at the firm.