



Arbitration Agreement May Not Waive Employee's Right to Administrative Hearing on Wage Claim

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In a recent significant decision for employers, the California Supreme Court decided the issue of whether an employer may enforce an arbitration agreement by which an employee waived his right to pursue administrative relief before the Labor Commissioner on a wage claim. In *Sonic-Calabasas A, Inc. v. Moreno*, the Court held that such a waiver violated public policy and was otherwise unconscionable.

Under the California Labor Code, an employee who asserts that an employer has failed to pay wages due (a) may file an action directly in court or (b) pursue a statutory administrative remedy before the Labor Commissioner. Under this statutory remedy, the employee files a complaint for wages allegedly due with the Labor Commissioner. In response, the Commissioner may (a) accept the matter and conduct an administrative hearing ("Berman hearing"), (b) prosecute a civil action for the collection of wages or (c) take no further action on the complaint.

The advantages to an employee of proceeding administratively and securing a hearing before the Commissioner are numerous:

- The hearing must be held within 90 days;
- The Commissioner's staff may attempt to settle the claim;
- A deputy Labor Commissioner conducts the hearing and possesses authority to issue subpoenas;
- There is no costly discovery process;
- The Commissioner must issue a decision within 15 days of the hearing;
- The technical rules of evidence are not applicable;

- The hearing officer is authorized to assist each party (both employee and employer) in cross-examining witnesses and to explain issues and terms not understood by the parties;
- The Commissioner is required to provide that an interpreter be present at all hearings and interviews where appropriate.
- Any decision not appealed becomes a judgment of the superior court and with which the Commissioner to enforce;
- Any party may appeal the Commissioner's decision and obtain a new trial before the superior court;
- An employer who appeals an award must post a bond in the amount of the award;
- An appellant who loses the appeal is subject to an award of costs and attorney's fees;
- A party defending an appeal and who loses is not liable to the successful appellant for attorney's fees and costs;
- An employee who appeals is considered successful (not a losing appellant liable for attorney's fees and costs) if the employee recovers an amount greater than zero even if the amount is less than the administrative award; and
- Lastly, the Commissioner may, upon request, represent a claimant in superior court if the claimant is financially unable to afford counsel.

In *Sonic-Calabasas*, the employee signed an employment agreement which required employer and employee to submit employment disputes to binding arbitration under the Federal Arbitration Act (FAA), in conformity with the procedures of the California Arbitration Act. With certain specified exceptions not relevant, the provision applied to all employment disputes including those that would otherwise require or allow resort to any court or "other governmental dispute resolution forum." This latter provision effectively waived the employee's right to pursue an administrative claim before the Labor Commissioner.

When the employee did in fact file an administrative claim regarding alleged unpaid wages with the Commissioner, the employer filed a petition in superior court to compel arbitration. The Commissioner intervened and argued on behalf of the employee that the waiver of the employee's right to pursue an administrative remedy before the Commissioner was against public policy. Significantly, the Commissioner conceded that any new trial conducted in connection with an appeal of an administrative award following a Berman hearing could be subject to the arbitration provision. In response, the superior court denied the petition to compel arbitration as premature. On review of the superior court decision, the Court of Review reversed and held that the waiver of the administrative process and Berman hearing was not contrary to public policy.

The California Supreme Court disagreed. The numerous benefits to an employee who pursued an administrative claim before Commissioner manifests a strong public policy that is not waivable. The Court also ruled that the purported waiver of these benefits was unconscionable and thus not enforceable. The employer argued that the Federal Arbitration Act preempted the court's holding. In reviewing a line of United States Supreme Court decisions on FAA preemption, the California Supreme Court concluded that there was no preemption of its holding¹.

In one important section of the California Supreme Court's decision, the Court acknowledged that an appeal and review of a Commissioner's administrative award may be subject to arbitration consistent with public policy. In short, the same protections and benefits an employee enjoys if the appeal and review were in the superior court, can be grafted onto the arbitration. One of the issues the Court did not address in *Sonic-Calabasas* is the expense burden of the arbitrator upon the employee.

Sonic-Calabasas also includes an interesting footnote related to executive compensation. In the footnote, the court stated that it is not deciding whether "it is contrary to public policy to knowingly and voluntarily waive the right to seek a Berman hearing as part of a freely negotiated, nonstandard contract, such as may exist between an employer and a highly compensated executive employee." Thus, it is an open issue as to whether a waiver of the right to pursue an administrative wage claim before the Commissioner in a "freely negotiated, nonstandard contract" is or is not valid.

COMMENT: Both the California and United States Supreme Courts have recently been devoting substantial attention to arbitration agreements between employers and employees. The issues that repeatedly arise before the California Supreme Court involve issues of whether particular arbitration provisions usually favorable to the employer violate public policy or are void because they are unconscionable. The issue that consistently arises in the United States Supreme Court is whether a particular state high court ruling declaring a provision void is preempted by the FAA. In this current context, employers should have arbitration agreements periodically (at least annually) reviewed by legal counsel to ensure they comport with the latest California and United States Supreme Court decisions. Employers should also work with counsel on the form and language of arbitration agreements to maximize their ability to assert that any provision a court may find invalid is severable so that it does not jeopardize the entire agreement.

¹ This year in *AT&T Mobility LLC v. Concepcion*, the United States Supreme Court will decide whether the FAA preempts the California Supreme Court's holding that class action waivers in arbitration agreements with employees are invalid. (*Class Action Arbitration for Employers and Employees - Quo Vadit?.*) The California Supreme Court's holding in *AT&T* was based upon a conclusion that the waiver was unconscionable. The ultimate decision in *AT&T* might affect any possible further United State Supreme Court review of the *Sonic-Calabasas* decision since similar issues are at issue in both cases.